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Case No: CL-2024-000225 and CL-2024-000426

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

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 14th February 2025

Before :

Paul Stanley KC
(sitting as a Deputy High Court Judge)

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Between :

CE Energy DMCC	**Claimant**
- and -	
ALHAJI ABDULRAHMAN MUSA BASHAR	**Defendant**

And between :

CE Energy DMCC	**Claimant**
- and -	
Ultimate OIL & GAS DMCC	**Defendant**

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- -

Nicola Allsop (instructed by **Stephenson Harwood LLP**) for the Claimant
Thomas Steward (instructed by **HFW LLP**) for the Defendant

Hearing date: 23 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14th February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Paul Stanley KC :

Introduction

1. Between 2022 and 2023, the claimant ("CEE") sold gasoil and jet fuel to the defendant in Case CL-2024-00426 ("UOG"), which is the offshore trading arm of a group of companies based in Nigeria. By January 2024 debt had built up. CEE and UOG entered into a payment agreement. UOG agreed to pay off the outstanding debt in instalments, and CEE agreed to supply two more spot cargoes, which UOG would pay for. The defendant in Case CL-2024-000225, Mr Bashar, owns UOG, and is its chairman. He gave a guarantee to support UOG's obligations.

2. UOG did not pay the agreed amounts in full. CEE decided not to supply the second of the additional spot cargoes, as it was entitled to. This has led to the commencement (or re-activation) of arbitrations between CEE and UOG relating to the pre-2024 sales. It has also led to two cases being started in this court. In one, CEE claims against Mr Bashar under the guarantee for all the sums that it says UOG owes. In the second, it claims against UO1G for the amount it says is due as the price of the cargo delivered under the spot contract that was made following the payment agreement.

3. CEE has applied, in each action, for summary judgment under CPR Part 24. (Or to strike out the defence; but this offers no advantage over summary judgment. The parties have argued the case as one for summary judgment.)

4. I must decide two broad questions. First, does Mr Bashar have a realistic prospect of defending the claim against him (or any part of it) under the personal guarantee? Second, does UOG have a real prospect of defending the claim against it for the price due under the last spot contract?

5. In each case I apply the measure famously explained by Lewison J in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch), which has been many times approved and followed: see, e.g., *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2010] Lloyd's Rep IR 301, at [24]. "Realistic" is to be distinguished from "fanciful". A defence may have a "realistic" prospect even though it will probably fail. A defence has a realistic prospect of success if it carries some degree of conviction, having regard not only to evidence already before the court but also to evidence which can reasonably be expected to be available at trial. A summary judgment application is not an opportunity to conduct a mini-trial, or to speculate about the likely outcome of a fuller investigation where there is reason to think that it might alter the position. Where legal issues are concerned, a summary judgment application may be a valid opportunity to grasp the nettle of a short and determinative point which does not depend on the detail of facts or evidence which deserve exploration. But it will rarely be the right opportunity to decide complex points of law which deserve argument in more depth than a short hearing permits.

6. Just before the hearing, Mr Bashar and UOG served draft amended defences. They are in the irregular form of a letter to the court, but nothing turns on that procedural defect, which could be remedied. CEE complained that this was an attempt to derail the summary judgment hearing, but nobody suggested it should be adjourned. I have been able to take them fairly into account when I was deciding whether to grant summary judgment. If the defences have a realistic prospect of succeeding, I would

not grant summary judgment just because they had not been raised earlier, but would grant permission to amend on such terms as are just. But if the arguments canvassed in the draft amended defences have no realistic prospect of succeeding at trial, summary judgment should follow, and permission to amend be refused.

The core issues

7. Counsel for both parties worked to tame the number of issues. In the end, the main ones are as follows:

   i) To establish Mr Bashar's liability under the guarantee must CEE show: (a) a demand made in good faith, or (b) an actual liability of UOG to CEE, or (c) that an arbitration tribunal or court of competent jurisdiction has held UOG liable?

   ii) If CEE must show that UOG is liable, are admissions of liability by UOG contained in the payment agreement conclusive against Mr Bashar?

   iii) Much of CEE's claim is for the price of the last delivery made before 2024, under the term contract, and the delivery made in 2024, under the new spot contract. If UOG's liability matters, can CEE claim the price at all in circumstances where it retained (and retains) title to the oil that was delivered and has not been paid for?

8. To those central issues may be added two others of secondary importance:

   i) Does Mr Bashar have a realistic prospect of defending the claim based on the contention that CEE acted capriciously or irrationally in the way that it allocated the payments that UOG did make to the various different debts?

   ii) Does Mr Bashar have a realistic prospect of establishing that UOG was not liable for demurrage or interest under the pre-2024 contracts?

9. I have concluded:

   i) To establish Mr Bashar's liability under the guarantee, CEE must show that UOG has defaulted in its obligations; but it is not obliged to wait for that liability to be established in an arbitration.

   ii) CEE can rely on the payment agreement as establishing contractually binding admissions of UOG's liability at the date of the payment agreement. Those admissions bind Mr Bashar because they determine UOG's liability that he has guaranteed.

   iii) Although the case law is not in a satisfactory state, I should follow recent authority under which CEE is entitled to claim the price under the spot contract (and would be so entitled under the term contract, although because of my previous conclusion that does not arise).

   iv) None of the other defences has any realistic prospect of succeeding.

Factual background

The original spot contracts and term contract

10. Between November 2022 and February 2023, CEE sold gasoil and jet fuel to UOG under five spot contracts. UOG has paid for the cargo delivered under those contracts. CEE maintains that interest on late payments has not been fully paid, and that demurrage due in respect of shipments *MT Bourda* and *MT Res Cogitans*, has not been paid.

11. On 25 April 2023, CEE and UOG concluded a term contract. Under that, CEE agreed to sell three cargoes of around 62,000 mt of gasoil.

12. The term contract provided for delivery ex-ship offshore Lome. It required payment to be made the earliest of 75 days after bill of lading date or 60 calendar days from completion of discharge in Nigeria. CEE would retain title in the oil until payment was made, with the contract providing for a mechanism for the release of oil from storage in Nigeria as payments were made.

13. The first cargo under the term contract was delivered between 14 May 2023 and 7 June 2023. It comprised 62,582.01 mt of gasoil, originally carried on the *MT Beks Lily*, and delivered by transhipment onto four other vessels. That cargo has been fully paid for, although some payments were late.

14. The term contract was amended on 18 September 2023, to allow CEE, if it wished to do so, to substitute two cargoes of 30,000 mt for one cargo of 62,000 mt. Shortly thereafter there was a further amendment which substituted LCIA arbitration for the Dubai arbitration originally agreed.

15. The second cargo was then delivered: 29,623.667 mt of gasoil, carried to Lome on the *MT HS Arge*, and delivered by transhipment to two vessels between 24 September 2023 and 4 October 2023.

16. By this point, CEE and UOG were negotiating over matters such as the demurrage due on vessels that had carried the cargoes under the spot contracts at around this time. UOG did not pay as expected for the second cargo.

17. On 6 October 2023, CEE validly terminated the term contract, on the ground that UOG had not paid in full for the first cargo, and had not paid demurrage.

The payment agreement and guarantee

18. On 14 January 2024, two agreements were made.

19. The first was a payment agreement. It was between CEE and UOG. It contained a long set of recitals. They included the following statements:

    i) Recital A sets out the spot contracts, and certain sums in relation to each of them that were due as interest for late payment, or demurrage. Those were as follows (the total is mine):

Table 1: Demurrage and late payment for spot contracts

Vessel	Demurrage (AED)	Late payment (AED)
MT Bourda	1,683,073.75	325,627.90
MT Zee Zee		348,535.08
MT Scylla		88,884.29
MT Res Cogitans	710,146.45	789,221.10
MT Errina		1,236,047.07
Total	710146.45	2788315.44

ii) By Recital B, UOG "irrevocably admits" that the amounts set out in Recital A were due to CEE.

iii) Recitals D and E describe the term contract, and the first delivery under it by *MT Beks Lily*. Recital F states that UOG has partly paid for that cargo, but that "an amount of AED 16,829,308.60 plus interest which continues to accrue until full payment has been made remains outstanding. UOG irrevocably admits that this amount is due to CEE in relation to" that cargo.

iv) Recital G records that demurrage was due in respect of *MT Beks Lily* of AED 2,417,614.07. UOG "irrevocably admits" that sum to be due to CEE.

v) Recitals H to K deal with the amendments to the term contract, and the delivery of the second cargo by *MT HS Arge*. They record that UOG has paid AED 1,102,500 against the invoices for that cargo. Recital K says that "AED 95,539,694.50 plus interest which continues to accrue until full payment has been received, remains outstanding. UOG irrevocably admits that this amount is due to CEE in relation to the cargo delivered by" *MT HS Arge*.

vi) Recital M summarises the overall financial position: "As at the date of this agreement, UOG owes CEE a total amount of AED 119,968,162.49, which comprises of the sums owed by UOG to CEE pursuant to the Term Contract and the Spot Contracts. Interest in accordance with the Term Contract continues to accrue in relation to the First Cargo and the Second Cargo until full payment of the principal amounts has been received."

vii) Recital N records that CEE was "willing to consider" entering into further spot contracts in consideration of UOG agreeing to make payment of the total outstanding amounts to it.

viii) Recital O explains that "without prejudice to their respective accrued rights under the Spot Contracts and the Term Contracts" the parties wish to enter into "this settlement agreement … to agree, on a binding basis, a mechanism for settlement of all the outstanding amounts from UOG to CEE and provision of further cargos … pursuant to new spot deals".

20. The operative provisions of the payment agreement contained various conditions for UOG to provide post-dated cheques; for the personal guarantee that Mr Bashar gave, which I describe below; for payment by UOG of outstanding sums; and for future spot deals.

21. Clause 5 required UOG to pay the outstanding price for the cargo delivered under the term contract in August from *MT Beks Lily* within five business days. That sum was paid.

22. Clause 6.6, having referred to two new spot contracts, provided as follows:

> "UOG shall make the next payment to CEE after NOR +45 days of daughter vessel at disport with respect to New Spot Cargo 1. The payment shall include: a) 50% of the late payment charges and demurrage due to CEE in relation to the [cargo delivered under the term contract from *MT Beks Lily*], proposed 50% estimated interest on the [cargo delivered under the term contract from *MT HS Arge*], and the spot contracts; b) 50% of Term Contract (Second Cargo); c) Payment of New Spot Cargo 1."

It went on to describe what was to happen with the second spot cargo (which CEE would only be bound to supply if those payments were made). It described the "next payment" to be made by CEE in essentially the same terms. So, if both cargoes were delivered and all payments made, UOG would have paid in full the amounts that it had "irrevocably" admitted were due, together with the price of the two new spot cargoes and interest. In the meantime, CEE agreed to stay arbitrations it had commenced under the spot contracts, and not to commence arbitration under the term contract (clause 8). The extant arbitration was to be discontinued when all the sums due had been paid.

23. The second agreement executed on 14 January 2024 was a guarantee, given by Mr Bashar. That also contained extensive narrative recitals, describing the background. Recital D stated:

> "As at the date of this Guarantee, a total amount of AED 119,968,162.49 is owed by UOG to CEE in relation to the Sale Contracts and, in addition, late payment interest continues to accrue in respect of certain cargoes delivered until full payment of the principal amounts."

24. Recital E recorded Mr Bashar's intention, in consideration of CEE entering into the payment agreement, to provide a guarantee pursuant to which he would "unconditionally, absolutely and irrevocably" guarantee "all of UOG's obligations under the Payment Agreement, including but not limited to the amounts owed to CEE under the Sale Contracts, and undertakes to make payment to CEE of the same should UOG not make payment of them as agreed in the relevant agreements".

25. The key operative provision of the guarantee was clause 2:

> "2.1 In consideration of CEE entering into the Payment Agreement, [Mr Bashar] irrevocably and unconditionally:

> 2.1.1 guarantees to CEE the punctual performance by UOG of all of UOG's payment obligations to CEE under the Payment Agreement, the Sale Contracts, New Spot Cargo 1 and New Spot Cargo 2;
>
> 2.1.2 undertakes with CEE that whenever UOG does not pay any amount when due under the Payment Agreement, [Mr Bashar] shall immediately on demand pay that amount as if the Guarantor were principal obligor, without any need whatsoever for CEE to have to obtain an award or judgment against UOG first; and
>
> 2.1.3 This Personal Guarantee shall stand null and void after all amount due (or falling due) under the Payment Agreement, the Contract [sic., sc "the Sale Contracts"], the New Spot Contract 1 and the New Spot Contract 2 have been received in full by CEE."

The new spot contract and subsequent payments

26. The first of the new spot contracts, which I shall call the "new spot contract", was concluded. It was for about 15,000 mt of industrial gasoil in one lot, delivery ex-ship offshore Lome in late January 2024. Payment was to be made by:

> "full settlement latest 45 calendar days from NOR Lagos (NOR=1) to seller's nominated bank account in AED … without any discount, withholding, abatement, set-off or counterclaim … For the avoidance of doubt payments received shall be allocated towards payment for the product supplied under this contract and other outstandings inline with clause 6.6 of the payment agreement dated 14 January between buyer and seller"

27. The reference to "NOR Lagos (NOR = 1)" was, counsel initially seemed to agree, a reference to the first notice of readiness given by a daughter vessel that was to tranship the cargo after its arrival at Lome. I was not sure this was right. In reply submissions both counsel accepted (in the light of a provision later in the same clause) that it envisages the first notice of readiness given on the arrival of the daughter vessel at Lagos to unload; but nothing turns on that. There was again provision for retention of title, and a release mechanism for the cargo as it was paid for. That cargo (14,941.015 mt) was carried on MT *Kmarin Restraint*. The daughter vessel tendered NOR on 2 February 2024. So, on the parties' agreed reading of the payment provision, full settlement was due by 19 March 2024.

28. The small payment due under clause 5 of the payment agreement was made, and some further payments were made between March and April 2024. CEE allocated them in differing amounts to the various contracts on which outstanding sums remained. The balance said to be due is approximately AED 125 million (around USD 33 million). Of that, some AED 31 million relates to the price under the new spot contract.

29. Some correspondence describes the sums claimed simply as due from UOG under the payment agreement and the new spot contract. But the position (as CEE accepts) is a little more nuanced. The payments due strictly *under* the payment agreement were those specified in clause 6.6, which fell due because of the new spot contract. The later instalment date never arrived because CEE decided (understandably, and as it

was entitled to) not to provide the second new spot cargo, though the payment agreement has not been terminated. The sum that was due under the payment agreement, however, partly overlaps with sums due (if due) under the original spot contracts and term contract, with which the payment agreement coexisted, but which it did not supersede.

These proceedings

30. CEE issued its claim against Mr Bashar on 17 April 2024, under the personal guarantee.

31. CEE issued its claim against UOG on 25 July 2024. That claim is put exclusively under the new spot contract. CEE accepts that if it wanted to claim against UOG under the payment agreement, it would be obliged to do so in an LCIA arbitration. It has not brought such an arbitration.

Other proceedings

32. There are two arbitrations between CEE and UOG:

    i) A claim that is subject to LCIA arbitration under the term contract.

    ii) A claim in a DIAC arbitration under the five spot contracts that preceded the payment agreement. UOG accepts that this claim is arbitrable, but disputes whether the DIAC is the correct arbitral body.

33. Criminal proceedings have also been started against Mr Bashar in Dubai because of what CEE maintains is UOG's dishonour of post-dated cheques that it was required to give under the payment agreement. Mr Bashar maintains his innocence, and says that he considers them to be "heavy-handed litigation tactics". Neither party suggested that those criminal proceedings have direct relevance to the matters I am deciding.

CEE's claim

34. As set out above, CEE claims (a) from Mr Bashar, sums allegedly due under the personal guarantee (including for the new spot contract) and (b) from UOG, sums allegedly due under the new spot contract. As I read the pleadings, the primary claim is that those sums are due under the original contracts to which they related, and that is obviously so for the claim against UOG. I think it is clear, however, that CEE also relies (as against Mr Bashar) on the partially overlapping obligations under the payment agreement: see paragraphs 28 and 29 of the particulars of claim.

The nature of the guarantee

35. I deal first with the nature of the guarantee. There are three possibilities:

    i) One possibility is that the guarantee is a demand guarantee. If so, Mr Bashar was obliged to pay any sum that CEE demanded in good faith, whatever UOG's actual liability. Since he accepts that there was a demand, and does not allege that it was made in bad faith, he would be obliged to meet it. That is CEE's primary case.

ii) The second possibility is that the guarantee is a contract of suretyship (a "see-to-it guarantee") under which Mr Bashar promised that UOG would perform the guaranteed obligations and is liable as a surety if it has not. If that is the position, CEE needs to establish that UOG is liable if it is to recover from Mr Bashar. That is effectively both parties' secondary case.

iii) The third possibility is that the guarantee requires that UOG's liability has been established by award or judgment before Mr Bashar can be called upon to perform. If so, as far as the term contract and pre-2024 spot contracts are concerned, he would not be liable until the arbitrations have concluded in CEE's favour. And so far as the 2024 spot contract is concerned, he would not be liable until this court had held UOG liable. This is Mr Bashar's primary case.

36. Identifying whether a particular contract (whatever it is called) is a demand guarantee or a classic contract of suretyship is, as the Court of Appeal pointed out in *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd* [2021] 1 WLR 5408, a matter of construction. The essential question is whether the guarantor's obligation is (a) to pay what is demanded because it has been demanded or (b) to ensure that the principal obligor meets its obligations. If the demand itself triggers the obligation to pay, the guarantor must pay even if the principal obligor is not actually liable, unless the demand is invalid or not made in good faith. If the guarantee depends on the principal obligor's actual liability, the creditor must be able to prove what that liability is.

37. This is not an issue that can be resolved simply by considering whether the parties have used the word "guarantee", or indeed whether the guarantee refers to a "demand". Both contracts of suretyship and demand guarantees are sometimes called "guarantees". Even a demand guarantee will need to say something to define the underlying category of liability that is the subject of the demand: see *Shanghai Shipyard* at [24]. And a contract of suretyship may often contain some provision for a demand to be made so as to notify the guarantor that they are being called on to perform, so that the presence of language referring to a "demand" does not determine the question (see, for example, *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2005] EWCA Civ 395, [2005] 1 WLR 2497). The difference is often more one of focus than category. Since both sorts of instrument are ways of securing payment of sums that are owed by someone else, they are bound to share much in common.

38. For obvious reasons, a creditor would often (not always) prefer a demand guarantee, and a guarantor would often (not always) prefer a contract of suretyship. Banks and financial institutions may prefer to give guarantees that do not depend on having any understanding of the actual state of the account between the principal debtor and the creditor, because they will not be in a position to know what it is. However, although demand guarantees are often given by banks and insurance companies, an individual can give one too.

39. Some cases refer to "presumptions", either based on the characteristics of the persons giving the guarantee (e.g., whether they are a "financial institution" or not) or on the language of the guarantee. Three points should be kept in mind:

i) Whatever these are, they are not "presumptions" in any technical legal sense. They are at most potentially telling matters of language or context. But since context matters, the weight that any one point has in any particular context will vary. That is one reason why Popplewell LJ, in *Shanghai Shipyard* at [32] and [43], poured cold water on arguments which proceeded from something identified in a previous case as a "presumption" to a particular conclusion in a case that arose in a different context. Where one is describing features of the commercial landscape, the word "presumption" risks giving too much abstract force to things that are probably more appropriately understood as potentially relevant contextual factors, based on commercial experience, which deserve to be considered as part of the overall picture.

ii) The same is true of points that arise from language, especially because commercial drafting is often defensive. Some language may be appropriate to either sort of contract (e.g., the word "guarantee"). Some may be largely neutral (e.g. references to the guarantor being liable "as principal obligor", which can appear in either kind of instrument: see *Shanghai Shipyard* at [36]). Some may be most likely to be directed at one rather than the other (e.g. the exclusion of some of the defences that specifically apply to contracts of suretyship at common law: see *Autoridad del Canal de Panamá v Sacyr SA* [2017] EWHC 2228 (Comm), [2017] 2 Lloyd's Rep 351 at [81]). But those cannot be regarded as a sort of litmus test, since the cautious creditor may include them as belt and braces.

iii) In many cases there will be conflicting indications. This is not surprising: if the language permits only one construction the issue is not likely to arise, and both types of security tend to play slightly different melodies but on the same strings. The court has to arrive at the best interpretation it can in the face of such inconsistencies. If the instrument being construed is precisely identical to one that has been authoritatively interpreted, then consistency would suggest that they should bear the same meaning. But where—as is usually the case—there is a mosaic of words and phrases, one should not assume that the fact that one tile in the mosaic appeared in another case, or was regarded as significant there, dictates the answer. The argument from authority is legitimate only if "the words used in the document *taken as a whole* are materially identical; and if the contractual context in which they are used is materially identical": *Shanghai Shipyard* at [34]. So just because a previous judge placed some emphasis on particular words in the context of one instrument does not mean that the inclusion of the same words will dictate the same result in another, since it is necessary to take the whole context into account.

40. One matter sometimes described as a "presumption" is the perception that a guarantee given by a financial institution is rather likely to be a demand guarantee, and that one given by a trading company is likely to be a contract of suretyship. It is clear, however, in the light of Popplewell LJ's discussion in *Shanghai Shipyard* that the language of "presumption" obscures more than it illuminates. So much depends on context. I am equally sure that Popplewell LJ did not intend his own contextual reasoning in that case to be treated as giving rise to a set of presumptions (for instance that if any part of the purpose of the guarantee is to address concerns about cash flow

then it is presumed to be a demand guarantee). The whole thrust of his judgment was to emphasise that these are highly context-sensitive assessments—to deprecate the elevation of context specific observations into general presumptions, not to offer a new set of such presumptions.

41. The commercial background to the guarantee in this case is clear. UOG was in admitted default, UOG and CEE had agreed in clear terms exactly how the account stood between them, and had spelled out a schedule for payment. The guarantee was intended to support that payment schedule. As such, it served both to reduce "counterparty risk" and to ensure cash flow. In *Shanghai Shipyard*, Popplewell LJ found that to be a factor tending to support construction as a demand guarantee: see [28]. But it does not seem to me to be a decisive factor, since a contract of suretyship can *also* serve that purpose, and in the end cash flow is itself an aspect of counterparty risk. Given that the amount to be paid had here been fixed by the payment agreement, either form of guarantee would put effective pressure on Mr Bashar as its ultimate owner to ensure that payment was duly made.

42. Another relevant aspect of the commercial background here is that the guarantee was given by an individual, not by a financial institution. It is common for such individuals to become a surety, but not (I think) common for them to give a demand guarantee, not least because they *are* likely to be in a position to know whether the principal obligor has or has not performed, whereas a financial institution usually is not. Although, in the light of *Shanghai Shipyard*, it would be wrong to describe that as giving rise to a "presumption", it remains a relevant point of context, as the Court of Appeal considered it was in, e.g., *Marubeni Hong Kong* at [30], and the many other cases set out by Blair J in *Autoridad del Canal de Panamá* at [81].

43. In terms of the language, there are indications pointing in both directions:

i) On the front of the guarantee, the "warning" to Mr Bashar was that he might have to pay "instead of UOG Oil & Gas DMCC". To my mind that is the language of suretyship, rather than of a demand guarantee, because it treats the guarantor as standing "in the shoes" of the principal obligor.

ii) Recital E provided that Mr Bashar "unconditionally, absolutely and irrevocably guarantees all of UOG's present and future payment obligations to CEE in respect of the Payment Agreement". In *Shanghai Shipyard*, Popplewell LJ thought references to "unconditional" and "absolute" liability suggested a demand guarantee in that case. But he had in mind those words in the context they were used there, which included references to the guarantor not acting as a surety. Simply on their own, they are equally applicable (and indeed, if one were to be pedantic, equally inaccurate) when applied to either form of guarantee. They seem to me to be words more of emphasis than of definition. What seems to me to be more significant—and to point to a contract of suretyship—is that *what* is said to be guaranteed is the UOG's *obligations*, which is an accurate description of a contract of suretyship (and not the focus of a demand guarantee).

iii) In clause 2.1, what Mr Bashar "irrevocably and unconditionally" (but not, this time "absolutely") guarantees is the punctual performance of "all of UOG's payment obligations". Although there is a reference to a demand in paragraph

2.1.2, the obligation to pay in response to that demand arises only "whenever UOG does not pay any amount when due under the Payment Agreement". Although there is a reference there to payment as principal obligor, that expression is not used (as it was in *Shanghai Shipyard*) in contrast to, or in some express capacity other than, suretyship. (The same is true of a reference to "principal debtor" in clause 3.3.)

iv) In clause 3.1, the guarantee is expressed to extend to "sums payable by UOG to CEE". Again that shows a focus on the underlying liability as the guarantee's subject-matter.

v) Clause 3.4 waives various defences which are applicable especially to suretyship agreements.

vi) The guarantee is "open-ended", in that it extends not only to specific sums payable on particular occasions (though it does, of course, cover them), but to "any (however fundamental) increase or addition of sums due and owing" by UOG under the relevant agreements: clause 3.4.5. It contains no monetary maximum amount.

vii) Clause 7.1, which is headed "Payments to CEE" provides "Immediately upon demand by CEE, payment of the demanded amount shall be made to CEE's nominated bank account in AED".

44. Apart from clause 7.1, the indications here, taken together, point strongly to this being a surety contract. The essential promise made by Mr Bashar is to guarantee that UOG performs (i.e. to "see to it" that UOG performs), and to pay on demand any sum that *is* due under the Payment Agreement (or related contracts), where such a demand can only validly be made if there *is* in fact such a sum that is due. Mr Bashar's obligations are expressed by reference to UOG's underlying obligations, in terms that make them co-extensive. For the most part, the "scaffolding" around that central obligation—such as the waiver of various guarantee-related defences, and the warning—is of a sort that one would expect to see in a surety contract. The background (notably the fact that this is a guarantee given by an individual UBO in respect of debts owed by a company he controls) supports the inherent probability that such a contract, not a demand guarantee, is what was intended.

45. Clause 7.1, on the other hand, has the flavour of a demand guarantee. That is not because it provides for payment "immediately on demand" (which could simply go to the time of payment), but because it refers to the payment being made "of the demanded amount". Does that show that the payment is to be made even if the demanded amount is not in fact due? In my view, read as part of the whole contract, it does not. That would attribute to a provision dealing with the mechanics and timing of payment a force that it does not have when set in the agreement seen as a whole. A "demand" for these purposes can only be made (as clause 2.1.2 makes clear) when there *is* a sum due from UOG. To regard clause 7.1 as altering the expressed intention of clause 2.1.2 and requiring Mr Bashar to meet any demand whether or not a sum is due from UOG would be to make the tail wag the dog, by turning a clause which is about *when* payment is to be made ("immediately on demand") into a clause which radically altered the previous agreement about *what* was to be paid ("any amount [that has not been paid] when due").

46. It follows, therefore, that CEE must indeed establish that UOG is in default of an obligation that Mr Bashar guaranteed if it is to succeed in its claim under the guarantee. Or, to be more precise: Mr Bashar has at least a realistic prospect of persuading a trial judge that CEE must establish that.

47. However, it does not—contrary to Mr Bashar's submissions—follow that CEE must establish that UOG *has been adjudged* to be liable. The existence of liability, and adjudication of liability, are not the same thing. A conditional bond to pay the amount of an award or judgment is quite a different thing from a guarantee of the underlying liability. An arbitral award or judgment holding a person liable does not create the liability (though it may also be an independent source of liability). What Mr Bashar promised was not that UOG would meet any award, but that it would discharge a liability to pay certain sums. The guarantee made it explicitly clear that he undertook that liability "without any need whatsoever … to have to obtain an award or judgment against UOG first". The submission that an arbitral award is a necessary precondition of Mr Bashar's liability would run directly contrary to that statement. It would also run entirely counter to the guarantee's commercial structure and purpose, for it would mean that CEE could only call on the guarantee if it first re-started (or commenced) arbitrations that the payment agreement and guarantee had stayed. It is truly a hopeless construction of the guarantee, both linguistically and in terms of commercial purpose.

48. I would therefore construe the personal guarantee as a contract of suretyship, but one which fastens on the underlying obligations of UOG and does not require that they should have been established by judgment or award. It follows that although Mr Bashar does have a realistic prospect of establishing that CEE must show that UOG is liable to it for the sums that he guaranteed, he has no realistic prospect of establishing that it cannot call on the guarantee unless or until it obtains an award or judgment against UOG.

Is Mr Bashar bound by admissions in the payment agreement?

49. Mr Bashar's personal guarantee extended to two different categories of obligation. First, it covered existing obligations, under the previous spot contracts, the term contract, and the payment agreement. Second, it covered future obligations which would arise under either of the new spot contracts, or under the payment agreement and the new spot contracts.

50. The payment agreement contained promises to pay specified proportions of outstanding sums at particular dates. It also contained in its recitals a succession of very precise and express admissions about what was due under the previous contracts. Each was described as "irrevocable".

51. Mr Bashar maintains that these admissions were wrong. He says that the amounts due from UOG for demurrage and in relation to interest were lower than UOG admitted, perhaps nothing. He submits that he can adopt UOG's defences in the DIAC and LCIA arbitrations about those points. He maintains (a) that as between CEE and UOG, UOG would be entitled to withdraw those admissions and (b) that in any event, no estoppel between UOG and CEE would bind Mr Bashar. Even though the payment agreement recited an admission that AED 95,539,694.50 was due, Mr Bashar can (he says) argue that it was not due, or that nothing was due. He can go back to square one.

52. I reject those submissions. It is clear, so that Mr Bashar has no realistic prospect of establishing the contrary, that UOG has admitted those sums are due and is obliged under and by virtue of the payment agreement to pay them. As Mr Bashar has guaranteed that obligation, so is he.

53. One starts with the payment agreement. It is a separate and binding contract between CEE and UOG. That is undisputed. For present purposes, it does two things. It contains, in its recitals, a set of admissions—expressly described as being irrevocable —that certain sums are due under the spot contracts and term contract. It also contains, independently, provisions in clause 6.6 for the payment of certain proportions of those sums following the new spot contract.

54. In *Rolls-Royce Holdings plc v Goodrich Corporation* [2023] EWHC 1637 (Comm), Foxton J described the doctrine of "contractual estoppel" as "well-established". As he pointed out, at [47], the doctrine (despite its conventional name) "is not a species of estoppel properly so-called, but simply a case of the court holding a party to its promise through a form of specific enforcement of the primary obligation assumed by requiring litigation to be conducted on the promised basis". It is "at heart, about the enforcement of promises rather than protecting reasonable reliance".

55. The first point that follows from this is that a contractual estoppel is not like an admission (of merely evidentiary value): it is a promise. By agreeing to proceed on the basis that *X* is true, a party does not merely provide supportive evidence for *X*: it binds itself to proceed *as if X* were true, even if it is not. Where that is expressed to be "irrevocable" then, unless there are grounds for avoiding or disapplying the contract by which it was made, the court will normally enforce the promise.

56. Mr Steward, who appeared on behalf of Mr Bashar, submitted that I could find no relevant promise in the recitals to the payment agreement. Like Foxton J in *Rolls-Royce Holdings,* at [49], I doubt that this is correct as a general matter, and *Richards v Wood* [2014] EWCA Civ 327 suggests that recitals may indeed be relevant. But, also as in *Rolls-Royce Holdings*, the case here goes considerably further. In particular, clause 6, imposes express payment obligations defined by reference to the amounts outstanding which have been agreed in the recitals; and clause 3.2 records that the agreement "reflects the Parties['] agreement as to how to deal with payment of the outstanding amounts due from" UOG. The "irrevocable" admissions as to what those amounts *were* is integral to the whole scheme of the payment agreement. That was essential to the parties' ability to achieve their stated purpose, which was to "agree, on a binding basis, a mechanism for the settlement of the outstanding amounts due". These are not, therefore, recitals which are merely narrative, but unconnected to the operative provisions of the agreement. They are integral to it, and expressed as being so (the language of "irrevocable" admission making that clear). I have no doubt that they must be taken as having promissory force, and to be binding.

57. Mr Steward submitted that such a conclusion must be inconsistent with clause 8.3 (a) of the payment agreement, which provided:

> "Should UOG breach any term of this Agreement whatsoever or any other agreement between CEE and UOG, CEE shall be entitled to: (a) pursue the DIAC Arbitration Proceedings and/or commence proceedings and provide a copy of this Agreement to the Tribunal as a

> proof evidencing that UOG acknowledges that the amounts due under the Term Contract and the Spot Contracts are due and owing to CEE"

A "proof evidencing that" is, Mr Steward suggests, inconsistent with the existence of a contractual estoppel: it made the agreement at most some evidence (capable of being rebutted), and implicitly therefore accepted that it was no more than that.

58. I disagree. To ordinary commercial parties, even those advised by lawyers, I do not think that reference to "proof evidencing" liability implies any possible contradiction or equivocation; and to construe clause 8.3 in that way would be inconsistent with the expressly irrevocable status of the admissions. Read in the context of the whole agreement, those words show that the parties expected that the payment agreement would in itself prove the liability—no more being needed. That would not necessarily entitle CEE to an award (for instance, there might be arguments about whether the acknowledged liability had been met, or as to subsequent interest). Reference to "proof evidencing" liability does not therefore displace the otherwise clear conclusion that the parties entered into the payment agreement on a firm, specific, and irrevocable contractual basis as to the outstanding amounts due at its date, and that it is contractually impermissible for UOG to resile from that. On the contrary, the reference to "proof" seems to me to do the opposite.

59. What of Mr Bashar? Had this been a merely evidential estoppel, it might be open to argument whether he was affected by it (though I did not hear submissions on the point). But, under the guarantee, he has guaranteed UOG's punctual performance of "all of UOG's payment obligations under the Payment Agreement". Those obligations are defined (at least in relevant part) by the agreed basis on which the payment agreement was concluded; the "contractual estoppel" is not separate from those obligations but part of them; and Mr Bashar has agreed to be bound by them. Moreover, he has himself (by Recital D to the personal guarantee) accepted as a fundamental basis for entering into the guarantee that "As at the date of this Guarantee, a total amount of AED 119,968,162.49 is owed by UOG to CEE". In those circumstances, he is equally incapable of resiling from the agreed calculation—consistent with his own contractual promise to pay what UOG owes under the payment agreement, which is the sum that it has irrevocably admitted by that very agreement that it owes.

60. It follows that Mr Bashar is contractually obliged to pay (if UOG has not) those amounts that UOG contractually agreed—by the payment agreement—were due in relation to the original spot contracts and the term contract, including interest that had accrued on those sums up to the date of the payment agreement. He is obliged (directly) to pay those sums in so far as they fell due under clause 6.6 of the payment agreement. He is obliged, as to the balance, to pay them because they are—both as between UOG and CEE, and as between CEE and him—conclusively agreed to have been due under the original spot contracts and the term contract by virtue of the terms of the payment agreement.

The issue under section 49 of the Sale of Goods Act 1979

61. In principle this issue could have arisen in relation to (a) the price for the second cargo delivered under the term contract (carried by the *HS Arge*) and (b) the price for the cargo delivered under the new spot contract (carried by the *Kmarin Restraint*). I

have held that the combination of the payment agreement and the personal guarantee prevents Mr Bashar from challenging the sum due under the term contract. But the issue still arises for the new spot contract, and would be relevant if I am wrong about the contractual estoppel issue under the term contract.

62. Section 27 of the Sale of Goods Act 1979 provides:

> "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale."

Section 55(1) provides:

> "Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract."

63. It might be thought that this leaves the parties free to decide when the price is due, and that their agreement in that respect would be enforced. Section 49 of the Sale of Goods Act 1979, however, provides as follows:

> "(1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
>
> (2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract ."

64. In *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 WLR 2365 (also known as *Caterpillar (NI) Ltd*), the Court of Appeal unanimously held that section 49 is a "complete code" (not simply a default term), and that unless subsection (2) is satisfied, no action for the price can be maintained before property in the goods has passed. The effect is that, where title is reserved, no action can lie for the price unless the seller has either satisfied the conditions set out in subsection (2), or has agreed to forego the reservation of title and transferred it to the buyer.

65. In *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] AC 1034, Lord Mance thought that this was wrong. It is hard to see why English law, usually committed to maximising the contractual freedom of sophisticated commercial actors, should tie their hands in this matter by virtue of a provision that was intended to replicate the practice of pleading different counts of *indebitatus assumpsit* in the mid-nineteenth century. But those comments, though powerful, were *obiter dicta*. Ms Allsop, who appeared for CEE, accepted that I am bound by *FG Wilson*, and that although Lord Mance's observations would provide a very powerful

argument in favour of granting permission to appeal, I could not decline to follow a considered and binding Court of Appeal decision. While reserving CEE's position if the case goes further, therefore, she accepts that if she must establish that the price is due, she needs to bring CEE within s 49(2).

66. The question then becomes: what is meant by the expression that the price be "payable on a day certain irrespective of delivery"? (It was common ground that these are the critical words. The final words of the subsection "although the property in the goods has not passed and the goods have not been appropriated to the contract" do not add additional conditions, so that s 49 (2) can apply even if the goods *have* been appropriated: "although" is to be read as "even if …" not "provided that …".)

67. On behalf of Mr Bashar and UOG, Mr Steward argued that a "day certain irrespective of delivery" means that the day must be defined in the contract in a way that is neither logically nor practically connected to delivery. For CEE, Ms Allsop contended for a "broad" meaning, and ultimately (as I understood it) that so long as the day was fixed by reference to something other than delivery as such, the subsection would be satisfied. She supported that contention by reference to the decision of Judge Yang in the High Court of Singapore in *Mitsubishi Corp RTM International Pte Ltd v Kyen Resources Pte Ltd* [2016] SGHCR 6, and of Martin Spencer J in *Readie Construction Ltd v Geo Quarries Ltd* [2021] EWHC 3030 (QB).

The origin of s 49(2)

68. This is one of those occasions where it is necessary to trace legal development historically. As so often the history is obscure, and bound up with questions of forms of action, pleading practice, and commercial background. In *Pordage v Cole* (1669) 1 Saund 319, 85 ER 449 an action was brought under a deed which had been given by the purchaser for the purchase price of land. The deed provided that the price was to be paid "a week after the feast of St John the Baptist next following". It was held that the action lay in debt, without proof that the land had been conveyed. The court assumed that, if necessary, the purchaser could sue in covenant to obtain the land. In other words, the model being assumed was one in which the obligation to pay and the obligation to convey were, in that case, separate enforceable obligations.

69. Working out whether covenants were independent or dependent was often controversial. Sergeant Williams' influential notes to Saunders' report of *Pordage* lament (note 4, 85 ER 450) that

> "Almost all the old cases, and many of the modern ones on this subject, are decided upon distinctions so nice and technical, that it is very difficult, if not impracticable, to deduce from them any certain rule or principle by which it can be ascertained, what covenants are independent , and what dependent; and of course, when it is necessary to aver performance in the declaration, and when not."

70. One example given where promises would be construed as independent was given as follows:

> "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the

> thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance ; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent … This seems to be the ground of the judgment in this case of *Pordage v Cole*, the money being appointed to be paid on a fixed day, which might happen before the lands were, or could be, conveyed."

71. In *Dunlop v Grote* (1845) 2 Car & K 153, 175 ER 64, the plaintiffs agreed to sell 1,000 tons of iron to the defendants. The contract provided that "if the delivery of the said iron should not be required by the defendants on or before the 30th day of April, 1845, the said iron was to be paid for by the defendants on the day and year last aforesaid". Some of the iron had been delivered and paid for; some had never been called for. The plaintiffs averred that they were ready and willing to deliver the iron, and that the specified date had passed, and claimed the balance of the price. The defendants took two points. First, that the plaintiffs could not show that they were "ready and willing" to deliver the iron unless specific iron had been appropriated to the contract. That argument failed. Secondly, the defendants argued that the plaintiffs were not entitled to the price, but only to damages, because "a party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant". For that proposition, the defendants relied upon *Laird v Pim* (1841) 7 M&W 474, 151 ER 852. In *Dunlop*, Cresswell J was able, from the bench, to accept the argument that he had made from the bar in *Laird v Pim* (which he had argued unsuccessfully as counsel), and hold that since the contract specified payment by a certain day, *Pordage v Cole* applied: "My present opinion is, that the plaintiffs are entitled to recover the whole sum as it was agreed to be paid on a day certain". Although the underlying reasoning was not expounded at greater length, it seems likely that what Cresswell J had in mind was not the significance of that fact as such, but that it showed that the parties had elected to treat the obligation to pay the price and the obligation to transfer title to the goods as independent promises, since the obligation to pay could (on the contract they had written) have occurred before delivery or transfer of title.

72. Section 49(2) closely tracked the decision and the language of *Dunlop*: the "day certain", the irrelevance of delivery, and the absence of appropriation or passing of title. Perhaps surprisingly, it did not include something that *was* regarded by the nineteenth century as essential, even in such a case, namely that the seller should be ready and willing to deliver the goods. That requirement was left implicit. (That had been alleged in *Dunlop*, and was regarded as necessary to maintain an action for the price: see *Maclean v Dunn* (1828) 4 Bing NC, 130 ER 947, which itself shows that there were at least some cases in which lawyers in the early nineteenth century considered an action for the price could be maintained even though title had not passed.)

73. Section 49(2) therefore encapsulated—though it did not comprehensively describe—a situation in which it was recognised that the obligation to pay and the obligation to transfer title could be regarded as independent obligations. It is not clear that it really went much further than that.

74. The paradigm cases that Sir Mackenzie Chalmers probably had at the front of his mind when drafting section 49(2), "day certain" were simple: in *Pordage v Cole* it was "a week after the feast of St John the Baptist next following"; in *Dunlop v Grote* it was "30th April 1845". In such a case, one might wonder what force the words "irrespective of delivery" would carry. There are various possible answers. One is that they might have been inserted to suggest that if the *same* day was fixed for delivery, the usual conclusion might well be that delivery and payment were concurrent rather than independent conditions, as Williams' notes on *Pordage* suggested. Or, in a world where "reservation of title" after delivery was not usual, it might simply have seemed that the subsection would never apply if delivery had taken place. Another possibility is that the words qualify not the "date certain", but the obligation to pay. Yet another is that they serve no specific purpose, but simply reflect a conservative attempt to codify the decision in *Dunlop,* an indication of the drafter's "focus" (as Lord Mance put it in *The Res Cogitans* at [50]). The reference remains a puzzle though, because it is not delivery as such (the passing of *possession*) but the passing of *title* that section 49(1) normally makes important, so in neither case is it easy to see why "irrespective of delivery" should matter, unless it simply put into words what happened to be the facts of *Dunlop*. Why shouldn't the parties agree that the price is payable on delivery, even if property passes later? Why shouldn't such an agreement be given effect? The absence of any convincing answer to that question makes interpretation difficult, because if we cannot see why the words are there it is hard to know what force they are supposed to have.

Early decisions under the Sale of Goods Act 1893

75. The first case that it has been suggested touches upon the issue of what might be meant by a "date certain"—by Males J in *The Res Cogitans*, at first instance, [2015] EWHC 2022 (Comm)—is the Court of Appeal's decision in *Workman, Clark & Co Ltd v Lloyd Brazileno* [1908] 1 KB 968. That concerned a shipbuilding contract which, Males J thought in *The Res Cogitans,* the Court of Appeal "rightly or wrongly" regarded as a contract for the sale of goods. The contract provided for payment in four instalments of £17,960 which were to occur when specified events took place: one when the keel was laid, one when the vessel was framed, one when the vessel was plated, and the last upon completion, delivery, and acceptance. The case concerned the first instalment. To obtain summary judgment under the rules of court then in force, the plaintiff shipbuilders had to show that the claim was for a "debt or liquidated amount". The Court of Appeal held that it was such a claim. The buyer's unpromising main argument was that at common law a debt payable in instalments was not due as a debt until the last instalment had fallen due. Some familiar cases were cited and discussed, including *Pordage* and *Dunlop*.

76. The focus of the argument was not on the Sale of Goods Act 1893, but Lord Alverstone CJ did refer to it. He said (at 977):

> "Without laying too much stress upon the provisions of the Sale of Goods Act, 1893, s. 49, as bearing on the present question, it may be observed that by sub-s. 2 of that section it is provided that, 'where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have

> not been appropriated to the contract.' The defendants' counsel contended that this sub-section does not apply to a case where the price of the article sold is payable by instalments. I do not quite see why it should not …"

77. Farwell LJ and Kennedy LJ also seemed to think that section 49 supported the shipbuilders' case. However, it is not clear that anyone's mind was really focused on the meaning of "date certain" in section 49.

78. Although Males J thought that the court was clearly treating the contract as one for the sale of goods, I am not myself so sure. Neither party argued that section 49 was applicable or decisive. The buyer's contention was that there was a common law rule (quite apart from section 49) that if a sum was payable in instalments, no claim for debt arose until all instalments had fallen due. The court referred to section 49 not to apply it, but to show (by analogy) that since even the common lawyer's paradigm case of debt (payment of the price for goods under a contract of sale) would permit the recovery of instalments as they fell due, it was highly improbable that the common law was different. Nobody's mind was really focused on the question whether "laying the keel" could define a "date certain" for the purposes of section 49(2). But it is fair to say that nobody seemed to think it could not.

79. With the possible exception of that decision, the meaning of "day certain irrespective of delivery" does not seem to have been directly addressed until 1928. (In *Mitsubishi* at [71], Judge Yang cites *Polenghi v Dried Milk Co Ltd* (1904) 10 Com Cas as a contrasting authority, but it does not seem to me to touch the issue.)

80. Two briefly reported early twentieth century decisions tended to take a restrictive view. In *Stein, Forbes & Co v County Tailoring* (1916) 115 LT 215, a CIF contract for the sale of sheepskins provided for payment "net cash against documents on arrival". When the shipment arrived, the buyers refused to take up the documents. Atkin J held that the seller was entitled only to damages, and not to the price. Faced with an argument (from Mr Wright KC, as he then was) that section 49(2) applied, Atkin J said:

> This is not the case of a day being appointed for payment of money and the day happening before the thing which is the consideration of payment. In such a case, which falls within one of the well-known rules in the notes to *Portage* [sic] *v Cole* … the money can be claimed before performance. Such a case is provided for by the Sale of Goods Act 1893 [s 49(2)]. … [T]his is not a case where the price is payable on a day certain irrespective of delivery. On the contrary it is payable expressly against delivery.

81. That was followed by Roche J in *Muller, MacLean & Co v Leslie & Anderson* (1921) 8 Ll L Rep 328—another case of refusal to accept documents. Roche J explained that title had not passed: "under … the Sale of Goods Act, the property remains in the sellers for the very good reason that they desire to have the security offered by the retention of property in the goods". So section 49(1) did not bite. The plaintiff argued that since payment was to be made "against documents", section 49(2) applied. Roche J said that he was deciding the case on the basis that payment against documents made "no provision for there to be payment on a day certain irrespective of delivery".

Exactly whether he thought that this was because presentation of documents did not occur on a "day certain" or that it was not a "day certain irrespective of delivery" (because presentation of documents was, in substance, delivery) is not clear, though I would be inclined to think that it was the latter. Both decisions seem to have been motivated by the judges' preference to preserve the buyer's ability to refuse delivery, albeit wrongfully, and pay damages, and to avoid the mere presentation of documents being sufficient to trigger an obligation to pay in debt.

82. The issue was squarely faced in *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com Cas 39. The buyers agreed to buy 1,000 tons of oil at £4 per ton, in roughly monthly quantities between June 1926 and June 1927. Payment was to be made within 14 days of despatch or, at the sellers' option, before delivery. The contract, however, also provided "Sellers have the right at any time to invoice to buyers the due quantities of oil not taken up, and to demand payment of the invoice amounts … or the sellers may, at their option, instead of invoicing, cancel such undelivered balance".

83. The background to the contract was the industrial unrest of 1926: the buyers wanted to be able to obtain oil in case the coal they usually used was in short supply. By the end of 1926, the strikes were over, and the buyers no longer needed oil. They repudiated the contract in February 1927. The price of oil had risen above the contract price, so that the sellers had no claim for substantial damages. With 466 tons left to be delivered, the sellers invoiced for the entire price of that quantity. The buyers contended that they should pay only nominal damages for non-acceptance.

84. Having referred to section 49, and noting that title had not passed (no oil having been appropriated to the contract, much less delivered), Wright J (as he now was) said that "time certain" means (at 43):

> "a time specified in the contract not depending on a future or contingent event … irrespective of the passing of the property or delivery."

He found that there was not "time certain". From this, it must follow that he did not regard the date of invoicing—which depended on the sellers' choice—as a "time certain". The authority he cited for that proposition (*The Merchant Shipping Co v Armitage* (1873) LR 9 QB 99) was not a sale of goods case, but a claim for freight under a charterparty. The freight was payable after discharge and delivery "two months after the ship's report inwards at the custom house". The point for which Wright J relied on it was a tiny discussion of interest at the very end of the case, in which the court held that interest was not due because the freight was not payable at a "time certain". This seems, with respect to a great commercial judge, a rather slender reed of authority.

More recent decisions

85. One might think that if *Shell-Mex* is correct, and if Wright J's analogy to *The Merchant Shipping Co v Armitage* is sound, that (a) a date fixed by reference to an invoice (dependent therefore on the seller's decision about when to invoice) or (b) a date fixed by reference to the arrival of a vessel (dependent therefore on "a future or

contingent event") would not be a "date certain", which would need to be fixed by reference to the calendar or to some certain event.

86. In *Otis Vehicle Rentals Ltd v Cicely Commercials Ltd* [2002] EWCA Civ 1064, the Court of Appeal was considering a claim arising out of a hire purchase agreement. The defendants sold some vehicles to a financing company, which then sold them on hire-purchase to the claimants, and the defendants agreed to "buy back" the vehicles at the end of the hire period. The defendants refused to accept the vehicles back. The question was whether the claimants could claim the agreed price, or were restricted to damages. By the time of trial, the claimants had sold the vehicles to third parties, and so would not have been able to claim the price. In reversing the trial judge's decision that the price could nevertheless be claimed, Potter LJ said (at [16], emphasis in the original):

> "[T]he agreement that a buy-back at the price agreed would take place three years after the date of the original sale did not in my view amount to an agreement that the price was payable on a day certain *irrespective of delivery*. The commercial reality was that, had the buy-back proceeded, the payment paperwork and arrangements for delivery of the vehicle would all have been coordinated and dated so as to have simultaneous effect as a matter of routine co-operation between the claimants, the defendants and [the finance company]."

He also held—and seems to have regarded it as an even stronger point—that section 49(2) could not be relied on anyway because the seller was not ready, willing and able to deliver the vehicles, a requirement which, although not expressly stated in section 49(2) is clearly established as a precondition. Neither counsel suggested that I could make much of these remarks, given in a case where the respondent did not make submissions, and where there was an easy route to the same answer.

87. In *FG Wilson*, Longmore LJ thought that an obligation to pay by reference to an invoice date would be on a "day certain". The point was obiter, because the seller was not relying on section 49(2): see [23]. At [44], having said that to avoid the consequences of section 49(1) a buyer "only has to provide for payment to be due on a day certain", Longmore LJ said that a term that payment would be due "within 30 days of the date of the invoice" would have achieved that. But it must be borne in mind that the point had not arisen for decision, and that the court did not have before it all the relevant authorities (notably, not *Shell-Mex*).

88. In *The Res Cogitans*, at first instance [2015] EWHC 2022 (Comm), Males J considered this point. The discussion is, again, *obiter* given his other conclusions ("doubly *obiter*" as he himself put it in [74]). He considered relevant authority including *Shell Mex*. Males J, however, considered that "provision for payment to be made within a fixed period after delivery is sufficient to satisfy the requirement in section 49(2)" [73]. He cited the Court of Appeal's decision in *Workman, Clarke & Co Ltd* as authority for his view that a "date certain" could be defined by reference to a contingent event, but did not extensively discuss the meaning of "irrespective of delivery".

89. When *The Res Cogitans* reached the Supreme Court, Lord Mance referred to section 49(2) and said that the words "payable on a day certain" were "words which can no

doubt be construed liberally, as Longmore LJ was minded to" [50]. Plainly Lord Mance was not troubled by any inconsistency between Longmore LJ's observations in *FG Wilson* and Wright J's judgment in *Shell-Mex* (to which the court was referred, and which Lord Mance discusses at [52]).

90. These various cases are, then, mixed. There is (a) clear first instance authority that "date certain" must be a date fixed without reference to any contingent future event, (b) indirect Court of Appeal authority—not exactly *obiter,* but not in response to direct submissions focused squarely on the point, that instalments defined by reference to such events may trigger payment, (c) recent Court of Appeal dicta (plainly *obiter*, and made without citation of all the relevant authority, but mentioned with apparent endorsement by Lord Mance in the *Res Cogitans* where the relevant authority had been cited) that a date may be a "date certain" although fixed by reference to a contingent future event, and (d) "doubly obiter" first instance authority expressing the opinion of an extremely experienced commercial court judge to the same effect.

The most recent decisions

91. I turn to the two more recent cases. The first in time is a decision of the High Court of Singapore: *Mitsubishi Corp RTM International Pte Ltd v Kyen Resources Pte Ltd* [2016] SGHCR 6. The contract in that case was for the sale of aluminium by the plaintiff seller to the defendant buyer. The contract provided for payment "100% net cash via wire transfer within 30 days after Seller's presentation of the documents". It contained a retention of title clause. Various shipments were made; invoices were raised, and they were not paid. The buyer argued that the seller had to elect between its claim for the price, and its proprietary claims to retention of title. It relied on section 49 of Singapore's Sale of Goods Act, which is materially identical to the UK statute.

92. Judge Yang preferred a "less restrictive understanding" of section 49(2) [71]. He could see no reason of principle or policy why the seller should not be able to come within the terms of section 49(2) and claim the price under a term which provided for "price to be payable on a date ascertainable by reference to delivery" [72], and was impressed—understandably—by the practical unreality of restricting s 49 to cases where the contract itself identifies a fixed and inevitable date. He therefore construed "date certain" to mean "date ascertainable" (including from contingent events, including delivery).

93. What of the words "irrespective of delivery"? Judge Yang interpreted those as "permissive not exclusory" [65]. In explaining precisely what he meant, Judge Yang used various different formulae. His ultimate conclusion as I understand it is that they were words inserted to make it clear that a "date certain" could be selected and applied *even if delivery had not occurred*: "It is intended to relieve parties from the default position that a day certain for payment is concurrent with delivery, but not to preclude parties from associating the time for payment with delivery if they so wish" [65]. In other words, those words function very like the words at the end of the subsection to mean, in effect, that a day certain can be stipulated for payment "whether or not delivery has taken place, whether or not the goods have been appropriated, and whether or not title has passed", rather than to limit the reach of

section 49(2) to a particular sub-class of days certain namely those that are defined "irrespective of delivery".

94. *Readie Construction Ltd v Geo Quarries Ltd* [2021] EWHC 3030 (QB) is a decision of Martin Spencer J on an appeal against a summary judgment. The buyer ordered 31,000 mt of aggregate. After delivery and invoice, the buyer claimed that the goods were defective, and suspended payment. The contractual terms, however, provided that payment was due "in full without any deduction or withholding whatsoever" at the end of the calendar month of invoicing, and that title would remain in the seller until payment was made. A key argument for the buyer, therefore, if the "full payment" clause was effective (as it was), was to argue that the price was not due until title had passed.

95. Martin Spencer J considered many authorities, including *Shell-Mex*. He accepted, on the facts of the case, that some sort of delivery was required to trigger an obligation to pay the price (a delivery of feathers, when aggregate was required, would not trigger the obligation). He nevertheless held that section 49(2) applied. Having pointed out that delivery and payment will often be concurrent conditions, he said (emphasis in original):

> "If that is right, and if one reads the words 'the price is payable on a day certain irrespective of delivery' together, then it can be seen that what is envisaged is a contract whereby delivery and payment on a day certain are divorced from each other, although the contract may still provide for delivery at some other time and, indeed, delivery (or purported delivery) may be a pre-condition for payment of the price, as here. In my view, Judge Yang was right to focus on *the time* of delivery and *the time* of payment. Once these are divorced from each other under the terms of the contract, the contract becomes one whereby the price is payable on a day certain irrespective of delivery."

96. Mr Steward criticised this reasoning, while Ms Allsop reminded me that although not bound by Martin Spencer J's decision, judicial comity would require me to follow it unless I was convinced that it was wrong. I would not myself have expressed matters quite as Martin Spencer J does, or placed the stress that he lays on temporal divorce. Nor do I think that was the main ground of Judge Yang's reasoning, which was rather on the idea that the words "irrespective of delivery" were permissive not restrictive and *allowed* parties to stipulate a day certain "whether or not" it was tied to delivery. But to have reservations over the detail of a judgment's reasoning is not the same thing as to have a conviction that it is wrong.

97. I should also refer to some academic discussion. The editors of *Benjamin of the Sale of Goods* adopt a slight variation on the theme ("can be determined independently of the action of either party or any third person"). The editors of *Chitty on Contracts* (at para 47-366) take essentially the same approach and are also doubtful about *Readie* (not surprisingly, since it appears to be the same author responsible for both). That change from Wright J's formulation in *Shell-Mex* seems to be designed to accommodate *FG Wilson* and Males J's comments in the *Res Cogitans*. But, if so, it does not go far enough, for neither case referred to the need to fix the event independently of the action of the parties to the contract or any third party: on the contrary, Longmore LJ fixed the event by reference to one of the parties' actions

(invoicing) and Males J would have been content to have it fixed by reference to delivery. Indeed, unless *Workman, Clark & Co Ltd* is treated as authority, the only pre-2000 authority which directly considered the question—*Shell Mex*—requires a date fixed by the contract without reference to any contingency at all. I cannot therefore see the Benjamin/Chitty approach as an accurate reflection of the law. On the other hand, Bridge, *Sale of Goods* (4th ed, OUP 2019) at para 11.70 fully supports the view that a date is a date certain if it can be ascertained ("*id certum est quod certum reddi potest*"), and advocates a construction of section 49(2) which places the spirit—which he sees essentially as permitting an action for the price so long as it is unconditionally due—over the letter.

98. I return to the question: should I follow *Readie*? Despite my doubts about its precise reasoning, I should. There are two separate aspects.

99. First: can a "day certain" be defined by reference to a contingent or future event, and can such an event include something that is to be done by one of the parties or a third person? On that issue, really *only Shell-Mex* stands in the way. It is a decision based on slender and barely relevant authority, there are many considered dicta of distinguished pedigree on the opposite side of the argument. *Readie* is plainly on the opposite side, and neither *obiter* nor *per incuriam.* I face a choice between two different first instance decisions. I have no hesitation, given both the weight of authority and the weight of reason, in preferring the view that a "day certain" can be so defined: that it means an *ascertainable date* not a *pre-specified* calendar date.

100. Second: what force does "irrespective of delivery" carry? On that point I have greater doubt. If those words do mean that a date certain cannot, for the purposes of section 49(2) be defined by reference (directly or logically) to the date of delivery, that undoubtedly produces some anomalies. Why not? But I do not myself find *Readie's* temporal analysis a satisfactory answer. To my mind, Judge Yang's approach is more promising. The real underlying point behind section 49(2) was to distinguish between independent and concurrent obligations, and it is just about linguistically possible to treat "irrespective of delivery" not as meaning "so long as the date certain is not fixed by reference to delivery" but as "whether or not the date certain is fixed by reference to delivery". However, this does not seem to have been the interpretation given to those words in *County Tailoring* or *Muller* or *Otis*.

101. In practical terms, however, my hesitation over this aspect of the decision in *Readie* (and, more generally, my uncertainty about the correct solution) makes no difference here. For even if one adopts a more restrictive view under which a "date certain" does not qualify for the purposes of section 49(2) unless it is both temporally and legally independent of the date specified for payment, the date here would so qualify. In any event, as things stand, my doubts about that would not be such as to lead me to refuse to follow *Readie.*

102. I conclude that, read in context, section 49(2) does not require the "day certain" to be specified without reference to any contingent or future event, nor that it be an event outside the control of the parties or a third party. Although that was the view of Wright J in *Shell-Mex*, highly persuasive *dicta* of distinguished commercial judges (Males J in *The Res Cogitans*, Longmore LJ in *FG Wilson*, and Lord Mance in *The Res Cogitans*), as well as the persuasive reasoning of Judge Yang in *Mitsubishi* and the actual decision of Martin Spencer J in *Readie*, speak with one voice: a day is

certain if it is ascertainable, including by reference to an uncertain event or something that one of the parties does (delivery and invoicing) or a third party does. Moreover, although none of the cases seems to have hit on a fully intellectually convincing explanation of what work the words "irrespective of delivery" are doing in section 49(2), there is no reason to give them wide force; and they cannot be taken to matter unless delivery and payment are expressed as simultaneous and concurrent conditions. The fact that delivery either legally (as in *Readie*) or factually will or may precede or roughly coincide with the "date certain" is not enough to disqualify it.

103. In this case, under the new spot contract, the time for payment was fixed by reference to the giving of notice of readiness which (the parties agree) was the notice of readiness which would be given when the first of the daughter vessels that offloaded cargo from the vessel that had carried it offshore arrived to begin discharge at Lagos. That notice would likely occur following delivery (which was to be ex-ship, i.e. when the cargo passed from the vessel that had carried it to Lome to the transhipping vessel), but it was not linked to it. If the law is as I have stated it, I am sure that this would be both a "date certain" and "irrespective of delivery". It would be a date certain (following *Readie* and the more recent authorities) because it is ascertainable from the occurrence of an event defined in the contract, though not specified as a fixed date. And it would be irrespective of delivery because it would not be bound to coincide with delivery, and because (moreover) nothing in the contract makes payment conditional upon delivery having occurred. Had it arisen, the same would have been the case under the term contract, which specified a date by reference to the bill of lading date or completion of discharge. (CEE submitted that that was amended by the payment agreement so that it too depended on the notice of readiness tendered by the daughter vessel under the new spot contract. I do not need to decide whether that is so, since it would make no difference to the position.)

104. However, although that is my own view, I must still consider whether this is a case appropriate for summary judgment. Of the cases that I have discussed above, only *FG Wilson, The Res Cogitans* (both at first instance and in the Supreme Court), *Mitsubishi*, and *Readie Construction* were before me or the subject of detailed argument. *Otis* was produced, at my request, during the hearing. *Dunlop* was mentioned, but counsel had not located a copy. None of the other authorities I have referred to were cited or discussed, and of the text-books only Benjamin was mentioned. I do not say that in any way as a criticism of counsel: this was a summary judgment application, listed for one day, with several issues to be covered.

105. In favour of granting summary judgment, it would be said that the conclusion I have reached is fully in line with a number of recent authorities, including one (*Readie*) in which a decistion to grant summary judgment was upheld on appeal. The conclusion I would reach would be one that gives me no qualms: it leads to the enforcement, in accordance with its terms, of a commercial contract. On the contrary, if section 49 makes retention of title clauses practically very difficult to operate, that would be a black mark against English commercial law. On the other hand, although it is undoubtedly a point of law, it would be difficult to describe it as a "short point" of law, and the fact that I have thought that a properly reasoned judgment needs to consider many authorities that were not the subject of detailed argument suggests that it is not. I bear in mind Mr Steward's submission about the risk of giving summary judgment in areas where the law is developing (*Richards v Hughes* [2004] EWCA Civ

266). But this is not an area—like duty of care in tort—where it can sensibly be said that findings of primary fact are likely to be critical.

106. Despite the complexity and interest of the point, and although it would warrant fuller argument than it has received before me especially on appeal, I am essentially simply following a recent decision (*Readie*) which itself swims in the stream of the recent cases. And—in relation to the point that I think is most obscure, which is the meaning of "irrespective of delivery"—I am doing so in a case which seems pretty clear cut on any view. In those circumstances, and bearing in mind that there is no factual dispute and that a trial judge would be no less hamstrung than I am by first instance authority, I shall grant summary judgment on the basis that on the law as it stands at first instance the defence has no realistic prospect of success. I consider, however, that the topic (perhaps alongside the question whether *FG Wilson's* conclusions about the role of section 49 generally, in so far as that is a matter open in the Court of Appeal) is very much ripe for appeal, and deserves a fully researched argument at greater length than it received before me.

The issue in relation to allocation of payments

107. The final set of questions concerns allocation of payments. In short summary, UOG and Mr Bashar say that payments have been allocated by CEE not first in time to the oldest debts, but in a way that spreads them across the various debts. That, they submit was capricious or irrational and in breach of a *Braganza* duty to act rationally: *Braganza v BP Shipping* [2015] UKSC 17, [2015] 1 WLR 1661.

108. I can deal with the point shortly. The payment agreement provided quite specifically for how the various payments were to be calculated, and by inference the obligations that they were to be taken to discharge. It also provided, by clause 7.1 that "In the event that there is any doubt as to how any payment from UOG should be allocated, CEE is entitled to, at its absolute discretion, allocate the payment … at thinks fit". The new spot contract expressly envisaged application consistently with the payment agreement.

109. Mr Bashar and UOG contend that it was capricious or irrational for CEE not to allocate the payments on a "first out, first in" basis. They do not suggest (and cannot suggest) that what CEE did—which was to allocate the payments *pro rata* between the outstanding amounts in rough accordance with the sums that under the payment agreement contributed to their calculation—was done in bad faith. The contention that this was irrational, and that the only rational approach would have been "first out, first in" is, in my view, entirely hopeless. Whether or not CEE was obliged to adopt the approach that it did, it was plainly a rational approach that was fully consistent with the parties' agreement and expectations.

110. This argument affords UOG and Mr Bashar no realistic prospect of defending the claim, even if (doubtful as it might be in the face of clause 7.1) any *Braganza* duty applied.

Other issues

111. The remaining issues would have concerned (a) whether UOG was in fact liable for demurrage under the spot contracts and (b) whether UOG was in fact liable for default

interest under the spot contracts. The issues were only really touched upon in argument. They are rendered moot by my conclusion that UOG (and Mr Bashar as guarantor) are bound by the admissions in the payment agreement, so that the defences being relied on in the DIAC and LCIA arbitrations are bound to fail.

Conclusion

112. For the reasons I have given I find that, although the guarantee is not a demand guarantee so that CEE must establish UOG's liability, it has done so. Mr Bashar and UOG have no realistic prospect of defending the claims against them. So far as the original spot contracts and the term contract are concerned, that liability is fixed by admissions in the payment agreement which are binding upon UOG and thereby determine Mr Bashar's liability. So far as the new spot contract is concerned, the contract specified a "day certain" on which payment was to be made. It follows that I shall grant summary judgment, and dismiss the application to amend the defence.

113. I shall hear counsel, to both of whom I am extremely grateful for the focus they brought to their submissions, on the form of my order, costs, and permission to appeal.