Neutral Citation Number: [2025] EWHC 150 (Comm)

Case No: CL-2021-000175

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 January 2025

Before:

Sean O'Sullivan KC (sitting as a Deputy High Court Judge)

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Between:

AMNS MIDDLE EAST FZE	**Claimant**
- and -	
LIQS PTE LTD	**Defendant**

- -
- -

Sudhanshu Swaroop KC and **Rishab Gupta** (instructed by **Howard Kennedy**) for the Claimant
The Defendant was not represented and did not appear.

Hearing dates: 12-13 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sean O'Sullivan KC (sitting as a Deputy High Court Judge):

1. This is a strange case in a number of respects. It concerns a claim by AMNS Middle East FZE ("C") for repayment of US$52,803,513.90, on grounds of unjust enrichment. C contends that (a) it paid this money to or for the benefit of LIQS Pte Ltd. ("D") in anticipation of and/or pursuant to a "Contract for Purchase of Steel Products", which envisaged steel or services being provided to C by D, but (b) it never actually received any steel or services.

2. The background to these payments is controversial and, even on C's own case, somewhat shadowy and mysterious. A puzzling transaction is rendered opaque by the fact that C itself has only limited information about what happened back in 2014-2016, having been subject to a corporate restructuring since those events. The mysteries have deepened further as a result of D's decision to stop participating in the current proceedings.

3. I will deal first with D's non-attendance at the trial and the procedural consequences of that non-attendance, before turning to the substantive issues.

Non attendance

Chronology

4. The claim was commenced in March 2021.

5. D was initially represented by leading counsel and Clyde & Co, and participated fully in the proceedings until August 2024, filing a Defence and Counterclaim settled by specialist leading counsel (and indeed an Amended Defence and Counterclaim) and 4 witness statements.

6. I understand that the trial was fixed for the availability of D's Counsel in the usual way. D's PMIS (filed on 30 July 2024 and revised on 6 August 2024) indicated that D would be ready for the trial in November 2024, with Clyde & Co acting as D's solicitors.

7. However, on 12 August 2024, C was served with an order of Mrs Justice Dias, permitting Clyde & Co to cease acting as D's solicitors, and providing an alternative email address for serving D.

8. On 4 October 2024, on the date of the PTR, a Mr Howard (said to be "*Legal Counsel For and on behalf of [D]*") wrote to the Court, stating: "*[D] will take no further part in these proceedings and nor will they be represented in the High Court trial currently due to commence on 12 November 2024 or at the hearing on 4 October 2024*".

9. At the PTR, because of uncertainty as to Mr Howard's authority to communicate on behalf of D, I ordered that D should provide a letter signed by Mr Sanjeev Gupta, confirming its position. That was on the basis that Mr Gupta was known to be a director, and the principal, of D.

10. On 9 October 2024, Mr Howard sent C's solicitors a letter from Mr Gupta, stating that "*[D] will no longer be able to take part in nor will it be represented at the above captioned proceedings (the Proceedings), as it cannot afford continued appropriate legal representation*". It might be noted that the letter added that D "*is able and more than willing to put forward its witnesses to be cross examined by [C]*".

11. I made some further orders at a hearing on 23 October 2024 which was not attended by D. These included orders for disclosure, in particular requiring D to search for and disclose "*ledgers, management accounts, annual financial statements and audit reports…*

prepared between 2014 and 2019 (inclusive)", "*Any other documents which refer to (i) the Balance Confirmation provided to the Claimant by the Defendant on 25 April 2017; or (ii) the sum referred to in the Balance Confirmation provided to the Claimant by the Defendant on 25 April 2017*" and "*copies of its annual financial statements and audit reports that were prepared or reviewed by the Defendant's accountants or auditors between 2014 and 2019*".

12. To assist D's understanding of the potential consequences of ignoring those orders, I made express reference to the possibility that, if disclosure was not given as ordered, the Court might draw inferences: "*For the avoidance of doubt and without prejudice to the Court's general powers of case management, if the Court finds that the Defendant has not complied, without satisfactory explanation, with any part of paragraphs 5 to 9 of this order, the Court may draw such inferences as it considers to be appropriate, which may include inferences against the Defendant's case*".

13. There has not been any response at all from D to that order for disclosure.

14. I made an order for payment of the costs of the application for disclosure, which I summarily assessed in the sum of £12,000. These costs have not been paid.

15. In the light of the comments which had been made about the cross-examination of witnesses, I included a recital to the Order as follows: "*AND UPON the Court indicating that a witness, in respect of whom a witness statement has been filed and served, will only be permitted to give oral evidence at the trial where that witness has been called by a party who attends the trial through an appropriate representative in accordance with the Civil Procedure Rules*".

16. Nothing further has been heard from D following on from that hearing on 23 October 2024. I was shown the covering messages by which the bundles and C's skeleton for this trial were sent to D at the email address provided by Clyde & Co. All of those communications have simply been ignored by D.

17. I am in no doubt that D was fully aware of the trial date and made a deliberate decision not to attend or be represented. Indeed, Mr Gupta, for D, made clear that that was what D had decided in his letter of 9 October 2024. It was said that the decision was made for financial reasons, but that assertion is not explained. If it matters, I do not accept, in the absence of any evidence, that D is unable to attend for financial reasons. Until August 2024, D was able to pay a top international law firm and leading counsel to act for it. I would need a proper explanation as to what has changed to mean that it cannot now afford to be represented at Court in any form.

Proceeding in the absence of D

18. CPR 39.3(1) provides:

> *(1) The court may proceed with a trial in the absence of a party but –*
> *(a) if no party attends the trial, it may strike out the whole of the proceedings;*
> *(b) if the claimant does not attend, it may strike out his claim and any defence to counterclaim; and*
> *(c) if a defendant does not attend, it may strike out his defence or counterclaim (or both).*

19. It is clear that I have a discretion to proceed with the trial in the absence of D. In "Williams v Hinton [2012] C.P Rep 3 (2011)", Gross LJ emphasised (at [40]) the competing policy considerations: "*It is of course of the first importance that a party is afforded a fair opportunity to present its case to the judge. It is also, however, of great*

importance that judges, as a matter of case management, act robustly to bring cases to a conclusion…".

20. The key to Gross LJ's conclusion that the trial judge in that case had been entitled to proceed in the absence of the appellants was that it was clear that they knew the trial had been listed and was going ahead. Hence (at [42]):

> *"Pulling the threads together, on the facts of the case, the Judge was entitled to conclude that the Appellants were aware of the hearing on the 29th June and had chosen, without any or proper explanation, not to attend. In such circumstances, I find it impossible to say that the course taken by the Judge was not properly open to him; neither the requirements of natural justice at common law nor Art. 6.1, ECHR, precluded him from doing so. Were it otherwise, a recalcitrant litigant could stymie proceedings".*

21. I do not consider the present to amount to a borderline case. As I have said, I am in no doubt that D was fully aware of the trial date and made a deliberate decision not to attend or be represented. D has not made any request for an adjournment. On the contrary, I understand D to have accepted that the trial would go ahead in its absence; hence its comments about its witnesses. I would hope that any misunderstanding on D's part about what would happen in relation to its witnesses was corrected by my Order at the hearing 23 October 2024. But the bottom line is that D was not offering any alternative to the trial taking place in its absence. There was no suggestion that D might attend if given different notice, or more time. In such circumstances, it is obvious that the Court is very likely to exercise its discretion to proceed under CPR 39.3. I made clear at the outset of the trial that I was doing so.

Application to strike out

22. CPR 39.3(1) also makes clear that I can, purely on the basis of non-attendance, strike out the defence or counterclaim. The rule does not make clear what the effect of doing so would be.

23. C applied for an order striking out the Amended Defence and Counterclaim, arguing that the effect of doing so would be that judgment could be entered in default of a defence and there would be no need for a trial. It is far from clear to me that that is what CPR 39.3(1) envisages.

24. The current version of the White Book states (at paragraph 39.3.5) as follows: "*The Practice Direction, para.2.2 (see para.39APD.1) envisages that even though a defence may be struck out, the claimant will still have to prove their claim, although this will normally only entail referring to the statement of case (with statement of truth) or tendering witness statements*". This reference to a Practice Direction appears to be outdated; there is no "*39APD.1*" as far as I can see,

25. In Collem v. Collem [2015] EWHC 2184 (Ch), Asplin J explained why she had refused the defendant an adjournment and struck out his Defence as a result of his non-attendance. However, she did not grant default judgment. Instead, she "*determined that it was necessary for the Claimants to prove their case by means of their Statement of Claim, confirmation of their evidence on oath by the witnesses present and by the admission of hearsay evidence*" (see her subsequent judgment on the merits: [2015] EWHC 2258 (Ch) at [7]).

26. In Payroller Ltd (In Liquidation) v Little Panda Consultants Ltd [2020] EWHC 391 (QB). Freedman J was asked to strike out the defence and enter judgment as a result of non-attendance at the trial by the defendants. He struck out the defence but declined to

enter judgment in default. He pointed out (at [16]) that "*The claimants have not sought at an earlier stage to have a judgment in default. On the contrary, they have come to court for a trial among other persons, against the fourth defendant*". He declined to decide whether or not judgment in default was an available remedy, although he pointed out that this was "*at odds with the commentary in the White Book*" and appeared unsure about the claimants' attempt to draw an analogy with the position of a defendant who has not served a defence at all (see [13]).

27. Mr Swaroop KC, Counsel for C, submitted that the right order was to grant default judgment and avoid a trial on the merits. He said that the D had no good reason for its non-attendance and that this was a case in which D's whole case was premised upon oral evidence from its witnesses. He emphasised it would be unfair if I had regard to that evidence if it was not called and he could not cross-examine the witnesses. He also pointed out that D was in breach of orders in relation to disclosure and costs.

28. It seems to me that there is a risk of confusing two different things here. There is no doubt that a default judgment can be entered if no Defence is filed before the relevant time limit expires. See CPR 12.3. It is also clear that the Court can strike out a Defence if the defendant does not attend the trial. See CPR 39.3(1). But it does not seem to me to follow that the former is an automatic consequence of the latter.

29. It is one thing to strike out a claim or a counterclaim if the party advancing the same does not attend the trial. In an adversarial system, without someone to present the claim, there is nothing for the Court to decide. The same is not true in quite the same way if no one attends to **defend** the claim. With that in mind, I have decided that it is appropriate to strike out D's counterclaim, such that there is nothing more that needs to be said about that, but I was not persuaded that I should grant default judgment on C's claim.

30. Nor was I persuaded that I should do so as a consequence of D's non-compliance with my orders about disclosure. No unless order has been made in that regard. In any event, I have already made clear what the consequences of such a failure to comply might be for D. I would consider the drawing of adverse inferences a more satisfactory response to failures in relation to disclosure, at least in a case like the present where the orders were only sought and obtained close to the date for trial.

31. In relation to Mr Swaroop's argument that it was unsatisfactory to have a trial at which D's defences to the claims were considered, but D's witnesses were not called by D, I am not sure I see the problem. D did not attend and the witnesses from whom statements had been served by D were not called. That was an inevitable consequence of D's decision not to attend. As the use of the verb "call" suggests, our system requires a party to play an active role in the presentation to the Court of evidence on which it wishes to rely. The English Court will not usually seek evidence of its own volition or descend into the fray in any way. If witness evidence is essential to D's ability to defend the claim, therefore, it must follow that its defences will fail if it does not attend the trial and call that witness evidence. Far from putting C in difficulties, that would seem to leave it in a strong position.

32. For the avoidance of doubt, since D has not attended, and did not call the witnesses from whom statements were served, nor make any application for that evidence to be taken into account as hearsay, I have not read those statements or relied upon them in any way when deciding the issues. I take the view that they have no evidential status. CPR 32.5(1) is perfectly clear: the witness "*must*" be called to give oral evidence unless the court orders otherwise or the statement is put in as hearsay evidence. Neither of

those things has happened. In Williams v. Hinton (supra), the Court of Appeal made clear that the effect is that the statements do not become evidence at the trial (per Gross LJ at [43]):

> *"As it seems to me, this provision is clear. The Appellants did not attend the trial. They neither called the witnesses who had given statements nor did they put in those statements as hearsay evidence. The Respondents could have adduced the Appellants' witness statements as evidence but wholly understandably did not do so. Those witness statements thus never became evidence at the trial".*

33. For the reasons given, I did not accede to C's application that I simply enter judgment in its favour without considering the merits of the claim. However, I repeat that:

    33.1. I struck out the counterclaim pursuant to CPR 39.3(1)(c) on the basis that D had not attended the trial; and

    33.2. I confirmed that I would not take into account the content of the witness statements served by D, because the witnesses were not being called to give evidence at the trial.

The procedure for the trial

34. The result was that the trial went ahead on the basis that C was required to prove its case on the balance of probabilities. Mr Swaroop confirmed that he recognised that, as a result of D's non-attendance, C had a duty of fair presentation, albeit one which is less extensive than the duty of full and frank presentation on a without notice application. See CMOC Sales and Marketing Ltd v Persons Unknown [2018] EWHC 2230 (Comm) at [14]-[15] and Lakatamia Shipping Co Ltd v. Tseng [2023] EWHC 3023 (Comm) at [13].

35. This is a convenient point at which to pay tribute to the clarity of Mr Swaroop's submissions and the very great assistance which he and his team afforded to me in understanding and analysing this case.

36. In terms of the format of the trial, Mr Swaroop made some opening submissions. He then called C's witness, namely Mr Vijay Upadhyay. He confirmed his statement and answered one or two supplementary questions from Mr Swaroop, which concerned points which had emerged as a result of discussions during the opening submissions. I also asked Mr Upadhay a very few questions. However, it is worth making clear that Mr Swaroop submitted, and I accepted, that (a) he was under no duty to put D's case to his witness and (b) it was not for the Court to cross-examine C's witness either. In Nitron Group BV (In Liquidation) v. Barington Alliance LLP [2020] EWHC 1244 (Comm), Foxton J explained (at [13]):

> *"...if the Defendants choose not to participate in the trial, the Court is not in a position to conduct a cross-examination of the witnesses by reference to the contemporaneous documents, and its ability to test the evidence is heavily constrained. Unless the witness statement is internally inconsistent or manifestly incredible on its face, the Court can only consider whether the evidence adduced is sufficient to make out the claimant's case, on the basis of that evidence and the inferences which can properly be drawn from it".*

37. That is the approach which I took to Mr Upadhyay evidence.

The claim and the defence in outline

38. C's case might be said to be simple. It is advanced primarily as a claim for restitution: it says that is paid US$ 52,803,513.90 by way of advance under a "Contract for Purchase of Steel Products" (which the parties called the "Trade Advance Agreement" and I will call "the TAA"), but never actually received any steel or related products or services.

39. D offers (or offered) a very different story.

40. The starting point was common ground: ESIL (C's parent company wished to implement a dollarisation programme to replace its high-cost short tenure Indian Rupee debt with a dollar debt, by re-financing with various third-party lenders ("the Dollarization Programme").

41. D says that it was agreed that the Liberty Group, of which D is part, would take part in the Dollarization Programme on a "*no risk, no exposure*" basis. That "Agreement" is alleged to have been entered "*between the Essar Group (which for the avoidance of doubt included the Claimant and ESIL) and the Liberty Group*" and to have been made "*During discussions that principally took place*" at "*ESIL's offices in Mumbai, India in 2013*" and "*at a meeting at Liberty's offices in Dubai, United Arab Emirates, in or around February to March 2013*" (see paragraph 11 of the Amended Defence and Counterclaim).

42. This "Agreement" was alleged to be the background to, and real motivation for, the TAA. Instead of being an agreement for the sale of steel products and services, I understood D's case (as pleaded) to be that this was actually a mechanism, or cover, to enable the Essar Group to funnel money to the Liberty Group, so as to meet the costs of the Dollarization Programme.

43. D's case seemed to me to amount to an allegation that the TAA is a sham: i.e. that the terms which were set out in that signed document deliberately bore no relation with what had actually been agreed between the parties. The word "sham" was not used in D's pleadings, but I struggled to see what else D could be saying. If the allegation is that the parties were only pretending that a contract meant what it said, that is an allegation that the contract amounted to a sham. I will say a little more about that in due course.

FACTUAL BACKGROUND

44. The factual background is complicated, and I was only invited to read a small selection of the documents which were contained in the bundles. However, I have no reason to doubt that this material was presented to me fairly by Mr Swaroop.

C's knowledge

45. It is, however, worth recording that C found itself in a difficult position as it embarked on this strange exercise of (almost) proving a negative: that the TAA was not a sham. The Essar Group had been subject to a corporate insolvency process in India between 2017 and 2019. Many employees of the group left or were made redundant. I was told that Mr Upadhyay was the only surviving employee of C from the pre-corporate insolvency process days.

46. I was also told that a number of documents had been lost from the period back in 2014 - 2017 which was now the focus of attention. Save for custodians who continued to be employed, I was told that the mailboxes and email data could not be retrieved.

The parties

47. C was previously called Essar Steel Middle East FZE (or "ESME"). In 2019, following the corporate insolvency resolution process in India, ESME, and its parent company, Essar Steel India Limited ("ESIL"), were both acquired by a joint venture formed between ArcelorMittal and Nippon Steel Corporation. As a result, ESME's name was changed to AMNS Middle East FZE (or "AMNSME"). I will refer to it consistently as "C".

48. C provided export support to ESIL, through a steel processing and distribution service centre in Dubai.

49. ESIL owned and operated an integrated steel manufacturing plant in Hazira, India, from where it produced steel to sell to the local and international markets. More generally, both C and ESIL were members of the Essar Group.

50. D is a Singapore company which is part of the Liberty Steel Group, a group of companies owned by Sanjeev Gupta.

The Dollarization Programme

51. In or about 2013-2014, ESIL wished to replace its high-cost short tenure Indian Rupee debt by re-financing such debt in US dollars with third party lenders (i.e. the Dollarization Programme as defined above).

52. However, ESIL, which is incorporated in India, was subject to certain Indian law restrictions regulating foreign exchange. It required the approval of the Reserve Bank of India ("the RBI"). On about 23 May 2013, approval was given to ESIL for the utilisation of long-term export advance of USD 2 billion to repay Rupee loans. An express condition of that approval was that the "*rate of interest payable should not exceed LIBOR + 150bps*".

53. For the Dollarization Programme, it was agreed that a series of Liberty Group special purpose vehicles ("the Liberty SPVs") would be incorporated and would secure funding from third party lenders pursuant to a series of facility agreements. The Liberty SPVs would then pass the funding secured under each facility agreement to ESIL by way of export advances pursuant to a series of Advance Payment and Supply Agreements ("the APSAs"). A total of 18 Liberty SPVs were duly incorporated in Hong Kong. They paid over sums totalling about US$1.191 billion to ESIL under the APSAs.

54. C acknowledges that there was a difference in the interest rate that was payable by ESIL to the Liberty SPVs under the APSAs (which was always LIBOR + 1.5%), and the higher rates that were payable by the Liberty SPVs under their own facility agreements. This difference in the rate has been labelled as "the Differential Interest". There is undoubtedly a lack of clarity as to which party was ultimately supposed to meet the Differential Interest and, if it was anyone other than the Liberty SPVs, how this was to happen.

55. C points out that the Liberty Group stood to benefit from its participation in the Dollarization Programme, by expanding its business generally and securing a long-term supply of iron and steel products from the Essar Group. For example, one Liberty document (apparently from November 2013 and intended for a presentation to banks) stated that the transaction would benefit the Liberty Group because it "*secures long-term supply of iron and steel products for Liberty House Group*".

The Memorandum of Understanding (28 June 2013)

56. ESIL and the Liberty Group entered an MoU in relation to the Dollarization Programme ("the MoU"). The MoU described the plan for the Dollarization Programme in a way that suggested that the plan was for the Liberty SPVs to advance money which would then be offset against steel and steel products over a period of 10 years.

57. It is worth noting that:

    57.1. Art 9 made clear that most of the terms of the MoU were not binding;

    57.2. however, Art 7 was expressed to be binding. It provided that:

> *"7. ESIL shall pay to Liberty all costs and expenses reasonably incurred by Liberty in connection with the Advance Payments up to Termination Date. For avoidance of doubt, the terms and conditions as detailed in definitive agreements shall prevail."*

Facility Agreements, APSAs and EPBGs

58. Between 30 December 2013 and 13 February 2015, the Liberty SPVs entered into facility agreements with various funding banks and APSAs with ESIL. In simple terms, the Liberty Group passed the sums which they had received from lending banks under the facility agreements to ESIL as advance payments under the APSAs.

59. This may be a convenient stage at which to describe the APSAs. Each of the APSAs was entered between ESIL as the "Supplier" and one of the Liberty SPVs as the "Buyer". It provided that:

    59.1. an advance payment was to be made to ESIL (clauses 1.1, 2);

    59.2. ESIL agreed to supply and the Liberty SPV agreed to buy products (clause 3.1);

    59.3. the advance payment was to be amortised by "*the value of a Shipment*", the amount of any refund from the Liberty SPV, or the amount of any payment made under the Export Performance Bank Guarantee ("the EPBG") (clause 3.2(d));

    59.4. the Liberty SPV was entitled to claim under the EPBG if any amount became due and payable by ESIL, but which was not paid (clause 3.3);

    59.5. ESIL was required to refund a portion of the advance payment in the event that the required value of products was not delivered by the relevant longstop dates (clause 3.4); and

    59.6. ESIL was to pay interest on the advance payment at the rate of 1.5% over LIBOR (clauses 1.1, 5).

60. As such, it might be said that the APSAs provided for loans to ESIL, bound up together with an agreement to supply products. On the face of it, however, there **does** appear to have been an intention to supply steel products. My understanding is that, as it turned out, the amounts of trade did not match the parties' expectations, with the result that the obligations to refund were triggered.

61. Turning next to the facility agreements, each of these was between one of the Liberty SPVs and a funding bank. For example, the facility agreement for LITL 2 was entered between LITL 2 and "*The Bank of India, London Branch*" and included the following terms:

61.1. the purpose was stated to be: "*Borrower shall apply all amounts borrowed by it under the Facility directly towards making the Advance Payment to the Supplier under the APSA*" (clause 3.1(a));

61.2. as regards repayment: 3.75% of the loan was to be repaid on "*the date falling 11 months and 15 days from the Initial Guarantee Issuance Date*", whilst the rest was to be paid by the "*the date falling 23 Months and 15 days after the Initial Guarantee Issuance Date*" (clause 6.1);

61.3. the rate of interest was given as 2.85% plus LIBOR (clauses 10 and the definition of "*Margin*").

62. As noted above, the Liberty SPVs (and the funding banks) were protected by the EPBGs. The EPBGs were issued by various banks. For example, the EPBG for LITL 2 was issued by "Bank of India22, Mumbai Large Corporate Bank" as guarantor and included the following terms:

62.1. the amount guaranteed would stand reduced by the value of the products delivered by ESIL under the APSA, any refund by ESIL of the Advance Payment under the APSA, and any payment made by the guarantor under the EPBG (clause 10); but

62.2. the Liberty SPV (or its assignee) could submit a demand under the EPBG at "*any time and for whatever reason*", including if ESIL defaulted in its supply obligations under the APSA, and in that case, "*the Guarantor shall honour any such Demand submitted in accordance with this Guarantee without any…verification, investigation or inquiry as to the basis on which the Demand was made*" (clause 11).

63. C confirms that US$1,191,180,000 was loaned under the facility agreements to the Liberty SPVs, and then paid over to ESIL pursuant to the APSAs.

ESIL Internal Notes

64. I was shown some documents internal to ESIL which have been relied upon by D but might be said to be ambivalent. They were consistent with D's basic position that funds being advanced by C were being used for the purposes of the Dollarization Programme. But they also revealed an expectation that these funds would ultimately be repaid to C.

65. For example, an internal ESIL document entitled "*Note on envisaged expenditure for completing USD 2 Bn Export Securitisation*" and dated 23 June 2024 described an "*Additional Payment to Funding Bank*" which included the Differential Interest and other costs and indicated that "*Pending long term resolution for remittance of Additional payment to Funding Bank, on stop gap arrangement, the money is currently remitted as loan to [C] for onward remittances thru Trader*". It refers to "*Agreement for remittance by [C] to trader*" and links this to a "*Contract for purchase of steel products between trader and [C]*" which was "*under process of execution*". That sounds like a reference to the TAA. But the note then concludes by identifying "*Support required*", being "*Long term mechanism for remittance of additional payment to Funding Bank*" and "*Unwind the remittance by [C] to trader*".

66. A similar internal ESIL note (also said to be dated 23 June 2014) also refers to funding for the Dollarization Programme being remitted by ESIL through C and in this regard refers to "*Draft contract for purchase of steel products between trader and [C]*" that is "*yet to be executed"*. However, this note concludes by seeking a decision on the means of remitting funds, including for Differential Interest.

67. An internal ESIL note for discussion dated 10 July 2014 refers to a 1.35% component of interest, which would appear to be the Differential Interest. It says that this was remitted by ESIL to C and to "*[D] under Trade Advance Agreement*", to "*Liberty SPV*" and finally to "*Funding Bank*". That might be said to be consistent with D's case as to how the TAA was being used. But the note next refers to a need to have a proper channel for required funding and refers to a need: "*To unwind the amount paid by [C] to [D] till date (USD 26 Mio)*". That does not fit with D's case that this payment was never to be refunded.

68. All of this ends up feeling as if for now we see through a glass, darkly. It would have been fascinating to see what coherent story, if any, D could find in these documents. I could make very little of such material on my own. Mr Swaroop reminded me that these documents appear to be internal to ESIL and that, even if any of these sentiments crossed the line to the Liberty Group/ D, they may only have done so in the (ever ambiguous) context of negotiations between the parties about the drafting of the TAA (see further below). It seems to me that he is correct about all of this.

The TAA

69. In July 2014, C and D signed the TAA.

70. The TAA contained the following provisions:

> *"**1. SCOPE OF THIS CONTRACT***
>
> *[D] agrees to sell steel and related products and services and [C] agrees to buy steel and related products under such terms and conditions as shall be mutually agreed upon between the Parties.*
>
> ***2. SUPPLY***
>
> *The steel and related products and services to be sourced from [D] will be limited to a total value of United States Dollars One Hundred and Fifty Million (USD 150,000,000). The details of the steel products and services are referred to in Annexure 1.*
>
> ***3. THE TRADE ADVANCE***
>
> *3.1 [C] shall at its sole discretion provide to [D] a trade advance not exceeding USD Seventy Five million ($75,000,000) (the "Trade Advance") which is up to 50% of the total contract value of United States Dollars One Hundred and Fifty million (USD 150,000,000)*
>
> *3.2. The Trade Advance shall be provided by [C] to [D].*
>
> *3.3. The Trade Advance shall not bear any interest.*
>
> *3.4. The Trade Advance shall be adjusted against the supply of such products as may be mutually agreed between the Parties.*
>
> ***4 TERM :***
>
> *The term of this Contract is for a period of ten (10) years ("the Term") commencing from the date of this Contract. This term may be amended by mutual written consent of both the parties…*

8 EVENTS OF DEFAULT

Upon the occurrence of any of the following events ("Events of Default"), the Trade Advance shall automatically become immediately due and payable:

8.1 [D] shall be dissolved or liquidated in full or in part; or any proceeding for the dissolution of [D] shall be commenced against [D] and not dismissed or discharged within sixty (60) days of commencement.

9 NO RECOURSE

Subject to the terms of this Contract, and provided that [D] has complied with all its obligations under this Contract, [C] agrees that it shall not have recourse against [D] until and unless there is an occurrence of an Event of Default…

12 GENERAL

12.1 This Contract shall be terminated any time with the mutual consent by both parties and prior to such termination parties shall mutually agree on a settlement process of the Trade Advance to the extent not apportioned in terms of this agreement.

12.2 This Contract shall in all respects be governed by and be construed and interpreted and take effect in accordance with the laws of England and Wales. The English Court shall have the non-exclusive jurisdiction as regards any dispute arising out of this Contract…

12.4 This Contract constitutes the entire understanding of the Parties in relation to the making of the Trade Advance and supersedes cancels and replaces all prior agreements between the Parties which set out the terms and conditions on which the Loan is to be made whether written oral express or implied and all such agreements shall be deemed to have been terminated by mutual consent with effect from the date of this Contract…"

71. The TAA was signed by Mr Sanjeev Tyagi on behalf of C, and by Mr Sanjeev Gupta on behalf of D.

72. On the face of it, therefore, this was an agreement whereby C paid a cash advance to D, and in return D agreed to provide steel and related products to C. As with the APSA, it seems clear that part of the justification for this agreement was some kind of loan or funding, but that funding still appears to be tied together with the supply of steel products or related services.

73. Since D's case was, in essence, that the TAA was not really what it appeared to be, but rather a sham (in the sense that word is used in Snook v. London and West Riding Investments Ltd [1967] 2 QB 786) entered into as cover for making payments under the Agreement, C drew my attention to some emails in relation to the negotiation of the TAA. Clearly, these are not admissible for the purposes of construing the agreement but have the potential to be relevant as to whether this was a sham.

74. The high-water mark for D's case is an email dated 22 March 2014 from Mr Kamdar of the Liberty Group wrote to Mr Jain at ESIL, as part of the negotiation over the terms of what became the TAA, stating:

> *"My two pennies.*
>
> *Ratnakar has advised our that we cannot agree with the changes made because performance as envisaged in revised agreement is not deliverable.*
>
> *Also as I understand, the spirit of the revised trade agreement was that it becomes a mechanism allowing Essar Entity to pay amounts to Liberty SPV "as Non-refundable trade advance on Demand".*
>
> *So the question of any sort of performance clause does not arise".*

75. However, C points out that the parties next agreed that they **would** include provisions for performance. Thus, on 9 April 2014, Niketa Kothari of ESIL wrote to Ratnakar Simha of the Liberty Group, stating:

> *"Please refer to discussions that Swapnil and Balajee had with you this morning.*
>
> *Following are the major elements based on which the changes have been carried out in the attached draft agreement:*
> 1. *The Products and services to be supplied/ rendered under the contract have been detailed in Annexure 1*
> 2. *The Tenor of the contract has been mentioned specifically as 10 years with a provision to amend on mutual consents*
> 3. *The contract value is assigned as US$ 100 million of which 50% to be paid as trade advance*
>
> *Additionally as discussed with Swapnil earlier, the trade advance would be provided to Liberty SPV as per ESIL's sole discretion and not as per the notice of drawdown from Liberty SPV…*".

76. On 10 April 2014, in response to an email from Ratnakar Sinha, Ms Urmila Shah of Liberty proposed "*Small suggestion – put a condition to enter to make the sale/purchase contract for products on terms conditions to be agreed mutually*".

77. I take away from these exchanges that the parties were either envisaging the TAA actually operating as a sale and purchase contract, or were working hard to create that impression, even internally.

Monetary Obligations Agreement

78. There is one further alleged agreement to which my attention was drawn, namely a "Monetary Obligations Agreement" ("the MOA"), apparently between C and Liberty FE Trade DMCC ("LFET"). The MOA provides for C to bear and pay to LFET certain defined "*monetary obligations*" otherwise falling to one of the Liberty SPVs relating to the Dollarization Programme. These "*monetary obligations*" were defined at clause 2.1 of the MOA, and were said to include, for example the costs of setting up "LITL 3" (which was the relevant Liberty SPV) and a proportion of the interest payable by LITL 3 under that Facility Agreement, which was supposed to be retained in a bank account by way of security.

79. The MOA also seemed to envisage sales being made to "*Alternative Buyers*", with C to pay to LFET a fee of 0.5% of the consideration for any steel so delivered.

80. I understood C's position to be that the MOA was unenforceable, perhaps for want of consideration. I did not really understand that submission, nor follow why it mattered to the case as now presented. There appeared to have been a suggestion on the part of D that the intention had been to enter into a series of such MOAs, covering "*monetary obligations*" for all of the Liberty SPVs. But, if that was the intention, it was never carried out.

Payments under the FAs and APSAs

81. C has pleaded out the payments which it says it made between 2014 and 2017 and which it says now fall to be refunded. It is useful for me to pick out some features of the evidence about this.

82. The payments are all evidenced by C's bank statements with one of Noor Islamic Bank, Barclays Bank, Habib Bank or Axis Bank. For each payment, the statements show the date of payment, the payor (i.e., C), the payee and the amount. These left me in no real doubt that the payments were made.

83. The relevant sums were collected together in a ledger (referred to as "the LIQS Ledger"). Mr Upadhyay confirmed that the information as to whether a particular payment should be recorded on that ledger, which was specifically for trade advances, came from the senior management of C, who (in turn) were receiving instructions from ESIL. He recalled there being something in writing for each payment, giving him details of the amount and where to send it. But he has been unable to find those emails and/or other documents now. There was no cloud storage at that time, or policy for keeping emails.

84. He remembered, on some occasions, receiving payment request letters signed by LIQS. Either way, he would need instructions about the purpose for the payment, in order to account for it in the SAP system. That would be the basis on which the payment would be put in a particular ledger (i.e. if the instruction was that it was a trade advance, it would be put in the LIQS Ledger). Once the instruction was received, he would prepare a standard "payment direction" letter to one of C's banks, which letter would record the purpose for the payment.

85. Mr Upadhyay also explained some accounting adjustments which were made to the LIQS Ledger. On 26 July 2014, there was a repayment by D to C of US$750,000. Then, during early 2016, there was a process of reconciliation, resulting in US$7,771,050.58, which had previously been recorded in another ledger, being moved to the LIQS Ledger, because it was identified as comprising trade advances. These have been listed out as Table C.

86. On 31 March 2016, Mr Upadhyay processed another accounting correction, this time to transfer a credit (i.e. in favour of D) in the sum of US$800,000 to the LIQS Ledger.

87. I accept Mr Upadhyay's evidence about all of this. There was nothing inherently implausible about what he said.

88. In terms of the payee in each case, I start with C's Table A, which breaks down the total of US$45,253,513.90 which C says it advanced between 27 March 2014 and 28 March 2017. As I have said, Table C deals with the payments which were **re**allocated to the LIQS Ledger, in the sum of US$7,771.050.58.

89. Out of that total of US$45,253,513.90 in Table A, payments totalling US$18,798,520.10 can be seen to have gone directly from C to D. For most of these, the instructions from C to its banks refer to the purpose of the payments as "*Trade Advance*".

90. The balance of US$26,454,993.80 was paid by C to third parties (i.e. to other Liberty Group companies, or in a few cases to "JD Infinum Asia Ltd", which appears to have acted as Company Secretary of Liberty India Trade Limited).

91. There are a series of complexities in this latter regard. C originally relied upon what appeared to be contemporaneous payment requests from D to C, to show that C had been disbursing the money to D's order. However, C was subsequently told by D, and now accepts, that many of these requests had in fact been postdated and were only signed by D **after** the payments in question had already been made.

92. For at least some of the payments to third parties, however, C can point to requests made by D in advance. Specifically, US$25,502.99 and US$114,241.59 paid to JD Infinum Asia Ltd and US$817,771.66 paid to LITL 5 Limited followed on from requests which does not appear to have been postdated. In the same way, the payments identified in Table B (totalling US$9,100,000), which were sent by C to LITL 1 between 29 May 2017 and 18 July 2017, all seem to have been made following requests from D. In that context, there is no sign of back-dating.

93. Those requests (as listed in Table B) were all in the following form, addressed to C, signed by Mr Gupta and sealed with D's stamp:

> *"Sub.: Payment of Trade Advance under Contract for Purchase of Steel Products dated 01.12.2013*
>
> *With reference to above and further to our discussions in receipt of trade advance from you towards supply of steel products to you. We request you to make below payment on behalf of us which will be treated as advance payment to us under the said agreement…".*

RBI Refuses to Renew EPBG

94. The RBI approval for the banking arrangements (and especially for the EPBGs) had been conditional on various performance indicators being met by ESIL. One of these was that ESIL would export steel worth at least US$1 billion in the first two years of the Dollarization Programme. This condition was not met.

95. Accordingly, by a letter dated 14 January 2016, the RBI declined a request to renew the EPBGs.

96. Non-renewal was a "*Specific Lender Event of Default*" under the Facility Agreements. Accordingly, the lenders under the Facility Agreements invoked the EPBGs. That resulted in an unravelling of the Dollarization Programme arrangements described above. However, it did not impact the TAA.

Meeting between Liberty Group and Essar Group

97. An internal ESIL document headed "Liberty Issues" (said to be dated 8 March 2017) describes one of the "*Issues*" which had arisen between the Essar Group and the Liberty Group as being that: "*The payments made to Liberty towards differential interest to banks, fees, etc have been provided by way of Trade Advance by [C]. Payment of USD 43mio has been made by [C] to [D] as advance against "Contract for purchase of steel products" dated 1st*

December 2013. This contract provides for supply of steel products by [D] over 10 years and the advance to be adjusted manually. So far no supplies have been made by [D]".

98. The document then refers to a proposal to settle "*the balance of USD 43m of Advance in [C]'s books*" at the same time as concluding all other issues between the two groups.

99. In a similar vein, on 9 March 2017, there is a document which records the "*Minutes of the Meeting held between Liberty Group and Essar Group held on March 09, 2017 at Essar House, Mahalaxmi Mumbai*". In relation to the TAA, it provided that:

> *"[C] has entered into a contract with [D] for the purchase of steel products dated 1st December 2013. Payment of USD 43 mio has been made by [C] to [D] as advance against the said Contract This contract provides for supply of steel products by [D] over 10 years and the advance to be adjusted mutually. It was discussed & agreed that both groups will evaluate the possible methodology for settlement of USD 43 mn advance lying in [C's]books".*

Balance Confirmation (April 2017)

100. On 10 April 2017, C wrote to D asking: "*in accordance with the request of our auditors…we ask you to kindly confirm directly to them the balance due from you is of USD 43,703,513.90 as on March 31, 2017*".

101. On 25 April 2017, D completed the requested confirmation, filling in that: "*The balance of 43,703,513.90 due to Essar as at March 31, 2017 agrees with our records*". The confirmation was signed by "*Anjali*" (Ms Anjali Chauhan), D's "*Accounts Officer*". It was stamped with D's stamp and returned to Mr Upadhyay. Mr Upadhyay explained in his evidence that the Balance Confirmation was requested in order to confirm that C's own books were accurate. He says that he spoke on the phone to Ms Chauhan before she signed the Balance Confirmation and that she said she would confirm it and send it back. He says that he took the Balance Confirmation to mean what it said.

102. D has pleaded in its Amended Defence that "*The confirmation was wrong. In fact, there was nothing due from the Defendant to the Claimant as at 31st March 2017*". In its June 2023 Further Information, it added that "*The confirmation was provided on the instruction of ESIL and/or the Claimant…*" and that "*…this is otherwise properly a matter for disclosure and/or evidence…*".

103. However, no disclosure was ever provided by D which sheds any light on how the confirmation came to be signed if it was "*wrong*", nor was any witness evidence called at trial to explain what happened.

104. I repeat that the Court made an order for specific disclosure of: "*The Defendant's ledgers, management accounts, annual financial statements and audit reports… prepared between 2014 and 2019 (inclusive)… Any other documents which refer to (i) the Balance Confirmation…"*, but that order was not complied with.

105. There simply must be, or at least must have been, ledgers, accounts and statements, which would make clear what D believed to be the status of its accounts vis-à-vis C. A trading company could not function properly without keeping accounts of some kind. It seems to me that there are grounds for me to draw adverse inferences from D's unexplained failure to provide disclosure of any of those documents; to infer that the reason D did not disclose them was because they did not assist its defence of the claim.

106. In reality, however, there is limited need for me to go down that road. The Balance Confirmation has been signed and stamped on behalf of D. There would need to be

cogent evidence before the Court would be able to conclude that it is something other than it appears to be. Here there is no evidence to suggest that the document is "*wrong*", whatever that means in this context.

107. As such, the Balance Confirmation is a very important building block for C's case. It demonstrates that both parties took the view, as at 31 March 2017, that D owed US$43,703,513.90 to C. That figure represented sums paid both to D and (in effect) to the order of D, pursuant to the TAA. It bears emphasis that D's confirmed figure matched precisely with the figure on the LIQS Ledger maintained by C.

Internal "admission"

108. D has disclosed an internal document entitled "*Details of India related issues.pdf*". This appears to record that a sum of US$35,713,520.00 was owed by "*LIQS Pte Ltd-Singapore*" to C, that the type of transaction was "*Trade Advance Payable*" and that this was "*Related to $2 Bln syndication transaction*". I was told that the metadata for the document suggests that it was created by D on 7 April 2018.

109. On the face of it, this was at least a partial (internal) acknowledgement by D that the money was owed as at April 2018.

C's demands

110. On 9 January 2018, C wrote to D, seeking repayment of the trade advance (then put at US$52.80m) on the basis that D had not supplied any materials against the TAA.

111. Mr Upadhyay says that he was informed that D did not respond. He followed this message up with some emails, to which again no response was received.

UNJUST ENRICHMENT

112. The primary way in which C puts it claim to recover the payments is on the basis of unjust enrichment.

The law

Unjust enrichment generally

113. A claim for unjust enrichment requires the claimant to prove that: (1) the defendant has been "enriched"; (2) the enrichment of the defendant was "unjust"; and (3) the enrichment of the defendant was "at the expense of" the claimant. See, for example, Croxen v Gas and Electric Markets Authority [2022] EWHC 2826 (Ch) at [117]-[120], in which Zacaroli J refers to the four stage approach originally outlined in the judgment of Lord Steyn in Banque Financière de la Cite SA v. Parc (Battersea) Ltd [1999] 1 A.C 221 (at p.227).

114. Zacaroli J in Croxen helpfully continued (at [118] and [120]):

> *"118. As explained by Lord Reed JSC in Investment Trust Companies v Revenue & Customs Comrs [2017] UKSC 29, at §39-42, a claim based on unjust enrichment does not create a "judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied". Nevertheless, Lord Steyn's four questions are "no more than broad headings for ease of exposition. They are intended to ensure a structured approach to the analysis of unjust enrichment, by identifying the essential elements in broad terms." While they should be considered and answered*

> *separately, "the questions themselves are not legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements…*
>
> *120. In Capital Insurance Co Ltd v Samsoondar [2020] UKPC 33, the Privy Council emphasised the importance of identifying (in relation to the third of Lord Steyn's questions) the "unjust factor" relied on, whether one of the established categories (examples of which included "mistake, duress, undue influence, failure of consideration, necessity and legal compulsion"), or "some incremental development" from them: see Lord Burrows as §19-20."*

Enrichment

115. Enrichment requires that the defendant receives a benefit (see *Goff & Jones: The Law of Unjust Enrichment* (10th Ed.) at §§4-01 to 4-05). The receipt of money is an obvious form of benefit (*Goff & Jones* at §4-34).

116. It seems clear that there is no need to prove that the defendant still retains the benefit at some later date. I was referred to *Goff & Jones* at §1-20, where it is said that:

> *"The claimant must show that the defendant received a benefit, but need not show that the defendant continued to be enriched up until the time of the action. Many cases hold that a cause of action in unjust enrichment is complete once the defendant has received a benefit from the claimant and circumstances have occurred which make this receipt unjust".*

117. Mr Swaroop submitted there would also be a claim for unjust enrichment against a party A, who requests party B to make payment to party C. His basis for that submission was slightly elusive, because he relied primarily upon a passage in *Chitty on Contracts* (35th Ed.) at §33-129, which paragraph is expressed **not** to be concerned directly with restitutionary remedies, unless the payment to party C actually results in a benefit for party A:

> *"…The ground for recovery is akin to the principle of the law of agency which imposes on the principal an obligation to indemnify his agent against any liability which he may incur in the exercise of his authority. However, although it is treated here for convenience, it is not necessarily restitutionary, since the claimant will be entitled to be indemnified even though his payment has conferred no benefit on the defendant. Where the payment has benefited the defendant, liability can be explained by reference to the unjust enrichment principle".*

118. In the same way, while Mr Swaroop referred to Croxen as an example of this principle in action, that case involved (in effect) the payment to party C discharging a debt which was otherwise owed by party A to party C. In such a scenario, obviously, party A **does** benefit from the payment, by virtue of his debt to party C being discharged.

119. The position is complicated further if there is no request by party A to party B. Mr Swaroop submitted that a defendant may also be enriched where the claimant confers a benefit on another which is then "ratified" or "adopted" by the defendant.

120. He relied primarily upon Leigh v. Dickeson [1884] 15 Q.B.D. 60, where Lord Brett MR (at pp.64–65) dealt with a situation where one tenant in common of a property carried out repairs to the property which benefited the other tenant in common:

> *"…Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit: in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit, in fact that he is bound to accept it: in this case he has no opportunity of exercising any option, and he will be under no liability…".*

121. Of course, that takes as its starting point an assumption that the person who is exercising the option to adopt or decline would, if he accepts, himself obtain some actual benefit. The issue in that case was not about whether carrying out repairs amounted to a benefit to a tenant in common of the property, but about whether he was obliged to accept and pay for that benefit, even if he did not want the repairs to be carried out. I read the reference to this case at §33-131 of *Chitty* as setting further parameters for the same ground for recovery as is being discussed in §33-129. As I have said, that ground of recovery does not seem to me to be premised upon unjust enrichment, but rather operates by way of analogy with the law of agency. I accept that, if party A ratifies a request that a payment be made by party B, that might give rise to an entitlement to reimbursement. But it does not follow that there would be unjust enrichment, unless the payment is made to party A, or otherwise benefits party A in some way.

122. However, it is obvious that whether party A in fact obtains a benefit from a payment does not depend only upon whether party A receives the money into its own bank account. Nor would it be right to say that the only other scenario in which party A would be enriched would be if the payment was used to discharge a debt owed by party A to a third party, even if a number of the reported cases concern that scenario. On the contrary, it seems to me that the question of whether party A obtains a benefit from the payment, and, if so, the extent of that benefit, is a question of fact.

123. I accept that, in principle, party A may be enriched if it ratifies or adopts a payment by party B to party C. Whether party A is enriched, however, will depend upon whether party A in fact obtains a benefit as a result of that payment. If so, and the payment has been requested or ratified by party A, then it will not be open to party A to suggest that the benefit it received was involuntary.

At the expense of

124. The words "at the expense of" the claimant require only that "*the immediate source of the unjust enrichment must be the plaintiff*": see Kleinwort Benson Ltd v. Birmingham City Council [1997] Q.B 380, per Morritt LJ at p.400.

125. In the same case, Saville LJ explained (at p.394) that:

> *"The expression "at the payer's expense" is a convenient way of describing the need for the payer to show that his money was used to pay the payee. Thus there may well be cases where this cannot be shown, but where in truth, for example, the payer was only the conduit through which the funds of others passed to the payee. What this expression does not justify is the importation of concepts of loss or damage with their attendant concepts of mitigation, for*

these have nothing whatever to do with the reason why our law imposes an obligation on the payee to repay to the payer what he has no right to retain."

126. As such, if a payment is made from party B's account, that payment is likely to be at the expense of party B unless it can be shown that party B was "*only the conduit through which the funds of others passed to the payee*". It is irrelevant whether party B is ultimately out of pocket, or is able to recoup the outlay from other sources. See Croxen at [179].

Unjust: failure of basis

127. It is common for the most difficult question to concern when enrichment is "unjust". In the present case, reliance is placed upon what is now called a "failure of basis" as generating the required injustice from the perspective of C.

128. Mr Swaroop submitted that a failure of basis occurs when the parties have a common understanding, assessed objectively, that the defendant's entitlement to retain the benefit is conditional, for example, on counter-performance which is not rendered, or on the happening of an event which does not occur; or a state of affairs that does not materialise. That seems to me a helpful summary of the principle.

129. The authors of *Goff & Jones* make clear that the understanding must be ascertained objectively, and the parties' uncommunicated subjective thoughts are irrelevant. See §13-02.

130. Where the failure of basis is said to involve a failure to perform obligations pursuant to a contract, it is very important to understand how the "understanding" or "basis" which is said to have failed fits into the contractual framework as a whole. The courts will not permit a claim premised upon failure of basis to subvert what has actually been agreed between the parties.

131. In Dargamo Holdings Ltd and another v. Avonwick Holdings Ltd and others [2021] EWCA Civ 1149, the Taruta parties were seeking to recover the sum of US$82.5m which had been paid as part of a total consideration of US$950m under a share purchase agreement. They alleged that this sum was paid on the understanding and in anticipation that the parties would enter into contracts obliging the Gaiduk parties to transfer not just the shares in Casterose, but also further assets. The further assets had not in the event been transferred to the Taruta parties.

132. Carr LJ confirmed that "failure of basis" was a potential unjust factor, where "*a benefit has been conferred on a joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit*" (at [79]). She explained that the failure has to be "total", but the courts have not adopted a literal approach to that requirement: "*In particular, its practical significance has been reduced by the doctrine of apportionment which allocates parts of the payment to distinct elements of the benefit in return for which the payment was made; if only part of that expected benefit has been conferred, it is said that there has been a total failure of basis in relation to the severable part of performance which has not been achieved*" (at [103]).

133. However, Carr LJ (and the rest of the Court of Appeal in Dargamo) agreed with the first instance judge (Picken J) that an analysis of the terms of the share purchase agreement precluded any apportionment and any claim for unjust enrichment in that case. The description in the contract of the consideration for which the payment of US$950m was made was limited to the transfer of the shares in Casterose. Hence: "*This was the express basis of payment agreed in a relevant contract the validity of which cannot be (and has not been) impugned. In such circumstances, there is no scope for the law of unjust*

enrichment to intervene by reference to a basis which is not only alternative and extraneous, but which also directly contradicts the express contractual terms…".

134. That decision was approved (and Carr LJ's judgment described as "*comprehensive and scholarly*" – see [77]) by the Supreme Court in Barton v. Morris [2023] UKSC 3. The latter case concerned payment of commission on the sale of a property and the majority took the view in relation to the alternative claim in unjust enrichment that "*When parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances; both any obligation to pay under the contract and any obligation to pay to avoid an enrichment they have received from the counterparty from being unjust. The "silence" of the contract as to what obligations arise on the happening of the particular event means that no obligations arise as Lord Hoffmann made clear in Belize cited earlier. This excludes not only an implied contractual term but a claim in unjust enrichment*" (per Lady Rose JSC at [96]).

135. Lord Leggatt and Lord Burrows JJSC dissented in relation to the absence of a contractual obligation to pay the commission. Lord Leggatt agreed with the result (if not the rationale) in relation to unjust enrichment and Lord Burrows confirmed that, if he was right that that there was a contractual obligation, there could be no role for unjust enrichment. However, Lord Burrows did go on to suggest that, if (contrary to his view) there was no contractual obligation, there would be a failure of basis (see [239]):

> *"I do not accept that the silence in the contract, as to what would happen where the price did not reach £6.5m, meant that the loss should lie where it fell. Rather the silence in the contract meant that any default law should apply; and here there is the default law of unjust enrichment. Nor do I accept that there is any inconsistency here between the express terms of the contract and the law of unjust enrichment. On the assumption on which I have been working in going on to look at the law of unjust enrichment (ie that there was no term implied by law that reasonable remuneration was payable), the contract simply did not provide for what was to happen where the contract price was less than £6.5m: the contract (even if regarded as subsisting) has "run out" and there is no good reason to stop unjust enrichment stepping in".*

136. It is important to note that the difference between Lord Burrows and the majority in this regard was really about what had been (impliedly) agreed, rather than with the principle discussed in Dargamo. As Lord Burrows put it at [237]:

> *"The parties' own allocation of risk can override the law of unjust enrichment that would be imposed if there were no such exclusion. If the unilateral contract was an 'if, but only if' contract in the strong sense, restitution for unjust enrichment would have been excluded".*

137. I will refer finally in this context to Anron Bunkering DMCC v. Glencore Energy UK Ltd [2023] 1 W.L.R 1912 in which it was confirmed that claims for unjust enrichment premised upon failure of basis are claims "*founded on a simple contract*" within the meaning of s.5 of the Limitation Act 1980, such that the limitation period is 6 years (see [38]). The cause of action accrues when the failure of basis occurs (see [39]).

Change of position

138. I should deal also with the defence which can be available if the ingredients identified above for a claim are present.

139. There is a defence to a claim in unjust enrichment where the defendant's "*position is so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively restitution in full*". See Lipkin Gorman (A Firm) v. Karpnale Ltd [1991] 2 A.C. 548 (at pp.578, 580) and *Goff & Jones* at §§ 27-01 and 27-02.

Entire agreement clauses and contractual estoppel

140. As I will explain, Mr Swaroop relied upon the entire agreement clause at 12.4 of the TAA:

> *"This Contract contains the entire understanding of the Parties in relation to the making of the Trade Advance and supersedes cancels and replaces all prior agreements between the Parties which set out the terms and conditions on which the Loan is to be made whether written oral express or implied and all such agreements shall be deemed to have been terminated by mutual consent with effect from the date of this Contract."*

141. An entire agreement clause gives rise to a form of contractual estoppel, precluding a party from asserting that something outside the written contract was intended to be a term, or to give rise to an agreement collateral to it. See *The Interpretation of Contracts* (8th Ed.) at §§3.133 to 3.137, Inntrepreneur Pub Co v East Crown [2000] 2 Lloyd's Rep 611,614 and Rock Advertising Ltd v. MWB Business Exchange Centres Ltd [2019] A.C 119.

Claim for sums that C paid directly to D

Introduction

142. It is easiest to start with the sums paid by C directly to D (i.e. the sum of US$18,798,520.10). These all feature on C's Table A.

143. There are two key factual questions:

143.1. were these payments made by C to D; and

143.2. if so, on what basis were they paid?

144. The second leads into the question of whether there was a failure of basis.

Payments made by C to D

145. As to the first question, I am satisfied that the payments were made by C to D. There was only limited (if any) dispute about this. In any event, I have described the evidence presented in this regard at paragraphs 81 - 93 above. That evidence (in the absence of any contradiction) is sufficient to prove that the payments were made to D as alleged by C.

146. For completeness, I note that Mr Upadhyay confirmed that the source of the funds was either C's own income from trading steel products, or general loans provided by ESIL. It does not seem to me to matter which. Either way, C was not simply a conduit for a payment coming from someone else.

147. D says that it was not enriched by receipt of the payments because the payments were "*received by the Defendant for onward transmission to the Liberty SPVs and all sums paid by the Claimant to the Defendant were, in accordance with ESIL and/or the Claimant's instructions, paid to the Liberty SPVs towards discharging the liability of the Liberty SPVs*

under the Facility Agreements" (see paragraph 32(2) of the Amended Defence and Counterclaim).

148. The short answer, at least in the present context, is that it probably does not matter whether D retained these sums or paid them on to others. As I have indicated (see paragraph 116 above), the basic rule is that the extent of the defendant's enrichment is tested at the date of receipt, and it is not necessary to show that the defendant continues to be enriched until the time of the action.

149. To the extent that D was alleging that its receipt of the money was only ministerial – i.e. that it was receiving the money on behalf of the Liberty SPVs – D adduced no evidence at trial to make that allegation good. In reality, D's case in this regard is just a variation on its central theme, namely that the background to these payments was the "Agreement", not the TAA. If that case were made good, it would be an answer to the failure of basis. I will deal with it in the next section.

Failure of basis: the "Agreement"

150. As to the second ingredient referred to at paragraph 143 above, C needs to show that the payments by C to D were made "*in anticipation of and/or pursuant to*" the TAA, in other words that these were advances by D towards the supply of steel or related products or services, either after the TAA had been concluded or (in a few examples) with an eye to the TAA which was being finalised.

151. The starting point, Mr Swaroop submits, is that the TAA is the only agreement between these particular parties which could explain these payments. It was, he suggested, the only game in town. He can also point to the fact that C's instructions to the bank mostly describe payments using the phrase "Trade Advance".

152. D's only real answer to any of this was that there was an "Agreement" between the parties as follows (quoting from paragraph 11 of the Amended Defence and Counterclaim):

> *"During discussions that principally took place at ESIL's offices in Mumbai, India in 2013 between Essar's Group CFO, V Ashok, Head of Corporate Finance, Swapnil Jain, and Niketa Kothari, and Liberty's Urmila Shah, Sanjay Kamdar and Anuj Mahujam; and at a meeting at Liberty's offices in Dubai, United Arab Emirates, in or around February to March 2014 attended by Mr V Ashok and Mr Jain on behalf of the Essar Group, and Sanjeev Gupta, Liberty's Chairman and Ratnkar Sinha, Liberty's CFO, it was agreed as between the Essar Group (which for the avoidance of doubt included [C] and ESIL) and the Liberty Group that:*
>
> *1) A series of Liberty Group special purpose vehicles . . . would be incorporated and would secure funding from third party lenders pursuant to a series of facility agreements… between the Liberty SPVs and the third-party lenders…*
> *2) The Liberty SPVs would pass the funding secured under each Facility Agreement to ESIL by way of export advances pursuant to an Advance Payment and Supply Agreement…*
> *3) ESIL and [C] would ensure that the Liberty SPVs were in funds to discharge all liabilities under the Facility Agreements and that the Liberty SPVs would be compensated and/or indemnified in respect of all other costs incurred by the Liberty SPVs participating in the Dollarization Programme;*
> *4) The Liberty Group's involvement in the Dollarization Programme would be on a no risk, no exposure basis, which the parties understood to mean that the Liberty entities would not be out of pocket or exposed to any default on the part of ESIL or any other Essar Group company…"*

153. D contended that the TAA was entered "*pursuant to*" the Agreement and that the parties agreed that payment of the Differential Interest would be made be made by C via the TAA to D.

154. At the heart of D's case, therefore, must be the proposition that the TAA is not really what it appears to be: that the parties entered into a sham agreement to conceal or cover what they were really doing. But that is not, or not quite, the case which has been pleaded.

155. Nor has D adduced the evidence which would be required to make a case of that kind good. It certainly might be said that it having been agreed that the Liberty SPVs would assist the Essar Group with the Dollarization Programme, it would have been logical for the Essar Group to agree to fund the Differential Interest. But that is not sufficient to prove that payments which appeared to be for steel under the TAA were in fact directed to meeting the Interest Differential.

156. It is not enough for D to show that the reason why C was **pre**-paying for steel was in order to provide **short-term** funding for costs incurred by the Liberty SPVs participating in the Dollarization Programme. D needs to show that, contrary to what appeared to be agreed in the TAA, these were not prepayments for steel at all, but sums which D would simply be permitted to retain. That would be a pretty remarkable agreement for the parties to reach. After all, the payments which were made cannot have been precisely calibrated to the costs; the amounts of the Differential Interest could not have been calculated in that way in advance and it does not appear to be contended that the total amount incurred by way of Differential Interest ended up being anything like as much as the sums advanced by C.

157. C points out that there is no documentary evidence of the alleged "Agreement". There is no note or minute of the alleged meetings in Mumbai in 2013, or of the alleged meeting in Dubai in early 2014. C can point to the April 2017 "Balance Confirmation", which is inconsistent with a supposed agreement that D should be allowed to retain these sums to fund the Differential Interest and other costs. Is it suggested that the parties were still play-acting when they had this exchange in April 2017? One would need some evidential basis for such a suggestion, which is counterintuitive in the extreme. There is also D's internal document from April 2018, which seems to show that D considered that it owed at least US$35,713,520.00. Again, this would need to be explained. But it has not been.

158. The documents apparently relied upon by D do not advance matters greatly. For example, there is an email dated 1 February 2016 from Mr Bohra of ESIL to Mr Upadhyay in which the latter was asked to send "*the pure Trade Advance balances used for payment of SPV interest in ESME's Books. As this transaction is getting closure*". It would have been interesting to see Mr Upadhyay cross-examined about that, but, on its face, the email reveals only that there was perhaps some relationship between the advance payments pursuant to the TAA and the funding of the Differential Interest. Neither that email, nor Mr Upadhyay's response to it, suggests that it had been agreed that, come what may, D would be permitted to **retain** the "*Trade Advance balances*". Quite the contrary; hence the need to be provided with the balances and the reference to the transaction "*getting closure*".

159. Similarly, there is the email from Mr Kamdar of the Liberty Group dated 24 December 2014, in which, while trying to persuade C to sign an indemnity agreement, he asserted that "*The whole transaction was envisaged as a no-risk/no-exposure transaction for Liberty*

which is subject to execution of the indemnity agreement". It is easy to see why D might think this description of the transaction is helpful to its case, but it does not seem to me to demonstrate that there had been an "Agreement" along the lines contended for by D. Certainly it does not assist D with its case that the TAA was not what it appeared to be. If the TAA represented the mechanism by which the Liberty Group's potential exposure was to be dealt with, why was there a need to execute any indemnity agreement?

160. In circumstances where D has chosen not to attend the trial, and where its witnesses have not given oral evidence, it is unsurprising that the Court is left shrugging its shoulders. Perhaps if D had attended, called that evidence, and provided cogent explanations for the gaps between the way things appeared and the way they are said to have been, I would have been persuaded. That seems unlikely, given the nature of the case which D would have been seeking to make good and the mixed bag of evidence which appears to have been available to it. But, in any event, it is a statement of the obvious to say that, if the evidence before it had been different, the Court might have formed a different view.

161. As I have already explained, it also seems to me it is appropriate (if probably unnecessary to my final conclusion) to draw adverse inferences from D's failure to comply with the disclosure orders which I made on 23 October 2024. In particular, if D had received sums from C on the unusual basis that D alleges, then I would have expected this to have been reflected in some way in D's financial records. Putting that the other way around, the absence of those records justifies an inference that their disclosure would not have assisted D's case.

162. In the end, I have to decide this case on the basis of the evidence, which is before me, not by reference to nagging doubts about what different evidence I might have heard if D had continued to participate in this action. On the basis of the evidence that I have heard, I find that these payments were indeed made pursuant to the TAA, and not for some different or collateral purpose.

163. The evidence does suggest to me that the parties may have had some other motivations for structuring their deal in the way in which they have done, but **not** that the apparent structure of the TAA did not in truth represent the deal at all. It seems to me genuinely to have been intended that steel and/or services would be provided to C by D. The parties do seem to have anticipated that this was how the trade advance would, at least in part, be reconciled. Perhaps there was also an expectation that D would have claims for other sums under other agreements (as, at least to some degree, it asserted in these proceedings by way of counterclaim) which would then be addressed by some form of set off. But none of that affects the basis on which the trade advances were being paid: namely, by way of advance payment for steel and services to be supplied to C by D.

164. For completeness, I note that C had a legal argument that it was not open to D to contend that the TAA was anything other than it appeared to be, because of the entire agreement provision at clause 12.4 of the TAA. I found this argument conceptually difficult. It had the feel of seeking to achieve elevation by pulling on one's own bootstraps.

165. If I were to reach the conclusion, on the evidence, that the terms of the TAA did not reflect the true bargain between the parties and did not reveal the basis on which the payments were made, I cannot see how I could be prevented from giving effect to that conclusion by clause 12.4. If I were persuaded that the TAA was a sham, then clause 12.4 would simply form a part of that sham.

166. However, I would not go so far as to say that clause 12.4 is irrelevant. Once I have rejected D's case that, in effect, the TAA is a sham, then clause 12.4 of the TAA operates in the usual way. It prevents D threshing around in the undergrowth for additional terms or collateral promises. D is stuck with what has been agreed.

Failure of basis under the TAA

167. Once it is established that the payments were made pursuant to the TAA, the remaining issue is whether, having careful regard to the terms of the TAA, the basis has failed. The TAA provides for C to advance sums to D in anticipation of the supply of steel or related products or services. It is clear that the anticipated supply of steel and services did not happen.

168. C's original way of expressing the argument was that the TAA as a whole was unenforceable. There is no doubt that the "promises" in clauses 1 and 2 of the TAA are only agreements to agree. D pleaded that these could be made sufficiently certain by implying terms, and specifically that the TAA implicitly provided for the sale of steel and related products to take place further to any order placed by C, at a reasonable price and within a reasonable time, to be determined in accordance with the relevant circumstances at the time of the order.

169. D's case suggests that C could order whatever steel from the list it wanted, and D would have to deliver it within a reasonable time. That seems unlikely. It is also not what the TAA says: there is no hint in the TAA that an obligation to supply was triggered by orders from C in that way. There is no reference to C placing orders at all. The reality is that the parties had not left any space for implied terms about quantities, or about price, etc. They had simply provided for the sale of steel and related products and services to be "*under such terms and conditions as shall be mutually agreed upon between the Parties*". That is an agreement to agree.

170. On that basis, C contended that the TAA as a whole was not binding on the parties (save perhaps clause 12.4). That seemed to me to go too far. Indeed, at the beginning of the second day of the trial, Mr Swaroop made clear that the C did not pursue a case that the TAA as a whole was unenforceable.

171. To the extent that the issue remains live, I do not accept that a contract which contains a promise which is only an agreement to agree cannot be binding in any other respect. On the contrary, I would suggest that the reason why the label "unenforceable" is often used when describing an agreement to agree, is because that agreement literally cannot be enforced. The court cannot be certain what the parties intended should happen next, because what the parties actually intended was that a further agreement be reached. That uncertainty prevents the promise from being enforced.

172. In the present case, the part of the agreement which envisages future sales cannot be enforced in any meaningful sense. That is an agreement to agree. However, there is nothing inherently wrong with an umbrella agreement of this kind, which fixes the parameters for future orders, or future transactions. The TAA is binding on the parties and enforceable to the extent that it contains promises which have the requisite certainty.

173. What happens, then, if an umbrella agreement provides for advance payment to be made in respect of future orders and those future order never happen? It is important to remember that (by clause 4) the TAA fixed a period of 10 years, which has now expired

(on 1 December 2023). However, there is no specific provision dealing with what happens on expiry. There is only clause 12.1, which envisages early termination:

> *"12.1 This Contract shall be terminated any time with the mutual consent by both parties and prior to such termination parties shall mutually agree on a settlement process of the Trade Advance to the extent not apportioned in terms of this agreement."*

174. Taking it first at a conceptual level, before descending into the detail, we are trying to identify what happens when:

174.1. an advance payment is made on the basis that the parties will agree the terms for future supplies and the payment will be applied to the price of those supplies, but the agreement terminates (for effluxion of time) without any further agreements of that kind being reached; and

174.2. the parties have made no express or implied provision for the advance.

175. In such a case, it does seem to me that the payment would have the necessary degree of conditionality to make it unjust if the money were retained by D after the point at which time runs out for supplies to be made.

176. This seems to me akin to a total failure of consideration and sales of goods cases in which a part-payment is made in advance. The usual assumption would be that, if the goods are not ultimately delivered, the payment will have to be returned. If necessary, this would be achieved by way of a claim for restitution. See, for example, Fibrosa Spolka Akcyjna v. Fairburn Lawson Combe Barbour Ltd [1943] A.C 32. The fact that no steel was supplied at all makes it easier to find that the failure of basis was total. There is no need in our case to consider whether a form of apportionment would be available.

177. The next question is whether that tentative conclusion continues to hold good when one looks at the specific terms of the TAA. The argument in this regard focussed on clause 9: "*Subject to the terms of this Contract, and provided that [D] has complied with all its obligations under this Contract, [C] agrees that it shall not have recourse against [D] until and unless there is an occurrence of an Event of Default*".

178. It does not seem to me that clause 9 is inconsistent with my tentative conclusion. In my view, this agreement that there will be no recourse is subject to the same conditionality as the payment of the advance, or (to put it another way) clause 9 simply assumes that the TAA will operate as the parties have envisaged and hence that the advance will be used to pay for steel and/or services, or that agreement will be reached as to a settlement process.

179. I certainly do not read clause 9 as an agreement that D will be permitted to retain the advance, come what may, subject only to an event of default whereby D is dissolved or liquidated. There are at least four reasons for that:

179.1. first, it is not what clause 9 says. Since that might be thought a surprising agreement for the parties to reach, I would expect to see clear words if that was what was intended. In fact, clause 9 is expressed to be subject to the terms of the TAA, which includes clause 4 (the 10-year term);

179.2. second, it would be inconsistent with clause 12.1. Why would there ever be any need for a settlement process if it is intended that D should keep the advance?

Why would D ever agree any settlement, if retention of all the money was intended as the default position?

179.3. third, it does not even fit with clause 9 itself and its cross-reference to clause 8. If the basic deal is that D is going keep whatever advance is paid, why provide for repayment in the event that D is dissolved or liquidated? If this is meant to become D's money, there would be no justification for repayment if D became insolvent. By contrast, repayment makes much more sense if D is supposed to be holding the money (i.e. as an advance), which arrangement would be greatly complicated by an insolvency.

179.4. fourth, it would be inconsistent with the scheme of the TAA as a whole. The advances are described as a "trade advance" and they are paid at C's discretion. Why would C pay over money on that basis if D could retain it and provide nothing in return? Moreover, if this is intended as a form of umbrella agreement, it stops working if the advance is to be used to meet the price of steel if any is delivered, but to be retained by D if nothing is delivered. It would then make no commercial sense for D to agree to supply any steel or services.

180. Accordingly, this does not seem to me akin to the contractual provision which the Court of Appeal in Dargamo considered to be inconsistent with a claim for unjust enrichment. In the TAA, the whole of the intended consideration for the advance payment is the anticipated supply of steel or services. To adapt Lord Burrows JSC's explanation of how a failure of basis might arise (from Barton): "*the contract simply did not provide for what was to happen where [the steel was not supplied]: the contract (even if regarded as subsisting) has "run out" and there is no good reason to stop unjust enrichment stepping in*".

181. On the face of the TAA, therefore, it seems to me clear that the correct answer is that the supply of steel or services to the value of the advance, before the end of the 10 year term, represented the "basis", or the condition, on which the advance was paid by C to D.

182. I have also considered whether what might be called the background, or the wider circumstances, affects the picture. Can it be said that the hints that the parties had additional reasons for structuring the TAA in this way, such as perhaps a desire to assist D with funding costs associated with the Dollarization Programme, reveal a different "basis" for the payment of the advance?

183. In the end, with only a little hesitation, I have concluded that they do not. My reasons are as follows:

183.1. first, it seems to me that, at this stage, it is D who is seeking to look beyond the four corners of the contract in the way which was deprecated by the Court of Appeal in Dargamo. I accept that the situation is different (D is not the party alleging a failure of basis), but I still query to what extent it is legitimate to assert that the "true" basis for the payment is something inconsistent with the terms of the parties' contract. Moreover, at least some of the material which has been relied upon by D in this context formed part of the negotiations of the terms of the TAA and much of it is post-contractual. Some messages are internal to one party or the other. It is doubtful whether it is appropriate for me to have regard to any of this material when deciding what, objectively speaking, amounted to the agreed basis on which the advance was made. I suspect that clause 12.4 of the TAA also has a role to play here;

183.2. second, once I have rejected D's primary case, to the effect that the TAA is really a sham, intended only to conceal that C was making payments for the purpose of the "Agreement", it is very unlikely that any secondary case could take D far enough to make a difference. If, for example, I were to take the view that the parties did intend the advance to be applied to steel deliveries, but structured their agreement to provide for payment in advance (rather than concurrent with delivery) in order to enable D to fund costs associated with the Dollarization Programme, that does not seem to me to alter the fact that the parties were agreeing that retention of the advance was conditional upon future deliveries (which have not materialised). D needs the Court to take the view that there was no genuine intention for the advance to be applied to any steel deliveries – i.e. that, contrary to appearances, that was not the basis for the payment at all. For the reasons I have explained, I do not accept that proposition on the basis of the evidence I have seen;

183.3. third, and related to that second point, there does not seem to me to be any inconsistency between (a) the parties contemplating that there might be some process in the future for setting off sums owed by C to D (and perhaps even to other Liberty companies) under other agreements, potentially including actual costs associated with the Dollarization Programme, and (b) the parties agreeing that the basis for the advance payments was to fund future supplies of steel and services. Indeed, it might be said that a fundamental problem with D's approach is that it ends up being all or nothing. D does not merely say that it is entitled to retain whatever it can show it is owed by way of costs associated with the Dollarization Programme. It says that it is entitled to retain the whole of the advance, whether or not that amount actually bears any relationship with those costs;

183.4. fourth, I see no basis in the evidence which I have seen for concluding that the parties had actually agreed that the advance should be retained by D come what may. Perhaps this is just another way of expressing the points I have already made, but it merits repeating.

Conclusion on sums paid by C to D

184. I am satisfied that C is entitled to restitution of the sums paid directly to D by way of advance payment, because the basis for those advances has failed.

Claim for sums that C paid to third parties at D's request

185. There is a little more complexity where C is said to have made the payments to third parties, following a request from D. These cases are all within C's Table A, and include all of the entries in Table B, making a total sum of US$10,057,516.13.

186. As I have said, in all cases, the request from D to C was in the following terms:

> *"Sub.: Payment of Trade Advance under Contract for Purchase of Steel Products dated 01.12.2013*
> *With reference to above and further to our discussions in receipt of trade advance from you towards supply of steel products to you. We request you to make below payment on behalf of us which will be treated as advance payment to us under the said agreement…"*

187. The difference from the previous scenario concerns only uncertainty as to whether these payment to third parties can still be said to be payments whereby D was enriched and for which the basis was the TAA. It seems to me that, on the face of the requests, the answer to that is plainly "yes".

188. D specifically requested that the advance be made on its behalf and confirmed that the payment be treated "*as advance payment to us under the said agreement*". As such, this is not akin to a situation in which party A simply asks party B to make a payment to party C. It is being agreed that those payments are to be treated as advance payments **to D**. It is also being agreed that they be treated as advance payments **under the TAA**. I say it is being agreed, because when C made the payment in accordance with those requests, it accepted D's request that the payments be treated in that way.

189. It may be that there is a backstory which explains why these requests were being made, but I would need some good reason before I could disregard what D was itself saying to C at the time. It goes back to what I have said above about D's case that all of this is really a sham: a case of that kind requires cogent evidence. There is none.

190. It follows that C is entitled to restitution of the sums paid to third parties in accordance with a request from D in the above form, because the basis for those payments has failed.

Claim for sums that C paid to third parties, subsequently ratified by D

191. That brings me to what might be thought the most difficult category.

192. This category concerns scenarios where C made payments to third parties and either: (a) there is a request letter from D, but it now appears that the request letter was only executed **after** the payment in question was made; or (b) no request letter has been located.

193. These sums total $25,497,477.67 and are all within C's Tables A and C.

194. It is relevant that backdated requests were provided by D (at least in some instances), but C recognises that, where the request came after the payment, it is not easy to spell out an agreement (i.e. as a result of C making a payment as requested) about the way those payments should be treated.

195. C relies heavily on the Balance Confirmation. C says that, by signing the Balance Confirmation, D accepted that it owed to C the sums claimed, including the US$25,497,477.67 that C had actually paid to other Liberty companies.

196. C analysed this as a ratification or adoption of the payments totalling US$25,497,477.67. I would suggest that the more important points are:

196.1. D's recognition that these payments have in effect been, or are to be treated as having been, made to D. That is the inevitable logic which underlies an acknowledgement that it is **D** which owes that money to C, at least in the absence of any other explanation; and

196.2. the acceptance that these payments are to be grouped together with the other sums owed, as described above, all being sums advanced pursuant to the TAA.

197. I accept that one might not always be able to infer so much from a balance confirmation. But the wider context is very important. The fact that other payments, under the first two categories discussed above, were being made by way of advance pursuant to the TAA, is revealing. In particular, the payments made to other Liberty Group companies

at D's request, and on the basis that these payments were to be treated as payments to D under the TAA, shows what these parties were doing. The backdated requests, which are agreed to have been provided by D, make the position even clearer. That is the context in which the Balance Confirmation falls to be considered. I also bear in mind Mr Upadhyay's evidence, which is that the figure of US$43,703,513.90 which he was asking be confirmed by Ms Chauhan on behalf of D came from the LIQS Ledger, which ledger recorded only the sums paid by way of advance under the TAA. That would make it a remarkable coincidence if D owed exactly that amount, but (in part) for a different reason.

198. Moreover, D has never advanced any positive case which distinguishes between the different categories of payment. On the contrary, D's own approach, while it was represented by Counsel and solicitors, was largely to explain all of the payments compendiously. D's case was that **all** of these payments were being paid to the Liberty SPVs to reimburse the costs of participation in the Dollarization Programme (i.e. pursuant to the Agreement, not the TAA), not that some of the sums identified by C had been paid for different reason.

199. I am conscious that I must not allow D's absence from the trial to reverse the burden of proof. However, the fact is that D signed the Balance Confirmation, but has offered no explanation for this, nor contended that there was a need to distinguish between different ingredients of the US$43,703,513.90 which it confirmed. It has not provided any disclosure about how it treated any of these payments. In those circumstances, D cannot have any complaint if I infer that there is no need to draw any distinction; that I do not need to be concerned that, while most of the sum of US$43,703,513.90 was owed because it was treated as advanced pursuant to the TAA, the sum of US$x and US$y might have been acknowledged to be owed to C for some completely different reason.

200. For all of these reasons, I accept that this third category of payments benefited D and were made on the basis that they were advance payments pursuant to the TAA, in exactly the same way as the second category. It follows that C is again entitled to restitution of those sums, because the basis for those payments has failed.

Change of Position

201. D pleaded that "*in paying the monies to the Liberty SPVs, in accordance with the instructions of ESIL and/or the Claimant, the Defendant changed its position such that it would be inequitable to require the Defendant to make any restitution*" (see paragraph 32(4) of the Amended Defence and Counterclaim).

202. This would seem to be directed to the first category of payment: the US$18,798,520.10 paid by C directly to D.

203. D has not adduced any very satisfied evidence in support of this assertion. I have not seen any evidence that D did in fact pay that money to the Liberty SPVs. of ESIL or C supposedly giving instructions to D to pay money over to the Liberty SPVs. I have not even seen any evidence that D did in fact pay that money to the Liberty SPVs.

204. Putting the alleged Agreement to one side, it is difficult to see how it could be said that any decision by D to disburse the money to others could amount to a change of position which rendered it inequitable to order restitution. After all, D knew that these were trade advances and that, unless it supplied steel or services to the value advanced, it would have to repay the same. If D chose to pay it over to the Liberty SPVs, and that meant D was unable to recoup it, that was at D's risk.

205. There seems to me to be an analogy with the case of Goss v. Chilcott [1996] A.C 788 (PC), in which the defendants had allowed the money to be paid over to a third party, Mr Haddon.[1] Lord Goff explained the problem for the defendants (at p.799):

> *"They had however allowed the money to be paid over to Mr. Haddon in circumstances in which, as they well knew, the money would nevertheless have to be repaid to the company. They had, therefore, in allowing the money to be paid to Mr. Haddon, deliberately taken the risk that he would be unable to repay the money, in which event they themselves would have to repay it without recourse to him. Since any action by them against Mr. Haddon would now be fruitless they are seeking, by invoking the defence of change of position, to shift that loss onto the company. This, in their Lordships' opinion, they cannot do. The fact that they cannot now obtain reimbursement from Mr. Haddon does not, in the circumstances of the present case, render it inequitable for them to be required to make restitution to the company in respect of the enrichment which they have received at the company's expense".*

206. See also *Goff & Jones* at §§27-068 to 27-070 and Haugesund Kommune v. Depfa ACS Bank [2010] EWCA Civ 579.

207. To the extent that the change of position defence is premised upon the Agreement and that is the premise for the allegation that the supposed payments to the Liberty SPVs were made "*in accordance with the instructions of ESIL and/or the Claimant*", I have already rejected the factual basis for that case and I do not need to say any more about it here.

Limitation Act 1980

208. D pleaded that, in relation to the claim for unjust enrichment, that "*the present claim was issued on 23 March 2021 and therefore, the Claimant is precluded from bringing any claim for repayment in respect of those sums which were advanced to the Defendant before 23 March 2015 by reason of section 5 of the Limitation Act 1980*" (see paragraph 33 of the Amended Defence and Counterclaim).

209. This plea misunderstands when the cause of action for restitution accrues in a failure of basis case. I have dealt with this at paragraph 137 above. It accrues when the failure of basis occurs.

210. In terms of when the failure of basis occurred in the present case, C submitted, and I accept, that it could not have happened before the term of the TAA expired. Up until that point, steel and/or services could still have been supplied by D, and the payment in advance would have had to be adjusted against the supply of the same as envisaged by clause 3.4 of the TAA. Or there could have been a termination by mutual consent, in which case clause 12.1 would have applied instead. It was only when the 10-year term expired pursuant to clause 4 that the TAA could be said to have "run out", leaving a gap which needed to be filled with a restitutionary remedy.

211. It follows that the failure of basis occurred on 1 December 2023. The claim was not time barred.

[1] This case has other echoes with our own. It is an example of the parties agreeing that payment by the claimant to a third party is to be treated as receipt by the defendants. There was also an allegation that the transaction was a sham.

Interest

212. It seems to me that C is entitled to interest under s.35A of the Supreme Court Act 1981, from the date of the failure of basis, when the advance payment should have been refunded by D.

213. Given that we are concerned with a judgment to be expressed in dollars, I will order that interest is paid at the rate of 1% over US Prime (see Lonestar Communications Corp LLC v. Kaye [2023] 2 All E.R. (Comm) 605) from 2 December 2023 to the date of judgment.

REPUDIATION

214. For completeness, I observe that C had an alternative case to the effect that the TAA was repudiated by D's failure to deliver any steel (or other products or services).

215. I have to say that I found this difficult, given that C's own case was that the "promise" in relation to delivery of steel was unenforceable. If an umbrella agreement envisages products being delivered as agreed between the parties, but in fact that does not happen, is the agreement repudiated? It is hard to see why there is a breach by D, let alone a repudiatory breach.

216. It may be that this alternative case was premised upon D being successful in its contention that the TAA included an enforceable promise to deliver steel. But even in that hypothetical world, the repudiation case does not seem to me to work. That case requires not only that there be found to be an obligation to deliver, but that the obligation was freestanding, requiring no involvement from C. D argues (or at least argued in its Amended Defence and Counterclaim) that C must place an order for steel in order to trigger the obligation to deliver. Since it is not said that C placed any orders, D would not be in breach of that supposed obligation.

217. In any event, I have rejected D's argument to that effect. For the reasons which result in my conclusion that the provisions concerning the delivery of steel and services are (unenforceable) agreements to agree, I cannot find that those obligations were breached by D.

218. Nor did I follow C's argument that, by failing to respond constructively to letter demanding a refund the payments, D renounced the TAA. That assumes that there was an obligation to refund the same, which (if it is true) makes it unnecessary for C to show that there was a renunciation.

219. It does not matter, of course, because C has succeeded on its claim in restitution and does not need to rely upon this alternative case.

THE COUNTERCLAIM

220. I have dismissed all of D's counterclaims because of its non-attendance at the trial, and do not propose to spend any time on the merits of those counterclaims. However, since Mr Swaroop very properly took me through the arguments, I will make clear that, if I had had to decide the counterclaims on their merits, I would have rejected them.

221. To a very large degree, they involved applying a slightly different legal analysis to factual contentions which I have already rejected. For example, it was alleged that C was obliged to indemnify D for any sums which had to be repaid by D to C, as a result of the Agreement. But I have rejected D's case that there was an Agreement to the

effect that the advance payments under the TAA were to be retained by D by reason of the Liberty Group's participation in the Dollarization Programme.

222. Similarly, to the extent that counterclaims were premised upon the Agreement and alleged that other amounts were payable, such as "*obligations of LITL 1, LITL 6, LITL 7 and LITL 18 in the total sum of US$4,321.881.86 which was due to the Lenders under the Facility Agreements with those respective Liberty SPVs*" (see paragraph 48 of the Amended Defence and Counterclaim), the evidence put before me does not satisfy me that there was any such Agreement, nor even address how those supposed obligations are quantified. This appeared to be a counterclaim premised in part upon the MOA, but ignoring the fact that the counterparty to the MOA was LFET and that the MOA was concerned with sums payable by LFET to **LITL 3**. It was not obvious how D could sue on the MOA, nor why the obligations of any of "*LITL 1, LITL 6, LITL 7 and LITL 18*" would be relevant to the MOA.

DISPOSITION

223. For the reasons I have given, I find that C is entitled to restitution from D in the sum of US$52,803,513.90, because the basis for the advance payments which were made by C pursuant to the TAA has failed. In addition, D must pay interest at 1% over US Prime from 2 December 2023 until the date of this judgment. The counterclaim is dismissed.

224. I will hear the parties on the form of the order and especially in relation the amount of interest and as to orders for costs. I should make clear that I continue to be willing to hear submissions on behalf of D, although obviously it will not serve any purpose for submissions to be made now about points which I have already decided.