Neutral Citation Number: [2018] EWHC 1731 (Comm)

Case No: CL-2017-000012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2018

Before :

PETER MACDONALD EGGERS QC (Sitting as a Deputy Judge of the High Court)

- -

Between :

SIXTEENTH OCEAN GMBH & CO KG	**Claimant**
- and -	
SOCIÉTÉ GÉNÉRALE	**Defendant**

- -
- -

Peter de Verneuil Smith (instructed by **Holman Fenwick Willan LLP**) for the **Claimant**
Emily Wood (instructed by **Dentons UK and Middle East LLP**) for the **Defendant**

Hearing dates: 19 April 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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PETER MACDONALD EGGERS QC

Peter MacDonald Eggers QC:

Introduction

1. The Claimant ("16th Ocean") is a shipping company incorporated in Germany and is a wholly owned subsidiary of the Islamic Republic of Iran Shipping Lines ("IRISL"). IRISL also owned three other subsidiary companies ("13th Ocean", "14th Ocean", and "15th Ocean").

2. On 4th February 2005, each of these four subsidiaries of IRISL entered into a shipbuilding contract with Hyundai Heavy Industries Co Ltd ("Hyundai") for the construction of a container carrier by Hyundai and its purchase by the IRISL subsidiary. The fourth of these vessels - the vessel *Zagros* or vessel no. 1821 ("vessel no. 4") - was intended to be acquired by 16th Ocean.

3. On 23rd August 2006, each of the IRISL subsidiaries entered into a loan agreement ("the Loan Agreement") for a facility in the sum of US$235,537,280 in order to finance the construction and purchase of these vessels.

4. The Defendant ("SocGen") was a party to the Loan Agreement in the capacity as "*Agent*", a "*Lender*" and a "*Swap Bank*". The other lenders under the Loan Agreement were Crédit Agricole Corporate and Investment Bank ("Crédit Agricole") and The Export-Import Bank of Korea ("KEXIM"). I shall refer to SocGen, Crédit Agricole and KEXIM as "the Lenders".

5. In September 2007, 16th Ocean and the other IRISL subsidiaries entered into an interest rate swap agreement to hedge their exposure to interest rate fluctuations in respect of the Loan Agreement. The interest rate swap agreement was contained in or evidenced by a 1992 ISDA Master Agreement and Schedule dated 12th September 2007. On 18th September 2007, 16th Ocean and SocGen as Swap Bank entered into a swap transaction to hedge 16th Ocean's obligations in relation to vessel no. 4, contained in or evidenced by a Confirmation dated 18th September 2007 ("the Swap").

6. Three of the vessels were built by Hyundai and delivered to three of the IRISL subsidiaries (13th Ocean, 14th Ocean, and 15th Ocean) in 2008. For each of these vessels, the facility under the Loan Agreement was used to fund the payments due to be made for the acquisition of these vessels.

7. In September 2008, the US Department of the Treasury Office of Foreign Assets Control ("OFAC") designated IRISL, its subsidiaries and vessels owned or controlled by IRISL, including the three vessels acquired by 13th Ocean, 14th Ocean, and 15th Ocean, as Specially Designated Nationals under Executive Order 13382. On 10th November 2008, OFAC further prohibited all "*U-turn*" dollar transactions with any Iranian entities.

8. As a result, in December 2008, SocGen as Agent informed the IRISL subsidiaries that the final advance under the Loan Agreement, required by 16th Ocean to purchase vessel no. 4 could not be drawn down. As a result, 16th Ocean did not pay the funds outstanding for the purchase of vessel no. 4.

9. On 31st December 2009, Hyundai terminated the shipbuilding contract.

10. During 2010, the Lenders demanded repayment of outstanding sums due under the Loan Agreement and the interest rate swap agreement, which led to the Lenders' purported acceleration of all sums due under those agreements, such that more than US$200 million was said to be due and owing by the IRISL subsidiaries to the Lenders.

11. On 9th June 2010, SocGen as Swap Bank demanded payment from 16th Ocean of US$8,889,063.42 ("the Termination Amount") as the sum due under the Swap.

12. In September 2010, Crédit Agricole as Security Trustee instituted proceedings in Singapore and obtained an order from the Singapore High Court for the arrest of the three vessels which had been delivered to the IRISL subsidiaries. The vessels were arrested in September 2010.

13. In October 2010, IRISL and its subsidiaries became subject to EU Council Regulation 961/2010 of 25th October 2010, which froze the assets of the IRISL subsidiaries. However, article 18 of that Regulation provided that where a payment was due under a contract concluded before the date on which IRISL was designated by the Sanctions Committee, the competent authorities of the Member States could authorise the release of frozen funds.

14. On 13th-14th December 2010, the IRISL subsidiaries paid approximately €155 million, being the Euro equivalent of US$205,221,665, to SocGen as Agent for the Lenders. The moneys were received into SocGen's EURO CAF Account, but then transferred to a Suspense Account, pending the receipt of authorisation from the competent authorities.

15. Included in the sum paid by the IRISL subsidiaries was US$8,889,063.42, being the Termination Amount claimed by SocGen under the Swap agreed between SocGen and 16th Ocean. 16th Ocean alleges that this sum (as well as the greater sum paid) was paid subject to a reservation of rights and was paid under duress (economic duress).

16. The competent authority in France was the *Direction générale du Trésor* ("the DG"). The DG's authorisation was required for all three Lenders. In addition, authorisation was also required from the Central Bank of Korea for KEXIM. The authorisations were received from the competent authorities on the following dates:

    (1) On 7th October 2010 from the DG for SocGen.

    (2) On 22nd December 2010 from the Central Bank of Korea for KEXIM.

    (3) On 27th December 2010 from the DG for Crédit Agricole.

    (4) On 10th January 2011 from the DG for KEXIM.

17. It is SocGen's case that the funds paid into the Suspense Account were distributed (via the EURO CAF Account) to the Lenders on 5th January 2011, save that SocGen's share was at first mistakenly paid to Crédit Agricole, but then repaid to SocGen on 6th January 2011, and KEXIM's share was paid to KEXIM on 12th January 2011. This is not accepted by 16th Ocean, who argued that the Termination Amount was transferred, and by reason of that transfer appropriated, after 10th January 2011.

18. On 5th January 2011, the vessels were ordered by the Singapore Court to be released from arrest.

19. On 10th January 2017, 16th Ocean commenced proceedings seeking from SocGen the recovery of the Termination Amount paid to it on the grounds of unjust enrichment (economic duress) and/or as damages for breach of the Swap. I understand that the Termination Amount was not a sum paid to and is not a sum recoverable from any Lender other than SocGen.

20. SocGen has applied to the Court for an order striking out the claim (CPR rule 3.4(2)(a)) or summary judgment dismissing the claim (CPR rule 24.2) on the ground that 16th Ocean's claims are time-barred under section 5 of the Limitation Act 1980.

21. If the causes of action accrued prior to 10th January 2011, the claims are potentially time-barred, subject to the operation of section 32(1)(a) and/or (b) of the Limitation Act 1980.

22. 16th Ocean resisted the application either on the grounds that the claims are not time-barred and/or because the issue as to when the funds were paid to SocGen should be tried, as SocGen's case was said to be inconsistent and contradictory, given the lack of information, documentation and evidence relating to the transfers which took place in January 2011.

Factual background

The Loan Agreement and the Swap

23. On 4th February 2005, each of the four subsidiaries of IRISL entered into the shipbuilding contract with Hyundai for the construction of four container carriers for purchase by the IRISL subsidiaries. Vessel no. 4 was intended to be acquired by 16th Ocean.

24. On 23rd August 2006, each of the IRISL subsidiaries and the Lenders concluded the Loan Agreement for a facility in the sum of US$235,537,280 in order to finance the construction and purchase of these vessels.

25. The Loan Agreement contained the following provisions:

> "***16.6 Agent only obliged to pay when monies received***
>
> *Notwithstanding any other provision of this Agreement or any other Finance Document, the Agent shall not be obliged to make available to any Borrower or any Lender or any Swap Counterparty any sum which the Agent is expecting to receive for remittance or distribution to that Borrower or that Lender or that Swap Counterparty until the Agent has satisfied itself that it has received that sum …*
>
> ***16.12 Source of funds***
>
> *16.12.1 The Agent may at any time at the request of any Lender require evidence satisfactory to the Agent that any payment under this Agreement is legally compliant and until such evidence has been*

*provided to the Agent neither the agent nor the Lenders (each a **beneficiary**) shall be obliged to accept such payment but each beneficiary shall be entitled to place such payment into a suspense account and such payment shall not be an effective discharge of the liabilities of the Borrowers under this Agreement.*

*16.12.2 For the purposes of this Clause **legally compliant** means that the payment of any funds under this Agreement and their source (whether direct or indirect) and their receipt and handling is or will be in the opinion of the Agent in all respects in accordance with any law and regulatory requirements of any relevant jurisdiction and, and [sic] the receipt of such funds by any beneficiary will not or is not reasonably likely in the opinion of the Agent to impose on any beneficiary any obligation to make a report to any authority or to repay such funds.*"

26. Clause 17 of the Loan Agreement made provision for the application of receipts towards the discharge of the various liabilities arising under the "*Finance Documents*" (as defined in the Loan Agreement).

27. The Loan Agreement was expressed to be governed by English law (clause 31).

28. In September 2007, in accordance with the Loan Agreement, 16th Ocean and the other IRISL subsidiaries entered into an interest rate swap agreement in order to hedge their exposure to interest rate fluctuations in respect of the Loan Agreement. The interest rate swap agreement was contained in or evidenced by a 1992 ISDA Master Agreement and Schedule dated 12th September 2007. On 18th September 2007, 16th Ocean and SocGen entered into the Swap, evidenced by the Confirmation of that date. In this capacity, SocGen was acting as a "*Swap Bank*".

29. The date of the payment obligations of 16th Ocean under the Swap was determined by reference to the "*Effective Date*", which was "*the earlier of (i) the actual delivery of the Ship with hull number 1821 (the "**Delivery Date**") and (ii) 18 July 2009*". It is 16th Ocean's case that the payment obligation under the Swap arose only upon the delivery of vessel no. 1821 to 16th Ocean and that in the event of non-delivery no payment obligation arose.

30. The ISDA Master Agreement contained the following provisions:

"***6. Early Termination***

*(a) **Right to Terminate Following Event of Default**. If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, "Automatic Early Termination" is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event*

of Default specified in Section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8), and as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant petition upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).

(b) ***Right to Terminate Following Termination Event.***

(i) ***Notice****. If a Termination Event occurs, an Affected Party will, promptly upon becoming aware of it, notify the other party, specifying the nature of that Termination Event and each Affected Transaction and will also give such other information about that Termination Event as the other party may reasonably require …*

(d) ***Calculations****.*

(i) ***Statement****. On or as soon as reasonably practicable following the occurrence of an Early Termination Date, each party will make the calculations on its part, if any, contemplated by Section 6(e) and will provide to the other party a statement (1) showing, in reasonable detail, such calculations (including all relevant quotations and specifying any amount payable under Section 6(e)) and (2) giving details of the relevant account to which any amount payable to it is to be paid. In the absence of written confirmation from the source of a quotation obtained in determining a Market Quotation, the records of the party obtaining such quotation will be conclusive evidence of the existence and accuracy of such quotation.*

(ii) ***Payment Date****. An amount calculated as being due in respect of any Early Termination Date under Section 6(e) will be payable on the day that notice of the amount payable is effective (in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default) and on the day which is two Local Business Days after the day on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event). Such amount will be paid together with (to the extent permitted under applicable law) interest thereon (before as well as after judgment) in the Termination Currency, from (and including) the relevant Early Termination Date to (but excluding) the date such amount is paid, at the Applicable Rate. Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed.*

(e) ***Payments on Early Termination****. If an Early Termination Date occurs, the following provisions shall apply based on the parties' election in the Schedule of a payment measure, either "Market Quotation" or "Less", and a payment method, either the "First Method" or the "Second Method". If the parties fail to designate a payment measure or payment*

> *method in the Schedule, it will be deemed that "Market Quotation" or the "Second Method", as the case may be, shall apply. That amount, if any, payable in respect of an Early Termination Date and determined pursuant to this Section will be subject to any Set-off.*"

31. There then followed a series of methods for the calculation of the amounts payable upon Termination. The Schedule to the ISDA Master Agreement identified the applicable method of calculation.

32. By the Schedule to the ISDA Master Agreement, the Swap was expressed to be governed by English law.

Sanctions against IRISL and the demand for payment

33. During the course of 2008, three of the vessels were built by Hyundai and delivered to 13th Ocean, 14th Ocean, and 15th Ocean. For each of these vessels, the facility under the Loan Agreement was used to fund the payments due to be made for the acquisition of these vessels.

34. The funds advanced under the Loan Agreement were also used for a part of the pre-delivery construction stage payments due in respect of vessel no. 4 (in the sum of US$14,721,080).

35. However, 16th Ocean did not acquire vessel no. 4. On 10th September 2008, OFAC designated IRISL, 18 of its subsidiaries and 123 vessels owned or controlled by IRISL, including the three vessels acquired by 13th Ocean, 14th Ocean, and 15th Ocean, as Specially Designated Nationals under Executive Order 13382. On 10th November 2008, OFAC also prohibited all "*U-turn*" dollar transactions with any Iranian entities.

36. By a letter dated 10th December 2008, SocGen as Agent informed the IRISL subsidiaries that the final advance under the Loan Agreement required by 16th Ocean to purchase vessel no. 4 could not be drawn down, because by reason of the OFAC designation, the IRISL subsidiaries would not be permitted to make US dollar payments due under the Loan Agreement and the Lenders, including SocGen, were unable to make payments in accordance with the Loan Agreement.

37. Accordingly, the final drawdown under the Loan Agreement relating to vessel no. 4 was not made and vessel no. 4 was not delivered to 16th Ocean.

38. On 23rd July 2009, SocGen sent a fax to 16th Ocean with a purported notice of the decision that the "*Effective Date*" under the Swap was 18th July 2009, meaning that 16th Ocean's payment obligation under the Swap had accrued on that date. It is 16th Ocean's case that this notice was ineffective and did not override the true construction of the Confirmation.

39. On 27th July 2009, 16th Ocean emailed SocGen stating that the start date for payment obligations under the Swap was postponed until the actual delivery of vessel no. 4 to 16th Ocean. On 28th July 2009, 16th Ocean paid the first coupon in the sum of US$66,396.42 purportedly due under the Swap. There is a dispute as to whether there was in fact a payment obligation in this respect.

40. On 14th October 2009, SocGen informed the IRISL subsidiaries alleging that a second coupon was due for payment under the Swap on 28th October 2009 (in the sum of US$719,513.60). On 29th October 2009, 16th Ocean replied that no payment obligations arose under the Swap in respect of vessel no. 4 until after delivery of the vessel. On 30th October 2009, SocGen responded that the second coupon remained due and payable on 28th October 2009, that by reason of 16th Ocean's failure to pay that coupon the IRISL subsidiaries were in breach of their payment obligations under the ISDA Master Agreement, and that the non-payment constituted an event of default.

41. On 31st December 2009, Hyundai terminated the shipbuilding contract in respect of vessel no. 4. On 5th January 2010, SocGen as Agent informed the IRISL subsidiaries that, by reason of the termination of the shipbuilding contract, the IRISL subsidiaries were required to unwind the interest rate swap agreement to ensure that its notional amount did not exceed the Loan amounts relating to vessel no. 4.

42. On 19th May 2010, Hyundai stated that it had sold vessel no. 4 to a third party.

43. On 2nd June 2010, SocGen as Agent demanded payment of US$14,867,302.95 due under the Loan Agreement, by reason of mandatory prepayment events, namely the termination of the shipbuilding contract and Hyundai's sale of the vessel, adding that there was an "*Additional Termination Event*" under the Swap and that the "*Swap Bank will send a separate notification to you in this respect*". SocGen demanded that payment be made to its EURO CAF Account. According to paragraph 17 of the second witness statement of Ms Felicity Ewing of Dentons UKMEA LLP ("Dentons"), SocGen's solicitors, the EURO CAF Account is a SocGen-owned account for receipt of payments from counterparties to transactions undertaken by SocGen's Global Finance business line.

44. On 3rd June 2010, SocGen as Swap Bank wrote to 16th Ocean purportedly giving notice of the early termination of the Swap, identifying 9th June 2010 as the "*Early Termination Date*" under section 6(b)(i) of the ISDA Master Agreement.

45. On 9th June 2010, SocGen as Swap Bank sent a letter to 16th Ocean purportedly giving notice under section 6(d) of the ISDA Master Agreement, alleging that US$8,889,063.42 (the Termination Amount) was payable by 16th Ocean to SocGen and identified the account to which that sum should be paid, namely account no. 76 30003 07003 0280 199 6555 26 ("the Section 6(d) Notice Account").

46. The IRISL subsidiaries allegedly failed to pay the sums due under the Loan Agreement. According to the evidence of Ms Ewing, as at 28th July 2010, the unpaid sums due under the Loan Agreement and the interest rate swap agreement amounted to US$37,191,196.15.

The arrest of the vessels in Singapore

47. On 9th September 2010, Crédit Agricole as Security Trustee under the Loan Agreement and the interest rate swap agreement obtained an order from the High Court of Singapore to arrest the three vessels purchased from Hyundai by 13th Ocean, 14th Ocean, and 15th Ocean in respect of the claim for the sums owing to the Lenders under the Loan Agreement and the interest rate swap agreement. The defendants in the

proceedings were the three IRISL subsidiaries who took delivery of the three vessels built by Hyundai; 16th Ocean was not a defendant.

48. The vessels were arrested on 9th and 14th September 2010.

49. On 17th September 2010, SocGen as Agent sent a letter purporting to accelerate all sums due under the Loan Agreement and the interest rate swap agreement, so that the sum of US$153,315,840.30 became immediately due and payable in addition to the US$37,191,196.15 in respect of the existing arrears.

50. On 23rd September 2010, Crédit Agricole brought fresh proceedings before the High Court of Singapore in respect of the additional sums claimed.

51. On 12th November 2010, the Singapore Court made orders, on the application of Crédit Agricole, for the sale of the vessels under arrest.

The payment of the Termination Amount

52. On 10th December 2010, the IRISL subsidiaries offered to pay the Euro equivalent of US$149,819,702.07 (*i.e.* US$179,119,702.07 under the Loan Agreement and interest rate swaps, less certain retentions of US$29,300,000), which they understood to be the amount outstanding and claimed by the Lenders. This offer was subject to a reservation of rights, in particular the right to challenge and reclaim any and all amounts which had been over-paid. SocGen rejected the offer on the basis that the full amount due was in fact US$203,855,277.

53. After exchanges between the parties' solicitors, on 13th December 2010, the Euro equivalent of US$205,221,665 (approximately €155 million) was paid by IRISL's subsidiaries to the bank account at SocGen which SocGen used for the receipt of payments where SocGen is acting as Lender or Agent (the EURO CAF Account) (Ms Ewing's second witness statement, paragraph 17). This sum included the Termination Amount of US$8,889,063.42 and was received by SocGen on 14th December 2010. This payment is attested to in paragraph 10 of the first witness statement of Mr Andrew Williams of Holman Fenwick Willan LLP ("HFW"), 16th Ocean's solicitors.

54. Upon receipt, the funds were transferred by SocGen directly from the EURO CAF Account to SocGen's "*Compte sequester degel IRAN account*" ("the Suspense Account"). According to Ms Ewing's second witness statement, at paragraph 17, the transfer to the Suspense Account was recorded in SocGen's books with a value date of 14th December 2010 and a transaction date of 17th December 2010 and was made on the advice of SocGen's Compliance department. According to paragraphs 42-43 of Ms Ewing's first witness statement, IRISL and its subsidiaries were subject to EU Council Regulation 961/2010 of 25th October 2010, which froze "*All funds and economic resources belonging to, owned, held or controlled by*" legal persons, entities or bodies owned or controlled by IRISL. However, article 18 of that Regulation provided that where a payment was due under a contract concluded before the date on which IRISL was designated by the Sanctions Committee, competent authorities of the Member States could authorise the release of frozen funds.

55. According to Ms Ewing's first witness statement (at paragraph 44), until the appropriate authorisations were obtained, payment of the funds by the IRISL subsidiaries was not

treated by the Lenders as an effective discharge of the IRISL subsidiaries' liabilities under the Loan Agreement (in accordance with clauses 16.12.1 and 16.12.2).

56. In fact, on 12th August 2010, SocGen had applied for authorisation from the DG as the competent authority to receive funds paid in payment of sums due under the Loan Agreement and related contracts and to pay itself the portion due to it from the funds received. By a licence dated 7th October 2010, the DG authorised SocGen to receive "*reimbursements, interests and fees related to*" the vessels financed under the Loan Agreement and related contracts, including payments due from 16th Ocean under the Swap, and to pay itself the portion due to it out of the funds received (paragraph 46 of Ms Ewing's first witness statement). Accordingly, insofar as the funds received by SocGen were to be paid and distributed to itself, SocGen had received pre-authorisation from the DG.

57. However, SocGen could not distribute the portions of the funds received due to the other Lenders, in particular Crédit Agricole and KEXIM, until authorisation had been obtained from the DG and, additionally in respect of KEXIM, from the Central Bank of Korea.

58. Pending receipt of those authorisations, SocGen transferred and kept all of the funds received on 14th December 2010 in the Suspense Account. On 3rd January 2011, SocGen informed the other Lenders of this arrangement and the Lenders confirmed their agreement. In fact, Crédit Agricole had received authorisation from the DG on 27th December 2010 and KEXIM had received authorisation from the Central Bank of Korea on 22nd December 2010. However, KEXIM still required authorisation from the DG. On 3rd January 2011, SocGen applied to the DG for authorisation to pay KEXIM its portion of the funds (paragraph 49 of Ms Ewing's first witness statement). In the event, the DG authorised the payment to KEXIM on 10th January 2011 (paragraph 58 of Ms Ewing's first witness statement).

The vessels' release

59. On 14th December 2010, 13th Ocean, 14th Ocean, and 15th Ocean applied to the Singapore Court for the release of their vessels. The hearing of that application was adjourned pending Crédit Agricole's confirmation that SocGen as Agent had received the €155 million. On 16th December 2010, the parties informed the Singapore Court that €155 million had been received by SocGen, but it was unclear whether, in light of the sanctions designation of IRISL, the funds received could be distributed amongst the Lenders in discharge of the IRISL subsidiaries' liabilities under the Loan Agreement. At the request of Crédit Agricole, the Singapore Court granted another adjournment to 5th January 2011.

60. On 16th December 2010, 16th Ocean's solicitors, HFW, wrote to SocGen's solicitors, Dentons, stating that "*our clients did on Monday 13 December 2010, arrange … to make an unencumbered payment to [SocGen], your client, of Euros 155 million for value 14 December 2010 … despite the clear evidence of the fact of the payment and of the receipt thereof by your clients, the order for the arresting of the three vessels has still not been lifted, the matter having been adjourned pending your clients confirmation that payment has been made to enable the arrests to be released*". HFW concluded that the payment had been made subject to a reservation of rights made on 10th December 2010.

61. On 17th December 2010, Dentons replied that SocGen considered the payment to be subject to the Iranian sanctions regimes and applications would have to be made to the competent authorities before the funds could be received by the Lenders and Swap Banks. Dentons referred to the fact that SocGen had received a licence from the DG which permitted it to receive payments from the IRISL subsidiaries under the Loan Agreement and the Swap. However, SocGen added that insofar as it acted as Agent it required authorisation from the French and Korean competent authorities before distributing the payments to KEXIM and Crédit Agricole. Dentons concluded that until the IRISL subsidiaries' liabilities were effectively discharged, the Security Trustee (Crédit Agricole) and the Agent (SocGen) were not required to release the vessels from arrest or to take any steps to discharge the vessel mortgages or release any other security interests. SocGen stated that "*As it is prohibited from distributing the funds to KEXIM and Crédit Agricole CIB, [SocGen] as Agent considers that the receipt and handling of the funds would not be in accordance with French law and regulatory requirements, and the receipt of those funds is likely to impose reporting requirements on [Crédit Agricole] and KEXIM. It has therefore determined, in accordance with Clause 16.12 of the Loan Agreement, that the funds are not "legally compliant" as defined in that clause. The funds have been placed on suspense account and the payment does not constitute an effective discharge of the Borrowers' liabilities under the Loan Agreement*".

62. Later in the same letter, Dentons stated that "*You suggested that our clients should immediately confirm to the court that they are in receipt of Euros 155 million. Our Singapore counsel did indeed confirm and acknowledge to the court in the hearing on 16 December that [SocGen], in its capacity as Agent, had received the amount*". In addition, Dentons took issue with the assertion by HFW that the payment was made under a reservation of rights.

63. On the same day, 17th December 2010, HFW replied by noting that SocGen had obtained a licence from the DG to receive payments from the IRISL subsidiaries under the Loan Agreement and related swap facilities to which SocGen is a party: "*This being the case, we presume that the payment of Euros 155 million which was confirmed received by [SocGen] on 15 December 2010 (and was confirmed by its Singapore Counsel to the court yesterday) has been duly received under the Loan Agreement … We note that the said funds have been placed on a suspense account pending it being established that the relevant funds are "legally compliant" as defined in clause 16.12 of the Loan Agreement. Without prejudice to the position as previously stated, given that such funds have, so far, not yet been distributed to either the Agent or any of the Lenders, we do hereby, on behalf of the Borrowers, ask you to confirm, on behalf of the Agent and all the Lenders, that there will be no onward payment to (or crediting the accounts of) the Agent/the debiting of such suspense account save on the basis of the conditions stated in our letter of 10 December 2010*".

64. On 22nd December 2010, in an affidavit filed in the Singapore proceedings on behalf of 13th Ocean, 14th Ocean, and 15th Ocean, Mr Mehrzad Soleymanifar stated that approximately €155 million had been transferred to SocGen as agent for the Lenders into the account designated by SocGen, that SocGen had confirmed safe receipt of the funds, that SocGen had obtained authorisation from the relevant authorities as early as 7th October 2010, that the other Lenders should have submitted their applications for authorisation earlier, that the payments made by the IRISL subsidiaries had discharged

the IRISL subsidiaries' obligations, and that all that remained was the distribution of those funds to the Lenders. Mr Soleymanifar also disputed that the funds were frozen.

65. In a letter dated 22nd December 2010 from Haridass Ho & Partners, the IRISL subsidiaries' Singapore solicitors, exhibited to the fifth affidavit dated 4th January 2011 of Mr Winston Kwek Choon Lin, Crédit Agricole's Singapore counsel, it was confirmed that the Lenders had received the €155 million payment and that the IRISL subsidiaries' position was that the Lenders have been paid the amounts they say they were owed.

66. On 3rd January 2011, Mr Soleymanifar swore a further affidavit in the Singapore proceedings and stated that the Lenders had received the amount that they said was owing and could have no further reason to require the vessels to be under arrest. He added that the amount in question had been paid to an account designated by the Lenders and that receipt of the payment had been acknowledged and that the money was out of the IRISL subsidiaries' control.

67. A letter from Dentons dated 4th January 2011 was exhibited to the fifth affidavit dated 4th January 2011 of Mr Winston Kwek Choon Lin, which stated that, as at 3rd January 2011, authorisations under French and EU legislation had been granted to SocGen, authorising SocGen in its capacity as Agent for the Lenders and the Swap Banks (i) to receive payments due from the IRISL subsidiaries under the Loan Agreement and the related ISDA Master Agreement; and (ii) to distribute to SocGen (in its capacities as Lender and Swap Bank) the portion of payments received from the IRISL subsidiaries which were payable to SocGen for the distribution to SocGen (as Lender and Swap Bank) of the portion of payments received from the IRISL subsidiaries which were payable to SocGen, but that this authorisation did not permit SocGen to distribute payments to the other Lenders, Crédit Agricole and KEXIM, for which additional authorisations were required.

68. By this date, Crédit Agricole had received authorisation from the DG, and KEXIM had received authorisation from the Central Bank of Korea but not from the DG. According to paragraphs 53 and 54 of Ms Ewing's first witness statement, at the hearing before the Singapore High Court on 5th January 2011, both parties' counsel accepted that there was no reason why such authorisation would not be forthcoming and Crédit Agricole's counsel accepted that the €155 million payment was sufficient security for the sums claimed.

69. On 5th January 2011, the Singapore Court rescinded its order for the sale of the vessels and ordered that the vessels be released, because Crédit Agricole had agreed that the sanctions concern had fallen away in light of certain regulatory authorisations received to date and those anticipated to be received in the near future.

70. In its judgment dated 31st January 2011, the Singapore High Court recorded the dates of the transfers in *The Sahand* [2011] SGHC 27. At paragraph 17, Quentin Loh, J noted that, on 14th December 2010, 13th Ocean, 14th Ocean, and 15th Ocean had applied for the discharge of the orders for the sale of the vessels and for orders for the release of the vessels on the ground that the IRISL subsidiaries "*had transferred €155m to [SocGen] in satisfaction of the claims made against them*".

71. At paragraph 76, the Singapore Court referred to the evidence in relation to the authorisations exhibited to the affidavit dated 4th January 2011 of Mr Winston Kwek Choon Lin. At paragraphs 77-82, Quentin Loh, J said:

> "[77] *In summary, the repayment position when I heard the parties on 5 January 2011 was that [SocGen] and [Crédit Agricole] had been fully paid the sums owed to them, having received the requisite authorisations from the Direction générale du Trésor, while KEXIM was only awaiting the Direction générale du Trésor's authorisation for it to receive its portion of the €155m received on 14 December 2010 …*
>
> [79] *As mentioned, the final obstacle to KEXIM receiving full payment was the Direction générale du Trésor's authorisation in respect of the €155m transfer. Once the authorisation was given, KEXIM would receive payment in full. In this connection, both Mr Tan and Mr Kwek accepted that there was no reason why such authorisation would not be forthcoming in light of the history set out above. Mr Kwek also submitted, quite candidly, that the €155m was sufficient security for the sums claimed by the plaintiff in the interim. According to him, Société Générale would certainly not repatriate the funds back to IRISL or Bank Tejarat no matter what happened.*
>
> [80] *In these rather unique circumstances, I rescinded the orders to sell the Vessels and ordered them to be released …*
>
> [82] *Mr Tan informed me that the defendants reserved their rights against the plaintiff in respect of any overpayment, disputed amounts and/or wrongful maintenance of arrests. I noted this when giving my decision, and stated for the avoidance of doubt that I was not making any decision on these issues.*"

72. Thus, the Court noted that repayment to SocGen and Crédit Agricole had taken place on 5th January 2011 and that the final obstacle to repayment to KEXIM was the obtaining of the DG's authorisation, which both counsel for Crédit Agricole and counsel for the 13th Ocean, 14th Ocean, and 15th Ocean accepted would be forthcoming. This payment was regarded by Crédit Agricole as sufficient security to release the vessels from arrest (see also paragraph 54 of Ms Ewing's first witness statement).

Further transfers

73. On 31st December 2010 and again 3rd January 2011, SocGen as Agent wrote to the Lenders and confirmed that €155 million had been received in full repayment of the outstanding amounts on the Loans and Swaps transactions, that the money was currently held in an "*escrow*" account due to EU Council Regulation 961/2010 and that each Lender or Swap Bank would receive its share once it provided necessary authorisations and once all participants had agreed on the calculation of each participant's share. SocGen then set out its calculations of amounts due to SocGen as Lender and Swap Bank, to Crédit Agricole as Lender and Swap Bank and to KEXIM as Lender. SocGen also asked the Lenders for approval of the allocation of the amount between the participants and for each participant to answer the question "*Do you consider that your institution has been fully repaid as of 14 December 2010*" (paragraph 20 of Ms Ewing's second witness statement).

74. On 4th January 2011, according to paragraphs 21-22 of Ms Ewing's second witness statement, there was a conference call between SocGen as Agent and the Lenders. After that call, SocGen sent to the Lenders revised questions for voting by close of business (in Paris) that day: (i) did the Lenders and Swap Banks agree with SocGen's proposed distribution of the payments received from the Borrowers; (ii) did the Lenders and Swap Banks authorise SocGen as Agent to issue a declaration (in advance of obtaining the final DG approval for payment to KEXIM) that the IRISL subsidiaries' debts were fully discharged; and (iii) did the Lenders and Swap Banks authorise the Security Trustee to notify the Singapore Court that it did not oppose the release of the vessels from arrest, and to proceed to release all other security interests. Later that day, SocGen, Crédit Agricole and KEXIM each provided their confirmation that they agreed to the Agent's questions.

75. As a result of the votes received, on 5th January 2011, SocGen as Agent gave instructions to its back-office to make the following transfers. This was expressed to be subject to the final agreement of Mr Alain Zimmerman of SocGen. It was not clear when or whether his agreement was provided. Nevertheless, SocGen asserts that the payment instructions were carried out, at least in part, on 5th January 2011. The instructions required the following transfers to be made:

    (1) EUR 87,721,687.34 to an account in the name of KEXIM on the books of SocGen but with the instruction that those funds were to remain blocked pending receipt by KEXIM of the licence from the DG. The transfer was to include the words: "*YRSHAREDECPAYMENT OCEAN13TO16VIATEJERAT BOKDEC222010*". This meant that payment was the repayment of the KEXIM part of the IRISL subsidiaries' debts and was in accordance with the Bank of Korea's authorisation obtained on 22nd December 2010.

    (2) EUR 33,072,120.23 to SocGen. To this end, Mr Mark Mettelet (a risk manager at SocGen) sent an internal email to Mr Julien Marconi (also of SocGen) in the following terms: "*Can you send, for value date 5 January 2011, the sum of EUR 33,072,120.33 out of the EUR 155 million received on 14 December 2010 that is currently deposited to the Iran unblock account.* ***The Swift message must absolutely include the following:*** *"SGPARTREMBTTOTALOCEAN 13A16PRIRISLACCORD DGT981620OCT072010" The aim being to give effect to the change in the status of the funds that, until today, still belonged to IRISL, and now belong to SG, as lender*". This was intended to refer to the fact that the payment was the repayment of the SocGen part of the IRISL subsidiaries' debts and was in accordance with the DG's authorisation (no. 981620) obtained on 7th October 2010.

    (3) EUR 32,834,273.95 to Crédit Agricole to an account at Crédit Agricole in the name of CA-CIB Paris-Shipping, with the Swift message to include the words "*CACIBPARTREMBTTOTALOCEAN 13A16PRIRISL ACCORDDGT082114 27DEC2010*". This was intended to refer to the fact that the payment was the repayment of the Crédit Agricole part of the IRISL subsidiaries' debts and was in accordance with the DG's authorisation for Crédit Agricole (no. 082114) which had been obtained on 27th December 2010.

76. Therefore, of the €155 million transferred to the EURO CAF Account and then to the Suspense Account on 14th December 2010,

(1) €33,072,120.23 (including the Termination Amount of US$8,889,063.42) was intended for SocGen as Lender and Swap Bank, who had already obtained authorisation to receive this sum.

(2) €32,834,273.95 was intended for Crédit Agricole in respect of its portion of the funds received. Crédit Agricole received authorisation from the DG on 27th December 2010.

(3) €87,721,687.34 was intended for KEXIM in respect of its portion of the funds received. KEXIM had received authorisation from the Central Bank of Korea on 22nd December 2010, but obtained authorisation from the DG only on 10th January 2011.

77. According to Ms Ewing's second witness statement, these sums were transferred (via the EURO CAF Account) on 5th January 2011, save that (a) the payment that was supposed to have been made to SocGen was mistakenly transferred to Crédit Agricole and was returned to SocGen on 6th January 2011 (paragraphs 25-26 of Ms Ewing's second witness statement), and (b) the payment due to KEXIM was made to the latter's account with Deutsche Bank on 12th January 2011 (paragraph 58 of Ms Ewing's first witness statement).

78. As stated below, 16th Ocean took issue with SocGen's contention that it had received its share of the funds from the Suspense Account before 10th January 2011.

79. On 11th January 2011, HFW asked Dentons to be informed as to the status of the permissions from the relevant authorities.

80. On the same day, Dentons replied that SocGen had only just "*received the final outstanding approval yesterday*", *i.e.* on 10th January 2011 (*i.e.* the DG's authorisation for KEXIM).

81. On 24th January 2011, SocGen sent an email to 16th Ocean, in response to a request on 19th January 2011 for details of the status of the loan account with SocGen following IRISL's payment of €155 million. In this email, SocGen reported that:

> "*The EUR 155 million sent by the Borrowers and received by the Agent on 14 December 2010 was used as:*
>
> • *full discharge of the Loans and the swaps (**USD 204,229,447.53**) …*"

82. On 27th January 2011, an unidentified employee of SocGen made a manual entry into the SocGen system evidenced in an extract from a spreadsheet exhibited to Ms Ewing's first witness statement, recording that date (27th January 2011) as the "*Journal Date*", the "*Posted Date*", the "*BO Date*" and the "*Transaction Date*". That same spreadsheet identified 5th January 2011 as the "*Value Date*" and the "*Event Date*".

The commencement of proceedings

83. 16th Ocean's case is that the Termination Amount demanded by SocGen was incorrect and should have been calculated as nil, and that the Section 6(d) Notice and all subsequent demands made by SocGen were illegitimate and in breach of section 6(e)

of the ISDA Master Agreement, because no payment obligations had arisen or could arise under the Swap without delivery of vessel no. 4 to 16th Ocean. Accordingly, 16th Ocean argued, the demand and receipt of the claimed Termination Amount were illegitimate and unlawful.

84. On 10th January 2017, 16th Ocean commenced legal proceedings against SocGen by the issue of a Claim Form (which was subsequently amended in a non-material respect on 21st April 2017). In the Claim Form, 16th Ocean seeks (1) a declaration that SocGen was not entitled to appropriate to itself on or about 11th January 2011 any sum paid on 13th December 2010 to satisfy the Termination Amount of US$8,889,063.42; (2) a declaration that SocGen was unjustly enriched by this appropriation on or about 11th January 2011 seeking relief in restitution (on the grounds of economic duress) or for damages for breach of contract; (3) an order for the payment by SocGen to 16th Ocean of such sum as is appropriate in the light of the declarations sought; (4) damages for SocGen's breach or breaches of the Loan Agreement and/or the Swap constituted by the appropriation.

85. On 4th July 2017, 16th Ocean served its Particulars of Claim. In those Particulars of Claim, 16th Ocean alleges and claims that:

(1) 16th Ocean's payment obligations did not arise because vessel no. 4 had not been delivered (paragraph 50).

(2) The Termination Amount demanded by SocGen on 9th June 2010 was in breach of section 6(e) of the ISDA Master Agreement, as the true Termination Amount was nil (paragraph 37).

(3) The payment of US$208,242,500 on 13th December 2010 was made under protest and/or under economic duress and/or subject to a reservation of rights (paragraphs 44-46).

(4) As stated by SocGen in its email dated 24th January 2011, that payment had been applied for a full discharge of the loans and swaps, including the purported discharge of the purported liability of the Termination Amount, which appropriation was wrongful as SocGen was not entitled to make such an appropriation (paragraphs 48-49).

(5) SocGen had been enriched at the expense of 16th Ocean (paragraph 53).

(6) Therefore, 16th Ocean claims:

(a) A declaration that no payment obligation arose under the Swap and the true Termination Amount was nil.

(b) The sum of US$8,889,063.42 or such other amount as the Court finds to have been wrongfully appropriated in respect of the termination of the Swap, as money had and received by SocGen.

(c) The sum of US$8,889,063.42 or such other amount as the Court finds to have been wrongfully appropriated in respect of the termination of the

Swap, as damages for breach of section 6(e) of the ISDA Master Agreement.

86. Accordingly, 16th Ocean claims the recovery of the Termination Amount paid - US$8,889,063.42 - from SocGen on the following grounds:

(1) In restitution (as money had and received) because SocGen has been unjustly enriched on the ground of economic duress.

(2) For damages for breach of section 6(e) of the ISDA Master Agreement in that the Termination Amount was incorrectly calculated by SocGen.

87. As far as the claims for declaratory relief are concerned, the entitlement to such relief accrued essentially at the same time as the entitlement to the monetary remedies (restitution and damages), to which the declarations relate, accrued (see *P & O Nedlloyd BV v Arab Metals* Co [2005] EWHC 1276 (Comm); [2005] 1 WLR 3733, paragraph 20). Accordingly, it was accepted by both parties that, for the purposes of this application, the claim for a declaration did not add anything to the claims for monetary relief, as far as the issues of limitation of action were concerned.

SocGen's applications for strike out or summary judgment

88. On 13th October 2017, SocGen issued an application for an order striking out 16th Ocean's statements of case pursuant to CPR rule 3.4(2)(a) on the ground that they disclose no reasonable grounds for bringing the claim or for summary judgment dismissing the claim pursuant to CPR rule 24.2. In both cases, the applications are based on the contention that both of 16th Ocean's claims for unjust enrichment and breach of contract are time-barred under section 5 of the Limitation Act 1980.

89. SocGen has not filed a Defence, having issued the applications currently before the Court.

90. 16th Ocean resists SocGen's applications on the grounds that (a) its causes of actions are not unarguably time-barred and that it has at the very least a real prospect of success in its claims; and (b) there is no compelling reason why the limitation issue should not be disposed of at trial.

91. As far as the limitation issue is concerned, 16th Ocean contended that: (a) it has a real prospect of showing that the relevant causes of action accrued on 24th or 27th January 2011 and are therefore not time-barred under section 5 of the Limitation Act 1980; (b) the contradictory and incomplete evidence adduced by SocGen regarding the alleged date of enrichment is a compelling reason for a trial of the limitation issue; (c) 16th Ocean's causes of action are based upon SocGen's fraud and the period of limitation did not begin to run until 16th Ocean discovered the fraud or could have done so with reasonable diligence (section 32(1)(a) of the Limitation Act 1980); and (d) a fact or facts relevant to 16th Ocean's right of action were deliberately concealed from 16th Ocean by SocGen and the period of limitation did not begin to run until 16th Ocean discovered the concealment or could have done so with reasonable diligence (section 32(1)(b) of the Limitation Act 1980).

92. Mr Peter de Verneuil Smith, on behalf of 16th Ocean, submitted the following principles were to be applied in the Court's consideration of an application for summary judgment and, I take it, the application for a strike out pursuant to CPR rule 3.4(2)(a):

(1) An application to strike out a claim or for summary judgment based on a limitation defence should be approached cautiously. In this respect, Mr de Verneuil Smith relied on the decision of Coulson, J in *Russell v Stone* [2017] EWHC 1555 (TCC), at paragraphs 6-7. In that case, Coulson, J said that "*But it is never straightforward to make applications to strike out based on a limitation defence, unless the claims are plainly and obviously statute-barred … A strike-out application requires the court to decide when particular causes of action accrued on an interlocutory basis, which can be unsatisfactory and may encourage a necessarily cautious approach*". I do not consider that the Court's approach to such applications based on a limitation defence is any different from any other defence. Either the requirements of an order for a strike-out or for summary judgment are met or they are not (see *Arcadia Group Brands Ltd v Visa Inc* [2014] EWHC 3561 (Comm), paragraph 109; [2015] EWCA Civ 883; [2015] Bus LR 1362; *Bridging Loans Ltd v Toombs* [2017] EWCA Civ 205).

(2) Such applications will succeed where the claimant has no real prospect of success at trial, meaning that the prospects of success are no more than fanciful.

(3) Such applications are not to be disposed of by way of a mini-trial. Indeed, the Court should have regard to the evidence which might reasonably be expected at trial.

(4) Cases turning on a short point of law can be resolved at the hearing of such applications. In *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at paragraph 15, Lewison, J said that "*it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it …*".

(5) However, summary procedures should not generally be used as a means to resolve controversial issues of law in a developing area. In *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, at paragraph 84, Lord Collins said that "*The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts …*". In a similar vein, in *Marsfield Automotive Inc v Siddiqi* [2017] EWHC 187 (Comm), Teare, J said (at paragraph 1) that "*The subject matter of the claim being restitution many authorities have been referred to and on several issues there is considerable dispute between counsel as to the applicable principles. A substantial claim in restitution involving disputed evidence and principles of law is not an obviously fertile ground for summary judgment*".

(6) The burden of proof rests on the applicant, in this case SocGen, to establish that the respondent (16th Ocean) has no real prospect of success at trial.

93. Save for the first of these submissions, I do not consider these principles to be controversial and I did not understand Ms Emily Wood, who appeared on behalf of SocGen, to have quarrelled with them.

When did the cause of action based on unjust enrichment accrue?

The applicable limitation period: section 5 of the Limitation Act 1980

94. 16th Ocean's claim based on unjust enrichment is that its payment of the Termination Amount - made on 13th December 2010 and received by SocGen on 14th December 2010 - was made under economic duress and subject to a reservation of rights. In other words, 16th Ocean contended that (a) SocGen was enriched, (b) the enrichment took place at the expense of 16th Ocean, and (c) the enrichment was unjust (the injustice emerging from the alleged economic duress). There is a separate question as to whether there is a defence available to the defendant. See *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938, paragraphs 10, 86; *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2018] AC 275, paragraphs 24, 41.

95. It is not in dispute that the Termination Amount was paid on 13th-14th December 2010 and that any enrichment of SocGen was at the expense of 16th Ocean (*Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2018] AC 275, paragraphs 43-45). For the purposes of the present application, I will assume (without deciding) that the payment was procured by economic duress.

96. The question is whether this claim for restitution of the Termination Amount paid on the grounds of unjust enrichment is time-barred pursuant to section 5 of the Limitation Act 1980. This in turn depends on when the cause of action for restitution accrued. If the cause of action accrued - meaning each of the three elements of the claim for unjust enrichment existed - before 10th January 2011, the action is time-barred, subject to the operation of section 32 of the Limitation Act 1980. If the cause of action accrued after 10th January 2011 or if time did not start running under the 1980 Act until after 10th January 2011, the claim is not time-barred. I have deliberately refrained from considering the possibility that the cause of action accrued on 10th January 2011, because I did not understand SocGen to assert that the cause of action accrued on that date.

97. This issue as to when the cause of action for unjust enrichment accrued principally turns on when SocGen was enriched by the payment made by 16th Ocean.

98. It is common ground that section 5 of the 1980 Act is applicable to the question whether the claim for restitution is time-barred, even though this claim is not a claim for breach of contract, but based on unjust enrichment.

99. Section 5 of the 1980 Act provides that "*An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued*". The 1980 Act does not refer to claims in restitution or for unjust enrichment. Nevertheless, the application of this provision to claims in restitution, at least where the claim in restitution is related to an express or implied contract, has been acknowledged

by the Supreme Court. Certainly, it has been held that claims for money had and received are subject to section 5 of the 1980 Act (*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890, 942-943).

100. In *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38; [2015] 1 WLR 2961, the claimant (Aspect) sued for the repayment of money paid to the defendant (Higgins) pursuant to an adjudication made under section 108 of the Housing Grants, Construction and Regeneration Act 1996 (which adjudication concluded that the claimant had been in breach of contractual and tortious duties to the defendant and required the claimant to pay damages to the defendant). The claimant sought the recovery of the funds paid on the basis that it was not legally obliged to pay damages to the defendant. The claimant formulated its claim on the basis of an implied contractual term and, with the permission of the Court, alternatively in restitution. At paragraph 25, Lord Mance said:

> "*Since Aspect's cause of action arises from payment and is only for repayment, it is, whether analysed in implied contractual or restitutionary terms, a cause of action which could be brought at any time within six years after the date of payment to Higgins, ie after 6 August 2009. For this purpose an independent restitutionary claim falls to be regarded as "founded on simple contract" within section 5 of the Limitation Act 1980: Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1994] 4 All ER 890, 942-943, per Hobhouse J, not questioned by the House of Lords in Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349, when it had to consider whether, in the circumstances of that case, section 32(1)(c) of the Act operated so as to extend the normal six-year limitation period*."

101. Therefore, the question is whether 16th Ocean has no real prospect of succeeding in its claim because the claim is time-barred under section 5 of the Limitation Act 1980, as its cause of action in restitution accrued before 10th January 2011. This question is also subject to the application of section 32 of the 1980 Act which I consider below.

SocGen's submissions

102. Ms Wood, on behalf of SocGen, submitted that:

(1) The cause of action in restitution (for unjust enrichment) accrued from the moment that SocGen received the payment of the Termination Amount into its EURO CAF account (which was legally and beneficially owned by SocGen) on 14th December 2010. From that time of receipt on 14th December 2010, 16th Ocean would have been entitled to bring a claim for the restitution of the sum paid. The reservation of rights which 16th Ocean asserts in connection with this payment, namely the right to reclaim any such which has been overpaid, contemplates such a right to recover the sum paid.

(2) The fact that SocGen transferred the Termination Amount to its Suspense Account is irrelevant, because (1) the Suspense Account was also legally and beneficially owned by SocGen; and (2) the funds in the Suspense Account were not held to the order of 16th Ocean. SocGen was free to pay the Termination Amount out of the Suspense Account to another of its accounts as it wished, as it did on 5th January 2011.

(3) 16th Ocean's argument that the cause of action for unjust enrichment did not accrue until SocGen appropriated the Termination Amount to discharge the debt owed by 16th Ocean is wrong. 16th Ocean's reliance on clause 16.12 of the Loan Agreement is irrelevant in this respect. The cause of action for unjust enrichment accrues upon the elements of the claim for restitution being established, including the enrichment of SocGen. In this case, the enrichment took place at the time of receipt by SocGen, whether as Agent or otherwise. Clause 16.12 is concerned solely with providing a mechanism, which the Lenders may at their option adopt, for determining whether a particular payment is "*legally compliant*" and for deferring the discharge of the Borrowers' debt until legal compliance is established. Irrespective of whether the mechanism in clause 16.12 of the Loan Agreement is invoked, the receipt of money is an incontrovertible benefit and is a simple matter of fact (Burrows, *The Law of Restitution* (3rd ed., 2011), pages 48, 567, fn 217).

(4) Insofar as it is relevant that the Termination Amount was received by SocGen as Agent, and not as principal, the cause of action for unjust enrichment accrued from the moment of receipt by an agent (in this case, SocGen) on behalf of a principal (in this case, SocGen) (see Goff & Jones, *The Law of Unjust Enrichment*, (9th ed., 2016), para. 6-59; Burrows, *The Law of Restitution* (3rd ed., 2011), pages 558ff). Thus, in *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202, 207, Millett, LJ said that "*The true rule is that where the plaintiff has paid money under (for example) a mistake to the agent of a third party, he may sue the principal whether or not the agent has accounted to him, for in contemplation of law the payment is made to the principal and not to his agent*". See also *Marsfield Automotive Inc v Siddiqi* [2017] EWHC 187 (Comm), paragraph 31.

(5) Further, even if SocGen as Agent did not hold the Termination Amount on behalf of itself as the Swap Bank, it did hold the funds to its order in this capacity.

(6) In any event, where, as here, the principal is also the agent *qua* itself, on any view there can only be one defendant to a claim for unjust enrichment, namely SocGen.

(7) The defence of ministerial receipt (which admittedly is in an uncertain and controversial state) referred to by 16th Ocean has no application in this case, because on its own case 16th Ocean sues SocGen as Swap Bank, not as Agent, because (a) SocGen's case is that it received the Termination Amount as principal and was enriched from the moment of its receipt, (b) there is no relevant distinction between SocGen as agent and SocGen as principal, because it is the one and same entity, and (c) it is a defence, and not a cause of action.

(8) If this analysis is wrong, and the cause of action had not accrued until the Termination Amount was appropriated by SocGen in discharge of 16th Ocean's debt to SocGen, such appropriation occurred when the instruction was given to transfer the funds on 5th January 2011 or when SocGen received the Termination Amount into its EURO CAF Account again on 6th January 2011. The appropriation did not take place on 24th January 2011: the email sent by

SocGen on that date was simply a status account recording the transfers made by SocGen as Agent to the Lenders.

(9) There was no requirement, in order to appropriate the relevant payment to the discharge of a debt, that the appropriation be communicated to 16th Ocean. If, however, the communication of the appropriation by SocGen was required, that took place no later than 5th January 2011 when the Singapore High Court recorded the appropriation communicated by SocGen in *The Sahand* [2011] SGHC 27, at paragraph 77: "*the repayment position when I heard the parties on 5 January 2011 was that [SocGen] and [Crédit Agricole] had been fully paid the sums owed to them, having received the requisite authorisations from the Direction générale du Trésor* …". Moreover, in the same judgment, at paragraph 79, the Court recorded that the receipt of the funds constituted sufficient security for the sums due to all of the Lenders, including KEXIM, whose authorisation had not yet been received from the DG at that date.

(10) Insofar as it is suggested that the resolution of this application involves the consideration of a complex and controversial question of law, in reality the point of law is a short one and the answer to the question in this case is clear. In any event, the Court can and should grapple with points of law on a summary judgment application (*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at paragraph 15). If SocGen is right on the point of law, there is no factual controversy requiring a trial. It is only if SocGen is wrong on the point of law that a factual question arises, and even then it is unrealistic to imagine that 16th Ocean will establish at trial that the cause of action accrued at some date after 10th January 2011.

16th Ocean's submissions

103. Mr de Verneuil Smith, on behalf of 16th Ocean, submitted that:

(1) The enrichment requires receiving something capable of bearing a market value or some other objective value to SocGen (relying on the decision in *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938, para. 15, 17, 100-102, 180-184). The receipt of money, whilst usually it might constitute an enrichment, is not invariably an enrichment (Burrows, *The Law of Restitution* (3rd ed., 2011), page 50; Edelman and Bant, *Unjust Enrichment*, (2nd ed., 2016), page 64). In this case, the combination of the Iranian sanctions regime and the use of the Suspense Account meant that the funds were treated as though it had no value to SocGen.

(2) SocGen's own case is that it did not receive the benefit of the €155 million on receipt on 14th December 2010 and could not do so until certain authorisations had been obtained under the Iranian sanctions framework. Having placed the €155 million in the Suspense Account, it could not have the benefit of this sum.

(3) As a matter of banking law, SocGen did not receive payment on 14th December 2010 because it did not then receive an unfettered or unrestricted right to the immediate use of the funds transferred. After the funds were transferred to the Suspense Account, the earliest that SocGen could have been enriched was when SocGen decided to credit the EURO CAF Account and recorded a credit against

that account (see Proctor, *Mann on The Legal Aspect of Money*, (7th ed., 2012), paragraphs 7.24-7.25; *Momm v Barclays Bank International Ltd* [1977] 1 QB 790, 803). There was no evidence that, on 5th January 2011, the EURO CAF Account was credited with SocGen's portion of the funds or that SocGen had begun the computer process for recording corresponding debits and credits against the Suspense Account and the EURO CAF Account.

(4) SocGen did not receive the Termination Amount on 14th December 2010 as Swap Bank but as Agent for the Lenders and the Swap Banks, subject to the terms and conditions of the Loan Agreement. Under the terms of the Loan Agreement, SocGen did not hold the Termination Amount until it decided that it considered receipt had occurred (in accordance with clause 16.6 of the Loan Agreement). SocGen as Agent was not satisfied that it had received the €155 million; instead, it determined that clause 16.12 of the Loan Agreement applied and placed the payment into the Suspense Account. Accordingly, the receipt of the Termination Amount on 14th December 2010 did not amount to SocGen as Agent holding the €155 million for the benefit of SocGen as Swap Bank (or anyone else). SocGen was therefore not enriched on 14th December 2010 because, SocGen as Agent had determined that it had not lawfully received the €155 million, by reason of the effect of the Iranian sanctions regime.

(5) This is not a simple agency case. The case concerns an agent to a syndicated loan with carefully negotiated terms, the impact of sanctions legislation, and the technical banking law questions as to when the payments are complete. The enrichment of SocGen as Agent is irrelevant to a claim against SocGen as Swap Bank.

(6) Although in many cases the receipt of money by an agent will constitute the enrichment of the principal in that the receipt by the agent is in effect receipt by the principal, such cases depend on the agent's duty to account for the receipt to the principal (*Coulthurst v Sweet* (1866) LR 1 CP 649, 653, 656; *Jeremy D Stone Consultants Limited v National Westminster Bank plc* [2013] EWHC 208 (Ch), paragraph 242). However, where the agent is not immediately obliged to account to the principal for the receipt, in such circumstances the principal cannot be said to have been enriched (in this respect, 16th Ocean drew a comparison with the decision in *Sorrell v Finch* [1977] AC 728, 750-751, 754, although it is fair to say that this was a case involving an absence of authority, as was the decision in *Jones v Churcher* [2009] EWHC 722 (QB); [2009] 2 Lloyd's Rep 94, paragraphs 48-51). In *Barclays Bank Ltd v WJ Simms & Cooke (Southern) Ltd* [1980] QB 677, at pages 703-704, Goff, J left open the question whether a claim for restitution would lie against a principal in respect of funds paid to its bank as agent, where the bank had neither paid the money to the principal nor done anything equivalent to payment.

(7) On the facts of the present case, SocGen received the funds on 14th December 2010 not merely as Agent for itself as the Swap Bank, but as Agent under the various "*Finance Documents*" (as defined in the Loan Agreement), that is as agent for all the Lenders and Swap Banks on the terms set out in the Agency and Trust Deed (which was not in evidence during the hearing of the application) and the Finance Documents. Pursuant to clauses 16 and 17 of the Loan Agreement, there was no immediate obligation to account to the

principals, because SocGen had not "*received or recovered*" sums "*under or by virtue of any Finance Document*" (clause 17) and because it had not yet "*satisfied itself that it has received that sum*" (clause 16.6).

(8) If SocGen received the Termination Amount as Agent, that is irrelevant, because 16th Ocean's claim is against SocGen as Swap Bank, not as Agent. Further, SocGen was not enriched by the payment of the €155 million as Agent, because as Agent SocGen derived no benefit or objective value from the funds received in order to constitute an objective value as required by the decision in *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938, and did not receive an unfettered or unrestricted right to the immediate use of the funds transferred.

(9) As Agent, SocGen may rely on the defence of ministerial receipt, at least if the "*strong version*" of the defence as explained in *Marsfield Automotive Inc v Siddiqi* [2017] EWHC 187 (Comm), at paragraph 31, applies, meaning that the receiving agent has a defence in all circumstances. The weaker version of the defence is that the agent bears no liability if it has paid the funds over to the principal before it has notice of the claimant's right to restitution. The authorities relied on by SocGen in support of the proposition that receipt by an agent constitutes an enrichment of the principal are in fact authorities concerned with the defence of ministerial receipt; in any event, they are not inconsistent with 16th Ocean's submissions.

(10) Until the funds were appropriated and disbursed from the Suspense Account, SocGen bore no liability for unjust enrichment either as Swap Bank or Agent. SocGen's submissions proceed on the mistaken premise that SocGen would bear liability in one capacity or the other.

(11) There is no satisfactory evidence as to why SocGen decided to place all of the €155 million in the Suspense Account, including whether it considered itself legally obliged to do so in light of the sanctions legislation. 16th Ocean referred to SocGen's letter dated 17th December 2010 where it said that "*As it is prohibited from distributing the funds to KEXIM and Crédit Agricole CIB, [SocGen] as Agent considers that the receipt and handling of the funds would not be in accordance with French law and regulatory requirements … It has therefore determined, in accordance with Clause 16.12 of the Loan Agreement, that the funds are not "legally compliant" as defined in that clause. The funds have been placed on suspense account and the payment does not constitute an effective discharge of the Borrowers' liabilities under the Loan Agreement*".

(12) There is no satisfactory evidence as to how and when SocGen as Agent became obliged to account to the Lenders for the funds received into the Suspense Account. That obligation to account could not have arisen until the earliest the funds were transferred to the EURO CAF Account from the Suspense Account.

(13) The evidence regarding the transfer of funds on 5th January 2011 is contradictory and short of what is required for an application for an order striking out the claim or for summary judgment. In this regard, 16th Ocean referred to:

(a) The fact that Ms Ewing in her first witness statement said that SocGen's portion of approximately €33 million was transferred from the Suspense Account to SocGen's EURO CAF Account on 5th January 2011, which was subsequently corrected in her second witness statement in explaining that this portion was in fact transferred, in error, to Crédit Agricole, which was repaid to SocGen to its EURO CAF Account on 6th January 2011.

(b) The fact there is no evidence that SocGen's portion of approximately €33 million was transferred to the EURO CAF Account on 5th January 2011. Given the operation of clause 16.12 of the Loan Agreement, SocGen could only have been enriched as the Swap Bank upon the transfer from the Suspense Account to the EURO CAF Account.

(c) That Mr Mettelet's email instruction of 5th January 2011 does not provide sufficient evidence of the transfer.

(d) That the Microsoft Excel spreadsheet exhibited to Ms Ewing's first witness statement recording the transfer to the EURO CAF Account does not provide sufficient evidence, given that it was created on 27th January 2011, and contains unexplained references. I return to this document below.

(e) The fact that SocGen has not disclosed a SWIFT instruction dated 5th January 2011 for the transfer from the Suspense Account, a debit entry made on 5th January 2011 on the Suspense Account, or a credit entry made on 5th January 2011 on the EURO CAF Account.

(f) The fact that no explanation has been provided by SocGen as to why there was a delay in informing 16th Ocean of the transfer until 24th January 2011.

Discussion

104. As is evident from the narrative above, the factual background to 16th Ocean's claim is a complex one. However, the following facts are either common ground or not contradicted by the evidence:

(1) 16th Ocean paid the Termination Amount on 13th December 2010, which was received by SocGen (as Agent) on 14th December 2010.

(2) SocGen had itself received authorisation from the DG by 9th October 2010 to receive and distribute the Termination Amount. There was no legal reason, as far as the sanctions regime was concerned, why SocGen could not or would not distribute the Termination Amount to itself at any time from 14th December 2010.

(3) SocGen had decided by no later than 5th January 2011 to apply the Termination Amount received on 14th December 2010 in discharge of 16th Ocean's obligations under the Swap. This is evident from (a) the judgment of the Singapore Court in *The Sahand* [2011] SGHC 27, at paragraph 77), and (b) the

votes cast by the Lenders on 4th January 2011. Consistent with this are the instructions given by SocGen for the transfer of the funds on 5th January 2011. Although these instructions were said to be subject to the agreement of Mr Alain Zimmerman, which agreement was not in evidence, the fact remains that the first-mentioned matters demonstrate that SocGen had decided to apply the Termination Amount in discharge of 16th Ocean's obligations under the Swap by 5th January 2011. This is not to say that the evidence unequivocally demonstrates that the transfer of the Termination Amount from the Suspense Account to SocGen's EURO CAF Account took place by 6th January 2011 (although I consider it very likely).

105. There is no reason to suppose that any documentary or other evidence might exist which would contradict these matters. I refer to my reasons below explaining why there is no compelling reason for a trial of the limitation issue.

106. With the parties' submissions in mind, I have concluded that, as a matter of law, the cause of action for restitution based on unjust enrichment, if it was otherwise valid, accrued on SocGen's receipt of the Termination Amount (as part of the larger sum of €155 million) on 14th December 2010, and in any event no later than 5th January 2011. By those dates, assuming that 16th Ocean's case is justified,

(1) SocGen had been enriched by the receipt of the Termination Amount.

(2) The enrichment was at the expense of 16th Ocean in that it had paid the sum.

(3) The enrichment was unjust in that it was procured by economic duress or otherwise unlawfully.

107. The battle lines were drawn on the first of these three elements and not on the second and third elements. The second and third elements must have existed on 14th December 2010, because the payment of the Termination Amount was made at that time and that payment had been procured, on 16th Ocean's case, by economic duress. The question for the purposes of this application is when the enrichment took place.

108. There are three candidates for such enrichment on the facts of this case: (1) the receipt of the payment of the Termination Amount on 14th December 2010; (2) the date on which SocGen had decided that the said payment should be accepted and discharged 16th Ocean's liability under the Swap; and (3) the date of the transfer of the funds from the Suspense Account to EURO CAF's account. In considering each of these candidates, it is worth noting that the word "*appropriation*" has been used by 16th Ocean. Although an "*appropriation*" could refer to a decision to apply the funds in discharge of a liability (candidate (2)), 16th Ocean refers to the appropriation as being effected by the transfer of funds (candidate (3)). I do not think that it is intended to refer to the concept of appropriation of payments which have been received by a creditor in respect of one or some of a number of debts owed by a debtor (*Chitty on Contracts*, 32nd ed., 2015), para. 21-061 - 21-063).

109. Whether there was an enrichment is a question of fact. An enrichment is constituted by the receipt of a benefit, which can be money or a non-monetary benefit. The benefit must be a real one. Thus, if the receipt of a benefit is matched by a corresponding liability, the net gain to the defendant is zero, and the defendant will not have been

enriched (*Jeremy D Stone Consultants Limited v National Westminster Bank plc* [2013] EWHC 208 (Ch), paragraph 242).

110. 16th Ocean submitted that an enrichment in the form of the receipt of a benefit must have an objective value and to this end relied on the decision of the Supreme Court in *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938. In that case, the appellant (Mr Benedetti) had provided services to the respondent (Mr Sawiris) rendering the respondent liable to a quantum meruit. The question for the Court was the valuation of the benefit received by the appellant. For this purpose, the Court held that the appropriate method of valuation was an objective one, namely the value of the benefit to the reasonable person in the position of the defendant. The Court was not concerned with the question whether or not the respondent had been the recipient of a benefit and therefore enriched; it was common ground that the respondent had been enriched: "*It is not disputed that Mr Benedetti did render services to Mr Sawiris which conferred a benefit on him and thus enriched him*" (paragraph 11). In considering the appropriate method of valuation, Lord Clarke (with whose judgment the other justices agreed) said at paragraphs 15-16:

> "*In my view, the starting point in valuing the enrichment is the objective market value, or market price, of the services performed by Mr Benedetti. That is consistent with the view taken by Professor Graham Virgo in The Principles of the Law of Restitution, 2nd ed (2006) ("Virgo"):*
>
> > *"Much of the uncertainty concerning the definition of enrichment stems from the lack of consensus about where the analysis should start. Essentially there are two options available. Either we start with an objective test, ascertained by asking whether reasonable people would consider the defendant to have received something of value, or we start with a subjective test, by considering whether the defendant considers that he or she has received something of value. Whilst both the objective and subjective tests are relevant to the identification of an enrichment, the better view is that the objective test should always be considered first …": p 64.*
>
> *I agree. Although Professor Virgo is there considering the approach to the question whether a benefit has been conferred on the defendant at all, as opposed to the question how such a benefit should be valued, it is clear that he takes the same view in relation to valuation: see Virgo, at p 98, where he says that the general test of valuation which should be adopted is an objective test.*"

111. Although the existence and valuation of the enrichment are distinct exercises, it should not be controversial that the existence of the enrichment should be determined by adopting the same approach to its valuation, namely an objective one.

112. In the present case, 16th Ocean essentially argued that SocGen did not receive a benefit, objectively identified or objectively valuable, upon receipt of the Termination Amount (as part of the larger sum of €155 million) on 14th December 2010, because at that date the funds were immediately placed in the Suspense Account and had not been allocated or appropriated by SocGen or the Lenders to the discharge of 16th Ocean's liability under the Swap (or the Loan Agreement for the larger sum of €155 million), and that

no enrichment had taken place until the transfer of the Termination Amount from the Suspense Account to the EURO CAF Account.

113. In my judgment, this argument is wrong. The receipt of the Termination Amount plainly had an objectively discernible value such as to constitute a real and incontrovertible benefit to SocGen as at 14th December 2010 for the following reasons:

(1) The Termination Amount was paid to the credit of SocGen into the EURO CAF Account. Money represents a universal medium of exchange, and by its receipt, SocGen benefited (Burrows, *The Law of Restitution* (3rd ed., 2011), page 48). Insofar as the benefit by the receipt of money is presumed (Burrows, *The Law of Restitution* (3rd ed., 2011), page 50; Edelman and Bant, *Unjust Enrichment*, (2nd ed., 2016), page 64), the presumption was not and could not be rebutted on the plain facts of this case. This is evident from the considerations discussed below.

(2) The Termination Amount was received by SocGen into its EURO CAF Account, an account which was legally and beneficially owned by SocGen. This constituted a receipt as a matter of law. The mere fact that SocGen was entitled to transfer and did transfer the funds into a Suspense Account in accordance with the Loan Agreement does not detract from, and indeed supports, this analysis. The crediting of the €155 million to the EURO CAF Account is evidenced by (a) the fact that Mr Williams' evidence referred to the payment having been made by the IRISL subsidiaries on 13th December 2010; (b) HFW's letter dated 16th December 2010 to Dentons referred to the IRISL subsidiaries making "*an unencumbered payment to [SocGen] … of Euros 155 million for value 14 December 2010*" and to "*the clear evidence of the fact of the payment and of the receipt thereof by your clients*"; (c) the fact that Ms Ewing's evidence referred to such receipt; and (d) Dentons' letter dated 16th December 2010 referred to the fact that Crédit Agricole's Singapore counsel "*did indeed confirm and acknowledge to the court in the hearing on 16 December that [SocGen], in its capacity as Agent, had received the amount*".

(3) The Suspense Account was SocGen's account and funds standing in that account were legally and beneficially owned by SocGen. The moneys were not received to the order or on behalf of 16th Ocean. In fact, if any part of the moneys were frozen in accordance with the EU sanctions regime, the funds would not have been returned to the IRISL subsidiaries in any event. In *The Sahand* [2011] SGHC 27, paragraph 79, the Singapore Court said that according to Crédit Agricole's counsel, "*Société Générale would certainly not repatriate the funds back to IRISL or Bank Tejarat no matter what happened*". There was therefore an immediate and tangible benefit to SocGen in the receipt of this sum. An impediment to that benefit might have arisen if the funds were inaccessible to SocGen by reason of the sanctions regime, but this was not the case as SocGen had received its authorisation beforehand.

(4) On the facts of this case, the receipt of a benefit for the purposes of unjust enrichment is not dependent on the receipt and acceptance of a payment in discharge of a liability under the Loan Agreement or the Swap, as contemplated by clauses 16.6 and 16.12 of the Loan Agreement. In any event, it was SocGen's decision whether it was satisfied that it had received and accepted the

Termination Amount under clauses 16.6 and 16.12 of the Loan Agreement. Once it was possessed of the funds, SocGen could make its decision to accept the funds as legally compliant and to distribute those funds to the Lenders and the Swap Bank.

(5) Although SocGen retained the funds in the Suspense Account pending confirmation of authorisation from the competent authorities, as far as the Termination Amount was concerned, it could have disbursed that sum to itself in the EURO CAF Account at any time after receipt on 14th December 2010, as it had received authorisation in the form of a licence from the DG on 7th October 2010 in advance of its receipt. If the Termination Amount was payable to Crédit Agricole or KEXIM, the position would have been more complicated, but not, in my judgment, fatal to SocGen's submission. However, that is not the position. The impact of this authorisation is evident not only from Ms Ewing's evidence, but also from Dentons' letter dated 17th December 2010 to HFW in which it referred to SocGen having obtained its licence and referred to the only legal obstacle being the then lack of an authorisation for Crédit Agricole and KEXIM stating that "*As it is prohibited from distributing the funds to KEXIM and Crédit Agricole CIB, [SocGen] as Agent considers that the receipt and handling of the funds would not be in accordance with French law and regulatory requirements, and the receipt of those funds is likely to impose reporting requirements on [Crédit Agricole] and KEXIM*". In this letter, Dentons did not suggest any legal obstacle in the path of payment to SocGen. This is also reflected in the letter from Dentons dated 4th January 2011 exhibited to the fifth affidavit dated 4th January 2011 of Mr Winston Kwek Choon Lin.

(6) I note that in its communications with the Lenders on 31st December 2010 and 3rd January 2011, SocGen as Agent informed the Lenders that each Lender or Swap Bank would receive its share of the funds once it provided necessary authorisations and once all participants had agreed on the calculation of each participant's share. I have addressed the "*necessary authorisations*" above. As regards the calculation of each participant's share, I do not regard this statement as an impediment to SocGen's or any Lender's entitlement to the sum or sums due to it, which sums are no doubt capable of objective and arithmetical calculation, in accordance with the Loan Agreement and the Swaps. Indeed, the Termination Amount had been calculated by SocGen in its letter dated 9th June 2010.

114. If, however, I am wrong and SocGen had not received a benefit and been enriched by the payment received on 14th December 2010, in my judgment SocGen had been enriched no later than 5th January 2011, because at that date:

(1) The value of the receipt of €155 million (including the Termination Amount which was to be paid to SocGen) was manifested by the fact that Crédit Agricole as Security Trustee considered that "*the €155m was sufficient security for the sums claimed by the plaintiff in the interim*" permitting the release of the vessels arrested on the order of the Singapore Court on 5th January 2011 (*The Sahand* [2011] SGHC 27, paragraph 79). This was because all but one authorisation from the competent authorities had been obtained in respect of the Lenders by this date. This payment therefore represented and provided an objective value

to SocGen (who had already received its authorisation) in respect of the Termination Amount.

(2) In addition, and independently of the first reason above, by 5th January 2011, SocGen had plainly decided to accept the sums received in respect of the liabilities owed by the IRISL subsidiaries to SocGen and Crédit Agricole (including the Termination Amount to be paid to SocGen), because by that date both SocGen and Crédit Agricole had received authorisations from the DG (on 7th October 2010 and 27th December 2010 respectively):

(a) Quentin Loh, J in *The Sahand* [2011] SGHC 27, at paragraph 77, recorded that "*In summary, the repayment position when I heard the parties on 5 January 2011 was that [SocGen] and [Crédit Agricole] had been fully paid the sums owed to them, having received the requisite authorisations from the Direction générale du Trésor, while KEXIM was only awaiting the Direction générale du Trésor's authorisation for it to receive its portion of the €155m received on 14 December 2010*". I am conscious that 16th Ocean was not a party to the Singapore proceedings, but whether or not 16th Ocean was aware of the application of the funds received in discharge of the relevant liability is irrelevant, because it was the decision to accept the funds in discharge of the liability which conferred a benefit or further benefit on SocGen, and not the communication of that decision to 16th Ocean. In addition, clauses 16.6 and 16.12 of the Loan Agreement did not require SocGen to notify 16th Ocean of this fact. In any event, it would have been remarkable if 16th Ocean was not aware of SocGen's statement in the Singapore proceedings, given that the other IRISL subsidiaries were aware.

(b) On 4th January 2011, the Lenders had conferred and voted to the effect that: (i) the Lenders and Swap Banks agreed with SocGen's proposed distribution of the payments received from the Borrowers; (ii) the Lenders and Swap Banks authorised SocGen as Agent to issue a declaration (in advance of obtaining the final DG approval for payment to KEXIM) that the IRISL subsidiaries' debts were fully discharged; and (iii) the Lenders and Swap Banks authorised the Security Trustee to notify the Singapore Court that it did not oppose the release of the vessels from arrest, and to proceed to release all other security interests.

(c) On 5th January 2011, SocGen had given instructions for the disbursement of funds from the Suspense Account with a value date of 5th January 2011, although there are questions about when those instructions were followed and when the transfer in fact took place. Although these instructions were given subject to the final agreement of Mr Zimmerman and although there was no evidence before the Court as to when Mr Zimmerman's agreement was in fact obtained, the fact remains that the Lenders had decided upon the distribution on 4th January 2011 and the Singapore Court was informed that SocGen had been repaid on 5th January 2011.

(3) As the decision had been taken, by 5th January 2011, to apply the Termination Amount to the discharge of 16th Ocean's liability under the Swap, that of itself

constituted a benefit to, and therefore an enrichment of, SocGen in accordance with clauses 16.6 and 16.12 of the Loan Agreement. The enrichment did not require the actual transfer of funds from the Suspense Account to the EURO CAF Account, because the funds were already in SocGen's possession and control and SocGen had already received authorisation from the DG.

115. That leaves the question whether SocGen received the Termination Amount as agent or principal and whether the capacity in which the funds were received made any difference. In my judgment, as far as SocGen's receipt of the Termination Amount is concerned on 14th December 2010, alternatively on 5th January 2011, whether SocGen received the funds as agent or principal makes no difference to the above analysis, for the following reasons:

(1) As agency is a relationship between two (natural or legal) persons, I do not consider that, as far as enrichment is concerned, there is a material distinction between SocGen acting as the Swap Bank and SocGen acting as agent for itself as Swap Bank, other than for the purposes of the Loan Agreement. The Loan Agreement plainly distinguished between SocGen's role as Agent (for all of the Lenders) and as Lender or Swap Bank. However, the question whether SocGen has been enriched, for the purposes of the law of unjust enrichment, is not to be found in the Loan Agreement, at least on the facts of this case. As principal and/or agent, in respect of the receipt of the Termination Amount, SocGen must have received the benefit of the payment of the Termination Amount.

(2) SocGen received €155 million on 14th December 2010 as Agent (for the purposes of the Loan Agreement) as Dentons' letter dated 17th December 2010 made clear. In so doing, it benefited from that payment, at least insofar as it concerned approximately €33 million which was due to SocGen as Lender or Swap Bank. If SocGen received the funds on 14th December 2010 as agent, it received the Termination Amount on behalf of or for the order of itself for the reasons submitted by Ms Wood on behalf of SocGen. If SocGen received the funds on 14th December 2010 as principal, it received the Termination Amount for its own account.

(3) By 14th December 2010, SocGen had received the DG's authorisation to receive the Termination Amount in discharge of 16th Ocean's liability under the Swap. Accordingly, SocGen had received the Termination Amount for its own account. It is inconceivable that this sum would be deliberately disbursed by SocGen from the Suspense Account to anyone other than itself (although, in fact, the funds were mistakenly disbursed to Crédit Agricole, who soon returned them to SocGen). Whether and when the funds were accepted by SocGen in discharge of 16th Ocean's liability for the Termination Amount is irrelevant to this analysis.

(4) If, however, the application of the funds to discharge 16th Ocean's debt under the Swap is relevant to the issue of enrichment, SocGen treated itself as repaid on 5th January 2011. The Termination Amount was therefore received on 14th December 2010 by SocGen into its EURO CAF Account (which was legally and beneficially owned by SocGen) and then paid into the Suspense Account (which was legally and beneficially owned by SocGen). During this entire period of time from 14th December 2010 to 5th January 2011, when SocGen

treated itself as repaid under the Swap, the moneys were within the control of SocGen. During this period, SocGen had the benefit of the payment.

(5) If SocGen as agent was not obliged to account to itself as principal, that does not mean that the funds had not been received by SocGen, and that SocGen had not been enriched, because the enrichment was constituted by the receipt of a benefit, in this case the Termination Amount, with an objective value (see above). In any event, if the obligation to account is relevant, pursuant to clause 16.6 of the Loan Agreement, SocGen was obliged to make available (to itself as Swap Bank) the Termination Amount received, and therefore to account for that sum, once it was "*satisfied itself that it has received that sum*" (under clause 16.6), such satisfaction emerging from evidence that the payment was "*legally compliant*" within the meaning of clause 16.12. In this case, it is clear that SocGen was satisfied that payment to it of the Termination Amount was legally compliant, because it had obtained the appropriate authorisation by 7th October 2010 and because it said so (as is evident from Dentons' letter dated 17th December 2010 and from the judgment of the Singapore Court in *The Sahand* [2011] SGHC 27). Accordingly, if relevant and if it makes sense to speak of SocGen's obligation to account to itself, SocGen's obligation to account to itself in respect of the Termination Amount arose on 5th January 2011.

(6) The submissions concerning the defence of ministerial receipt are not relevant to this analysis, in that it is a defence available to an agent, and in this case SocGen is both principal and agent and 16th Ocean's claim is not made against SocGen as agent.

116. I note that, in its Particulars of Claim, 16th Ocean alleges that the unjust enrichment occurred on 24th January 2011, when SocGen sent an email to 16th Ocean confirming that the moneys received on 14th December 2010 had been transferred and applied in full discharge of the Loan Agreement and the Swaps, which 16th Ocean described as "*the Appropriation*" and that the Appropriation was unlawful (paragraphs 48-54 of the Particulars of Claim). The submissions during the hearing were concerned with the date of SocGen's enrichment. However, the premise underlying this plea is that the date of the enrichment is the date of appropriation in the sense meant by 16th Ocean, *i.e.* the date of the transfer to SocGen's EURO CAF Account. For the reasons explained above, the date of the transfer of the funds from the Suspense Account to the EURO CAF Account is irrelevant to the date of enrichment and, even if it was relevant, the date on which SocGen "*had satisfied itself that it has received*" the relevant sum (clause 16.6 of the Loan Agreement), was 5th January 2011, not when the transfer of funds in fact took place following that decision. Accordingly, the terms of the plea do not detract from my conclusion above.

117. Accordingly, the cause of action for restitution based on unjust enrichment accrued on 14th December 2010, and in any event no later than 5th January 2011. The claim based on unjust enrichment is therefore time-barred, subject to the operation of section 32 of the 1980 Act.

When did the cause of action based on breach of contract accrue?

118. 16th Ocean claims damages for breach of section 6(e) of the ISDA Master Agreement in that it is alleged that SocGen wrongfully calculated the Termination Amount payable

on the occurrence of an Early Termination Date (as defined in the ISDA Master Agreement) in the sum of US$8,889,063.42, rather than nil, and that the correct calculation was nil because its payment obligation under the Swap arose only upon delivery of vessel no. 4.

119. This breach of contract occurred on 9th June 2010 when SocGen presented its calculation by fax on 9th June 2010 (see paragraphs 36-37 of the Particulars of Claim). As the Claim Form was issued on 10th January 2017, that was plainly more than six years after the accrual of the cause of action for breach of contract on 9th June 2010 and therefore time-barred pursuant to section 5 of the Limitation Act 1980.

120. 16th Ocean, however, argued that there was a continuing obligation upon SocGen not to calculate and seek payment of the Termination Amount under section 6 of the ISDA Master Agreement as no payment obligations under the Swap could have arisen until delivery of vessel no. 4, which by June 2010 was an impossibility. Therefore, it is argued, each demand made by SocGen for the Termination Amount up until the appropriation of the payment in discharge of 16th Ocean's liability upon the transfer of the sum out of the Suspense Account on 24th or 27th January 2011 was a breach of contract. Accordingly, there was a continuing breach or there were successive breaches of contract, including after 10th January 2011, which would mean that the claim is not time-barred.

121. 16th Ocean however accepted that this limitation defence is "*parasitic upon the same arguments raised in respect of unjust enrichment as to why that cause of action did not accrue until after 10 January 2011*" (paragraph 86 of 16th Ocean's skeleton argument).

122. As Mr de Verneuil Smith pointed out, whether the relevant contractual obligation is a continuing obligation or whether there have been successive breaches of a contractual obligation is a question of construction (*AMT Futures Limited v Boural* [2018] EWHC 750 (Comm), paragraphs 38-39).

123. In this case, the obligation was to calculate and demand the sum due under section 6 of the ISDA Master Agreement in the manner specified in that provision. The alleged breach resided in the calculation of and demand for the incorrect or impermissible sum. In particular,

(1) Under section 6(a), if an Event of Default with respect to a party has occurred and is then continuing, the other party may by notice designate a day as an Early Termination Date in respect of all outstanding Transactions. If, however, an "*Automatic Early Termination*" is specified in the Schedule as applying to a party (as it did to 16th Ocean), then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default.

(2) Under section 6(b)(i), if a Termination Event (including an Additional Termination Event as identified in the Schedule to the ISDA Master Agreement) occurs, the "*Affected Party*" will promptly notify the other party specifying the nature of the Termination Event. This notice was provided by SocGen to 16th Ocean by letter dated 3rd June 2010.

(3) Under section 6(d)(i), "*On or as soon as reasonably practicable following the occurrence of an Early Termination Date*", each party will make the calculations on its part contemplated by section 6(e) and will provide to the other party a statement showing such calculations and giving details of the relevant account to which any amount payable to it is to be paid. That statement was provided by SocGen to 16th Ocean by letter dated 9th June 2010.

(4) Section 6(e) set out the methods of calculating the Termination Amount, which in this case was informed by the provisions of the Schedule to the ISDA Master Agreement.

124. On analysis, these contractual provisions impose an obligation on SocGen to provide a statement with its calculations to 16th Ocean at one moment in time, namely "*On or as soon as reasonably practicable following the occurrence of an Early Termination Date*". SocGen provided its statement and calculation at that time and, on 16th Ocean's case, acted in breach of contract. I do not consider that this is a continuing obligation or that there has been a series of successive obligations. It was also argued that the obligation upon SocGen was a negative one, namely an obligation not to do something. Although it might be argued that in preparing the statement and calculations, there was an obligation not to do it incorrectly, the obligation is in truth a positive requiring SocGen to prepare the statement and calculations at a particular point in time.

125. I note that the claim for breach of contract was not pleaded against SocGen either as a breach of a continuing obligation or a negative obligation and was not pleaded as a series of successive breaches. In any event, even if the claim had been so pleaded, I would have concluded that the claim was based on a single breach of a non-continuing contractual obligation.

126. In these circumstances, the cause of action for breach of contract accrued no later than 9th June 2010 and any proceedings for damages for that breach became time-barred pursuant to section 5 of the Limitation Act 1980 no later than 9th June 2016. Accordingly, the claim for breach of contract made in the Claim Form issued on 10th January 2017 is time-barred.

127. If this analysis is wrong, and the obligation was a continuing one, I consider that the obligation came to an end when 16th Ocean made its payment on 13th or 14th December 2010, alternatively when SocGen had decided to accept the payment in discharge of 16th Ocean's liability in respect of the Swap on 5th January 2011. In each case, the claim for breach of contract is time-barred.

Section 32(1) of the Limitation Act 1980

128. In the event that SocGen succeeds in establishing that 16th Ocean's cause of action for unjust enrichment accrued prior to 10th January 2011 (as I have found), 16th Ocean relied on section 32 of the Limitation Act 1980 so that time under the Limitation Act 1980 did not start to run until at the earliest 24th January 2011, with the result the claims in the Claim Form issued on 10th January 2017 are not time-barred.

129. Section 32 of the Limitation Act 1980 provides that:

> *"(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *(a) the action is based upon the fraud of the defendant; or*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
>
> *(c) the action is for relief from the consequences of a mistake;*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*
>
> *References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.*
>
> *(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.*"

130. In particular, 16th Ocean relied on section 32(1)(a) and 32(1)(b) in arguing that:

(1) The claim for restitution based on economic duress is a claim for "*fraud*" within the meaning of section 32(1)(a).

(2) SocGen had deliberately concealed the fact the date on which the funds had been released from the Suspense Account held by SocGen as Agent into the account from which SocGen as Swap Bank could derive value until SocGen informed 16th Ocean of the appropriation on 24th January 2011.

(3) 16th Ocean discovered the fraud or the concealment on 24th January 2011 so that time under the Limitation Act 1980 did not commence until that date.

(1) Section 32(1)(a): fraud

131. The word "*fraud*" can be difficult to define, especially in the context of a statute of limitation. It could mean a deceit (a fraudulent misrepresentation), it could mean a wrong or breach of duty involving dishonesty, or it could conceivably (although with less justification) refer to unconscionable conduct, falling short of deceit or dishonesty.

132. In *Beaman v ARTS Limited* [1949] 1 KB 550, a claim was made in 1946 in conversion by the plaintiff against the defendant in respect of goods wrongfully disposed of in 1935. The plaintiff argued that this was an action "*based on fraud of the defendant or his agent*" within the meaning of section 26(a) of the Limitation Act 1939. The plaintiff argued that where the defendant disposed of goods which he knew were not his own and without authority, that would be a claim based on fraud. The defendant argued that fraud must be the gist of the action. The Court of Appeal held that this action was not based on fraud. At page 558, Lord Greene, MR said that:

> "*It must be borne in mind that s. 26 is a section of general application. It applies to every sort of action which is affected by the Act. Of these many can properly be said to be based upon fraud: for example, an action for damages for deceit and an action claiming rescission of a transaction brought about by fraud. In all such cases fraud is a necessary allegation in order to constitute the cause of action. In other actions covered by the Act fraud is not a necessary allegation at all and the action of conversion is one of them. Indeed, the word "fraudulent" in connexion with conversion, however important it may be in a criminal matter is, in the civil action of conversion, so far as regards the cause of action, nothing more than an abusive epithet. I am of opinion, therefore, that the language of para. (a) means what it says and that the action was not based on fraud*."

133. This appears to require that the action be based on and constituted by an allegation of fraudulent misrepresentation or deceit. At page 571, Singleton, LJ also considered that the claim was not based upon fraud, but did not say what fraud meant. At page 567, Somervell, LJ appeared to adopt the same position, without really explaining what amounted to "*fraud*", but suggested that a different approach might be permitted in the case of an equitable claim. In *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216, the Court of Appeal held that section 26(a) of the 1939 Act applied to a claim against the defendants who claimed through a trustee who had transferred trust funds to the defendants in fraudulent breach of trust or by a fraudulent conversion. In *Regent Leisuretime Ltd v NatWest Finance Ltd* [2003] EWCA Civ 391; [2003] BCC 587, at paragraph 100, the Court of Appeal held that section 32(1)(a) of the 1980 Act applied to a claim for fraudulent misrepresentation, even though there was an alternative claim for negligent misrepresentation.

134. In *Chagos Islanders v The Attorney General* [2003] EWHC 2222 (QB), it was argued that the claim was based on "*fraud*", not just because there was a claim in deceit, but also because there were claims based on unconscionable behaviour, falling short of common law fraud or even of moral turpitude; it was further argued that section 32(1)(a) required behaviour which made it unconscionable for a defendant to rely on the lapse of time as a bar to the claim. At paragraphs 615-620, Ouseley, J dismissed this argument. The Court of Appeal refused permission to appeal ([2004] EWCA Civ 997), at paragraph 45, holding that "*We consider that the judge was very probably right in rejecting this argument as a matter of principle, on the grounds that the Limitation Act 1980 is intended to provide a complete code, including the circumstances in which it is unconscionable for a defendant to seek to invoke limitation, and that it is simply not open to the courts to seek to circumvent the effect of the 1980 Act by adding fresh grounds*".

135. In *Attorney General of Zambia v Meer Care & Desai* [2007] EWHC 952 (Ch) (reversed on other grounds: [2008] EWCA Civ 754), a claim was made for a conspiracy by unlawful means to defraud the claimant by fraudulent misappropriation of its monies in breach of trust and to conceal such fraud, and for dishonest assistance. At paragraphs 380-386, Peter Smith, J held that section 32(1)(a) applied not only to claims in deceit, but to any claim of which dishonesty is an integral element. In this respect, the Court did not consider itself bound by the Court of Appeal's decision in *Beaman v ARTS Limited*, given that the Court of Appeal's interpretation was influenced by the use of the word "*fraud*" in connection with the separate provision for concealment in the 1939 Act, a word now replaced by "*deliberate*" in section 32(1)(b) of the 1980 Act. Peter

Smith, J justified this conclusion as follows: "*It seem to me plain that the balancing exercise as against stale claims is that when someone is defrauded or is the subject of dishonest conduct they are not to be disadvantaged until they have an opportunity to discover the wrongful acts. The reason for that is that it would be an unsatisfactory state of law if people who behaved dishonestly could escape liability by successfully hiding their wrongdoings for the period of the primary limitation period. That would encourage fraudster*s".

136. In the present case, Mr de Verneuil Smith argued that no authority has touched on the question whether or not section 32(1)(a) of the 1980 Act applies to a claim based on economic duress, but so to hold would be consistent with the decisions of the Court in *Beaman v ARTS Limited* and *Attorney General of Zambia v Meer Care & Desai*, given that economic duress is constituted by the exercise of illegitimate pressure by the defendant, the clearest example of which - it is said - is a threat to breach a contract in bad faith.

137. For reasons I will soon explain, I do not need to decide whether section 32(1)(a) applies to a claim for or based on economic duress. Nevertheless, based only on a consideration of the above authorities, I consider that section 32(1)(a) extends only to common law fraud (in the sense of a deceit) and to fraud recognised as such in equity, but does not extend to wrongs or breach of duty carried out dishonestly or involving dishonesty, but not involving fraud. The policy considerations which underline an extension of the running of time under the 1980 Act for claims based on fraud are based on its deceptive nature and the fact that by that nature the existence of the fraud might not emerge into the light for some time. It might be said that a similar consideration applies to at least some instances of dishonesty, but section 32(1)(a) makes no reference to any ground of claim other than fraud. Furthermore, I would not be prepared to accept that section 32(1)(a) extends to claims based on any unconscionable conduct, even if not fraudulent or dishonest, not least because the language of the statutory provision does not extend so far.

138. In any event, in my judgment, 16th Ocean cannot benefit from section 32(1)(a) for the following reasons.

139. First, even if a claim based upon economic duress were a claim based upon fraud within the meaning of section 32(1)(a), in this case at least, 16th Ocean had discovered that economic duress as and when it was allegedly exercised. In its Particulars of Claim, 16th Ocean pleads that by reason of the arrest of the vessels in September 2010, SocGen's demand for payment of the Termination Amount was "*illegitimate*" (paragraphs 38-41); that in order to secure the release of the vessels, 16th Ocean had no reasonable alternative but to pay the sum demanded by SocGen (paragraph 42); and that 16th Ocean paid the Termination Amount "*under protest and/or duress and subject to the Reservation of Rights*" (paragraphs 43-45).

140. This means that 16th Ocean was aware of the alleged economic duress no later than 13th December 2010, when it paid the €155 million (including the Termination Amount). Accordingly, even if section 32(1)(a) nominally applied, the running of time under the Limitation Act 1980 would have started by 14th December 2010.

141. Second, there is no allegation of any additional duress being exerted or operating after the date of payment on 13th or 14th December 2010. Thus, the argument that there

remained at least an implicit threat to re-arrest the vessels if the payment were not made does not pass muster. The same implicit threat, if it existed, would in any event have been apparent to 16th Ocean, given that the vessels had already been arrested.

142. Third, I reject Mr de Verneuil Smith's argument that time does not run in respect of claims based on economic duress until the duress ceases, because there is no suggestion in the language of the provision that section 32(1)(a) is intended to have such an effect.

143. Fourth, contrary to Mr Verneuil Smith's argument that economic duress is a form of fraud, falsifying the consent of the victim, there is no requirement that a claim for economic duress must be based on fraud; it is not an essential element of the cause of action (see *Beaman v ARTS Limited*). The exercise of illegitimate pressure may take place openly and without dissembling or in the sincere belief that the demands being made are legitimate. Furthermore, there is no plea of fraud against SocGen. Paragraph C1.3(c)(i) of the Commercial Court Guide, in its current edition, provides that, in the context of a Particulars of Claim, "*full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality*".

144. Therefore, in my judgment, there is no real prospect that 16th Ocean is entitled to rely on section 32(1)(a) to postpone the start of the running of time under the Limitation Act 1980.

(2) Section 32(1)(b): deliberate concealment

145. 16th Ocean submitted that sections 32(1)(b) and 32(2) applied to extend the running of time under the Limitation Act 1980 because: (1) SocGen concealed the date on which the funds had been released from the Suspense Account held by SocGen as Agent into an account held from which SocGen as Swap Bank could derive value, being information known to SocGen; (2) SocGen discovered the concealment not before 24th January 2011; (3) SocGen was under an implied contractual duty to inform 16th Ocean of the discharge of the liability in respect of the Termination Amount, or it was a normal incident of the relationship between SocGen as Agent and 16th Ocean; (4) SocGen deliberately delayed informing 16th Ocean of the transfer (the appropriation) until 24th January 2011; (5) there is a good argument that SocGen deliberately delayed the provision of this information, because (i) on 11th January 2011, HFW sought information as to what happened to the monies in the Suspense Account (although in fact the enquiry related to the authorisations obtained by the Lenders); (ii) SocGen knew that HFW had asserted that the payment of €155 million was subject to a reservation of rights and that there was a challenge to the Termination Amount; (iii) SocGen had chosen not to answer the request for further information as to why it delayed informing 16th Ocean of the appropriation; and (iv) SocGen has not advanced any evidence that it did not deliberately fail to inform 16th Ocean of the date of the transfer and that it was not aware that the transfer was a breach of 16th Ocean's rights under the Swap.

146. I reject this submission, because the fact that is deliberately concealed must be "*relevant to the plaintiff's right of action*" (section 32(1)(b)). For the reasons explained above, the date of the transfer of the funds from the Suspense Account to the EURO CAF Account is not, in my judgment, relevant to 16th Ocean's right of action for unjust enrichment. It is the receipt of the moneys on 14th December 2010 which is relevant and that was a matter known to 16th Ocean at an early stage. Indeed, 16th Ocean must have been aware of all of the elements of its cause of action based on unjust enrichment

by 14th December 2010, because it was aware that it had paid the Termination Amount on 13th December 2010 and that it paid that sum by reason of the alleged economic duress.

147. Furthermore, I have seen no evidence to suggest that in not providing confirmation that the liability for the Termination Amount had been discharged until 24th January 2011, SocGen acted deliberately in breach of any duty or otherwise deliberately concealed this fact. Indeed, I find it inconceivable that SocGen acted in deliberate breach of duty (having regard to section 32(2) of the 1980 Act) or had deliberately concealed a relevant fact from 16th Ocean, in circumstances where:

(1) On 5th January 2011, Crédit Agricole had made it clear in the Singapore proceedings that SocGen had treated the sums owing to SocGen as repaid. Although 16th Ocean had not been a party to those proceedings, the fact was made clear to the other IRISL subsidiaries and their legal advisers, and if SocGen was willing to state this fact publicly on that occasion, there is no reason why it should deliberately conceal the fact from 16th Ocean.

(2) When HFW sought information as to the state of the authorisations on 11th January 2011, Dentons replied on the same day answering HFW's enquiry.

(3) SocGen provided the confirmation to 16th Ocean by letter on 24th January 2011 (Monday) in response to a request for details of the status of the loan account made on 19th January 2011 (Wednesday), as stated in that letter. I do not regard that as a period of unreasonable delay.

(4) There is no reason why SocGen would deliberately conceal this information from 16th Ocean at this time. None of the reasons relied on by 16th Ocean in support of an allegation of deliberate delay explain what could have motivated SocGen to conceal this information from 16th Ocean.

148. Accordingly, there is no real prospect that 16th Ocean is entitled to rely on section 32(1)(b) to postpone the start of the running of time under the Limitation Act 1980.

Is there a compelling reason for a trial of the limitation issue?

149. 16th Ocean maintained that the alleged contradictory and incomplete evidence adduced by SocGen regarding the alleged date of enrichment is in itself a compelling reason for the limitation issue to proceed to trial. In particular, 16th Ocean argued that SocGen has provided "*strikingly deficient evidence*" as to when the funds were transferred out of the Suspense Account into the EURO CAF Account for the benefit of SocGen as Swap Bank.

150. In particular, 16th Ocean pointed to an exhibit to Ms Ewing's first witness statement which is an excerpt of a Microsoft Excel spreadsheet, which recorded the payment of SocGen's share of the funds paid by the IRISL subsidiaries on 14th December 2010 (the sum of €33,072,120.23). According to 16th Ocean, this spreadsheet has not been adequately explained in the evidence and which identified two dates:

(1) 5th January 2011, as the "*Value Date*" and the "*Event Date*"

(2) 27th January 2011, as the "*Journal Date*", the "*Posted Date*", the "*BO Date*" and the "*Transaction Date*".

151. The explanations given by SocGen for this document are contained in Ms Ewing's first witness statement (at paragraph 56) and second witness statement (at paragraphs 24, 27, 29). According to Ms Ewing, the "*Event Date*" and the "*Value Date*" are the dates on which the transfer was performed and on which the transaction took effect respectively; and the "*Posted Date*", the "*BO Date*" and the "*Transaction Date*" refer to the dates on which instructions were given by SocGen Back Office to SocGen's Accounting department to record the transfer and the date the transfer was "*posted*" in SocGen's ledger.

152. On 15th November 2017, 16th Ocean served a CPR Part 18 request for further information. According to paragraph 8 of Ms Ewing's second witness statement, SocGen provided the further information sought by 16th Ocean in that witness statement. 16th Ocean contended that SocGen failed to give the requested information (as further explained in paragraph 11 of Mr Williams' first witness statement), including: (1) full particulars of SocGen's compliance procedures, being relevant to SocGen's decision to place the funds in a blocked account upon receipt; (2) full particulars of SocGen's internal definitions of "*Value Date*", "*Event Date*", "*Posted Date*", "*BO Date*", and "*Transaction Date*" as used in the spreadsheet extract; (3) how and when €33 million was appropriated by SocGen to satisfy alleged Swap and Loan Agreement liabilities; (4) information as to the persons who authorised the transfer to the EURO CAF Account; (5) an explanation as to why there was a delay to 24th January 2011 before SocGen informed 16th Ocean of the appropriation of funds; (6) the response to Mr Mettelet's email dated 5th January 2011; (7) the instruction with the SWIFT message referred to in the email dated 5th January 2011; (8) records or documents generated on 5th January 2011 purporting to show a €33 million transfer from the Suspense Account to the EURO CAF Account on 5th January 2011; and (9) documents showing the decision to authorise the transfer to the EURO CAF Account. Furthermore, it was argued by 16th Ocean that SocGen's evidence, both in Ms Ewing's witness statements and in the spreadsheet extract, was contradictory, in particular as to the transfer and the date of the transfer of SocGen's share of the funds from the Suspense Account to the EURO CAF Account.

153. The information which is said to be lacking or contradictory in the evidence is information relating to the reasons for SocGen's decision to transfer, and the transfer itself of, the Termination Amount from the Suspense Account to the EURO CAF Account. However, for the reasons I have given, the transfer of the funds itself is not relevant to my decision that the cause of action for unjust enrichment (or breach of contract) accrued before 10th January 2011. Moreover, the reasons for SocGen's decision is not relevant to my decision as to when the enrichment took place. By 5th January 2011, SocGen had decided to apply the Termination Amount in discharge of 16th Ocean's obligations under the Swap, as is evident from the statement made to the Singapore Court and the vote taken by the Lenders. In any event, it is not difficult to discern the reasons for its decision, because authorisation had been received from the DG for itself. If I had concluded that the enrichment of SocGen occurred upon the transfer of the funds from the Suspense Account to the EURO CAF Account, I would have been tempted to dismiss SocGen's application, because although I consider it very likely that the transfers took place as Ms Ewing explained in her witness statements,

there are questions raised by 16th Ocean which would require an answer and which might well be answered only at trial.

154. The alleged lack of evidence in respect of SocGen's alleged delay in informing 16th Ocean of the "*appropriation*" of funds until 24th January 2011, does not affect my assessment that there is no real prospect of 16th Ocean succeeding in its submission that time did not start running under the Limitation Act 1980 until that date pursuant to section 32(1)(b), for the reasons explained above.

155. In addition, 16th Ocean argued that the questions of law involved in determining this application are controversial and developing areas of law, as is evidenced by the fact that SocGen's written submissions (including supplementary submissions which I permitted the parties to serve) ran to 38 pages in total, and 16th Ocean's submissions ran to 51 pages.

156. However, based on the evidence available to the Court, the questions of law could be dealt with on a summary basis, based on the facts of the case which were either common ground or which were not contradicted by the evidence, and which I did not see as being open to question, other than the existence and influence of economic duress (which I was prepared to assume for the purposes of this application). The principal issue of law - essentially the existence and nature of the enrichment required for a cause of action for restitution - is a confined issue readily amenable to summary determination. I see no reason why the determination of this issue should be deferred to a trial which would no doubt entail considerable additional expense.

157. Therefore, in my judgment, there is no compelling reason why 16th Ocean's claim should proceed to trial.

Conclusion

158. For the reasons explained above, I conclude that:

(1) 16th Ocean's cause of action in restitution based on unjust enrichment (and for the related declaratory relief) accrued on 14th December 2010, and in any event no later than 5th January 2011.

(2) 16th Ocean's cause of action for damages for breach of contract (and for the related declaratory relief) accrued on 9th June 2010.

(3) The running of time under the Limitation Act 1980 was not postponed pursuant to section 32(1)(a) or (b) of the 1980 Act.

(4) 16th Ocean's claims are time-barred pursuant to section 5 of the Limitation Act 1980.

(5) There is no real prospect that 16th Ocean would succeed in its claim because of SocGen's limitation defence.

(6) There is no compelling reason why 16th Ocean's claim should proceed to trial.

159. Therefore, SocGen is entitled to succeed in its application for summary judgment dismissing 16th Ocean's claim. SocGen's application was for an order to strike out 16th

Ocean's statements of case pursuant to CPR rule 3.4(2)(a) or for summary judgment pursuant to CPR rule 24.2. Although I consider that SocGen is entitled to summary judgment, I have not heard argument as to which of the orders sought should be granted. I therefore await counsel's submissions in this respect and in respect of other consequential issues.

160. I would like to thank both counsel for their industry and the quality of their submissions.