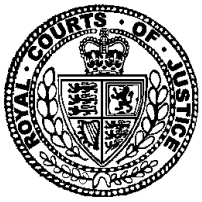

Neutral Citation Number: [2023] EWHC 131 (Comm)

Case No: CL-2022-000493

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2023

Before :

MR JUSTICE FOXTON

- -

Between :

GRAVELOR SHIPPING LIMITED	**Claimant**
- and -	
(1) GTLK ASIA M5 LIMITED	
(2) GTLK ASIA M6 LIMITED	**Defendants**

- -
- -

Alexander Wright KC and **Edward Jones** (instructed by **HFW LLP**) for **the Claimant**
Chris Smith KC and **Andrew Leung** (instructed by **Tatham & Co**) for the **Defendants**

Hearing date: 12 January 2023
Draft judgment to parties: 23 January 2023

- -

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.

.....

THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 27 January 2023 at 10:30am.

Mr Justice Foxton :

INTRODUCTION

1. This is the expedited hearing of:

    i) the Claimant's (**Gravelor's**) application for summary judgment in the form of declaratory relief as to and an order for specific performance of obligations arising under two bareboat charterparties; and

    ii) the Defendants' (**GTLK M5** and **GTLK M6** and together **the Owners**) application for a stay of part of the dispute pursuant to s.9 of the Arbitration Act 1996.

2. The Owners' stay application had originally been advanced in relation to the entirety of Gravelor's claim, and for that reason, I had directed that it be argued and determined first. However, Mr Smith KC made it clear in his skeleton argument that the argument was only maintained in relation to a limited and essentially consequential issue. For that reason, I deal with the stay application (briefly) at the end of the judgment.

THE BACKGROUND

The Charterparties

3. This dispute arises out of two bareboat charterparties (as novated) dated 24 June 2019 and 16 July 2019 (**the Charterparties**) for the bulk carriers MV "WL TOTMA" (**Totma**) and MV "WL KIRILLOV" (**Kirillov**) (together **the Vessels**).

4. Gravelor, a Cypriot company, is the bareboat charterer of the Vessels. On 5 November 2019, the Charterparties were novated to the Owners, who are the registered owners of the Vessels. The Owners are direct subsidiaries of GTLK Asia Maritime Limited (**GAML**) which is owned by GTLK Asia Limited (**GTLK Asia**). The ultimate parent company of the GTLK group was JSC State Transportation Leasing Company (**JSC GTLK**), which is owned and/or controlled by the Russian Ministry of Transportation. There is a dispute between the parties as to whether GAML is still in the ultimate beneficial ownership of the Russian state, or whether the ultimate beneficial ownership changed following a transaction in August last year.

5. The Charterparties were essentially finance leases, providing Gravelor with a means of financing the purchase of the Vessels, and they contemplated that at their expiry, title to the Vessels would be transferred to Gravelor. The Charterparties set out a formula for the calculation of the sums payable by Gravelor for the Vessels, which would depend upon the circumstances in which the Charterparties came to an end. Thus:

    i) If the Charterparties were terminated for Gravelor's default, Gravelor would be obliged to purchase the Vessels against the payment on demand of the total of the amounts set out in clause 18.3 of the Charterparties, which would include default interest and other costs, expenses and losses incurred by the Owners (**the Clause 18.3 Sum**).

ii) Gravelor also had early purchase options, and a purchase obligation at the end of the Charterparties' term if they expired without breach on its part, in which eventuality certain of the items making up the Clause 18.3 Sum were not payable.

The key terms of the Charterparties

6. By clause 23, the Charterparties are governed by English law.

7. In the definitions section:

i) "Sanctions and Export Controls" were defined as "…any and all of the following: … (ii) U.S. sanctions and export controls including those administered by the Office of Foreign Assets Control of the U.S. Department of the Treasury (the 'OFAC'), the U.S. Department of State, the U.S. Department of Commerce or any other U.S. Government authority or department; (iii) EU restrictive measures implemented pursuant to any EU Council or Commission Regulation or Decision adopted pursuant to a Common Position in further of the EU's Common Foreign and Security Policy…(v) any other sanctions or export control laws and regulations applicable to the Ship, any Obligor, the Owner or any part thereof which are in relation to the supply, use, operation or financing or commercial ships or the transactions contemplated under the Charter Documents".

ii) "Sanctions Target" was defined as: "…a target or subject of any Sanctions and Export Controls including, without limitation, any person or entity designated as a Specially Designated National and Blocked Person or included in the annex to the Executive Order by OFAC".

8. Clause 8.3 provided that all amounts payable by Gravelor under the Charterparties must be paid for value on the due date to the Owners' bank account held with JP Morgan Chase Bank NA, Hong Kong Branch or "such other account as notified by the Owner to the Charterer from time to time".

9. By clause 8.6:

"(a) All amounts payable by the Charterer under any Charter Document (other than payments under clause 9 (Expenses and indemnities) will be paid in Dollars in time to enable the funds to be cleared on the due date for payment…

(d) If any sum due from the Charterer under any Charter Document…is received or recovered in the Second Currency, the Charterer will, when the Owner receives that sum, indemnify and hold harmless the Owner from and against any loss suffered as a result of any discrepancy between: (A) the rate of exchange used for converting the sum in question from the First Currency in the Second Currency; and (B) the rate or rates of exchange at which the Owner may in the ordinary course of business purchase the First Currency with the Second Currency".

10. Clause 8.10 was entitled "Sanctions payment restrictions" and provided as follows:

"Where a payment under this Charterparty is incapable of being processed by the relevant banking institution and has not been received by the Owner on the due date by virtue of the Owner becoming a Sanctions Target, the Owner and the Charterer shall cooperate and promptly take all necessary steps in order for the payments to be resumed. Any delay in payments resulting solely from the circumstances referred to in the immediately preceding sentence shall not be deemed an Event of Default contemplated by clause 17.1(a) of this Charterparty."

11. Clause 12.16, entitled "Sanctions", states:

"(a) The Charterer must not employ and will procure that the Ship is not employed nor permit the Ship to be employed:

(i) in breach of any Sanctions …

(ii) in any manner or for any purpose which would violate or cause the Owner to violate, when and as applicable, any Sanctions

(b) While engaging in any activities with or related to the Ship, the Charterer shall not violate and shall not cause or permit any of its affiliates or the Owner to be in violation of any Sanctions or Export Controls…"

12. Clause 17, entitled "CHARTERER DEFAULT" provides:

"17.1 Charterer Events of Default

The following events or circumstances will be Events of Default:

(a) If any Charterhire or other amount payable by the Charterer under this Charterparty or under any Charter Document is not received within three (3) Business Days of the due date in the case of a scheduled payment or five (5) Business Days from a demand or any other applicable due date set out in this Charterparty in the case of an unscheduled payment…"

13. Clause 17.2, entitled "Consequences of an Event of Default", provides:

"The Charterer agrees with the Owner that:

(a) it is a condition of this Charterparty that the occurrence of any of the events described in clauses 17.1(a) to 17.1(d) inclusive will constitute an event of default and a repudiatory breach of this Charterparty; and

(b) the occurrence of any of the events described in clauses 17.1(e) to 17.1(s) inclusive will constitute an event of default,

which in each case will entitle the Owner to terminate the chartering of the Ship in accordance with clause 18.1 (Owner's rights) and to recover the amounts specified in clause 18.3 (Payments upon termination) from the Charterer as liquidated damages in the case of a repudiatory breach and as a liquidated sum or debt in the case of an event of default."

14. Clause 18.1, entitled, "Owner's rights" relevantly provides:

"At any time after an Event of Default has occurred and provided the same is continuing the Owner may, at its option:

(a) direct the Charterer either:

(i) to leave the Ship at the port where it is then located or, if it is not then in port, to direct it to the port designated by the Owner, in which event the Charterer's right to retain possession of the Ship will terminate immediately (if the Ship is then in port) or upon the Ship's docking at the designated port; or

(ii) to redeliver the Ship to the Owner immediately in accordance with clause 16 (Redelivery); and/or

(b) without being obliged to give notice to the Charterer, retake possession of the Ship wherever it is located; and/or

(c) (in the case of an Event of Default described in clauses 17.1(a) to 17.1(d) (inclusive)) accept the Charterer's repudiatory breach and (in the case of any Event of Default) by notice to the Charterer (a "Default Notice") terminate the chartering of the Ship immediately; and/or … ."

15. Clause 18.3 entitled "Payments upon termination" states:

"On termination of the Chartering of the Ship or the acceleration of the Charter Term, as the case may be, after Delivery for any reason, the Charterer will on demand pay to the Owner as liquidated damages or, as the case may be, a debt:

(a) the Termination Amount calculated as at the relevant Payment Date

(b) all arrears of Charterhire that are due but unpaid at the Payment Date, together with interest at the Default Rate on those amounts from the date on which that Charterhire or other amounts fell due to the date on which the Owner received them;

(c) all arrears of all other amounts payable under this Charterparty and the other Charter Documents that are due but unpaid at the Payment Date, together with interest at the Default Rate on those amounts from the date on which the other amounts fell due to the date on which the Owner receives them;

(d) all other amounts due and payable by the Charterer to the Owner pursuant to this Charterparty;

[…]

Provided that all amounts set out in this clause 18.3 have been duly and irrevocably paid to and received by the Owner in full, the title to the Ship shall be transferred to the Charterer in accordance with clause 19.2. For the avoidance of doubt, any amount which is duly and irrevocably paid to and received by the Owner under the Security Documents shall, to the extent any such payment is of an amount payable by the Charterer to the Owner pursuant to this clause 18.3, be deemed to be a payment of the Charterer for the purposes of this clause 18.3."

16. Clause 18.6, entitled "Title Transfer/Final Disposition of Ship" states:

> "(a) Upon payment by the Charterer of all amounts due and payable by it under clause 18.3 (Payments upon termination), the Owner shall, subject always to the provisions of clauses 19.2 (Transfer of Title) and 19.3 (Clawback), transfer title to the Ship to the Charterer pursuant to clause 19.2 (Transfer of Title).
>
> (b) If the Charterer fails to pay all amounts referred to in clause 18.3 (Payments upon termination), in full within thirty (30) calendar days of the relevant demand, without in any way limiting or reducing the obligation of the Charterer to pay such amounts, the Owner shall be entitled (but not obliged) to enter into a Final Disposition of the Ship with a third party on such terms as it shall think fit. Pending any Final Disposition the Owner shall be free to lease the Ship (directly or indirectly) to any person on such terms as it sees fit and such arrangement shall not constitute a Final Disposition for the purposes of this Charterparty."

17. Clause 19, entitled "PURCHASE OPTION AND OBLIGATION" states:

> "19.1 Purchase option and obligation
>
> Provided that it has complied with all its obligations under the Charter Documents and that Delivery has occurred, the Charterer shall purchase the Ship from the Owner on the Expiry Date and may purchase the Ship at any time from the first anniversary of the Delivery Date until the Expiry Date upon giving not less than three (3) months prior irrevocable written notice to the Owner, in each case by paying to the Owner a purchase price equal to the aggregate of (the "Purchase Option Price"):
>
> (a) the Termination Amount;
>
> (b) all interest which has accrued or which has fallen due in accordance with the Charterparty but which has not been paid or which falls due on or before the relevant Termination Date; and
>
> (c) all other sums then due and payable by the Charterer under the Charter Documents."
>
> 19.2 Transfer of title
>
> Any purchase of the Ship by the Charterer pursuant to this clause 19 (Purchase Option and Obligation) will, unless the Owner otherwise agrees in writing, be on the following terms:
>
> (a) the Owner shall transfer title to and ownership of the Ship to the Charterer by delivering a bill of sale, recordable in the Charterer's nominated flag state, executed, notarized and apostilled/legalized at the Charterer's expense;
>
> (b) the transfer shall be on an "as is, where is" basis, and no condition, warranty or representation of any kind will be made or given by the Owner or its

officers, employees or agents in relation to the airworthiness, condition, design, merchantability or fitness for use or operation of the Ship, and all conditions, warranties and representations (or obligations or liability, in contract or in tort) in relation to any such matters, expressed or implied, statutory or otherwise, shall be expressly excluded;

(c) no continuing obligation of any kind shall be assumed by the Owner in relation to the Ship or its condition or operation following the date of purchase.

19.3 Clawback

It shall be a condition precedent to the Owners' obligation to transfer of title to the Ship to the Charterer pursuant to this clause 19 … in circumstances where an Event of Default has occurred and is continuing, that there shall have been furnished to the Owner a legal opinion of independent competent bankruptcy counsel acceptable to the Owner, obtained at the cost of the Charterer, to the effect that there is and will be no material risk of payments made for the account of the Charterer as referred to in clause 19.1 … or 18.3 …. To being 'clawed back', recouped or otherwise being required to be refunded or accounted to, or paid to, the Charterer or any person claiming through the Charterer (including, without limitation, any liquidator, bankruptcy trustee, administrator, examiner or other similar insolvency official or creditor or shareholder of the Charterer) or other evidence satisfactory in all respects to the Charterer to that effect."

The imposition of sanctions

18. On 24 February 2022, the Russian Federation invaded Ukraine. A number of individuals and entities were made the subject of sanctions by the US, the EU and the UK following the invasion.

19. On 3 March 2022, Gravelor wrote to the Owners stating that "due to the difficult political situation, Gravelor has intention to purchase" the Vessels, albeit "purchase of vessels is a mere intention at this date … We will inform you additionally when we have a firm decision to purchase".

20. On 8 March 2022, the Owners replied stating "we both are on the same page and working together to solve the problems with execution of PO and conducting necessary registration procedures".

21. On 8 April 2022, JSC GTLK and its associates were made the subject of EU sanctions which Gravelor contended prevented it from paying hire under the Charterparties. In addition, the Vessels Protection and Indemnity and FDD insurers withdrew cover, and the Hull and Machinery insurers stated that they would be withdrawing cover on 22 April 2022.

22. On 25 April 2022, the Owners said that the non-payment of hire amounted to an Event of Default and that the Charterparties would be terminated "effective immediately".

23. On 6 June 2022, Gravelor asserted its entitlement to exercise purchase options under the Charterparties, and asked the Owners to calculate the purchase option price payable,

and to prepare "a bill of sale for each vessel with nominating frozen account allowed to pay into".

24. In response on 16 June 2022, the Owners challenged Gravelor's position, but stated:

> "Without prejudice to our primary position set out in the Default Notice and in accordance with our rights and remedies under the Charter following the occurrence and continuance of the Event of Default, we will be ready to transfer title to the Vessel to Charterer upon receipt by us of all amounts due (as set out in clause 18.3) … calculated as of actual payment date (the 'Due Amount') which shall be paid to one of the following bank account of GTLK Asia Limited as might be further agreed between the Charterer and the Owner".

25. The account nominated by the Owners was with JSC Gazprombank in Moscow (**the Gazprom Account**), and payment was sought in HKD, CNY or RUB. In response, on 11 July, Gravelor stated its willingness to pay the option price but stated that "the stumbling block to the transfer of title is Gravelor's ability to pay the Purchase Option Price and outstanding hire under the terms of the Regulation". Gravelor explained that it had taken steps to obtain a licence which would enable it to make the payment into a frozen account with the Malta Sanctions Operating Board. On 15 July 2022, Gravelor sent a letter by which it stated it was exercising its purchase options if, contrary to its position, it had not yet validly done so.

26. On 21 July 2022, the Owners replied, stating that without prejudice to their position as to Gravelor's default "we acknowledge that Owners will transfer the title to the Vessel in accordance with the terms and conditions set out in clause 18.3 of the Charter upon receipt by the Owner of all amounts due … to be calculated as of actual payment date".

27. On 2 August 2022, the US State Department designated JSC GTLK and its subsidiaries as "blocked" under section 1(a)(vii) of Executive Order 14024.

The EU and US sanctions

The EU sanctions

28. The EU sanctions were imposed by Council Regulation (EU) No 269/2014 ("the **Sanctions Regulation**"). This lists the sanctioned entities in Annex I. On 7 April 2022, JSC GTLK and its subsidiaries including GAML and GTLK Asia were added to that list. The EU sanctions also extend to the associates of the companies listed in Annex I. The Sanctions Regulation stated that the reason for GTLK's designation was that "GTLK is a legal entity, financially supporting and benefitting from the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine".

29. The principal provisions of the Sanctions Regulation which are relevant for present purposes are as follows:

    i) Article 1 contained a series of definitions:

        a) "Economic resources" are defined as "assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may

be used to obtain funds, goods or services". It is common ground that this definition encompasses the Vessels.

b) "Freezing of economic resources … means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them".

c) By Article 2(1), "all funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I, shall be frozen".

d) Article 2(2) provides that "no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I".

ii) Article 5 provides for a derogation from Article 2 (a) where the funds or economic resources were (a) "…subject to…a judicial decision enforceable in the Member State concerned, prior to or after [the date on which the natural or legal person, entity or body referred to in Article 2 was included in Annex I], (b) "the funds or economic resources will be used exclusively to satisfy claims…recognised as valid in such a decision…", (c) "the decision is not for the benefit of a natural or legal person, entity or body listed in Annex I" and (d) "recognition of the decision is not contrary to public policy in the Member State concerned".

iii) Article 7(2) provided for a further derogation from Article 2(2) for "the addition to frozen accounts of…payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 2 has been included in Annex I…".

30. The cumulative effect of Articles 1, 2 and 5 of the Sanctions Regulation is that both payment by Gravelor to the Owners of any of the sums in respect of the purchase of the Vessels (whether under Clause 18.3 or otherwise) and transfer of the Vessels to Gravelor are *prima facie* blocked, but that a derogation may exist where there is a judicial decision recognised in an EU Member State to the extent that such decision recognised valid claims.

31. Finally, Article 9 of the Sanctions Regulation provides that "it shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 2."

The US sanctions

32. EO 14024 had the effect of blocking all payments to GTLK entities, including (at least until August 2022) the Owners. EO 14024 is only applicable to entities domiciled in the US, or transactions within the US. However, the evidence before me establishes that the effect of EO 14024 is that payments cannot be made to any account held by JSC GTLK or its subsidiaries because these would have to be routed through intermediary banks in the USA (and in any event payment in US dollars would give the transaction a sufficient US nexus to trigger the applicability of EO 14024).

The disputed change of ownership

33. On 26 September 2022, the Owners informed Gravelor that the shares of their parent company had been sold by JSC GTLK/GTLK Asia to new owners, such that none of the entities in the chain of ownership were now subject to sanctions. In a witness statement from Mr Gorizontov served on the Owners' behalf, the following account of the transaction (**the Disputed Transfer**) is given:

    i) On 31 August 2022, 100% of the shares in GAML were sold by GTLK Asia to "LLC PRSD-AKTIV" (**the New Parent**) pursuant to an SPA governed by Hong Kong law.

    ii) The New Parent is said to be ultimately owned by the "Ministry of Property and Natural Resources of Chelyabinsk Oblast".

    iii) GTLK M5 has been renamed "AM Asia M5 Limited" and GTLK Asia M6 has been renamed "Albatross Marine Asia Limited".

34. The circumstances surrounding, and effect of, these transfers are obscure and involve a number of concerning features:

    i) Chelyabinsk is a landlocked province, and the New Parent is said to be owned by a local government entity within the Russian Federation. The acquisition by a landlocked local government entity of companies owning two laid-up bulk carriers lacks any obvious commercial rationale.

    ii) The copy of the SPA produced to the court has the "Consideration" section redacted, such that it is not possible for the court to determine whether it is consistent with an arms-length sale, and references to provisions dealing with intercompany loans, including those owed to JSC GTLK, have also been redacted.

    iii) The New Parent has no history of activity or operations in the maritime sector.

    iv) It appears to have signed up the SPA without knowing what the inter-company loan liabilities of the Owners were at the date of acquisition, beyond knowing that they were less than USD 375 million (a provision which appears calculated to alarm rather than reassure).

    v) Mr Gorizontov was appointed as a director of the Owners and GTLK Asia on 26 July 2022. He was re-appointed as a director on 1 November 2022 following the apparent change of beneficial ownership. Mr William Ho remains the Director and Legal Counsel of GAML and the Owners.

    vi) Gravelor has raised a number of legitimate questions as to the purpose of the share sale, and asked for an explanation of certain features of the transaction (Mr Gidman's email of 30 September 2022). There has been no response.

    vii) Despite it being very clear that Gravelor would invite the court to look sceptically at the Disputed Transfer, no evidence was served by the Owners addressing it. The suggestion that the Owners would wish to adduce such evidence at trial is no answer to what was clearly a considered decision to say as little as possible.

35. However, Gravelor has not asked the court to determine on a summary judgment basis that the purported sale to the New Parent is a sham transaction undertaken in an effort to avoid EU and US sanctions. What it does say is the following:

    i) There are objective features of the transfer which can be shown to summary judgment standard to raise very strong suspicions as to the bona fides of the transaction.

    ii) The effect of these features is that it will not be possible to make any payment due to the Owners otherwise than in the same manner in which payment can be made to a sanctioned entity.

THE DISPUTE IN SUMMARY

36. Gravelor contends that it validly exercised its purchase options for both Vessels on 3 March 2022, but this is disputed by the Owners who say that they say that the options were not validly exercised, and that from late April 2022 onwards, Gravelor was in default under the Charterparties. The Owners allege that they were entitled to and did terminate the Charterparties by notice dated 25 April 2022.

37. It is not necessary, for the purposes of this application, to resolve which of Gravelor or the Owners are right on the issue of default. Gravelor accepts that this dispute gives rise to a triable issue, but contends that, even if the Owners are correct in asserting that they terminated the Charterparties for Gravelor's breach, it nonetheless has a legal entitlement to acquire title to the Vessels on payment of the Clause 18.3 Sum.

38. Gravelor's entitlement to a transfer of title in the Vessels, even on this basis, is disputed by the Owners on a number of grounds.

39. First, the Owners assert that the pre-conditions to any right to acquire title to the Vessels on payment of the Clause 18.3 Sum have not been satisfied.

40. Second, there is a dispute as to what would constitute payment of the Clause 18.3 Sum. This dispute arises because, at least until the latter part of last year (and Gravelor contends that this remains the position) the group of which the Owners form part have been the subject of EU and US sanctions:

    i) Gravelor contends that the effect of these sanctions is that it cannot pay the Clause 18.3 Sum in the currency stipulated in the Charterparties, US Dollars, or into the account nominated by the Owners for payment, the Gazprom Account.

    ii) There is a dispute as to whether the Owners still fall within the scope of the relevant sanctions regimes (which I have not been asked to resolve) following the alleged change of beneficial ownership in August 2022.

    iii) There is a dispute as to whether the effect of clause 8.10 of the Charterparties is to permit Gravelor to make payments otherwise than in US Dollars and otherwise than by payment into the Gazprom Account.

    iv) There is a dispute as to whether Gravelor can seek judgment on the basis of the rights to delivery it would have under clause 18.3 of the Charterparties unless it

is willingly now to forego its primary case that it has validly exercised its clause 19.1 purchase option.

41. If Gravelor can establish that the Owners are presently under an obligation to transfer title to the Vessels to it on payment of the Clause 18.3 Sum, it seeks orders for specific performance, including an order:

    i) requiring the Owners to nominate a Euro account into which the Clause 18.3 Sum can be paid in compliance with the Sanctions Regulation; and

    ii) in default of such nomination, authorising the Court under s.39 of the Senior Courts Act 1981 to give such a nomination on the Owners' behalf.

42. The Owners contend that it would not be appropriate for the court to order specific performance for the following reasons:

    i) There is a real prospect of the Owners showing that damages would be an adequate remedy.

    ii) The terms of the proposed order for specific performance are too vague.

THE SUMMARY JUDGMENT TEST

43. I was (inevitably) referred by both parties to Lewison J's summary of the principles to be applied when determining whether it is appropriate to grant summary judgment in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch), [15]. The value of that paragraph in a world in which judgments carried royalties can only be wondered at.

44. In this case, summary judgment is only sought in respect of part of Gravelor's claim, namely whether by tendering payment of the Euro equivalent of the amount claimed by the Defendants as the Clause 18.3 sum, it is entitled to an order for specific performance of the Owners' obligations to transfer the Vessels.

45. I am satisfied that this is a distinct issue which is susceptible to an application for summary judgment (having regard to the guidance given by Mr Justice Fancourt in *Anan Kasei Co Ltd v Neo Chemicals and Oxides (Europe) Ltd* [2021] EWHC 1035 (Ch), [82]), because, if determined in Gravelor's favour, it will enable the court to grant Gravelor particular relief and have important practical consequences for the parties.

HAS ANY CLAUSE 18.3 ENTITLEMENT TO TRANSFER ARISEN?

46. By way of a threshold argument, the Owners argued that clause 18.3 is not engaged at all for three reasons:

    i) It is said that the Owners have made no demand for payment under clause 18.3(a), and have not stipulated the amount to be paid, and that this is a condition precedent to any obligation on the Owners' part to transfer title.

    ii) It is said that Gravelor cannot exercise any clause 18.3 right because it is in breach of its obligation under clause 18.1 to redeliver the Vessels to the Owners.

iii) It is said that clause 19.3 is engaged, and Gravelor has not provided the necessary legal opinion.

Have the Owners made a demand for payment so as to trigger a clause 18.3 entitlement on Gravelor's part?

47. Mr Smith KC argues that, under clause 18.3 of the Charterparties, the Owners can terminate the Charterparties for breach, but then have a discretion as to whether or not to demand payment of the Clause 18.3 Sum, and until they do so, Gravelor has no entitlement to delivery of the Vessels. They say that there has been no such demand either (a) at all or (b) which is valid, because the Owners have not specified the amounts payable.

48. It is helpful to consider the how the Charterparties would operate if Mr Smith KC is correct in this argument:

i) The Owners could terminate the Charterparties, and demand and obtain redelivery of the Vessels.

ii) Having done so, the Owners could decide (for as long as they wished) not to demand the Clause 18.3 Sum.

iii) Unless and until such a demand was made, the Owners would not themselves be able to sell the Vessels. This is because clause 18.6(ii) conditions the Owners' right to sell the Vessels to someone else on Gravelor's failure to pay all amounts referred to in clause 18.3, and there could be no "failure to pay … within … 30 days of the relevant demand" without a demand.

iv) There is an issue, which it is not necessary to resolve, as to whether the Owners' ability to trade the Vessels pursuant to the final sentence of clause 18.3 is similarly conditional on non-payment by Gravelor in response to a demand.

v) If the right to trade the Vessels is so conditioned, then on Owners' case, they can keep the Vessels idle for as long as they wish, but without the ability to sell or trade them, and without any express obligation to maintain them, and then (at a point of their choosing) serve a clause 18.3 notice. On doing so, Gravelor would come under a debt obligation to pay the Clause 18.3 Sum which would include interest at the Default Rate from the Termination Date, even though there may have been a very substantial change in the condition of the Vessels between those dates, and even though many years may have passed.

vi) If the right to trade the Vessels is not so conditioned, then the Owners could trade the Vessels for as long as they wished to so, keep the profits of doing so, and then (perhaps when the market turned) make a demand which would require the Owners to pay the Termination Amount as it would have been due had a demand been made before any trading took place, plus default interest from the Termination Date.

vii) In any event it would enable the Owners to demand interest at a default rate during a period when there was no default.

49. This is, with respect, a wholly unrealistic construction, and I am satisfied it is not a tenable one. These difficulties are avoided if clause 18.3 is interpreted as giving rise to an implied obligation on Owners' part to make the relevant demand within a reasonable time. If Mr Smith KC had been correct, therefore, in saying that there had been no demand in this case, the Owners have identified no basis on which it is said that the Owners could not have made such a demand by this point. In those circumstances, I am satisfied that clause 18.3 does not have the effect that the Owners could take advantage of their own wrong in failing to make the demand as an answer to Gravelor's claim. That conclusion would follow on conventional principles of contractual construction (under the principle in *Alghussein Establishment v Eton College* [1988] 1 WLR 587), or because the Owners' failure to make a demand in these circumstances operates as a waiver of the pre-condition of a demand (albeit not of their right to payment) under the "narrow" principle in *Mackay v Dick* (1881) 6App Cas 251, or because the effect of the breach in failing to take a step necessary for Gravelor's right to transfer to accrue is that the condition is deemed satisfied as a matter of law (the "wider" principle in *Mackay v Dick* as discussed in *Nautica Marine Ltd v Trafigura Trading LLC (The Leonidas)* [2020] EWHC 1986 (Comm), [105]-[109]). I was not impressed by Mr Smith KC's objection that no such point was pleaded. With the agreement of both parties, the case was expedited. Mr Smith KC could not realistically suggest he was unable to deal with what was essentially an argument about the construction of the Charterparties, and which he foresaw and addressed in his skeleton argument.

50. Further, the argument that Gravelor's right under clause 18.3 following a termination is subject to a unilateral option on the Owners' part to make a demand is inconsistent with the terms of clause 17.3. This provides that certain events:

> "will entitle the Owner to terminate the chartering of the Ship in accordance with clause 18.1 … and to recover the amounts specified in clause 18.3 from the Charterer as liquidated damages in the case of a repudiatory breach and as a liquidated sum or debt in the case of an event of default".

The drafting assumption underpinning the clause is that it is the act of termination which brings Owners' monetary entitlements into being, not the decision to make a demand.

51. In any event, Mr Wright KC had an alternative argument, which was that the Owners had made a demand, or at least done enough to preclude them from contending that the clause 18.3 sale regime had not been triggered. As to this:

i) After terminating the Charterparties on 25 April 2022, on 16 June 2022 the Owners wrote to Gravelor saying that "Without prejudice to our primary position set out in the Default Notice and in accordance with our rights and remedies under the Charter following the occurrence and continuance of the Event of Default, we will be ready to transfer title to the Vessel to Charterer upon receipt by us of all amounts due (as set out in clause 18.3) … calculated as of actual payment date (the 'Due Amount') which shall be paid to one of the following bank account of GTLK Asia Limited as might be further agreed between the Charterer and the Owner".

ii) On 21 July 2022, the Owners stated that without prejudice to their position as to Gravelor's default "we acknowledge that Owners will transfer the title to the Vessel in accordance with the terms and conditions set out in clause 18.3 of the

Charter upon receipt by the Owner of all amounts due … to be calculated as of actual payment date".

iii) I see real force in Gravelor's contention that if some act or election on the Owners' part is necessary to bring the clause 18.3 sale mechanism into operation (and with it an obligation on Owners' part to do what was necessary to consummate that process, by providing the relevant figures), these communications had that consequence. Mr Wright KC accepted, however, that the absence from those communications of any figures from the Owners necessary to calculate the Clause 18.3 Sum raised a potential obstacle for his argument that the Owners' communications amounted to a clause 18.3 demand.

iv) It is not necessary to resolve that issue, because on 9 December 2022, the Owners served a witness statement from Mr Dmitry Gorizontov. Paragraphs 17 and 18 of that witness statement provided:

> "The Defendants do not agree that no Event of Default has occurred or is continuing under the bareboat charterparties. Any transfer to the Claimant of title to the vessels can therefore only take place on payment and receipt of the sums payable under Clause 18.3 into an account or accounts nominated by the Defendants in accordance with the terms of the bareboat charterparties. The termination sum for each vessel as at 1 January 2023 will be as follows:
>
> a WL TOTMA: US$14,534,266.42.
>
> b WL KIRILLOV: US14,935,562.90".
>
> The above sums should be paid into an unfrozen bank account or accounts nominated by the Defendants".

52. I agree with Mr Wright KC that, whatever the position before the service of the witness statement, this was clearly the making of a demand under clause 18.3. Mr Smith KC had three answers to this suggestion:

i) First, that Mr Gorizontov was not intending to specify the Clause 18.3 Sum, but only the "Termination Amount" as specified in clause 18.3(a). This was a thoroughly unmeritorious argument. The figure demanded by Mr Gorizontov was clearly not "the Termination Amount" (which was significantly lower that the amount demanded). Mr Gorizontov appears to have used the undefined expression "termination sum" as a shorthand for the full amount payable under clause 18.3. As Mr Wright KC noted, at the time when his witness statement was served, Tathams were acting in a very similar dispute in which very similar charterparties used the term "termination sum" to refer to the entire amount payable under the equivalent of clause 18.3 (*Havila Kystruten As v STLC Europe Twenty-Three Leasing Limited* [2022] EWHC 3166 (Comm), a case also concerned with vessels financed by the Russian Ministry of Transportation).

ii) Second, that the figures prepared by Mr Gorizontov were incorrect, as noted in a later witness statement of Mr Alexey Yanbukhtin. However, there is nothing in clause 18.3 which would invalidate a demand simply because the person making

the demand got their sums wrong. To the extent that further amounts beyond those demanded were in fact due, the Owners would retain the right to recover them as a debt (clause 18.5 providing that "notwithstanding any termination of the Chartering of the Ship … and the issuance of any demand under clause 18.3 … or 18.4 …, following such termination and/or issuance the Owner may issue further demands in respect of, and the Charterer shall upon demand pay, any amounts referred to in those clauses which have not yet been incurred and/or quantified when any previous demand was made". Mr Wright KC has confirmed, in any event, that if the Owners' case that the parties are in a clause 18 rather than clause 19 regime is upheld, Gravelor accepts that the amounts set out in Mr Yanbukhtin's witness statement are due, and it will not seek to re-open that calculation.

iii) Mr Gorizontov's witness statement "post-dates both the issuance of this application and the Particulars of Claim and Charterers' entitlement to relief must be judged by reference to the position at the latter points in time". No authority was cited for that thoroughly unattractive assertion, and I am satisfied it is without merit.

53. Mr Smith KC also argued that, if a clause 18.3 demand had been made, it was open to the Owners to withdraw it at any time before payment and that, by the service of his skeleton, that was what the Owners had done. However, it is clear from clause 18.6(b) that the effect of a demand is that a debt becomes payable by Gravelor in the Clause 18.3 Sum. There is no contractual mechanism for discharging or suspending that debt simply because the Owners change their minds, nor any means of reversing the Owners' right to sell the Vessels to third parties which follows from Gravelor's failure to pay a demand within 30 days. The complex regime which Mr Smith KC's argument would require to be implied into the Charterparties is inconsistent with the express terms of the Charterparties, and would be highly unusual and wholly uncommercial.

54. For these reasons, the Owners' first objection to Gravelor's attempt to enforce its rights under clause 18.3 fails.

Does Gravelor's (assumed) breach of its clause 18.1 obligation to redeliver the Vessels to the Owners prevent it from exercising its rights under clause 18.3?

55. Gravelor accepts that, for summary judgment purposes, the Owners have an arguable case that it is in breach of its clause 18.1 obligation to redeliver the Vessels to the Owners. Does this assumed breach preclude Gravelor from exercising its clause 18.3 entitlement? I am satisfied it does not:

i) No such condition is specified in clause 18.3 itself. Indeed clause 18.3 is clear as to what pre-conditions must be satisfied before Gravelor's clause 18.3 right can be exercised. It states:

> "Provided that all amounts set out in this clause 18.3 have been duly and irrevocably paid to and received by the Owners in full, the title to the Ship shall be transferred to the Charterer in accordance with clause 19.2".

ii) Nor is any such condition specified in clause 18.6. On the contrary, clause 18.6(a) provides "upon payment by the Charterer of all amounts due and payable by it

> under clause 18.3, the Owner shall, subject always to the provisions of clauses 19.2 and 19.3, transfer title to the Ship to the Charterer". This identifies three conditions to transfer (payment and compliance with clauses 19.2 and 19.3) but not compliance with any obligation under clause 18.1. Further, while clause 18.6(b) addresses what is to happen if Gravelor does not make the clause 18.3 payment when due, it says nothing about what is to happen if the clause 18.1 redelivery obligation is not fulfilled.

iii) Clause 19.3 creates an express condition precedent to transfer (which is addressed below). Clause 19.1 makes compliance with all obligations under the Charterparties a condition to Gravelor's right to invoke *that* transfer regime. These paragraphs provide very strong support for the view that, when the Charterparties were intended to create a condition precedent to Gravelor's right to the transfer of the Vessels, they do so in clear terms.

iv) There is nothing in Mr Smith KC's assertion that the Owners' clause 18.1 right would be "rendered nugatory" unless such a condition precedent is implied. If clause 18.3 is triggered and Gravelor makes the payment due, the Owners' entire performance interest under the Charterparties will have been satisfied, and (having transferred title to Gravelor) they would have absolutely no basis for demanding possession of the Vessels, simply so they could immediately be handed back to Gravelor.

v) Nor does clause 18.6(b) necessarily assume that the Vessels will have been redelivered to the Owners before any clause 18.3 transfer can take place. It simply reflects the fact that there may have been such a delivery (whether voluntarily or following legal process).

56. For these reasons, I am satisfied that the Owners' second ground for contending that Gravelor's rights under clause 18.3 have yet to arise is also without merit.

Is clause 19.3 is arguably engaged?

57. Gravelor accepts for the purpose of this summary judgment application that it is arguable that it failed to pay hire when due. Clause 19.3 provides that it is a condition precedent to the Owners' obligation to transfer title to the Ship to Gravelor:

> "in circumstances where an Event of Default has occurred and is continuing, that there shall have been furnished to the Owner a legal opinion of independent competent bankruptcy counsel acceptable to the Owner, obtained at the cost of the Charterer, to the effect that there is and will be no material risk of payments made for the account of the Charterer as referred to in clause 19.1 … or 18.3 …. being 'clawed back', recouped or otherwise being required to be refunded or accounted to, or paid to, the Charterer or any person claiming through the Charterer (including, without limitation, any liquidator, bankruptcy trustee, administrator, examiner or other similar insolvency official or creditor or shareholder of the Charterer) or other evidence satisfactory in all respects to the Charterer to that effect."

58. The Owners contend that, on the assumption on which this hearing is being conducted, the breach in failing to pay hire is continuing. Mr Wright KC contends in response that

the contractual payment required by clause 18.3 will, by definition, include any outstanding hire (clause 18.3(b) requiring payment as a condition of exercising the clause 18.3 right of "all arrears of Charterhire that are due but unpaid …") such that the very act of payment of the Clause 18.3 Sum will mean that no breach is continuing.

59. I am satisfied that Mr Wright KC's argument is without merit, and should be summarily determined against Gravelor. Clause 19.3 operates in circumstances in which, by definition, Gravelor is *then* in a position to make all outstanding payments and, as a condition of acquiring the Vessels, will do so, but where there is a concern that those funds might be clawed back as a result of some insolvency event. Where there has been a prior Event of Default which has continued up to the point when the payment necessary to secure the transfer of title is about to be made, there is a heightened risk of some form of insolvency process occurring which could lead to the payment made in return for the transfer of the Vessels being reversed in whole or in part. The legal opinion required in these circumstances will provide a degree of reassurance that no such clawback will materialise.

60. It follows that, in circumstances in which Gravelor accepts for the purposes of this hearing that there is an arguable breach in failing to pay hire which will continue until payment of the Clause 18.3 Sum, clause 19.3 is engaged. Gravelor must provide the requisite opinion as a condition of the exercise of its clause 18.3 right.

61. I understand that steps are currently underway to obtain an opinion of the required kind. If there is any dispute as to its adequacy, the court can rapidly convene a short hearing to resolve it.

CAN GRAVELOR SEEK SUMMARY JUDGMENT ON THE BASIS OF ITS CLAUSE 18.3 RIGHT NOW WHILE RESERVING THE RIGHT TO ARGUE THAT IT IS ENTITLED TO ACQUIRE THE VESSELS UNDER CLAUSE 19.1 AT THE TRIAL?

62. As I noted, there are two different regimes in the Charterparties pursuant to which Gravelor may acquire title to the Vessels:

    i) The clause 18.3 regime, where Gravelor has breached the Charterparties in such a way as to entitle the Owners to terminate them. The "price" for transfer in these circumstances involves not simply payment of the Termination Amount, but a series of other costs including interest at the default rate.

    ii) The clause 19.1 regime, under which Gravelor has an option to acquire the Vessels for payment of the Termination Amount plus outstanding amounts and accrued (non-default) interest.

63. Gravelor contends that it is entitled to and has validly invoked the clause 19.1 regime, but accepts that the question of whether or not it has done so gives rise to a triable issue. For that reason, it seeks summary judgment today on the basis that, at the very least, the clause 18.3 regime is engaged. The Owners argue that Gravelor cannot do so without irrevocably committing itself to the position that clause 18.3 is engaged and applies. That argument is advanced on two bases:

    i) First, that clause 18.3 requires payment of the amounts due under that clause "duly and irrevocably", and that payment made on the basis that Gravelor reserves

the right to claim back any amount exceeding the sum due under clause 19.1 renders the payment revocable.

ii) Second, that a court judgment that Gravelor is entitled to transfer of the Vessels on the basis of clause 18.3 would be *res judicata*.

64. There is nothing in the first point. The only circumstance in which Gravelor would have any right of recovery would be if *no amount is due* under clause 18.3. If an amount is due under clause 18.3, then any payment of the amount due will, by definition, be irrevocable.

65. The second raises a more interesting question. The Civil Procedure Rules make express provision for the case in which a minimum sum of money is due to the claimant on at least one of two bases, and the claimant wishes to obtain a judgment for that minimum sum while reserving its right to claim the excess, through the mechanism of an interim payment.

66. The issue of whether a court can make a final order for specific performance in circumstances in which there are two alternative rights to delivery, on different terms, might raise complicated issues, which were not the subject of any argument. While the contractual obligation to deliver does not itself merge in an order for specific performance, it is the provisions of the order (so long as it remains in force) rather than the contract which ordinarily regulate the working out of the contract (*Singh v Nazeer* [1979] Ch 474, 480-81). It is open to a court to cancel a decree of specific performance, but this has happened in cases in which the ordered performance has not yet been rendered (e.g. *Johnson v Agnew* [1980] AC 367). Whether, in a case in which specific performance was available on one of two grounds, but there was a triable case as to which, the court could make a final order for specific performance on one ground on the basis that it could, if necessary, cancel that decree after performance and replace it with an order on the other ground, is a question which would merit rather fuller examination than it has had in this case.

67. It is not, however, necessary to grapple with this issue for the purposes of resolving Gravelor's application. If I am satisfied that Gravelor is entitled to specific performance at trial, either under clause 18.3 or clause 19.1, and that there is no arguable defence to an order on one of those grounds, this would be the very strongest basis for the otherwise exceptional order of interim mandatory specific performance, on condition that Gravelor pay the higher amount. Such an order could be accompanied by declaratory relief under CPR Part 24 in respect of those issues which I have decided at this hearing, to avoid any risk of the Owners (or indeed Gravelor) seeking to relitigate any of those issues.

68. In particular:

i) If the court is otherwise satisfied of Gravelor's "in principle" entitlement to judgment, applying the summary judgment test, then its entitlement to such relief, and the inadequacy of damages as a remedy, will have been established to the court's most demanding merits standard.

ii) Ordering delivery on the basis that Gravelor pay the higher of the two amounts potentially due, with the ability to recover any excess, fully protects the Owners'

position. There is no risk of the Owners being prejudiced by any later determination that the lower amount is due.

iii) While Gravelor is exposed to the risk of irrecoverability of any excess, it is willing to assume that risk as the price of obtaining the relief sought.

MUST THE CLAUSE 18.3 AMOUNT BE PAID IN US$ INTO THE BANK ACCOUNT NOMINATED BY THE OWNERS?

69. The Owners also contend that Gravelor can only acquire title to the Vessels under clause 18.3 if it pays the Clause 18.3 Sum in US$ into the Gazprom Account.

70. There can be no doubt that this would ordinarily be the result of clauses 8.3 and 8.6(a). The issue is whether a different conclusion follows in the prevailing circumstances through the application of clause 8.10. By way of a reminder, this provides:

> "Where a payment under this Charterparty is incapable of being processed by the relevant banking institution and has not been received by the Owner on the due date by virtue of the Owner becoming a Sanctions Target, the Owner and the Charterer shall cooperate and promptly take all necessary steps in order for the payments to be resumed. Any delay in payments resulting solely from the circumstances referred to in the immediately preceding sentence shall not be deemed an Event of Default contemplated by clause 17.1(a) of this Charterparty."

71. The application of this clause gives rise to a number of sub-disputes:

i) First, whether clause 18.3 applies in circumstances in which it is accepted that it is arguable that the effect of the Disputed Transfer is that the Owners are no longer Sanctions Targets.

ii) Second, whether clause 18.3 applies when it is the paying banking institution, rather than the receiving banking institution, which is said to be incapable of processing the payment.

iii) Third, whether the evidence establishes to summary judgment standard that the paying bank or any substitute is "incapable of processing" payment of the clause 18.3 amount into the Gazprom Account by reason of the original designation of the Owners as Sanctions Targets.

iv) Fourth, if clause 18.3 is engaged, whether clause 8.10 has the effect that payment of the clause 18.3 amount in Euros into a bank account which will be subject to the EU sanctions regime constitutes a good discharge of Gravelor's obligations under the Charterparties.

Does clause 8.10 apply in circumstances in which it is accepted that it is arguable that the effect of the Disputed Transfer is that the Owners are no longer Sanctions Targets?

72. It is common ground that, at least until the Disputed Transfer, the Owners were Sanctions Targets. It must follow from that the Owners became Sanctions Targets (or, were designated as Sanctions Targets). In these circumstances, provided that the incapability of the relevant banking institution to process the payment arises "by virtue" of that original designation, there is nothing in clause 8.10 to condition the operation of

the clause on the fact that the Owners remain, as a matter of law, subject to the relevant sanctions legislation.

73. That construction of clause 8.10 accords with commercial good sense. Payments falling within clause 8.10 will often have to be made within a tight period: under clause 17.1(a) there is an Event of Default if amounts payable by Gravelor under the Charterparties are not paid within three Business Days of the due date. The question of whether a Sanctions Target has been able to take steps – such as a change of beneficial ownership – to remove itself from the scope of sanctions will be a complex and fact intensive enquiry. Given the motivation which many Sanctions Targets may have of seeking to evade the operation of sanctions through sham changes in beneficial ownership, a suggestion that a Sanctions Target has managed to remove itself from the scope of sanctions is one which is likely to be approached by sanctions authorities and banking institutions with a degree of caution, scepticism and a "safety first" outlook. It therefore makes every sense for the parties to agree that the incapability of a sanctions institution to process a payment arising from the continuing effects of an original designation, even if it could be shown after a full and thorough enquiry that the Owners no longer fall within the sanctions regime, would nonetheless trigger the operation of clause 8.10. Whether or not a payment is, in these circumstances, "incapable of being processed" by virtue of the original designation will be a question of fact.

Does clause 8.10 apply when it is the paying banking institution, rather than the receiving banking institution, which is said to be incapable of making the payment into the Gazprom Account?

74. Mr Smith KC argues that clause 8.10 is only engaged when it is the receiving bank, rather than the paying bank, which is incapable of processing the payment. He argues that the "processing" of a payment is inherently concerned with its receipt.

75. I am satisfied that argument is wrong. Whatever the ordinary meaning of the language might be (and it is possible to find numerous references to a paying entity "processing payments"), it is clear that clause 8.10 is intended to apply to incapability at both the paying and receiving ends:

    i) While clause 8.10 only applies to payments due to the Owners, clause 8.10 refers to "the relevant banking institution", clearly contemplating that more than one banking institution may be incapable of processing a payment, and that it is for that reason that the Owners have not received it. That is obviously a reference to the paying bank and the receiving bank.

    ii) As the Owners were, at the date of the Charterparties, in the ultimate beneficial ownership of the Russian Federation, and were to receive payment in USD, it was overwhelmingly more likely that if the Owners became Sanctions Targets, the problems would arise at the paying end rather than the receiving end.

    iii) There is no commercial reason why clause 8.10 would address the incapability of making a payment by virtue of the Owners becoming Sanctions Targets only when the incapability is caused by difficulties on the part of the receiving bank, and not the paying bank.

Does the evidence establish to summary judgment standard that the paying bank or any substitute is "incapable of processing" payment of the clause 18.3 amount into the Gazprom Account by virtue of the original designation of the Owners as Sanctions Targets?

76. It will be apparent from the summary at [34] above that the circumstances of the Disputed Transfer have a number of suspicious and unexplained elements, and that the Owners have failed to offer an answer to any of those questions. It is obvious that, faced with those circumstances and the absence of a very persuasive response, no reasonable banking institution would run the risk of breaching US and EU sanctions by making a payment to the Owners otherwise than on the basis that those sanctions were engaged. The Commercial Court is able to take judicial notice of the cautious and careful approach adopted by banks in these circumstances, not least because of the very serious consequences which would follow if payments were made to the Owners, and it was later concluded that the Disputed Transfer had not changed the beneficial ownership of those companies.

77. The court's own experience is amply corroborated by the particular circumstances of this case:

    i) First, it is striking that the Owners do not appear to have been able to persuade any English law firm to act for them on the basis that the effect of the Disputed Transfers was that they were no longer subject to sanctions (Mr Gorizontov's emails to the court of 2 and 3 November 2022). It was only the enactment of General Licence INT/2022/2252300 issued by the Office of Financial Sanctions Implementation on 28 October 2022 which enabled the Owners to obtain legal representation in this jurisdiction.

    ii) Second, while there is something in Mr Smith KC's submission that the enquiries sent by Gravelor to four banks asking whether they would be willing to make payments were leading in suggesting that the shareholders of the Owners after the Disputed Transfer were "possibly owned or controlled by the Russian state", that is a fair reflection of the evidence as it currently stands. The two banks who replied said that they would not make payments to the Owners on the information now available (Credit Suisse and Bank of Cyprus):

        a) On 22 December 2022, the Bank of Cyprus informed Gravelor that such a "transaction cannot be facilitated".

        b) On 21 December 2022, Credit Suisse AG informed Gravelor that it would not "accept" the transaction.

    iii) Third, and tellingly, if the Owners are not in fact sanctioned entities, they will be able to access and deal with any payment made into an account with a bank which is subject to and will follow the EU sanctions regime. It is precisely because the Owners recognise that they will not be able to persuade such a bank that they are no longer sanctioned and money can be released accordingly that the Owners argue that such a payment would not be contractual. The Owners accept that they will not be able to persuade any bank which is subject to EU or US sanctions regimes to pay them those funds "for the foreseeable future" (indeed they suggest that they "may never be able to do so").

78. Further, in so far as it is suggested that, if there were a full trial of the Disputed Transfer issue and the Commercial Court issued a judgment upholding its validity, the banks would pay, the time that would take is wholly inconsistent with the 30-day timescale for payment required by clause 18.3, failing which timely payment the Owners are entitled to sell the Vessels to a third party purchaser. Clause 8.10 applies when "a payment under this Charterparty is incapable of being processed … *and has not been received by the Owner on the due date"*, it being clear that the incapability in question is one which has the effect that the payment is not received *in time*. It is no answer to Gravelor's reliance on clause 18.3 that it might be possible for them to make the payment following the conclusion of litigation at some point in 2024.

79. It requires no banking evidence, therefore, to establish to the summary judgment standard that the effect of the Owners' designation as Sanctions Target is that the clause 18.3 payment cannot be made in USD into the Gazprom Account within the foreseeable future.

Does clause 8.10 have the effect that payment of the clause 18.3 amount in Euros into a bank account which will be subject to the EU sanctions regime constitutes a good discharge of Gravelor's obligations under the Charterparties?

80. Mr Smith KC argues that clause 8.10 does not oblige the Owners to bring about a situation in which the clause 18.3 amount can validly be paid:

    i) into an account other than that nominated by the Owners, when the effect of doing so is that the Owners would not in practice be able to access the amount paid for some significant period due to the impact of EU sanctions; and

    ii) (very much by way of a subsidiary point) in a non-contractual currency.

81. Mr Smith KC argues that clause 8.10 only requires measures to be taken which would enable "payments to be resumed", which it is said necessarily entails resumed in the same manner as before the incapability prevented the payment. Mr Smith KC argues (relying on statements by Mr Justice Brandon in *Tenax Steamship Co Ltd v The Brimnes (The Brimnes)* [1973] 1 WLR 386, 400 and Lord Bridge in *A/S Awilco v Fulvia SpA Di Navigazione of Cagliari (The Chikuma)* [1981] 1 Lloyd's Rep 371, 375) that the concept of payment requires that the payee obtains "the unconditional right to the immediate use of the funds transferred", or the "unfettered and unrestricted use of those funds". He also points to clause 9 of the Charterparty, which provides for payment "in Dollars in time to enable the funds to be cleared on the due date for payment". He argues that payment into an account with a bank who will look to comply with the EU sanctions regime will not meet those requirements.

82. This argument can be considered in two stages.

83. At to the first stage, I do not accept Mr Smith KC's submission that if, because of characteristics or attributes of the payee (here the fact that they became a Sanctions Target), the payee may have difficulty in accessing (or indeed be wholly unable to access) the funds if paid into a particular bank account, it follows that there has been no payment within the ordinary meaning of that concept, or in accordance with clause 9 of the Charterparties:

i) Mr Justice Brandon in *The Brimnes* was addressing the issue of when the process of payment was complete, and whether hire had (yet) been paid when a transfer order was received by the payee's bank correspondents, or only when the funds were actually credited to the payee's bank. In that context, he observed:

> "I consider first the meaning of 'payment … in cash' in clause 5 of the charterparty. In my view these words must be interpreted against the background of modern commercial practice. So interpreted it seems to me that they cannot mean only payment in dollar bills or other legal tender of the United States. They must, as the owners contend, have a wider meaning, comprehending any commercially recognised method of transferring funds the results of which is to give the transferee the unconditional right to the immediate use of the funds transferred. This would include both the direct and the indirect transfer methods used by Hambros as agents for the charterers in this case."

ii) *The Chikuma* is another case in which the issue was whether matters intrinsic to the receipt and processing of the payment in the banking chain, before that process had completed its ordinary course (such that the amount was not yet capable of earning interest for the payee), meant that there had been no payment. Lord Bridge approved Mr Justice Robert Goff's conclusion that Mr Justice Brandon's reference to "unconditional" meant "equivalent to unfettered and unrestricted".

iii) In the present case, however, payment into an account of a bank who would seek to comply with its obligations under the EU and US sanctions regimes would not leave the payment process incomplete, nor would the Owners' difficulty in accessing those funds (or perhaps the impossibility of doing so) result from any feature of the payment process. Instead, it would be the result of an entirely external limitation arising from a perceived characteristic of the payee.

iv) I understood that Mr Smith KC was ultimately disposed to accept that payment into a bank account which could not be accessed by the payee because of a freezing injunction would still constitute payment and give the payor a good discharge. Whether accepted or not, the proposition is correct, and even applies when it is the paying party who has obtained the freezing order as the "ship sale" freezing order cases show (*The P* [1992] 1 Lloyd's Rep 470, 472; *Ateni Maritime Corporation Great Marine Ltd (The Great Marine) (No 1)* [1990] 2 Lloyd's 245, 249).

v) I also understood Mr Smith KC to accept that, if the nominated account had been an account which was "frozen" in the sense in which the term is being used in this case (i.e. an account with a bank which will seek to comply with the EU and US sanctions regimes), payment into that account would nonetheless constitute payment for the purposes of the Charterparties. That was the conclusion reached (in my view, correctly) by Mr Houseman KC sitting as a Deputy Judge of the High Court in *Havila Kystruten AS v STLC Europe) Twenty-Three Leasing Limited* [2022] EWHC 3166 (Comm), [97], where he observed:

> "Whether or not the payee, here the lessor, has access to or gets the benefit immediate or otherwise, of funds in such bank account is immaterial to this contractual analysis. This account was frozen when it was nominated. No other entity has access to or the benefit of such funds, and certainly not the payor, i.e. the lessee, which is what matters most".

vi) In my view, the position would not change if the account had become frozen after nomination. By paying into it, Gravelor would have done all that the Charterparties required.

vii) It is clear, therefore, that the mere fact that the transfer of funds is made into a bank account from which the Owners will have great difficulty withdrawing them does not *of itself* mean that payment has not taken place for the purposes of the Charterparty.

84. As to the second stage, I accept that Gravelor's submission requires the Owners (pursuant to clause 8.10) to take steps which would materially impact the obligations arising under the Charterparties as they existed before clause 8.10 was engaged:

i) in requiring the Owners to nominate a new bank account, and thereby change the identity of the account into which the payment had to be made; and

ii) in requiring the Owners to accept payment in Euros instead of USD.

85. In support of its contention that clause 8.10 is capable of having this effect, Gravelor relies on the recent decision of the Court of Appeal in *MUR Shipping BV v RTI Ltd* [2022] Bus LR 473. In that case, freight under a contract of affreightment was due to be paid in US dollars, but the charterers were made subject to US sanctions and could not lawfully pay in that currency. They sought to pay in Euros, relying on a clause in the contract of affreightment which provided:

> "36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria:
>
> …
>
> d) It cannot be overcome by reasonable endeavors from the Party affected."

86. The majority of the Court of Appeal held that clause 36.3 required the owners to accept payment in Euros, and rejected the argument that this had the effect of requiring the owners to accept performance under that charterparty in a non-contractual form. Males LJ held:

> "55. The parties' arguments, both in this court and in the court below, were principally concerned with the question of reasonable endeavours. But in my judgment the real question in this case is whether acceptance of RTI's proposal to pay freight in euros and to bear the cost of converting those euros into dollars would overcome the state of affairs caused by the imposition of sanctions on Rusal. If it would, it would have been a very straightforward matter for MUR to accept that

proposal, requiring no exertion on its part. If it would not, no amount of endeavours, reasonable or otherwise, would change that situation.

56. So the question is whether, in order to overcome the state of affairs in question, it was essential for the contract to be performed in strict accordance with its terms (as Mr Eaton submitted) – in this case, therefore, whether that state of affairs could only be overcome if RTI found a way to make timely payments of freight in US dollars. In my judgment that is too narrow an approach to the construction of the clause. Terms such as "state of affairs" and "overcome" are broad and non-technical terms and clause 36 should be applied in a common sense way which achieves the purpose underlying the parties' obligations – in this case, concerned with payment obligations, that MUR should receive the right quantity of US dollars in its bank account at the right time. I see no reason why a solution which ensured the achievement of this purpose should not be regarded as overcoming the state of affairs resulting from the imposition of sanctions. It is an ordinary and acceptable use of language to say that a problem or state of affairs is overcome if its adverse consequences are completely avoided.

57. The arbitrators' finding in paragraph 50 of their award was that RTI's proposal would have presented "no disadvantages" to MUR and could have been accepted with "no detriment" to it. There was no doubt about the ability and willingness of RTI to make payment in euros, and to bear any additional costs or exchange rate losses in converting the euros to US dollars. Acceptance of RTI's proposal would have achieved precisely the same result as performance of the contractual obligation to pay in US dollars, namely the receipt in MUR's bank account of the right quantity of dollars at the right time. MUR's contractual right to payment in dollars remained, but MUR would have suffered no damage whatever as a result of RTI's breach consisting of payment in euros.

58. Accordingly, unless the word "overcome" necessarily means that the contract must be performed in strict accordance with its terms, which in my judgment it does not, the arbitrators' conclusion in paragraph 51 of the award that the force majeure could have been "overcome by reasonable endeavours from the Party affected" is a finding of fact, or at any rate of mixed fact and law, with which the court should not interfere.

59. The position would be different if RTI's proposal would have resulted in any detriment to MUR or in something different from what was required by the contract. In such a case, it could not be said that the force majeure had been overcome, but only (at most) that it had been partially overcome. That would not satisfy clause 36.3(d). But on the facts as found by the arbitrators, there was no difference between what MUR would obtain from acceptance of RTI's proposal and what it was entitled to under the contract."

87. Newey LJ, at [78], described the issue before the court as whether the "reasonable endeavors" in clause 36.3(d) must "be such as to enable the contract to be performed in strict accordance with its terms? Or can it suffice that the 'Force Majeure Event' would be 'overcome' in a more practical sense, such that all its adverse consequences would be avoided?" Like Males LJ, he held that the latter construction was correct.

88. I accept Mr Smith KC's submission that in *MUR Shipping* there was a finding of fact by the arbitrators that receipt of the sum due in Euros rather than US$ occasioned MUR no prejudice. Viewed in isolation, that is also the case for the receipt in Euros here (not least because clause 8.6(d) of the Charterparties provides that if payment is made in a currency other than USD, Gravelor will "indemnify and hold harmless the Owner from and against any loss suffered as a result of any discrepancy ..."). For that reason, Mr Smith KC accepted that the issue about payment in Euros did not take the Owners very far on its own.

89. However, I accept Mr Smith KC's submission that the Owners will suffer real prejudice as a result of the payment being made into an account with a bank which will apply EU and US sanctions as against an account with a bank who will not, although that prejudice will not follow from anything inherent in the payment as such, but from legal and practical constraints that those who are obliged to comply with the EU and US sanctions regimes will experience in any dealings with the Owners.

90. While the facts are different *MUR Shipping* does, however, demonstrate that clauses in contracts which are intended to address extraneous circumstances which render performance in the manner originally anticipated impossible, while keeping the relevant obligations alive as a matter of substance, or in "a … practical sense", may well involve one party accepting performance otherwise than "in strict accordance with its terms".

91. In this case:

    i) The identity of the bank account into which payments must be made under the Charterparties is not fixed by a contractual obligation which can only be changed by a contractual variation with the consent of both parties, but results from the unilateral nomination of the Owners from time-to-time.

    ii) Clause 8.10 expressly addresses the position where a payment cannot be processed by a "relevant bank" because the Owners have become a Sanctions Target which, as I have said, extends to both the incapability of the paying bank and the receiving bank. It is, therefore, a clause with a much narrower and more focussed target than the general force majeure clause in *MUR Shipping*, and that focus is itself highly instructive in determining what the clause can require of Gravelor and of the Owners.

    iii) In particular, the Charterparties specifically contemplated that the Owners might become the subject of US, EU or other sanctions and that the Owners might be designated as a "Specially Designated National and Blocked Person". It would have been obvious to both parties that sanctions of this kind were likely to include attempts to block the Owners' access to and use of funds if they became a Sanctions Target.

    iv) The consequences to Gravelor of being unable to make a contractually compliant payment as a result of the Owners becoming a Sanctions Target are potentially very significant.

    v) As I have stated, payment into a "frozen account" designated by the Owners under clause 8.3 would constitute a contractually compliant payment.

92. Against that background, I am satisfied that that the expression "all necessary steps" in clause 8.10 extends, as a matter of construction, to requiring the Owners to nominate an alternative bank account into which the required payment can be made, even if the Owners would be restricted in their ability to access and use those funds following such payment.

93. I would also note that if the Owners are correct in the contrary argument, it would seem to follow that if payment into the nominated account would be caught by the sanctions regime, albeit nonetheless be contractually compliant, it would be open to the Owners to exercise their right of re-nomination under clause 8.3, so as to require payment into a "sanctions free" account, albeit the paying banks could not lawfully pay into that account. That would be a wholly unattractive outcome, and the courts are generally resistant to the suggestion that contractual rights of nomination can be exercised in such a way as to prevent performance (e.g., *Aktieselskabet Olivebank v Danske Svovlsyre Fabrik (The Springbank)* [1919] 2 KB 162). If, however, the Owners cannot replace an existing clause 8.3 nomination of a "frozen account" into which a payment can be made with a "sanctions-free" account into which it is not possible to make a payment, then it is not challenging to interpret clause 8.10 as requiring a nomination to the reverse effect.

What is the consequence of my finding as to the effect of clause 8.10?

94. Mr Smith KC informed the court that if clause 8.10 had the effect for which Gravelor contends, then the Owners were content for the clause 18.3 amounts to be paid into court, rather than being given the opportunity to make a clause 8.10 compliant nomination.

CAN GRAVELOR ESTABLISH TO THE SUMMARY JUDGMENT STANDARD THAT AN ORDER FOR SPECIFIC PERFORMANCE IS APPROPRIATE?

Is it arguable that damages would constitute an adequate remedy?

95. I am satisfied that the Vessels are specific chattels, with the result that the court may order specific performance under section 52 of the Sale of Goods Act 1979. However, the court will not generally make such an order where damages would be an adequate remedy.

96. In this case, Gravelor contends that damages would not be an adequate remedy for a number of reasons, including the following:

    i) uncertainty as to the Owners' financial ability to meet any damages award (cf. *Evans Marshall & Co Limited v Bertola SA and another* [1973] 1 WLR 349, 380-81);

    ii) the difficulty of enforcing any award, in the light of the sanctions regime.

97. In response, the Owners submit that:

    i) on the current evidence, the market value of the Vessels substantially exceeds Gravelor's net loss; and

    ii) the effect of the Disputed Transfer is that the Owners are not in fact subject to sanctions.

98. In considering how to approach this question in a summary judgment context, it is helpful to consider the nature of the exercise which the court is engaged in when asked to determine whether or not damages are an adequate remedy. It involves the court engaging in an essentially evaluative and, at least in part, predictive exercise at the time when the remedy of specific performance is sought (because it is at that stage that the decision whether or to grant the remedy must be taken). It has been noted that "the standard question …, 'Are damages an adequate remedy?' might perhaps, in the light of the authorities in recent years, be rewritten: 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?'" (*Evans Marshall & Co ltd v Bertola SA* [1973] 1 WLR 349, 379). When undertaking this enquiry, the court is not making findings as to the historic position (or counterfactual position), in circumstances in which further evidence as to that position may be available at trial.

99. The commentaries or cases discussing this particular reason for concluding that damages are not an adequate remedy generally speak in terms of a "risk" (of a sufficient scale) of the defendant being unable to satisfy any damages award:

i) *Chitty on Contracts* (34th) Vol 1, [30-023] provides "specific performance may also be ordered to avoid the risk that the defendant may not be 'good for the money'.

ii) Spry, *The Principles of Equitable Remedies* (8th edition), 68 states:

> "It appears to be clear that *a significant risk that a legal remedy such as damages will be ineffective on the ground of the inadequate resources of the defendant* or otherwise, may of itself justify the conclusion that it is inadequate. Further, e*ven a very slight risk of insolvency* of the defendant may be decisive, especially in combination with other matters that tend to show that only if the plaintiff is given specific relief in equity will he be sufficiently protected."

(emphasis added).

iii) In *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 4110 (TCC), [18], having referred to this passage in *Spry*, Ramsey J ordered specific performance of a contractual obligation to provide a performance bond (which I accept raises particular issues), stating "where, as here, the chances of a judgment being satisfied cannot be rated as other than questionable, damages would prima facie not be an adequate remedy."

iv) Similarly, in *Re Gillie* (1996) 70 FCR 254 Finn J said:

> "Because the circumstances here are ones in which *there are reasonable grounds for apprehending that an award of damages would go unsatisfied*, and because no set-off or cross claim has been raised, the case is one'"where it would be unjust or improper that [Melissa] should have the option of paying the money or keep the [cattle]' cf *Chilton v Carrington* (1855) 24 LJCP 78 at 80. I will, then, give judgment for the delivery of the cattle"

(emphasis added).

100. Looking at the position as it pertains at this hearing:

i) It is known the Vessels are mortgaged to a sanctioned bank, and the extent of Owners' unencumbered interest in them is not known.

ii) It is known that the Owners owe substantial intercompany loans, but their amount is not known.

iii) Unless Gravelor continues to meet the insurance and maintenance costs, the condition and value of the Vessels will fall. On the unchallenged evidence before the court, the effect of sanctions while title remains with the Owners is impeding maintenance in any event. The evidence is that:

> "Equipment manufacturers have refused to provide service and supplies to the Vessels, affecting the safe navigation and maintenance of the Vessels. It has not been possible to undertake key maintenance of the Vessels, with the result that their condition is deteriorating".

iv) The circumstances surrounding the Disputed Transfer will make the prospects of enforcing any judgment against the Owners challenging for the foreseeable future.

101. It is, therefore, highly questionable whether any damages award could be enforced at all, still less within a reasonable period, with a real risk of the position deteriorating over time. The position before the court at the date of this hearing, therefore, is that damages are clearly not an adequate remedy. That being the case, I am not persuaded that I should refuse specific performance at this stage merely because of the prospect that the position with regard the Owners' financial circumstances or in relation to sanctions might improve by the trial date. In any event, I am satisfied that the Owners' ability to make good on any damages aware is likely to become more questionable as further time passes, not less.

Is the order sought too vague to be the subject of a mandatory injunction compelling performance?

102. I was referred to Lord Hoffmann's statement in *Co-operative Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 13-14:

> "If the terms of the court's order, reflecting the terms of the obligation, cannot be precisely drawn, the possibility of wasteful litigation over compliance is increased. So is the oppression caused by the defendant having to do things under threat of proceedings for contempt. The less precise the order, the fewer the signposts to the forensic minefield which he has to traverse. The fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages, or to permit compliance to be made a condition of relief against forfeiture, does not necessarily mean that they will be sufficiently precise to be capable of being specifically enforced."

103. Particular complaint was made about paragraph 6 of the draft order, which required the Owners to take "such further steps as are necessary in connection with" transfer of title. The principal concern appears to have been concerned with any "implicit obligation"

on the Owners to take steps to discharge the Alfa Bank mortgages. However, in reply, Mr Wright KC made it clear that he was content for an order which would require the Owners to transfer title to the Vessels subject to the mortgages.

THE STAY APPLICATION

104. In his skeleton argument, Mr Smith KC made it clear that a stay under s.9 of the Arbitration Act 1996 was only sought insofar as Gravelor was seeking an order requiring steps to be taken to discharge the Alfa Bank mortgages. That is no longer the case, and therefore I need say no more about this issue.

CONCLUSION

105. The precise form of order will depend on whether Gravelor are able to satisfy the clause 19.3 condition (see [59]-[60] above). The parties are asked to agree a list of any consequential matters arising, and then approach the court for directions as to how they should be determined.