Neutral Citation Number: [2021] EWHC 1161 (Comm)

Case No: CL-2017-000458

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2021

Before :

MR JUSTICE FOXTON

- -

Between :

PALMALI SHIPPING SA	**Claimant**
- and –	
LITASCO SA	**Defendant**

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John Russell QC, Jessica Wells and Fiona Whiteside (instructed by **Lax & Co LLP**) for the **Claimant**
Charles Béar QC, Thomas Munby, Tom Bird and **Andrew McLeod** (instructed by **Hogan Lovells International LLP**) for the **Defendant**

Hearing date: **27 April 2021**
Draft judgment to the parties**: 28 April 2021**

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00 AM 06 May 2021.

Mr Justice Foxton :

A INTRODUCTION

1. This hearing relates to the claimant's ("Palmali's") application for permission further to amend its Particulars of Claim in which it seeks damages under what it contends was a long-term contract of affreightment ("the COA") with the defendant ("Litasco", a subsidiary of the Russian oil company Lukoil).

2. The amendment application has been brought in the light of the rulings I made on Litasco's application for reverse summary judgment and Palmali's application for permission to re-amend the Particulars of Claim, which are set out in my judgment of 1 October 2020 reported at [2020] EWHC 2581 (Comm). At that hearing ("the Summary Judgment Hearing"), I held that the basis on which Palmali had quantified its damages claim, in the sum of $1.9 billion ("the Original Damages Claim"), was not seriously arguable because:

    i) it failed to allow for the costs Palmali had saved in not having to sub-contract the carriage of cargoes to other companies in the same beneficial ownership; and

    ii) it was not reasonably arguable as a matter of law that Palmali could recover the profits which those related companies would have made if they had been sub-contracted to lift Litasco cargoes under the COA.

3. The issues which now arise for determination are:

    i) Whether I should decide that Palmali is entitled to permission to amend to advance a claim for US$151m.

    ii) Whether I should order what is described by Litasco as a "short hearing" at which Palmali's witnesses could be cross-examined on the issue of why it advanced the claim which I struck out for as long as it did, and why the application to advance the case as currently formulated had only been brought forward at such a late stage (on the basis that the court would refuse permission to amend if it was not satisfied by the explanations offered).

    iii) Whether I should refuse permission to amend now, and (in effect) strike out the claim.

4. There are two distinct bases on which Litasco resists Palmali's application for permission to amend:

    i) The first, which occupied by far the greater part of Litasco's submissions, was that it was arguable that Palmali's initial claim for $1.9bn – on which I entered judgment in Litasco's favour – had been advanced for three years "on a fundamentally false factual basis" and, was "a dishonest attempt to inflate [Palmali's] claims" with the result that:

        a) the court should order a hearing at which individuals from Palmali involved in the presentation of the Original Damages Claim could be cross-examined, with a view to determining whether the Original Damages Claim

had been advanced dishonestly, and whether it was appropriate for that reason to strike out the claim; or

b) if Palmali is unable to persuade the court at this hearing that the Original Damages Claim had not been advanced dishonestly, I should refuse permission to amend (which it is common ground would have the effect of striking out the overwhelming majority of Palmali's residual claim).

ii) The second, addressed in two pages of Litasco's skeleton, is that the amendments stand no realistic prospect of success.

5. I summarised the background to the claim and the prior history of the proceedings in my previous judgment and will not repeat that background here.

B THE PRINCIPLES RELEVANT TO PALMALI'S APPLICATION FOR PERMISSION TO AMEND

Principles generally applicable to applications for permission to amend

6. The principles which are generally applicable to applications for permission to amend are well known. I was referred to summaries of those principles in SPI North Ltd v Swiss Post International (UK) Ltd [2019] EWHC 2004 (Ch), [5] and Swain-Mason v Mills & Reeve LLP [2011] EWCA Civ 14; [2011] 1 WLR 2735, 2750 [73].

7. I was rightly reminded that where the amendment is a late one, the party seeking permission to make the amendment bears a particular burden, and must satisfy the court of the overall justice in permitting the amendment taking into account all of the circumstances, including the history of the amendment, the reasons why it was brought forward at the time it was, and the potential prejudice to each side if the amendment is allowed or refused: Brown v Innovatorone Plc [2011] EWHC 3221 (Comm), [14] and Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm), [38].

8. It is suggested by Litasco that a party who has been advancing a false case bears a particularly heavy burden in explaining the reasons for the delay. I accept that this is likely to be a relevant factor (not least because it will ordinarily deprive the applicant of any satisfactory explanation for its delay), albeit the ultimate significance of that factor will be context dependent.

The jurisdiction to strike out for abuse of process

9. Litasco also prayed-in-aid the court's jurisdiction to strike out claims as an abuse of process under CPR r3.4 and referred in this context to the decision in Icebird Ltd v Winegardner [2009] UKPC 24. While mere delay in pursuing a claim, however inordinate and inexcusable, will not without more constitute an abuse of process, a unilateral decision not to pursue a claim for a substantial period of time will sometimes constitute an abuse of process (Asturion Foundation v Alibrahim [2020] EWCA Civ 32; [2-2-] 1 WLR 1627, [61]).

Dishonest claims and the impossibility of a fair trial

10. Finally, Litasco relied on the power of the court to strike out a claim by reason of the claimant's serious misconduct in its pursuit. The starting point for any analysis of this

jurisdiction remains the decision of the Court of Appeal in Arrow Nominees Inc v Blackledge [2001] BCC 591, a case in which the petitioner in an unfair prejudice claim had produced and relied on letters later determined to be forgeries. Some two months before trial, the respondents applied to strike out the petition on the basis that the petitioner's conduct rendered a fair trial impossible. That application was rejected at first instance but upheld by the Court of Appeal. Chadwick LJ (with whom Ward and Roch LJ agreed) held at [54] that:

> "… [T]he object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and … accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience to those rules – even if such disobedience amounts to contempt for or defiance of the court – if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled (indeed, I would hold bound) to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him."

11. He expanded on what was meant by a "fair trial" in this context at [55]:

> "Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself."

12. Ward LJ (with whom Roch LJ also agreed) held that the court was required "to allot to the case an appropriate share of the court's resources while taking into account the need to allot resources to other cases. In this day and age they are elements of case management which must not only be seen to have been placed in the scales but also given due and proper weight when assessing how justice is to be done to the parties and to other litigants" (at [73]). In such circumstances, striking out a claim was a proportionate remedy even if the offending parties "lose so much of the fruits of their labour" ([74]).

13. In Masood v Zahoor (Practice Note) [2009] EWCA Civ 650; [2010] 1 WLR 746, the Court of Appeal gave further consideration to the application of Arrow Nominees in a case in which the trial judge had found that all of the documents relied upon by both sides were forgeries. Mummery LJ stated that Arrow Nominees stood for the proposition that "where a claimant is guilty of misconduct in relation to proceedings

which is so serious that it would be an affront to the court to permit him to continue to prosecute the claim, then the claim may be struck out for that reason" (at [71]). He identified as one of the objects sought to be achieved by striking out the claim "to *stop* the proceedings and *prevent* the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined" (at [73]). The Court upheld the decision to refuse to strike out the claim, but only because the utility of doing so was spent, given that the trial had taken place.

14. In Summers v Fairclough Homes Ltd [2012] UKSC 26; [2012] 1 WLR 2004, the Supreme Court considered the Arrow Nominees principle again, on this occasion when considering the circumstances in which it would be appropriate to strike out a fraudulent claim after a trial. Summers involved a personal injury claim in which the claimant had dishonestly exaggerated the extent of his injuries. At [43], Lord Clarke accepted that "it must be a very rare case in which, at the end of the trial, it would be appropriate for a judge to strike out a case" rather than determine it on its merits. The Court emphasised at [49] that:

> "[t]he draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court has held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court, but the award of damages would be very small".

15. At [61], Lord Clarke concluded that "[t]he test in every case must be what is just and proportionate. It seems to us that it will only be in the very exceptional case that it will be just and proportionate for the court to strike out an action after a trial." As to the pre-trial position, Lord Clarke noted at [62]:

> "nothing in this judgment affects the correct approach in a case where an application is made to strike out a statement of case in whole or in part at an early stage. As the Court of Appeal put it in Masood v Zahoor [2010] 1 WLR 746, para 73 … in a passage with which we agree, one of the objects to be achieved by striking out a claim is to stop proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined".

16. I accept that Arrow Nominees and Summers confirm that the court has jurisdiction in an appropriate case to strike out the entirety of a claim, part of which is advanced dishonestly (and thereby abusively), and that jurisdiction exists even if a fair trial of the action remains possible. I also accept Mr Béar QC's submission that that jurisdiction is more likely to be exercised in advance of, rather than at the end of, the trial because of the prospect in the pre-trial scenario of preserving court time and the parties' resources. However, whether in a pre- or post-trial context, successful reliance on the Arrow Nominees principle has been rare. In Alpha Rocks Solicitors v Alade [2015] EWCA Civ 685; [2015] 1 WLR 4354, the claimant solicitors had presented two bills for payment, the first of which was found to be partly false and deliberately exaggerated, and the second brought on the basis of fabricated documents and known to be

inaccurate. In what might be thought to be a recalibration of the Arrow Nominees principle, Vos LJ at [22] held that the court "should exercise caution in the early stages of a case in striking out the entirety of a claim on the grounds that a part has been improperly or even fraudulently exaggerated". He continued:

> "That is because of the draconian effect of so doing and the risk that, at a trial, events may appear less clear cut than they do at an interlocutory stage. The court is not easily affronted, and in my judgment the emphasis should be on the availability of [a] fair trial of the issues between the parties".

17. I accept that much of Vos LJ's judgment is aimed at the undesirability of the court reaching the conclusion that the claimant is pursuing the claim dishonestly at an early stage of the proceedings, and without the benefit of oral evidence and cross-examination. However, the judgment also gave guidance on the issue of when the jurisdiction should be exercised, even assuming the allegations of dishonesty can be made out. Vos LJ noted that a strike out at an early stage of the proceedings required "misconduct .. which is so serious that it would be an affront to the court to permit him to continue to prosecute the claim" ([21]), and (at [22]) that "the court is not easily affronted" and "the emphasis should be on the availability of [a] fair trial of the issues between the parties". The judgment recognised that the court has power to strike out the entire claim, part of which had been pursued dishonestly, even when a fair trial of the claim remained possible, but makes it clear that this would only be appropriate in "truly exceptional circumstances" ([26]).

18. Alpha Rocks does not directly discuss the issue of whether it remained open to the respondent in that case to seek to strike out the entirety of the solicitor's claim if the requisite fraud was established at trial. However, my reading of Vos LJ's judgment is that he was not contemplating this possibility. At [32], when identifying the consequences if fraud was established at trial, Vos LJ referred to "the likelihood of penalties in costs and interest, and the serious possibility of proceedings for contempt of court", but not the possibility of the valid part of the claim being forfeit. Further at [33] Vos LJ referred to the solicitors having the opportunity "to reduce the bills to take account of the points made against them if they wish to do so", with the issue of whether the claims were exaggerated, fraudulent or supported by forged documents only arising at trial "if they refuse to do so". The implication appears to be that if those parts of the substantive claim were no longer a live issue on the merits at trial, that would be the end of the matter.

19. On Energysolutions EU Limited v Nuclear Decommissioning Authority [2016] EWHC 1988 (TCC), [928] Fraser J reviewed the authorities, and observed that "conduct at the very extreme end of the scale – for example forging documents, mounting a campaign of dishonesty – are necessary before access to the courts will be denied by striking out a claim such that it is never adjudicated upon".

20. Finally, Litasco also relied on certain extra-judicial statements addressing the position of the litigant who fraudulently exaggerates a valid claim. I was referred to an article by Professor Zuckerman, provocatively entitled 'Must a fraudulent litigant be allowed to think: if the fraud is successful, I will gain much; if it is not, I will still recover my legitimate claim?' (2011) 30 Civil Justice Quarterly 1, 8. Professor Zuckerman rationalised the striking out of the claim in these circumstances on the basis that "doing

justice under the CPR requires more than a process which produces the correct decision on the merits. Doing justice in accordance with the overriding objective is a bi-directional concept that takes account of the interests and opportunities of both parties, not just one of them" (p.8). For that reason, "[t]he exclusion from the adjudicative process of a party who has failed to comply with the rules is not a punishment but a mere consequence of failing to meet conditions of participation." (at p.10) Instead, striking out a claim in such circumstances signifies that the procedural opportunity for advancing the legitimate claim has now passed. "The moment the court reaches the conclusion that the party never believed the facts stated in the statement of case to be true, it is entitled to hold that the statement of case may no longer be relied upon and strike it out." (at pp12-13). Professor Zuckerman identified a deterrent rationale for such a rule, namely that "the fraudulent litigant must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose none of my entitlement" (at p.14).

21. Litasco also referred to Lord Reed's 2012 lecture, 'Lies, damned lies: Abuse of process and the dishonest litigant', in which he discussed how the courts deal with litigants who set out to deceive the court, for example those "who produce forged documents, or conceal the existence of relevant documents, or give untruthful evidence". In considering cases where "it is established prior to proof, possibly as the result of an admission or a preliminary proof, or where it becomes apparent during the proof, that one of the parties is seeking to subvert the process of the court by fraudulent means" (p.2), he said (at pp.2-3):

> "[T]he court has to decide whether the case should be allowed to proceed any further. It has essentially two choices. It can decide to carry on notwithstanding the party's efforts to subvert the court process, and do the best it can in the circumstances, or it can decide to dismiss the party's case there and then."

After reviewing the authorities, he concluded as follows at p.17:

> "In conclusion, I would suggest that judges should not be unduly reluctant to dismiss cases where it appears that the litigant is determined to subvert the adjudicative process by fraudulent means. If the courts wish to avoid bringing the administration of justice into disrepute, they should in my view be slow to make decisions favouring those who set out to use the court process as an instrument of fraud. Summary dismissal in such circumstances is not to my mind aptly regarded simply as the denial of a right of access to the court. Where a litigant has demonstrated that his object is to prevent a fair trial, he is merely purporting to invoke his right of access to the court: his real object is not to have a fair trial at all. It seems to me that a court which declines to entertain such a litigant's case is merely drawing a reasonable conclusion from his refusal to accept the rules of the institution whose processes he is seeking to abuse."

22. It is not, however, a rule of English procedure, as it is of English insurance law, that the bringing of a claim, the quantum of which is dishonestly exaggerated, automatically forfeits the entire claim. It is necessary for the court to consider whether the conduct

meets the "truly exceptional circumstances" in which a litigant's conduct leads to the forfeiture of its claim, even though it may be valid, and a fair trial of the claim remains possible.

C PALMALI'S CONDUCT IN ADVANCING THE ORGINAL DAMAGES CLAIM

23. The Original Damages Claim was calculated as follows:

    i) Palmali asserted breaches of the Exclusivity and Minimum Cargo Obligations in the COA (the "EO" and "MCO" respectively), although the pleaded breach conflated the two obligations (referring to an obligation "to provide minimum monthly quantities of the Cargo of between 400,000 and 700,000 mt").

    ii) It was asserted that loss and damage had been suffered in the amount of the profit which Palmali "would have achieved if Litasco had provided up to 700,000 mt of Cargo per month".

    iii) Damages were claimed on the basis of the following calculation:

        a) taking the "actual quantity of Cargo shipped";

        b) using "actual revenue earned" to calculate "the gross revenue per ton of the Cargo actually shipped";

        c) taking the volume of Cargo if 700,000 mt/month had been shipped (i.e., assuming that there was in fact 700,000mt being shipped by Litasco per month which would have been shipped under the COA if the Exclusivity Obligation had been complied with);

        d) calculating the difference between the quantities in a) and c);

        e) using the "gross revenue" figure in b) to calculate an alleged loss of revenue on the figure in d);

        f) calculating what is said to be "the average percentage profitability for each year after deduction of expenses incurred in earning the actual revenue" (a percentage of just over 70%); and

        g) applying the "average percentage profitability" in f) to the alleged loss of revenue in e) to arrive at the loss of profit claim.

24. So far as the figure in f) is concerned, a distinction was drawn between "third party vessels" and so-called "own fleet" vessels:

    i) for the former, the expenses deducted include the costs which Palmali would have incurred in chartering vessels from third parties to carry the additional volumes of Cargo and any demurrage payable to those third parties (in addition to bunkers and port charges); and

    ii) for the latter, only port expenses and bunkers are deducted (i.e., it was assumed that Palmali would not itself have to pay any freight or hire in respect

of the vessels which would have been used to carry the additional quantities of Cargo or pay demurrage for those vessels).

25. It has now become clear that what were described as "own fleet" vessels fall into three groups:

    i) Vessels owned by Maltese companies in the Palmali group made available to Palmali as manager under Ship Management Agreements ("SMAs") whereby Palmali was entitled to 2.5% of freight earned as a management fee.

    ii) Vessels owned by Palmali LLC ("Palmali Rostov"), which were time-chartered to a company called Dolphin Overseas Shipping SA ("Dolphin") and then voyage chartered to Palmali, with Palmali making a profit through deploying those vessels under the COA represented by the difference between the amounts received under the COA and the amounts payable under the voyage charters;

    iii) Vessels which were subject to various bareboat and time charter arrangements, before being made available to Palmali under SMAs, Palmali's profit being derived from commissions payable under the SMAs (which, effectively, are in the same position for present purposes as i) above).

26. In the Claim Form and the Particulars of Claim, Palmali had drawn a simple (and it must be said simplistic) distinction between "own fleet" and "third party" vessels, which did not acknowledge or reflect the fact that, whatever the position at the level of ultimate beneficial ownership, the so-called "own fleet" vessels were in fact in different legal ownership and provided to Palmali on the basis of contractual arrangements rather than through the deployment by Palmali of its own assets. Instead, the calculation was performed on the basis that all of the companies in the same beneficial ownership could be treated as a single entity.

27. I held that that approach was misconceived. But it is far from unique in the world of commerce for a businessman to treat as "my property" assets owned by companies they own or control, and to fail to appreciate that the benefits (fiscal or in litigation) which may follow from structuring asset holdings in the form of separate companies – whether vertically or horizontally related – carried with them legal consequences which on occasion may be less advantageous.

28. It is also right to record that English law (and English courts) attach more significance to the position as a matter of legal – rather than economic – analysis than some other jurisdictions. By way of example, in international arbitration, a number of distinguished tribunals have allowed one company in a group to assert and recover losses suffered by other companies in the same group under the so-called "group of companies" doctrine. That doctrine originated in an award involving Dow Chemical in France. The arbitrators (Professors Sanders, Goldman and Vasseur) decided that non-signatory companies in a group could rely on an arbitration clause in contracts between Isover St Gobain and two Dow Chemical group companies. In an award reported at (1984) 9 YB Comm Arb 131, the tribunal held at p.136 that a group of companies constituted one and the same economic reality of which the tribunal should take account when it ruled on its jurisdiction. The Paris Cour d'Appel rejected an application to set aside the award although the English court has made it clear that recovery by non-signatories raises an

issue of applicable law, not one of arbitration law: Peterson Farms Inc v C & M Farming Ltd [2004] EWHC 121 (Comm); [2004] 1 Lloyd's Rep 603.

29. Against that background, I do not believe that the Original Damages Claim should be characterised as a dishonest claim:

i) To the extent that I am able to determine the position, it did not involve false assertions of fact or forged documents, and there is no suggestion that it is not arguable that the other companies in the same beneficial ownership as Palmali would have earned profits which made up the $1.9 billion claimed had the COA been performed.

ii) The effect of my ruling was that it was not open to Palmali to claim those losses. But it would not be appropriate, in my view, to conclude that the relevant individuals at Palmali must have known that this was the position under English law (cf. [28]) above. In these circumstances, I do not find the explanations offered by Mr Datsyuk and Mr Javadov that, in calculating the losses suffered by reason of the alleged breaches by Litasco of the COA, they looked at losses across the Palmali fleet and did not appreciate the need to distinguish between losses suffered by Palmali and losses suffered by other companies in the Palmali group, improbable. This appears to have been the basis on which data was presented and reported within the group. It seems even less likely that Mr Mansimov, the (or at least an) ultimate beneficial owner, and an individual who did not discharge a financial control function in the Palmali organisation, was alive to the significance of the distinction between loss caused by breaches of the COA to Palmali, and loss caused to other group companies.

iii) More importantly, I am not persuaded that it is arguable that they knew that Palmali could not properly claim losses suffered elsewhere in the group as a matter of English law (as might have been possible in other contexts). If they had not received advice from their legal team, then there is no reason to suppose that they should have appreciated that such a claim was not legally permissible. If the assumption is made that Palmali did receive legal advice on this issue (which is the inference that Litasco invite the court to draw), then it must follow that the legal team (about whose conduct no criticism is rightly made) were content to continue to advance the claim on that basis, and to allow Palmali to do so.

iv) It is significant that, on essentially the same facts as are now known to be the position, Palmali's legal team felt able to maintain the claim in the Amended Reply served on 28 February 2020, at the Summary Judgment Hearing before me and on appeal. It was not suggested that the arguments advanced at the Summary Judgment Hearing were abusive, and there was no application that the costs of the summary judgment application be assessed on an indemnity basis. That of itself, in my view, is determinative on the issue of whether the Original Damages Claim was an intrinsically dishonest claim.

30. So much for the claim itself. Litasco next points to the terms of the Particulars of Claim of 11 September 2017, and to the statement in paragraph 1 that Palmali "operates and manages a large portfolio of owned and chartered in vessels". It is said that this sought to give the false impression that Palmali itself owned vessels, when in fact the vessels

which Palmali referred to as "owned" vessels were owned by other companies in the group. However, paragraph 1 (which Litasco admitted) is not quite so stark, and must be read in full:

> "The Claimant, Palmali Shipping SA ("Palmali") is an international freight transportation group".

The misplaced "group-think" which treated Palmali as co-extensive with the group of which it formed part is apparent from the first sentence of the pleading, and the last line of the paragraph can fairly be read as a reference to the position of the "international freight transportation group", as can the references to "tonnage from its own fleet" in paragraph 7 and elsewhere.

31. Litasco next points to the First Response for Further Information on 19 July 2018:

i) Request 2.2 sought particulars as to Palmali's case on "own fleet" vessels.

ii) Palmali's response, although brief, was consistent with its case now – that the vessels were those "owned by Palmali Holding Company Limited or Palmali Rostov or under the de facto control of the Palmali Group of Companies … Vessels over which Palmali had de facto control and which were used to carry cargo for Litasco under the COA consisted of four chemical tankers owned by Maritime Holdings Limited. Palmali also chartered in vessels on long term bareboat charter". The response did not provide any detail of the contractual arrangements, but it did make it clear that the vessels were not owned by Palmali and that the case was premised on what was said to be a factual rather than legal ability to control the vessels.

iii) Further, Responses 2.3.1 and 2.3.2 referred to "cargo shipped by the Palmali group of companies … under the COA … using its own vessels and using tonnage chartered from third parties", which once again made it clear that Palmali was treating vessels owned by other group companies as vessels which it owned.

iv) Request 6.2.2 asked for particulars of "the operating expenses and any other categories of expenses incurred by Palmali … in procuring, equipping, crewing and maintaining such vessels".

v) The response addressed only the running costs of the vessels, and, as Mr Béar QC rightly observed, "avoided the issue" of procuring costs. I am not happy with this response, which was certainly not forthcoming, albeit the Further Information as a whole did enough to flag the point that Palmali was using vessels in the ownership of other group companies. Further, the failure to address anything other than running costs for the vessels themselves was obvious. This is far from the first occasion in which one party has simply failed to engage, for whatever reason, with part of an RFI. I would simply observe that, in a mindset in which it was thought possible to treat all of the different Palmali group entities as, in effect, a single whole, it is not surprising that payments within that greater whole were not identified as expenses.

32. Certainly, by the time of the service of this Further Information, it was clear that Palmali was claiming profits which it contended would have been made by deploying vessels owned by other group companies, albeit it had failed to answer requests which sought to ascertain the terms on which those vessels would have been made available to Palmali. The fact that there might be such arrangements, and that Palmali had failed to answer questions directed to them, was clear from the face of the Statements of Case.

33. Next, Litasco points to Palmali's disclosure which did not include the SMAs or documents containing or evidencing the contractual arrangements between Palmali Rostov, Dolphin and Palmali. However:

    i) While an order for standard disclosure was made on 28 June 2018, this was not carried into effect and a more detailed disclosure order was made by Andrew Baker J on 5 October 2018 which provided for disclosure by reference to agreed search terms and time periods, but provided that no disclosure was to be given on issues going to proof of loss.

    ii) The reason for this is that it was contemplated that the parties would hold discussions on a sampling approach and agree search terms and search periods in the light of that agreement. The parties do not appear to have progressed this issue, with the result that no further search terms or search periods were agreed.

    iii) On the evidence of Mr Pollock-Hill, which was not challenged, the agreed search terms, and search periods did not capture documents relating to internal Palmali group arrangements. While it might be said that there was an element of happenstance in this, it cannot be said that Palmali was in breach of a disclosure order.

    iv) In any event, as I explain below, thanks to Litasco's perseverance, the SMAs were disclosed, and, adopting Chadwick LJ's language in Arrow Nominees, [54], the object of any disclosure requirement was "ultimately secured".

34. Litasco identified the existence of the SMAs themselves from the Palmali group's published accounts, leading to a tailored request for specific disclosure of the SMAs and any other documents relating to the "own fleet" vessels. Palmali's response of 20 September 2019 – stating "we fail to see how any ship management agreement between [Palmali] and the individual ship owning companies is relevant to the pleaded issues" – was pure bluster.

35. However, by this point, Litasco was fully alive to the issue on which it ultimately prevailed before me at the Summary Judgment Hearing and it amended the Defence to plead this case on 29 October 2019. On the same date it sought specific disclosure of the SMAs and other documents relating to the provision of "own fleet" vessels, and served a further RFI. In response, on 23 December 2019, Palmali served evidence attaching the SMAs, albeit no documents relating to the other "own fleet" vessels.

36. A response to the second RFI was served by Palmali on 31 January 2020, followed by an amended Reply on 28 February 2020. Palmali continued to advance the Original Damages Claim, as it did at the Summary Judgment Hearing. If one of the two arguments advanced by Palmali at the Summary Judgment Hearing had succeeded, it would remain open to Palmali to assert the Original Damages Claim now.

37. There is one further criticism of Palmali's conduct which I should deal with. Palmali's response to the enquiries initiated by Litasco in relation to the SMAs led to Palmali serving evidence acknowledging the existence of the SMAs, the effect of which was to suggest that all of the "own fleet" vessels were in this category. In fact, there were a significant number of vessels which were not subject to SMAs between Palmali and the Palmali group company, but which involved an intermediary company called Dolphin Overseas Shipping SA ("Dolphin") between the ship owning company and Palmali. In some instances, Palmali's contractual interaction with the vessels took the form of an SMA, but in other cases it took the form of a charterparty.

38. Mr Béar QC criticised Palmali for failing to disclose the circumstances of the Dolphin vessels, and for suggesting that all the "own fleet" vessels were subject to SMAs. It appears on the evidence as though Dolphin was a company under the same ultimate control as the Palmali group, interposed into some of the group's contractual arrangements to secure tax benefits, in which context it was falsely presented to the Russian tax authorities as an independent company. I have found the explanations from Mr Erdem for Palmali as to why the arrangements relating to the Dolphin vessels were not revealed when the existence of the SMAs was confirmed unsatisfactory, and that explanation changed between Mr Erdem's second and third witness statements. I do not feel able to place reliance on either of the explanations, essentially for the reasons given in paragraphs 37.1 to 37.4 of Litasco's skeleton argument. It may well be that Palmali was particularly sensitive about the Dolphin arrangements because of the tax issues I have referred to, and which appear eventually to have caught up with Palmali. That conduct is, no doubt, reprehensible, as Mr Béar QC submitted, but it is Litasco's own case that it signed up to the MCO in the COA as part of a scheme to assist Palmali in misleading banks and preparing misleading accounts.

39. However, I am not persuaded that the Dolphin material was deliberately suppressed in an attempt to improve Palmali's prospects in the action:

    i) In terms of the issues considered at the Summary Judgment Hearing, there was (as Mr Béar QC accepted) no difference between the position as presented (all "own fleet" vessels were subject to SMAs between related companies and Palmali), and the actual position (some of the Rostov vessels were subject to such SMAs and others to charterparties between a related company and Palmali).

    ii) It would appear that the profit margins on the non-SMA vessels were considerably higher than the 2.5% profit under the SMAs (an average profit is claimed of 47% in 2011, 28% in 2012 and 2013 and 10% from 2014 onwards). Treating all the "own fleet vessels" as SMA vessels would, on the information before me, have reduced rather than increased the damages claim.

40. Further, it was Palmali itself which corrected the position – unprompted by Litasco – on 9 September 2020, two weeks before the Summary Judgment Hearing, in correspondence which acknowledged the potential implications of the information. The Dolphin point did not in any way impact on the outcome of the Summary Judgment Hearing.

41. To summarise the position:

i) I am not persuaded that it is arguable that the case was fraudulent, in the sense that Palmali knew that it could not claim the losses of group companies but decided to bring such a claim nonetheless by suppressing the intra-group arrangements.

ii) Palmali did not breach the disclosure orders which had been made, and in any event, any deficiencies in its disclosure were rectified, or the need for further disclosure brought to light, before the first contested hearing on the Original Damages Claim, the Summary Judgment Hearing.

iii) Palmali avoided answering questions directed to ascertaining the intra-group arrangements in its Further Information and in correspondence, but the relevance of those questions, and Palmali's failure to answer them, were clear.

iv) Palmali has no satisfactory explanation for its failure to reveal the Dolphin arrangements at the same time as it confirmed the SMA arrangements, but I am satisfied that this was not done for the purposes of improving its case in the litigation, and the failure was cured by Palmali.

v) The delay in revealing that the Dolphin arrangements had no material impact on the litigation.

D IS A FAIR TRIAL OF THE ACTION STILL POSSIBLE?

42. So far as the Original Damages Claim is concerned, there has already been a fair and final determination of Palmali's claim. I finally determined that claim in Litasco's favour at the Summary Judgment Hearing.

43. There was an attempt by Litasco in its skeleton argument to suggest that Palmali's conduct in pursuing the Original Damages Claim had imperilled a fair trial of the claim which Palmali sought to advance through the proposed amendments. Those submissions were not developed orally and I therefore propose to deal with them briefly:

i) I do not accept that a fair trial is not possible because the court can have no confidence in the reliability of Palmali's disclosure. I have already noted that Palmali had not breached any disclosure order. It has since provided disclosure relating to the intra-group arrangements, disclosing substantial quantities of documents: 2,135 on 20 November 2020; 322 on 11 December 2020 and 2,894 on 29 January 2021. Litasco did not argue that this disclosure was deficient, or that it did not provide a reliable basis for performing a damages assessment which was almost certainly going to have involved some sampling or extrapolation in any event.

ii) In any event, I am satisfied that with the benefit of the procedures available under the CPR, and the power of the court to draw adverse inferences, there is no appreciable risk that any deficiencies in Palmali's disclosure will prevent a fair trial. Litasco did not attempt to put any flesh on this bone.

iii) I am not satisfied that the delay in the trial is the result of Palmali's decision to advance the Original Damages Claim. It would not have been possible for

Palmali to formulate its quantum claim, on whatever basis, and for the case to proceed to a trial of that case, until such time as Litasco had disclosed the shipments of cargo which it had effected through third parties. Palmali first requested that material in 2018, but Litasco did not produce it until August 2020.

iv) In any event, it would always have been open to Palmali to advance the Original Damages Claim and the current proposed claim in the alternative. Had this been done, there would still have been a summary judgment application, and the same amount of court time would have been necessary to determine it.

v) For the same reasons, I am not persuaded that the pursuit of the Original Damages Claim has had the effect that material witnesses who would otherwise have given evidence at trial will no longer do so; or that documents which would otherwise have been available have been destroyed. The calculation of quantum will essentially turn on forensic analysis of underlying records, and extrapolation and modelling from sample transactions.

44. Further, the effect of the amendments which Palmali now seeks permission to put forward not only very substantially reduce the claim, but also simplify it:

i) In relation to vessels which were ultimately provided to Palmali under SMAs, the claim is now for 2.5% of the freight or demurrage payable under the COA, without the need to investigate port expenses or bunker costs (as was required in the Original Damages Claim).

ii) In relation to vessels chartered in through the Dolphin route, the claim is for the difference between freight and demurrage which would have been received under the COA and freight, demurrage and expenses payable under the Dolphin charterparties.

45. Mr Béar QC submitted that there had been a change to the characterisation of the claim as well – that Palmali had previously asserted its entitlement to receive amounts payable under the COA in its own right, and was now accepting that this was no longer the case. I noted in my previous judgment that no one was contending that Palmali had acted other than as principal under the COA ([21]-[23]). I do not read Palmali's proposed amendments as departing from that position, and Mr Russell QC confirmed the correctness of this reading (although I would note that, in any event, any such change in characterisation would have no effect on the issues which would require to be determined).

46. In these circumstances, it is necessary for Litasco to establish that this is arguably one of those "truly exceptional cases" in which Palmali's conduct "is so serious that it would be an affront to the court to permit [it] to continue to prosecute the claim", notwithstanding that (a) a fair trial of the Original Damages Claim has already taken place and (b) a fair trial of the proposed amendments remains possible. In my view, the criticisms which can realistically be made of Palmali do not come close to meeting the req uisite level of seriousness, and the case involves conduct very far removed from what Fraser J in Energysolutions described as "the extreme end of the scale".

E SHOULD THE COURT ORDER A HEARING FOR THE ORAL EXAMINATION OF PALMALI'S WITNESSES?

47. Mr Béar QC accepted that it would not be appropriate for the court to conclude at this hearing that the Original Damages Claim had been advanced dishonestly by Palmali, or that dishonest conduct had been undertaken for the purpose of advancing it. He accepted that fairness required the relevant individuals to have the opportunity to give oral evidence, and for the court to see that evidence tested by cross-examination, before such findings could be made.

48. Instead, he submitted that if it was arguable that there had been dishonesty of one or other kind, I should fix a three-day hearing at which the individuals involved in formulating and supporting the Original Damages Claim could be cross-examined, so as to allow the court to reach final conclusions before determining whether to grant permission to amend.

49. Orders for cross-examination on witness statements filed for the purposes of interim hearings are rare (as Peter Smith J noted in Cadogan Petroleum Plc v Tolley [2009] EWHC 2527 (Ch), [19]). I accept that Chadwick LJ contemplated in Arrow Nominees (at [61]) that there might be cases in which this course would be appropriate, but in my view it would be an exceptional case in which it would be proportionate to devote three days of court time to cross-examination on an issue which was concerned with the manner in which the case has been advanced rather than the merits of that case, for the purpose of determining the essentially procedural question of whether the court should exercise a discretion to permit amendment of the Particulars of Claim. Such a course carries with it significant potential to delay the resolution of the dispute (something which Litasco professes a desire to avoid).

50. Given my conclusions as to the criticisms to which Palmali might realistically be subject in this case, I am satisfied that there is no sufficient basis for taking this extraordinary course on this application.

F SHOULD THE COURT REFUSE PERMISSION TO AMEND?

51. In the alternative, Mr Béar QC submitted that, unless Palmali was able to persuade me that there was no arguable case that the Original Damages Claim had been pursued with the requisite degree of dishonesty, the proper course was to refuse the application for permission to amend (with the effect, in this case, of striking out of the vast majority of Palmali's claim).

52. I have concluded that it is not arguable that there has been conduct of sufficient seriousness to warrant striking out Palmali's claim even though it is arguable and can fairly be tried. I would, in any event, have been unwilling to accept Mr Béar QC's argument that it would have been appropriate to effectively strike out Palmali's case merely because it had been unable to establish the Litasco's dishonesty case was not arguable.

G ARE PALMALI'S AMENDMENTS REASONABLY ARGUABLE?

53. The claim which Palmali seeks permission to advance claims damages for breaches of the MCO and EO. Litasco has raised two objections to the proposed amendments which concern the interrelationship of those two claims.

54. The first was that Palmali had failed to set out its case on how the two damages claims were to be aggregated. That complaint has now been addressed by a new Annex 3 to the proposed amendments. Provided that this Annex is made part of the amended pleading, I am satisfied that this objection has been overcome.

55. The second complaint has more substance. Palmali has calculated the damages claim for the MCO on the assumption that that the cargoes which it would have been asked to lift would have been river voyages (which were more profitable for Litasco). The basis for that assumption is that the voyages which Litasco asked Palmali to perform under the COA were largely of this kind, and it has been assumed that Litasco would have performed the MCO using the same types of cargo. By contrast, the cargoes lifted by third parties, which it is said involved a breach of the EO, were mostly non-river voyages. A further issue arises in relation to the EO, namely whether it extended only to cargoes of 10,000 mt or less, or whether the effect of the EO was that Litasco was obliged to ship all cargoes under the COA, and to present that cargo for lifting in lots of 10,000 mt or less. If the former construction is correct, then it is accepted that Palmali's claim for damages of the EO largely falls away.

56. Mr Béar QC submits that if Palmali recovers damages in respect of the breach of the EO, that will necessarily reduce the amount of any damages claim under the MCO, because the effect of such a damages award will be to put Palmali in the position it would have been in had cargo been shipped under the COA (thereby counting towards the MCO). That is a forceful argument, forcefully put, and it may very well be right. However, in my view, it is not an argument which it would be appropriate to determine at this hearing (with the attendant risk of an appeal):

    i) First, the terms of the COA which are said to give rise to the MCO and the EO are obscure. Arguments premised on the doctrine of minimum performance or similar arguments are, in my view, best determined at a hearing at which the court will be ruling finally on the construction of the COA.

    ii) Second, if Palmali's argument as to the effect of the 10,000 mt reference is accepted, it may be that in the counterfactual world Litasco would not have chosen to ship the EO cargoes in performance of the MCO. That might provide no answer to Mr Béar QC's point, but I am not sufficiently confident that this is necessarily the case to reach a final determination now.

    iii) Third, if Palmali's argument in relation to the 10,000 mt is rejected, this issue will not arise for determination at all.

    iv) Fourth, resolving this argument now will not impact on the evidence required at the trial. Litasco should be in a position now to work out what the broad financial consequences of success in this argument at trial would be.

H CONCLUSION

57. For these reasons, Palmali has permission to amend the Particulars of Claim in the form of the draft produced to the court, to include Annex 3. I will hear the parties on any consequential issues, at a hearing to be fixed for junior counsel's availability. The parties should now take steps to list a CMC as quickly as possible, to ensure that this long-standing action now proceeds expeditiously to trial.