



Neutral Citation Number: [2021] EWHC 2380 (Comm)

IN THE HIGH COURT OF JUSTICE Claim No CL-2020-000336
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL
Friday 27 August 2021

BEFORE:

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the High Court

BETWEEN

- (1) **HERITAGE TRAVEL AND TOURISM LIMITED**
(2) **MLDO PRIVATE FOUNDATION**

Claimants

- and -

- (1) **LARS WINDHORST**
(2) **TENNOR HOLDING B.V.**
(3) **LA PERLA FASHION FINANCE B.V.**
(4) **CIVITAS PROPERTIES FINANCE B.V.**

Defendants

Mr Simon Salzedo QC and Mr Jonathan Scott
(instructed by *Withers LLP*)
appeared for the Claimants

Mr Robert Anderson QC and Ms Gayatri Sarathy
(instructed by *Baker McKenzie LLP*)
appeared for the Defendants

Hearing date: 20 July 2021

.....
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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Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on 27 August 2021.

MR SALTER QC:

Introduction

1. This is the Claimants’ application to lift the stay of proceedings imposed by the Order dated 10 June 2020 of Moulder J (the “**Tomlin Order**”) and to enter judgment against the Defendants pursuant to the terms of the Tomlin Order and of a settlement agreement (“**the June Settlement**”) scheduled to the Tomlin Order.
2. The application was made by Application Notice dated 18 December 2020, and was supported by the witness statement of Leslie-Anne Timms, a partner in Withers LLP, the Claimants’ solicitors, made on the same date. The First Defendant, Mr Lars Windhorst, has made a witness statement dated 3 March 2021 on his own behalf and on behalf of the other Defendants, in opposition to the application. This was responded to by the witness statement dated 18 March 2021 of Ms Cristina Levis, the Chief Investment Officer of the First Claimant.
3. The application was heard remotely by video link on 20 July 2021. The Claimants were represented at the hearing by Mr Simon Salzedo QC and Mr Jonathan Scott and the Defendants by Mr Robert Anderson QC and Ms Gayatri Sarathy.
4. On Wednesday 18 August 2021, when a draft of this judgment had already been prepared for circulation to the parties, the Supreme Court handed down its judgment in the case of *Times Travel (UK) Ltd v Pakistan International Airlines Corp*¹. As the decision of the Court of Appeal in that case² had featured to a considerable extent in the submissions at the hearing, the parties agreed that I should delay my judgment to permit them to make (as they have done) further brief written submissions on the effect of the Supreme Court’s decision. This judgment therefore takes into consideration both the decision of the Supreme Court and those further submissions.
5. I am grateful to counsel on both sides and to the teams behind them for their assistance and for the clarity and quality of their submissions. I am particularly grateful to them for their willingness to provide, even in the depths of the long vacation, the further submissions to which I have just referred.

Background

6. The present action was begun by a Claim Form issued on 22 May 2020. Its purpose was to enforce the terms of an earlier settlement agreement dated 14 February 2020 (“**the February Settlement**”), by which the parties had agreed to settle certain disputes that arisen between them in relation to the failure by the Defendants (and entities connected with them) to perform their obligations under various prior commercial agreements (“**the Prior Transactions**”).

¹ *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40.

² [2019] EWCA Civ 828, [2020] Ch 98.

7. The details of those prior commercial agreements are set out in the Recitals to the February Settlement and the June Settlement. In very broad summary, they involved four sets of option repo transactions in the shares of companies connected with Mr Windhorst, the economic effect of which was to provide large short-term loans from the Claimants (and entities connected with them) to the Defendants (and entities connected with them)³.
8. It is not in dispute that the Defendants failed fully to perform their obligations under the February Settlement. As stated in recital Y to the June Settlement:

The terms of the [February Settlement] included a provision whereby [the Fourth Defendant was] to deliver 10,000,000 shares in [Civitas Property Group SA] to [the Second Claimant]. This did not occur. Also, certain payments have not been made in accordance with the February 2020 Agreement. On this basis, [the First Claimant and the Second Claimant] issued [the present action].
9. The express purpose of the June Settlement was to settle both the disputes which had arisen as a result of the failure by the Defendants fully to perform the terms of the February Settlement and also to settle the present action.
10. The June Settlement provided that the Defendants would be jointly and severally liable to pay to the Claimants the following sums:
 - 10.1. A “First Amount” of EUR 55,002,559.70 (including EUR 600,000 in respect of the Claimants’ legal costs), payable by 30 June 2020 (clause 3.1(a)); and
 - 10.2. A “Second Amount” of EUR 69,197,440.30, plus a daily lump sum payment of EUR 139,134 (the “**Daily Lump Sum**”) accruing pro rata on the unpaid part of the Second Amount from 27 May 2020, payable by 15 February 2021 (clause 3.1(b)).

The Second Amount would be discounted to EUR 50,000,000 if payment in that amount was made in full by 31 December 2020 (clause 3.1(c)).
11. If the First Amount was not paid in full and on time, the June Settlement also provided that the Claimants would be entitled (inter alia) to:
 - 11.1. Serve notice, declaring that the discounting provision in clause 3.1(c) no longer applied and that the unpaid balances of the First and Second Amounts were immediately due and payable, including the Daily Lump Sum calculated up to 15 February 2021; and

³ Mr Windhorst’s evidence was that these transactions were “effectively a loan”. That evidence was disputed by Ms Levis in her responsive witness statement, who asserted that the transactions were instead in substance “the purchase of shares with an option for Heritage to sell them back at a profit”. However, Ms Levis did not dispute that the economic effect was to make cash available to the Defendants.

11.2. Enter judgment against the Defendants for the unpaid amounts (clause 7.1).

The terms of the June Settlement further required the Defendants to pay all legal costs reasonably incurred by the Claimants in enforcing the terms of the June Settlement (clause 8.2).

12. Unfortunately, the Defendants (as again is common ground) did not fully perform the terms of the June Settlement. The Defendants made part payments totalling EUR 15,600,000 (paid in one instalment of EUR 600,000 on 28 July 2020 and three instalments of EUR 5,000,000 between 5 August and 2 September 2020). Otherwise, the Defendants did not make the payments specified in the June Settlement. As I shall explain later in this judgment, the Defendants' case is that, in the events which have happened, they were and are not liable to do so.
13. On 15 December 2020, the Claimants (via their solicitors) served a notice pursuant to clause 7.1 of the June Settlement, declaring that all outstanding sums were immediately due and payable.

The correct approach to this application

14. Mr Salzedo QC submitted on behalf of the Claimants that, given that the Defendants are *prima facie* in default of their obligations under the June Settlement, it is for them to persuade the Court that it should not enter judgment against them. In support of that submission, he relied upon the following passages from the judgment of Jacobs J in *Bostani v Pieper*⁴:

23. The present application is an application to give effect to a settlement agreement scheduled to a Tomlin order, by entering judgment in consequence of breaches of that agreement. There is no dispute that the sums due in respect of the third to sixth instalments were not paid. The claimants therefore have (subject to the question of limitation) a prima facie entitlement to the judgment which they seek; i e to a judgment which would give effect to the court's order.

24. However, the first defendant contends that the court should decline to give effect to that prima facie entitlement because of the oral agreement relied upon by Mr Pieper. A threshold question arises as to the standard which the court should apply in considering the argument as to the alleged oral agreement. Should it determine the matter on the balance of probabilities, based on the documentary and other evidence submitted? Should it adjourn the matter so that there can be oral evidence and cross-examination of witnesses? Should it take an approach, analogous with CPR Pt 24, of asking whether the first defendant's argument has "no real prospect of succeeding"?

25. It seems to me that there is much to be said for the view that this is an application to enforce an order of the court, and that the court should

⁴ [2019] EWHC 547 (Comm), [2019] 4 WLR 44 at [23] – [25].

simply form a view on the existing evidence as a whole as to whether it is appropriate to enforce its existing order; or, conversely, whether it should decline to do so because of the issues raised by the first defendant. In circumstances where the claimants can show a prima facie entitlement to the judgment sought, the evidential burden if not the legal burden would be on the defendants to provide the court with satisfactory evidence that would persuade the court to take a different view; i e to decide either not to enforce, or to decide that the matter is not capable of being fairly resolved on the documents or existing evidence alone and requires cross-examination of witnesses. In practical terms, however, I consider that in the context of the present case, the test to be applied is whether or not a further evidential hearing is required because the first defendant has a real prospect both of proving the oral agreement on which it relies, and also of showing that this would be an answer to the claimants' claim.

15. On behalf of the Defendants, Mr Anderson QC accepted that that was the general approach which I should adopt in considering this application. However, he emphasised that the June Settlement, even though forming part of a Tomlin Order, was a contract. As such, its enforceability was to be determined in accordance with the general law of contract. In that connection, he relied upon the following observations of Ramsey J in *Community Care North East v Durham CC*⁵:

The terms of the schedule [to a Tomlin Order] are not an order made by the court. The court obviously has the ability to interpret that agreement on well known principles of interpretation .. and would have to do so when it was asked to take any enforcement action under the standard liberty to apply for that purpose in the Tomlin order. Likewise the court has the ability to deal with the terms of that agreement in the same way as any other contract. That would include, for instance, a claim for rectification or a claim that the agreement was unenforceable for some reason. If the court decided that the agreement should be rectified or that it was unenforceable then the court may well take the view that they would vary or revoke the terms of the order part of the Tomlin order, to take account of that determination ..

16. In substance, the parties were ultimately agreed that I should approach this application on the same basis as if it were an application under CPR Pt 24 for summary judgment, applying the familiar principles explained by Lewison J in the cases of *JD Wetherspoon Plc v Van de Berg & Co Ltd*⁶ and *EasyAir Ltd (trading as Openair) v. Opal Telecom*

⁵ [2010] EWHC 959 (QB), [2012] 1 WLR 338 at [28]. See also *CFL Finance Limited v Laser Trust, Moises Gertner* [2021] EWCA Civ 228 at [26], per Newey LJ.

⁶ [2007] EWHC 1044 (Ch), [2007] PNLR 28 at [4].

*Ltd*⁷, and by Cockerill J in *Aquila Wsa Aviation Opportunities II Limited v Onur Air Tasimacilik AS*⁸.

The grounds of defence put forward

17. The Defendants rely upon four grounds of defence to the Claimants' claim to enforce the terms of the June Settlement:
 - 17.1. First, the Defendants say that the June Settlement cannot be enforced against them because it was entered into as a result of economic duress, and has not been ratified and/or affirmed;
 - 17.2. Alternatively, they assert that the June Settlement is not presently enforceable, because an implied condition precedent to the enforceability of the Defendants' obligations under the June Settlement has not been fulfilled;
 - 17.3. In the further alternative, they say that the June Settlement should be rectified so as expressly to provide for that condition precedent;
 - 17.4. Finally, they argue that clause 7.1(b) of the June Settlement is unenforceable as a penalty.
18. The Defendants say that they have a real prospect of establishing all of these defences at trial, and that any one of them would be sufficient to defeat the Claimants' claim. They also assert that there are a number of issues on which oral evidence is likely to be critical and which cannot therefore be determined on a summary basis at the present hearing.
19. I shall consider each of these four grounds in turn.

Economic duress

The Defendants' case, in outline

20. In summary, it is the Defendants' case that it was well known to both parties that the Defendants' only realistic prospect of raising the funds necessary to meet their obligations under the February Settlement was a proposed securitisation transaction ("**the Evergreen Transaction**"), and that the Claimants threatened to sabotage the Evergreen Transaction unless the Defendants entered into the June Settlement by disclosing (in breach of their contractual and/or equitable obligations of confidence) the

⁷ [2009] EWHC 339 (Ch.) at [15]; approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at [24], per Etherton LJ, and in *Global Asset Capital Inc and another v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163 at [27], per Hamblen LJ. See also *TFL Management Services Ltd v. Lloyds TSB Bank plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006 at [26]-[27] per Floyd LJ.

⁸ [2018] EWHC 519 (Comm) at [27], [30] and [31].

confidential terms of the Prior Transactions to potential investors in order to dissuade them from investing in the Evergreen Transaction.

The Evergreen Transaction

21. The nature of the Evergreen Transaction was explained by Mr Windhorst as follows:

.. In around April 2020, an opportunity arose with a third party investor, H2O Asset Management ("H2O"), to raise additional finance so that Tennor [the Second Defendant] would be in a position to buy back the relevant shares in respect of each of the [Prior Transactions] (as varied by the February 2020 Settlement Agreement).

This deal .. required Tennor to establish a special purpose vehicle, Evergreen Funding SÀRL .. which was to purchase a number of securities from H2O, then issue bonds to investors in order to raise the necessary finance .. I anticipated that the amounts raised from this transaction would be up to EUR 1.25 billion, which would readily allow Tennor to repay the amounts outstanding to the Claimants, as I told Ms Levis and Mr Lefebvre at that time ..

As I have recorded in paragraph 2 above, Ms Levis, is the Chief Investment Officer of the First Claimant. As for Mr Lefebvre, he was a named party to some of the Prior Transactions, and to the February Settlement and the June Settlement. According to Mr Windhorst, Mr Lefebvre is the ultimate beneficial owner of the Heritage Group, of which the Claimants are part.

22. Mr Windhorst's evidence (in paragraph 41 of his witness statement) was that the total amount that had been agreed to be repaid under the Prior Transactions (as varied by the 2020 February Settlement) was in excess of EUR 124m. What was not made clear by Mr Windhorst's evidence was how the Evergreen Transaction was intended to raise that sum for the Defendants given that, in the normal course of things, all or most of the proceeds of a proposed securitisation such as this (to be backed by assets not already owned by the arranger) would primarily go towards buying the assets to be securitised.

23. In response to a question from me, Mr Anderson explained on instructions that the securities to be bought from H2O were to be purchased at a deep discount, for a price of EUR 850m, having originally been sold to H2O (by the Defendants or entities connected with them) for a price of EUR 1.25bn. That explanation is to an extent supported by comments in the 13 May 2020 article from the *Financial Times* exhibited to Ms Timms' witness statement, which noted that:

German financier Lars Windhorst has struck a deal to buy back illiquid stocks and bonds from H2O Asset Management, nearly a year after concerns around these hard-to-sell assets sparked a stampede of investor withdrawals from the London-based investment firm.

H2O .. signed an agreement at the end of April with a new investment vehicle set up by Lars Windhorst, which will buy back stocks and bonds linked to the German financier at a discount .. A spokesman for Mr Windhorst’s investment company Tennor .. said: “We are aware that a company linked to our founder Lars Windhorst, with backing from a group of German investors, has signed an agreement to purchase securities linked to Tennor Group from H2O Asset Management LLP.”

24. Unfortunately, that explanation still does not reveal how these “illiquid stocks and bonds” could realistically have been expected to stand as the underlying assets for a securitisation that was itself intended to yield EUR 1.25bn, given that the market value of such “hard-to-sell assets” might (at least *prima facie*) be expected not to be significantly greater than the acquisition cost of EUR 850m. That, however, is not an issue that I am in a position to explore further on this application.
25. It was also Mr Windhorst’s evidence that the Evergreen Transaction was, in practice, the only realistic prospect that the Defendants had of raising the funds to meet their obligations under the February Settlement and, subsequently, the June Settlement.

[46] .. It was absolutely clear to all parties that the consummation of the Evergreen Transaction was essential to the performance of the obligations under the June 2020 Settlement Agreement. The principal obligations under the June 2020 Settlement Agreement were the payment terms ... and it was agreed that the first payment could not be met within the short time frames envisaged under the agreement without the Evergreen Transaction taking place. In particular, the date of 30 June 2020 was chosen because it was the date by which I fully expected Evergreen to have issued the relevant bonds to investors, so it would have sufficient funds to meet the first payment obligation contained in the agreement. ...

[48] ... the whole purpose of the negotiations leading up to the June 2020 Settlement Agreement was to put in place a mechanism by which the Defendants could repay the amounts owed to the Claimants, and the Evergreen Transaction was that mechanism. ...

26. As Ms Timms accepted in Paragraph 13 of her witness statement, it was the common expectation of the parties that the funds with which the Defendants were to pay the sums due under the June Settlement were to come from the Evergreen Transaction. Indeed, the documentary evidence (including Schedule 3 to the June Settlement) clearly establishes that the first payment under the June Settlement was intended to be made by Evergreen.
27. Unfortunately, the Evergreen Transaction was not successful in raising the required funds. According to Mr Windhorst:

[50] The bond was duly issued by Evergreen on 9 June 2020. Unfortunately, shortly after the [June Settlement] was signed, it became apparent that the Evergreen Transaction would not proceed as had been anticipated. The Financial Conduct Authority ("FCA") confirmed that it was investigating various transactions concerning H2O, in response to a parliamentary question lodged by Lord Paul Myners, the former City Minister. This was naturally the subject of much press attention. As a result of the FCA's confirmation that it was looking into H2O's activities, and as a result of the publicity this received, Evergreen was unable to secure sufficient investors in connection with the bond issuance comprising the Evergreen Transaction.

[51] Nevertheless, I continued to make every effort to secure sufficient subscribers for the bonds in order to raise the necessary finance .. [W]hen it became clear that the 30 June 2020 deadline for the First Amount would not be met .. I discussed this with Ms Levis and we agreed to extend the deadline for payment of the First Amount by an additional 30 days .. However, even with this additional time and despite my efforts, by 30 July 2020 the bonds were not fully subscribed and there was no real prospect of securing sufficient investors to enable the Evergreen Transaction to proceed. It was also clear from my conversations with Ms Levis at this time that Mr Lefebvre was unwilling to consider any further extension for payment of the First Amount. In light of this, it was clear to all parties to the June 2020 Settlement Agreement that there was no prospect of payment in accordance with its terms.

[52] It was in this context, and as a gesture of goodwill in order to keep the ongoing negotiations alive, I personally made a series of payments to Heritage in order to appease Mr Lefebvre as follows:

- (a) A payment of EUR 600,000 on 28 July 2020;
- (b) A payment on account of EUR 5,000,000 on 5 August 2020;
- (c) A payment of EUR 5,000,000 on 17 August 2020, and on receipt of which Heritage delivered to Tennor the corresponding value (i.e. 2 million) of the shares it held in LP Holding; and
- (d) A payment of EUR 5,000,000 on 2 September 2020, and on receipt of which Heritage delivered to Tennor the corresponding value (i.e. 2 million) of the shares it held in LP Holding.

[53] Notwithstanding these payments, which I made personally as a gesture of goodwill and for the purposes of maintaining our ongoing commercial relationship, communications between the parties broke down which seems to have led to Heritage issuing the Application

28. The February Settlement, like the June Settlement, contained provisions relating to confidentiality. Subject to various exceptions set out in clause 12.3 (none of which are relevant for present purposes), clauses 12.1 and 12.2 of the February Settlement provided that:

[12.1] The terms of this Settlement Agreement and the substance of all negotiations in connection with it are strictly confidential to the Parties and their advisors, who shall not disclose them to, or otherwise communicate them to, any third party without the written consent of each of the other Parties.

[12.2] No Party shall make any public comment or comment to the press or other media concerning this Settlement Agreement.

29. Those confidentiality provisions were nevertheless expressly subject to the provisions of clause 7.3, which provided (inter alia) that:

.. Upon and at any time after the occurrence of an Event of Default, any Claimant may by notice to Tennor (a) declare that any and all amounts accrued or outstanding owed by the Obligors under this Settlement Agreement be immediately due and payable, at which time they shall become immediately due and payable and/or (b) *declare that the Parties shall no longer be bound by any of the obligations set out in Clause 12 (Confidentiality), from which time the parties shall no longer be so bound* ..⁹

Pressure

30. According to Mr Windhorst, he was constrained to agree to the February Settlement by threats made by Mr Lefebvre and Ms Levis on behalf of the Claimants to tell potential investors of the terms of the Prior Transactions and of the Defendants' alleged breaches:

[35] .. [B]y December 2019 .. the relationship between Tennor and Heritage was extremely fragile. I was trying to work with them to reach a resolution over the amounts owing under the agreements, but in parallel Mr Lefebvre and Ms Levis were continually threatening to speak to potential investors in Tennor Group (and its indirect subsidiaries) to try to dissuade them from investing, in breach of the confidentiality obligations referred to above. It was clear to me that they intended to do this by disclosing the confidential terms of the various transaction agreements (and the alleged breaches by Tennor) to potential investors. If this did have the effect of putting off those investors, it would have a significant impact on Tennor's profits and its ability to raise further funds, which would have led to disastrous financial consequences for both Tennor and me personally ..

[37] Ms Levis and Mr Lefebvre were well aware that if this information leaked out into the market, this would prevent us from closing transactions

⁹ Emphasis added.

that had been put in place to raise the necessary funds to enable the Defendants to meet their performance obligations. Despite this, however, they deliberately took advantage of the concerns I had raised about this and threatened to do exactly that by seeking to exercise their rights as shareholders to obtain information, including details of potential buyers ..

[38]. I knew (as did Mr Lefebvre and Ms Levis) that, if investors thought that Tennor was in serious financial difficulty, they would pull out of the ongoing asset sales and liquidity events that were necessary to ensure the continuing profitability of Tennor. If these transactions were jeopardised by Heritage leaking confidential information to those investors, as I discussed with Ms Levis, the financial consequences for Tennor would be significant, as it would lose substantial cash investment ..

[39] For these reasons, I had no alternative but to enter into [the February Settlement] ..

31. With regard to the June Settlement, Mr Windhorst's evidence was as follows:

[45] In the light of [the potential Evergreen Transaction] Mr Lefebvre was prepared to enter into negotiations with me to terminate the February 2020 Settlement Agreement and enter into a new settlement agreement on revised terms .. In parallel to these negotiations, however, the Claimants issued an Acceleration Notice on 11 May 2020 in which they asserted that they were no longer bound by the confidentiality obligations in the February 2020 Settlement Agreement. This was consistent with their previous practice of, on the one hand seeking to negotiate a deal with me, but on the other purporting to enforce rights or threatening to disclose confidential information. Now that Mr Lefebvre and Ms Levis were aware of the H2O deal and Evergreen Transaction, it was helpful in terms of giving them comfort that an agreement could be reached with Tennor; but they also threatened to jeopardise that transaction if required by disclosing the confidential terms of the various transactions and the February 2020 Settlement Agreement to potential investors in the Evergreen bond, which would have caused the entire deal to collapse ..

[49] I knew that if I did not agree to these terms, Ms Levis and Mr Lefebvre would seek to jeopardise the H2O transaction / Evergreen Transaction by disclosing to potential investors the confidential terms of our agreements which, as outlined above, could ultimately lead to Tennor losing an investment of up to EUR 1.25 billion. This was clear to me from the discussions that had taken place between us. I therefore had no option but to agree to the terms that they dictated, even though I thought that they included punitive payment terms, including the additional Daily Penalty Sum. Now that Mr Lefebvre had issued proceedings against Tennor, I considered there to be a serious risk that he would carry out his other

threats and seek to put off potential investors in this way. The June 2020 Settlement Agreement was therefore signed on 8 June 2020.

32. To a strictly limited extent, this evidence in relation to the June Settlement was accepted by Ms Levis. According to Ms Levis:

[17] .. Upon default by the Obligors and the service of the Acceleration Notice, Heritage was no longer bound by any duty of confidentiality It is correct, therefore, to say that Heritage was considering warning potential investors in Tennor of its claim, and indeed it was approached by other creditors of Tennor in this respect ..

33. It is common ground that both sides had the assistance of legal teams in connection with the negotiation and drafting of both the February Settlement and the June Settlement. The Defendants were at that stage represented by White & Case LLP, the Claimants (as now) by Withers LLP. According to Ms Levis,

The negotiation and drafting of both the February 2020 Agreement and the Settlement Agreement were undertaken against the background of intensive without prejudice discussions primarily involving Mr Windhorst and me, together with significant input from our respective legal representatives.

However, according to Mr Windhorst:

[A]lthough both parties were legally represented, usually the key terms with discussed between me or Mr Eoin Speight (the Chief Operating Officer of Tennor) and [Ms Levis] ..or Mr Lefebvre himself (on behalf of Heritage) directly. Frequently, Ms Levis would insist upon the main conditions, describing them as ‘non negotiable’ and insist that the documentation should be prepared to that effect either that same day or shortly afterwards. The role of our legal teams was principally to document (or “paper”) the provisions that she directed with limited subsequent negotiation over the precise wording.

The law concerning economic duress

34. There was little dispute between the parties, either in their submissions at the hearing or in their further written submissions, as to the legal principles applicable to the defence of economic duress. In my judgment, on the current state of the authorities, the relevant principles which I must apply are as follows:

- 34.1. There are two essential elements that a claimant needs to establish in order to succeed in a claim for rescission of the contract on the ground of duress. The first is a threat (or pressure exerted) by the defendant that is illegitimate. The

second is that that illegitimate threat (or pressure) caused the claimant to enter into the contract¹⁰.

34.2. Economic pressure can amount to duress, provided it may be characterised as illegitimate¹¹. However, in the context of economic (though not of other forms of) duress, there is a third element. This is that the claimant must have had no reasonable alternative to giving in to the threat or pressure¹².

34.3. In determining (in relation to the first element) whether pressure is illegitimate, it is relevant to consider both the nature of the pressure and also the nature of the demand which the pressure is applied to support¹³:

34.3.1. A threat of unlawful action such as the commission of a tort or similar wrong or of an offence will usually be treated as illegitimate, whatever the nature of the demand. Many, if not most, threats to break a contract will also similarly be regarded as illegitimate¹⁴.

34.3.2. Where, however, the action threatened is a lawful one, the question of whether it is illegitimate focuses on the nature and justification of the demand rather than the nature of the threat. The court will have regard to, among other things, the behaviour of the threatening party including the nature of the pressure which it applies, and the circumstances of the threatened party¹⁵.

34.3.3. In the commercial context, it is only in extremely limited circumstances that the law will regard a threat to act lawfully as illegitimate or unconscionable. It is not ordinarily duress to threaten to do that which one has a right to do, for instance to refuse to enter into a contract or to terminate a contract lawfully. The pursuit of commercial self-interest is justified in commercial bargaining. The pressure applied by a

¹⁰ *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* (fn 1 above), per Lord Burrows JSC, and at [1], per Lord Hodge DPSC (with whom Lord Reed PSC, Lord Lloyd-Jones and Lord Kitchin JJSC agreed).

¹¹ *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366; *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152; *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* (fn 1 above) [78], per Lord Burrows JSC, and at [1], per Lord Hodge DPSC (with whom Lord Reed PSC, Lord Lloyd-Jones and Lord Kitchin JJSC agreed).

¹² *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* (fn 1 above) at [79], per Lord Burrows JSC, and at [1], per Lord Hodge DPSC (with whom Lord Reed PSC, Lord Lloyd-Jones and Lord Kitchin JJSC agreed).

¹³ *The Universe Sentinel* [1983] 1 AC 366 at [401], per Lord Scarman; *R v Attorney-General for England and Wales* [2003] UKPC 22, [2003] EMLR 24 at [16], per Lord Hoffmann.

¹⁴ *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* [2019] EWCA Civ 828, [2020] Ch 98 at [51], per David Richards LJ (not discussed on appeal). See also *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm) | [2011] 1 All ER (Comm) 46 at [92], per Christopher Clarke J.

¹⁵ *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* (fn 1 above) at [88] and [96], per Lord Burrows JSC, and at [1], per Lord Hodge DPSC (with whom Lord Reed PSC, Lord Lloyd-Jones and Lord Kitchin JJSC agreed).

negotiating party (unless it involves a threat to act unlawfully) will very rarely come up to the standard of illegitimate pressure or unconscionable conduct. It will therefore be a rare circumstance in which a court will find lawful act duress in the context of commercial negotiation¹⁶.

- 34.4. A contract entered into under duress is not void, but voidable. A person who has entered into a contract under duress may therefore either affirm or avoid the contract after the duress has ceased. If he has voluntarily acted under it with a full knowledge of all the circumstances he may be held bound on the ground of ratification, or if, after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it¹⁷.

The submissions of the parties

35. On behalf of the Defendants, Mr Anderson submitted that the Defendants' defence that they entered into the June Settlement as a result of economic duress has a real prospect of success. In his submission:

- 35.1. The purpose of the Prior Transactions was clearly to obtain short term finance to enable Tennor Group to complete other transactions. The evidence also establishes that it was known to both parties that it was critical to Tennor's profitability that the terms and conditions of the various agreements, as well as the information relating to the parties, remained confidential.
- 35.2. That need for confidentiality was protected by the contractual confidentiality provisions of the February Settlement set out in paragraph 28 above.
- 35.3. The Claimants were also subject to an equitable duty of confidence, which (at least arguably) would have continued even after service of the Acceleration Notice brought the contractual obligations of confidence to an end: see *CF Partners (UK) LLP v Barclays Bank plc*¹⁸. It would be wrong for me to determine against the Defendants on this application the issue of whether that equitable duty did so continue, since that issue requires the sort of detailed examination of all the facts and surrounding circumstances that is only possible at trial.

¹⁶ *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* (fn 1 above) at [28] – [30], per Lord Hodge DPSC (with whom Lord Reed PSC, Lord Lloyd-Jones and Lord Kitchin JJSC agreed), citing J Beatson, A Burrows and J Cartwright (eds), *Anson's Law of Contract* (31st edn, OUP 2020) ch 10.2(d).

¹⁷ Beale and others, *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) at [8-054]; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 at 719-720, per Mocatta J.

¹⁸ [2014] EWHC 3049 (Ch) at [132]-[134] and [894]-[895], per Hildyard J.

35.4. Mr Windhorst's evidence to the effect that he was pressured into agreeing the June Settlement by threats to break those obligations is credible and must be assumed to be true for the purposes of this application.

35.5. Insofar as those threats took place prior to service of the Acceleration Notice on 11 May 2020, they were (inter alia) threats to commit a breach of contract and so amounted to the sort of economic pressure that the law regards as illegitimate.

35.6. Insofar as those threats took place after service of the Acceleration Notice:

35.6.1. They were threats to breach the Claimants' continuing equitable duty of confidentiality and so also amounted to the sort of economic pressure that the law regards as illegitimate; alternatively

35.6.2. To the extent that (contrary to Mr Anderson's primary submission) those threats amounted to 'lawful act duress', the Claimants' conduct:

35.6.2.1. was a reprehensible and unconscionable means of applying pressure, not merely the Claimants exploiting their bargaining power in hard-nosed commercial negotiation; and/or alternatively

35.6.2.2. caused the Defendants to enter into the kind of unconscionable bargain which the law will not uphold.

35.6.2.2.1. As Lord Burrows noted in *Times Travel*¹⁹, the law of unconscionable bargains:

.. is concerned with the exploitation by A of a weakness of B by entering into a contract that is clearly disadvantageous to B who has not obtained independent advice. In almost all past English cases on unconscionable bargains, B has been an individual with a mental weakness such as inexperience, confusion because of old age or emotional strain .. But it is not inconceivable that the relevant weakness could be the very weak bargaining position of a company ..

35.6.2.2.2. Here, the Defendants were in a very weak bargaining position because they were unable to pay the sums due under the various agreements if

¹⁹ *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* (fn 1 above) at [77].

potential investors formed the view that Tennor was in serious financial difficulty.

35.6.2.2.3. The Claimants were aware of the Defendants' financial position and acted unconscionably by threatening to disclose confidential information if the Defendants refused enter into the February and June Settlements on the Claimants' terms (largely on a "take it or leave it" basis).

35.6.2.2.4. The terms of those agreements were highly disadvantageous to the Defendants: The June Settlement also contained punitive terms, including the Daily Lump Sum.

35.6.2.2.5. On Mr Windhorst's evidence, the involvement of lawyers in the commercial negotiations was minimal.

35.6.3. In the present, developing state of the law concerning economic duress, it would be wrong for me to determine any of these issues against the Defendants on this application, since they require the sort of detailed examination of all the facts and surrounding circumstances that is only possible at trial.

36. On behalf of the Claimants, it was Mr Salzedo's submission that the evidence put forward by Mr Windhorst does not disclose even an arguable basis for the Defendants' assertion that the June Settlement was procured by economic duress or amounted to an unconscionable bargain.

36.1. Mr Windhorst's evidence of threats in relation to the June Settlement is vague, unspecific and incredible, and should not be accepted even for the purposes of this application:

36.1.1. Most of Mr Windhorst's evidence is concerned with events leading up to the February Settlement, and is therefore not directly relevant to the issues on this application, which is concerned only with the enforceability of the June Settlement.

36.1.2. With regard to the June Settlement, Mr Windhorst gives no evidence about what was allegedly said, when or by whom. Nor does he refer to any contemporaneous documents to support the Defendants' case. Indeed, the only contemporaneous document to which he refers in support of his allegations of illegitimate pressure is the Acceleration Notice.

- 36.1.3. Mr Windhorst's complaints in paragraph 45 of his witness statement conflate "purporting to enforce rights or threatening to disclose confidential information" and wrongly treat the service of the Acceleration Notice (a plainly lawful act) as part of the pressure which he complains was illegitimate.
- 36.1.4. Mr Windhorst's assertion that the Claimants were threatening to jeopardise the Evergreen Transaction cannot be reconciled with his repeated refrain that it was understood by all parties that the Evergreen Transaction was the only way for the Claimants to get paid. Such conduct would make no commercial sense.
- 36.2. Mr Windhorst's evidence (even taken at its highest) only describes pressure said to have been felt by him personally. That is significant because Mr Windhorst did not sign the June Settlement on behalf of any of the Second to Fourth Defendants. It was instead signed by Mr Kindler and Mr Khan. Unlike Mr Kindler and Mr Khan, Mr Windhorst was not a member of the management board of any of the Second to Fourth Defendants when the June Settlement was concluded. There is therefore no evidence at all of any duress against the Second to Fourth Defendants, and no reason why the Claimants should not be able to enforce against those Defendants.
- 36.3. In any event, the June Settlement was entered into on 8 June 2020, almost a month after the service of the Acceleration Notice on 11 May 2020 caused the contractual obligations of confidence relied on by the Defendants to come to an end.
- 36.4. The Defendants' suggestion that there could be a continuing equitable obligation of confidentiality is misconceived and unsupported by the authority relied on. That case says in terms that "where the parties have specified the information to be treated as confidential and/or the extent and duration of the obligations in respect of it, the court will not ordinarily superimpose additional or more extensive equitable obligations"²⁰. There is nothing in the evidence to suggest that this is a case involving "circumstances that are not ordinary" justifying the imposition of any wider equitable duties of confidence.
- 36.5. Furthermore, even if the June Settlement had been voidable on the grounds of economic duress or as an unconscionable bargain, it is clear on Mr Windhorst's own evidence that he was free of any such duress and had full knowledge of the relevant circumstances by very shortly after the June Settlement was concluded. Not merely have the Defendants thereafter omitted to take any steps to avoid the June Settlement (which would itself preclude any defence based upon economic duress) but they have positively affirmed the June Settlement by

²⁰ *CF Partners (UK) LLP v Barclays Bank plc* (fn 18 above) at [131].

making the payments identified in paragraph [52] of Mr Windhorst's witness statement (set out in paragraph 27 above).

Analysis and conclusions on this issue

37. In my judgment, Mr Windhorst's evidence is in many respects unsatisfactory. I accept Mr Salzedo's submission that Mr Windhorst's evidence of threats in relation to the June Settlement is vague and unspecific. I also accept Mr Salzedo's submission that there is an inherent contradiction between Mr Windhorst's assertion that the Claimants were prepared to jeopardise the Evergreen Transaction and his assertion that both parties knew that the success of the Evergreen Transaction was essential if the Claimants were ever to be paid. Furthermore, Mr Windhorst's evidence gives no proper explanation of the financial positions and resources available to the Defendants at the material time, to support his assertion that the Defendants had no 'real choice' or 'realistic alternative' but to yield to the alleged pressure. That is particularly striking in circumstances in which the Defendants had had the use of the funds released by the Prior Transactions (the fate of which Mr Windhorst makes no attempt to explain), and appear to have had available to them the EUR 850m resources needed to buy from H2O the securities required to back the Evergreen Transaction.
38. On an application such as this, however, the court must avoid being drawn into an attempt to resolve without disclosure or evidence those conflicts of fact which are normally resolved by a trial process. In my judgment, therefore, the right course on the present application is for me to assume, in the Defendants' favour, that they would have a real prospect of establishing at trial:
- 38.1. That both parties believed at the relevant time that the Evergreen Transaction stood reasonable prospects of being successful and would, if successful, produce the funds required for the Defendants to meet their obligations to the Claimants;
 - 38.2. That both parties believed at the relevant time that, unless the Evergreen Transaction were successful, it was highly unlikely that the Defendants would be able to perform their obligations under the February Settlement or the June Settlement.
 - 38.3. That, both before and after service of the Acceleration Notice, the Claimants communicated to the Defendants that, unless the Defendants agreed to the terms eventually incorporated into the June Settlement, the Claimants were prepared to disclose to potential investors matters which, prior to service of the Acceleration Notice, would have been subject to the obligations of confidentiality in the February Settlement; and that
 - 38.4. The Defendants, in the belief that such disclosure would be likely to jeopardise the Evergreen Transaction, considered that they therefore had no realistic alternative but to accede to the Claimants' demands.

39. Even on those assumed facts, however, it seems to me that the Defendants would have no real prospect of being able to establish any defence based upon economic duress or unconscionable bargain to the Claimants' claims to enforce the terms of the June Settlement.
40. Even prior to the service of the Acceleration Notice, it was always open to the Claimants to serve an Acceleration Notice that would release them from their contractual obligations of confidence. It was therefore always open to them to do lawfully that which (on the assumptions which I have made above) they were threatening to do. Since that was what they in fact did, it would in my judgement be wrong to interpret any pre-Acceleration Notice "threats" as threats to act unlawfully, rather than as threats to enforce the Claimants' contractual rights.
41. In any event, the relevant time for considering whether the Defendants were constrained to enter into the June Settlement by illegitimate pressure is, in my judgment, the period on and shortly prior to the date when they did so. At that point, the Claimants had for almost a month no longer been subject to any contractual restraint under the terms of the February Settlement.
42. Properly analysed, it therefore seems to me that the relevant threats which Mr Windhorst alleges that the Claimants made to him were simply threats either to enforce the Claimants' contractual rights or to do things which the Claimants were not contractually prohibited from doing.
43. As to the suggestion of some more extensive equitable duty of confidence, it is not in dispute that the court will not ordinarily superimpose additional or more extensive equitable obligations, where the parties have contractually specified the information to be treated as confidential and the extent and duration of the obligations of confidence in respect of it. I nevertheless accept Mr Anderson's submission that the scope and content of equitable obligations of confidence may be neither exclusively nor conclusively defined by the terms of the parties' contract²¹ and that, where the use of certain information would plainly excite and offend a reasonable man's conscience, an equitable duty not to use the information having that quality may perhaps exceptionally be recognised, even if that duty goes further than that prescribed by such a contract²².
44. I am, however, unable to accept Mr Anderson's further submission that this is even arguably such an exceptional case. The contracts with which I am concerned involved experienced commercial parties who, on both sides, had the assistance of well-known firms of commercial solicitors. Both sides were well able to stipulate for the restrictions, and limitations to those restrictions, which they required. There is no suggestion in Mr Windhorst's evidence that the matters which the Claimants were saying they were proposing to reveal were anything other than matters which the Claimants believed in

²¹ *CF Partners (UK) LLP v Barclays Bank plc* (fn 18 above) at [895].

²² *CF Partners (UK) LLP v Barclays Bank plc* (fn 18 above) at [132].

good faith to be true - that the Defendants had entered into the Prior Transactions, had failed to perform their obligations thereunder, had then entered into the February Settlement, but had again failed to perform their obligations, and were now seeking yet more time to do so. There is nothing about that sort of situation or that sort of information to “excite and offend a reasonable man’s conscience”, so as to attract the intervention of equity to change the parties’ bargain.

45. It follows that, even on the assumptions which I have made in the Defendants’ favour, the only case properly open to them would be one of ‘lawful act duress’. To make out such a case at trial, it would therefore be necessary for the Defendants to establish that the conduct of the Claimants was so unconscionable or improper (having regard to the principles discussed above) as to come within that rare category of cases in which the law will intervene.
46. I am entirely satisfied, taking into account not only the evidence presently before the court but also any evidence which could reasonably be expected to be available at trial, that the Defendants have no real prospect of successfully making out such a case. What the Defendants say happened here was, in my judgment, plainly a lawful act threat, coupled with a demand motivated by commercial self-interest. Such conduct is generally regarded in law as wholly legitimate²³. Nothing in the facts of this case, even taking the Defendants’ case at its highest, comes close to establishing the kind of reprehensible or improper conduct or the kind of unconscionability that could provide the Defendants with an arguable defence.
47. In particular, the submission that the financial problems of the Defendants were such as to put them into the category of parties which equity does or should protect from exploitation is, in my judgment, a wholly unrealistic one, having regard (inter alia) to the evidence before me of the considerable commercial experience and sophisticated financial expertise (as demonstrated, amongst other things, by the nature of the Prior Transactions and of the Evergreen Transaction) possessed by or available to the Defendants, and their ready access to lawyers.
48. I reject Mr Anderson’s submission that the determination of these issues requires the sort of detailed examination of all the facts and surrounding circumstances that is only possible at trial, following disclosure and with the benefit of cross-examination. As I have said, I am prepared for the purposes of this application to assume in the Defendants’ favour the substance of their allegations concerning the facts. The circumstances in which the June Settlement came to be negotiated between these experienced commercial parties, however, speak for themselves. As Mr Salzedo submitted, the most material of those circumstances is the fact that the Defendants were already in default of their obligations under the Prior Agreements and the February Settlement, and were seeking a yet further extension of their time to honour those obligations. In the circumstances, it would have been wholly understandable and

²³ *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* (fn 1 above) at [98], per Lord Burrows JSC, and at [1], per Lord Hodge DPSC (with whom Lord Reed PSC, Lord Lloyd-Jones and Lord Kitchin JJSC agreed).

reasonable for the Claimants to believe that they were entitled to exact whatever additional consideration that they could lawfully negotiate as the price of that further extension. Such is the nature of commerce.

49. Mr Anderson's submission that something might turn up either on disclosure or in the course of cross-examination which would show that the Claimants' conduct was reprehensible and/or improper or that the June Settlement amounted to an unconscionable bargain is, in the circumstances, pure Micawberism²⁴.
50. In my judgment, the Defendants therefore have no real prospect of successfully defending the Claimants' claims on the grounds either of economic duress or that the June Settlement was an unconscionable bargain.
51. In the circumstances, I can deal with the Claimants' remaining arguments concerning this suggested ground of defence quite shortly.
52. In my judgment, I cannot resolve on this application the issue of whether the Defendants had no reasonable alternative but to give in to the threats which they say that the Claimants made to them. I was initially inclined to accept Mr Salzedo's submission that the Defendants' evidence on this application fails to show that they would have a real prospect of establishing at trial this crucial third element of the defence of economic duress. As Mr Salzedo submits, the evidence shows that Mr Windhorst was (and is) an experienced and resourceful businessman, and that he and the company Defendants had the benefit of legal advice. The Defendants have not submitted any detailed evidence concerning their respective financial positions at the material time, but it seems likely that they had available to them at least the EUR 850m necessary for the Evergreen Transaction. It is therefore tempting to accept Mr Salzedo's further submission that the "reasonable alternatives" open to the Defendants were for them either to pay what was due from them under the February Settlement or, if they could not pay, to enter into some form of insolvency process.
53. Nevertheless, having assumed in the Defendants' favour that both parties believed at the relevant time that, unless the Evergreen Transaction were successful, it was highly unlikely that the Defendants would be able to perform their obligations under the February Settlement, it would be inconsistent for me to hold that they otherwise had the resources to meet their obligations under the February Settlement: and the question of whether administration or some other insolvency process was a reasonable alternative requires, in my judgment, a more detailed factual enquiry than is possible on the limited evidence before me on this application.
54. In my judgment, I also cannot resolve on this application the issue of whether the Defendants have affirmed the June Settlement by making the payments referred to in

²⁴ See *Lungowe and others v Vedanta Resources plc* [2020] AC 1045 at [45], per Lord Briggs JSC (with whom Baroness Hale of Richmond PSC, Lord Wilson, Lord Hodge and Lady Black JJSC agreed). In reaching this conclusion, I have not forgotten that something did in fact turn up for Mr Micawber, who by the end of *David Copperfield* had emigrated to Australia, where he became a successful Magistrate.

paragraph 52 of Mr Windhorst's witness statement. Mere delay or inactivity does not of itself amount to affirmation: and, given the extent of the Defendants' existing liabilities under the February Settlement, it is impossible on the basis of the very limited information contained in the witness statements for this application for me to form a concluded view about whether those payments were so clearly connected with the June Settlement (rather than the February Settlement) as to amount to a sufficiently unequivocal act of affirmation.

55. It follows that, if the Defendants (contrary to my conclusions above) had otherwise been able to show a real prospect of establishing the defence of economic duress, I would not have given judgment summarily against them simply on the basis of either of these two further arguments raised by the Claimants.

Condition precedent

56. The Defendants' second ground of defence is their argument that the payment obligations under clause 3 were dependent upon the successful completion of the Evergreen Transaction. Since the Evergreen Transaction was not completed, the terms of the June Settlement are not presently enforceable against the Defendants.

57. Clause 2 of the June Settlement includes a list of conditions precedent to the effectiveness of the June Settlement. That list does not include the completion of the Evergreen Transaction. Clause 18.1 of the June Settlement is an "entire agreement" clause, in the following terms:

.. this Settlement Agreement constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to the subject matter of this Settlement Agreement ..

58. On behalf of the Defendants, Mr Anderson nevertheless submits that the June Settlement is subject to the further condition precedent which I have identified in paragraph 56 above, either on its proper interpretation or as a matter of necessary implication.

59. I have already held that I am prepared, for the purposes of this application, to assume in the Defendants' favour that both parties believed at the relevant time that, unless the Evergreen Transaction were successful, it was highly unlikely that the Defendants would be able to perform their obligations under the February Settlement or the June Settlement. In Mr Anderson's submission, that context is highly relevant to the proper interpretation of the terms of the June Settlement. Mr Anderson also drew my attention, in particular, to the following aspects of the evidence presently before the court:

- 59.1. In an email dated 6 April 2020, Ms Levis acknowledged that the payment of the First Amount would occur only upon receipt of funds following the Evergreen Transaction:

In the call you told me you think it is possible to use part of the money you collect, to buy back the shares from us, so we look forward to receiving a firm commitment and a precise date.

- 59.2. Ms Levis acknowledges in paragraph 21 of her witness statement that

Mr Windhorst gave [her] various assurances that the Evergreen Transaction would happen and complete, and that [she] took considerable comfort from this when entering into the Settlement Agreement.

- 59.3. Ms Timms states in paragraphs 16 and 17 of her witness statement that the Defendants told the Claimants that

Evergreen was in June 2020 in the process of raising funds backed by third party investors to fund these acquisitions and Mr Windhorst and Tennor stated that sufficient funds could be raised at the same time in order for the Defendants to purchase the La Perla Shares and the Avatera Shares to which the First Amount related ..

.. In the light of the difficulties encountered by Evergreen in raising funds, it was apparent to the Claimants as early as late June that the Defendants would breach the Settlement Agreement and fail to pay the First Amount.

She also acknowledges in paragraph 13 that

Funding with which to pay the Settlement Sums was intended to come from the issue of a bond to Evergreen

- 59.4. Schedule 3 to the June Settlement clearly shows the intention of the parties that the First Amount payable under the June Settlement should be paid by Evergreen.

- 59.5. In paragraph 28 of her Witness Statement, Ms Levis states that the Daily Lump Sum provided for in clause 3.1(b) of the June Settlement was calculated on the basis that the Evergreen Transaction would take place, and that this was the justification for the inclusion of such a provision.

- 59.6. The Claimants agreed a one-month extension for the payment of the First Amount to 31 July 2020. This was the anticipated date for consummation of the Evergreen Transaction. When agreeing this extension on 24 July 2020, Ms Levis asked Mr Windhorst by email to provide

.. the agreement terms and waiver with H2O ..

and

.. evidence that the bond is now fully subscribed and the money is in the account ..

60. In Mr Anderson's submission, the evidence already available, in context, shows that there is a real prospect that a court, at trial, would conclude (either as a matter of interpretation or necessary implication) that the parties intended that the successful completion of the Evergreen Transaction should be a condition precedent to the effectiveness of the June Settlement.
61. Mr Anderson further submitted that a fuller investigation of the facts, and oral evidence, would be available to a trial judge and may affect the conclusion on this issue. This is therefore not an issue that I should finally decide on this application. I do not accept that submission. In order to be relevant either to interpretation or to implication, facts must be known or reasonably available to both parties²⁵. It follows that any relevant facts must already be known or reasonably available to the Defendants. Yet Mr Anderson has not suggested the existence of any relevant further fact not already in evidence before the court on this application.
62. This is therefore a case in which I can be entirely satisfied that I have before me all the evidence necessary for the proper determination of these issues and that the parties have had an adequate opportunity to address the issues in argument. In my judgment, these issues of interpretation and implication are short points of law which are not dependent on any disputed facts (other than those which I have assumed in the Defendants' favour), and are therefore matters which the court both can and should determine summarily.
63. The principles of contractual interpretation which I should apply were not in dispute, established as they have been by the familiar decisions of the Supreme Court culminating (at least for the time being) in *Wood v Capita Insurance Services Ltd*²⁶. I will not attempt to distil or paraphrase that learning²⁷.
64. As Lord Neuberger said in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*²⁸, construing the words used and implying additional words are different processes governed by different rules. The rules relevant to implication, as re-stated in that case, were helpfully distilled by Butcher J in his recent judgment in *Alpha Marine Corp v Minmetals Logistics Zhejiang Co. Ltd*²⁹, and I gratefully adopt that summary:

[41] .. a term may be implied on the basis of business necessity or obviousness. These are alternatives, in that only one needs to be established,

²⁵ *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [21], per Lord Neuberger of Abbotsbury PSC,

²⁶ [2017] UKSC 24, [2017] AC 1173.

²⁷ *Trillium (Prime) Property GP Limited v Elmfield Road Limited* [2018] EWCA Civ 1556 at [9], per Lewison LJ.

²⁸ [2015] UKSC 72, [2016] AC 742.

²⁹ [2021] EWHC 1157 (Comm)

although .. in practice it would be a rare case where only one of those two requirements would be satisfied. In relation to business necessity, this involves a value judgment; it is not a test of absolute necessity; it is rather a question of whether without the term, the contract would lack commercial or practical coherence .. In relation to obviousness, one way of testing this is by reference to Mackinnon LJ's officious bystander .. but if this is done, it is necessary to formulate the question to be posed by him with great care ..

[42]. It is necessary, for a term to be implied, that it should be clear what that term is, and that it is capable of clear expression .. it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred. In this regard, the fact that an implied term may take several different formulations is a classic sign that it is neither necessary nor obvious ..

65. It is plain from the evidence referred to by Mr Anderson that the commercial context for the June Settlement was one in which the parties contemplated that the Evergreen Transaction would complete and would be the source of funds for (at least) the First Amount payable under the June Settlement: and that expectation is reflected in the terms of the June Settlement itself, both in the definition of “Irrevocable Payment Instruction” in clause 1 and in the terms of the instructions set out in Schedule 3. Beyond that, I am also (as I have said) prepared to assume that both parties believed at the relevant time that, unless the Evergreen Transaction were successful, it was highly unlikely that the Defendants would be able to perform their obligations under the February Settlement or the June Settlement.
66. However, the definition of “Irrevocable Payment Instruction” is not used anywhere else in the June Settlement, and there is no reference whatsoever to the Evergreen Transaction in any of the operative parts of the June Settlement. Particularly given the inclusion of a specific list of conditions precedent in clause 2, it seems to me to be impossible to interpret any of the express terms of the June Settlement as providing, on their true interpretation, for the success of the Evergreen Transaction to be a condition precedent to the Defendant’s obligations thereunder. Quite simply, that is not “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”³⁰.
67. For broadly similar reasons, the Defendants’ suggested condition precedent does not, in my judgment, satisfy any of the tests for implication. The contract does not lack commercial or practical coherence as it stands, without the suggested implied term, nor is the suggested implied term so obvious that it goes without saying.

³⁰ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at [14], per Lord Hoffmann; *Arnold v Britton* (fn 28 above) at [15], per Lord Neuberger of Abbotsbury PSC.

68. It would, in any event, be necessary to re-write and expand the terms of the June Settlement to a significant extent in order to incorporate any such implied term. In his skeleton, Mr Anderson refers to the requirement being that the Evergreen Transaction should be “consummated”. It is not clear to me - and would not have been clear to those drafting the June Settlement - precisely what that is intended to mean. The evidence does not suggest that the Claimants (or those advising them) were aware of the precise details of the Evergreen Transaction. In a formal document such as this, drafted by lawyers, it would have been necessary to include a definition of “consummated” to make clear the precise point at which the Defendants’ obligations thereunder were to be triggered. The evidence does not show what that would have involved. Would the proposed condition precedent be satisfied only if the Evergreen Transaction were fully subscribed, or would it be sufficient if it was subscribed to a sufficient extent to enable the First Payment to be made? What about timing? What obligations would the Claimants have wished to impose upon the Defendants in relation to the Evergreen Transaction, for example in relation to the amount of the issue, best endeavours etc etc?
69. It also seems to me to be highly unlikely that the Claimants would have agreed to any such terms, in circumstances where the Claimants had no control over the Evergreen Transaction and where the Defendants (already in default under the Prior Transactions and the February Settlement) would by the relevant time already have received the extension of time for payment and the deferment of enforcement measures for which they were bargaining.
70. Each and all of these matters are fatal to the suggested implication. In my judgment, the Defendants therefore have no real prospect of successfully defending the Claimants’ claims on this second suggested ground.

Rectification

71. The Defendants’ third suggested ground of defence involves a claim for rectification. They assert that, if it was not already an express or implied condition precedent to performance of the June Settlement that the Evergreen Transaction should have been successfully completed, it should be rectified so as expressly to provide for such a condition precedent.
72. In Mr Anderson’s submission, the parties had a common understanding that the Defendants could only satisfy the payment obligations under clause 3 of the June Settlement if the Evergreen Transaction had been consummated. This was reflected in the contemporaneous correspondence between the parties, the terms of the June Settlement and the witness evidence. Oral evidence at trial will cast further light on this issue. If, by mistake, the June Settlement does not contain an express term reflecting this condition it should therefore be rectified.
73. I accept Mr Anderson’s submission that the fact that the June Settlement is scheduled to the Tomlin Order does not preclude an order for rectification, and that terms of a

compromise embodied in a scheduled to a Tomlin Order may be rectified in the same way as any other contract³¹. For much the same reasons as I have already given in paragraphs 61 and 62 above, I do not, however, accept his submission that this issue is one which can only properly be determined at trial.

74. The ground of rectification relied upon by Mr Anderson was that of common mistake, and it was not in dispute that:

.. [B]efore a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an “outward expression of accord”—meaning that, as a result of communication between them, the parties understood each other to share that intention ..³²

75. The Defendants’ case is that these requirements are satisfied for the same reasons as they put forward in support of their case that this suggested condition precedent was already a term of the June Settlement, either on its proper interpretation or as a matter of necessary implication.
76. Because the arguments put forward by the Defendants in support of this third suggested ground of defence simply duplicate their arguments in relation to their second ground, I can deal with them shortly, by saying that I reject them broadly for the same reasons as I have already given in relation to the Defendants’ second ground of defence. There is simply no evidence of any such common intention. Nor is there any relevant outward expression of accord demonstrating any such common intention. To the contrary (as I said in paragraph 69 above), both the evidence and the inherent probabilities suggest that it is highly unlikely that the Claimants would have agreed to any such term.
77. Indeed, the evidence suggests that even Mr Windhorst himself did not believe at the relevant time that the June Settlement contained any such condition precedent. It is common ground in the evidence of Mr Windhorst and Ms Levis that, when it became clear that the Evergreen Transaction would not be consummated in time for its proceeds to be used to pay the First Amount, Mr Windhorst negotiated a 30-day extension with Ms Levis; and that the parties later discussed (but did not agree) a further such extension on the same basis. Had the June Settlement contained the suggested condition precedent, there would have been no contractual payment deadline to extend, and these arrangements and negotiations would therefore have been unnecessary.

³¹ See e.g. *Lloyds TSB Bank Ltd v Crowborough Properties Ltd* [2013] EWCA Civ 107 at [55]-[70].

³² *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2019] EWCA Civ 1361, [2020] Ch 365 at [176].per Leggatt LJ (giving the judgment of the court).

78. Moreover, although I accept that it is not always necessary for a party seeking rectification to show “the exact form of words in which the common intention is to be expressed .. if in substance and in detail the common intention can be ascertained”³³, it is impossible (for the reasons which I have given in paragraph 68 above) to do more than speculate about what the parties might perhaps have agreed “in substance and in detail” had they decided to include any such terms in the June Agreement.
79. In my judgment, the Defendants therefore have no real prospect of successfully defending the Claimants’ claims on this third suggested ground.

Penalty

The issue

80. The Defendants’ fourth suggested ground of defence is a more limited one. Clauses 3.1(b) and (c) of the June Settlement provide for payment in certain events of a Daily Lump Sum of EUR 139,134:

In consideration for the full and final satisfaction of the Proceedings and settlement of the Disputes, the Obligors shall pay unconditionally and irrevocably to the Claimants to the Settlement Account (and, in relation to such payment, Tennor shall on the date of such payment notify the recipient of the payment in writing) the following:

..

b) subject to paragraph c) below, for value by no later than 15 February 2021, an amount equal to EUR 69,197,440.30 plus a daily lump sum payment of EUR 139,134 (if the full EUR 69,197,440.30 remains outstanding otherwise reduced pro rata) which shall accrue pro rata on the unpaid amount from 27 May 2020 until payment has been made in full (the "Second Amount"). The daily lump sum payment has been negotiated and agreed between the parties as being a fair reflection of the value to the Claimants of ensuring compliance by the Obligors with the terms of this Settlement Agreement:

or, alternatively to sub-paragraph b) above;

c) subject to clause 7 (Failure to make payment), if the Obligors pay to the Settlement Account for value by no later than 31 December 2020 an amount equal to EUR 50,000,000 in respect of the Second Amount (the "Discounted Second Amount") such that the aggregate amount received for value in the Settlement Account on or prior to 31 December 2020 is not less than the sum of (i) any costs payable under clause 8.2 and (ii) EUR 105,002,559.70 (being an amount equal to the aggregate of the First Amount and the

³³ *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71 at [34(2)], per Peter Gibson LJ.

Discounted Second Amount) the Obligors shall have fully satisfied their payment obligations under this Clause 3.1.

The Defendants' case is that that provision is a penalty, in that it is a sum payable upon breach which extends far beyond any reasonable compensation for that breach, and which is not designed to protect any legitimate interest of the Claimants.

81. In that connection, the Defendants also rely upon the terms of clause 7 of the June Settlement, which provides:

7.1. If the First Amount is not paid in full and on time in accordance with Clause 3.1(a) above, any Claimant may by notice to Tennor:

a) declare that clause 3.1(c) concerning the Discounted Second Amount shall cease to have effect, following which that clause shall immediately cease to have effect; and

b) declare that the unpaid balance of the First Amount and the Second Amount be immediately due and payable by the Obligors jointly and severally, at which time any Claimant can immediately enter judgment upon default against any Obligor individually or two or more Obligors jointly and severally for the unpaid balance of the First Amount and/or the Second Amount (which shall include the daily lump sum payment with respect to any unpaid amount calculated up to 15 February 2021) and/or the legal costs referred to in Clause 8.2 below; or c) declare that the First Amount be immediately due and payable by the Obligors jointly and severally, but permit the Obligors further time to make payment of the Second Amount but only on the basis that during this period the daily lump sum payment payable under clause 3.1(b) shall continue to accrue with respect to any unpaid amount until payment of the Second Amount.

The law

82. As re-stated in the recent decision of the Supreme Court in *Cavendish Square Holding BV v Makdessi*³⁴ the test for the applicability of this doctrine is:

.. whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation

..

83. This test is a two-stage one. At the first stage, the court must determine whether the impugned provision is a “secondary obligation” – that is, one which arises on the occurrence of a breach of contract. If it is not, then the penalty doctrine can have no application:

³⁴ [2015] UKSC 67, [2016] AC 1172 at [32], per Lord Neuberger of Abbotsbury PSC.

[14] This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, ie whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.

[15] However, the capricious consequences of this state of affairs are mitigated by the fact that, as the equitable jurisdiction shows, the classification of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it ..³⁵

84. At the second stage, the court must consider whether the detriment which the impugned provision imposes upon the contract breaker is out of proportion to the innocent party's legitimate interest in enforcement.

.. the penal character of a clause depends on its purpose, which is ordinarily an inference from its effect. As we have already explained, this is a question of construction, to which evidence of the commercial background is of course relevant in the ordinary way ..

.. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach .. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations ..

³⁶

85. When considering the second stage, it is well established that “the Court should not be astute to descry a ‘penalty clause’”³⁷, and that “what the parties have agreed should normally be upheld”, not least because “any other approach will lead to undesirable uncertainty especially in commercial contracts”³⁸. A comparatively modest increase in

³⁵ *Cavendish Square Holding BV v Makdessi* (fn 34 above) at [14]-[15], per Lord Neuberger of Abbotsbury PSC.

³⁶ *Cavendish Square Holding BV v Makdessi* (fn 34 above) at [28] and [32], per Lord Neuberger of Abbotsbury PSC.

³⁷ *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, CA, at 1447, per Diplock LJ.

³⁸ *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41, PC, at 59, per Lord Woolf.

the contractual rate of interest following breach has frequently been upheld, on the basis of the increased risk in lending to a party in default³⁹.

Primary or secondary obligation?

86. The first question which I have to decide is whether the obligation to pay the Daily Lump Sum is, as the Claimants contend, a conditional primary obligation, or (as the Defendants contend) a secondary obligation providing a contractual alternative to damages at law. This, again, is a short matter of contractual interpretation which is entirely suitable for me to determine on the present application.
87. Mr Salzedo submitted that the obligation to pay the Daily Lump Sum was plainly a conditional primary obligation. In his submission, the Daily Lump Sum accrued daily from 27 May 2020, if and to the extent that the EUR 69m principal Second Amount remained outstanding. There was, however, no contractual obligation on the Defendants to pay the principal Second Amount on 27 May 2020, or on any date prior to 15 February 2021, when it fell due. The accrual of the Daily Lump Sum from 27 May 2020 onwards therefore was not a contractually specified consequence of breach, because non-payment of the Second Amount was not a breach. Rather, the obligation to pay the Daily Lump Sum was a primary obligation conditional on whether the Second Amount had been paid.
88. Mr Anderson, by contrast, argued that this characterisation of these provisions is unsustainable. In his submission, (i) clause 3.1(a) requires the First Amount to be paid by 30 June 2020 (later varied by the parties to 31 July 2020); (ii) in the event that the First Amount is not paid in full and on time in accordance with clause 3.1(a), the Claimant may give notice under clause 7.1(b) declaring that the unpaid balance of the First Amount and/or the Second Amount is immediately due and payable; and (iii) this includes the Daily Lump Sum calculated up to 15 February 2021 (irrespective of the date of notice).
89. In my judgment, both of these submissions are to some extent correct. As Mr Salzedo rightly points out, the June Settlement contains no contractual obligation on the Defendants to pay the Second Amount (including the Daily Lump Sum) on any date prior to 15 February 2021. To that extent, the obligation to pay the Daily Lump Sum has to be considered a primary obligation, since the obligation to pay it is not conditioned upon any breach by the Defendants.

³⁹ See eg *Lordsvale Finance v Bank of Zambia* [1996] QB 752 (1% uplift); *ZCCM Investments Holdings plc v Konkola Copper Mines plc* (rate increasing in stages from 2.5% to 10% over LIBOR); *Cargill International Trading Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) (LIBOR + 12%); *Taiwan Scott Co Ltd v the Masters Golf Company Ltd* [2009] Civ 685 (15%); *Davenham Trust Plc v Homegold* [2009] WLUK 368 (36%) (but see *White v Davenham Trust Limited* [2011] Bus LR 615); *Holyoake v Candy* [2017] EWHC 3397 (Ch) (50%); *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) (LIBOR + 12%); *ICICI Bank UK plc v Assam Oil Co Ltd* [2019] EWHC 750 (Comm) (4% uplift); *Lombard North Central plc v European Skyjets Ltd* [2020] EWHC 679 (QB) (5% uplift); *Biosol Renewables UK Ltd v Lovering* [2021] EWHC 71 (Comm) (1.5% per month); *Bedford Investments Ltd v Sellman* [2021] EWHC 799 (Comm) (standard rate 3% per month, concessionary rate 1.25%).

90. It also seems to me that the nature of the Daily Lump Sum does not, in law, change on 15 February 2021. The fact that it is payable only while the EUR 69m principal sum which the Defendants were required to pay on 15 February 2021 remains outstanding and reduces pro rata if part of that principal sum is paid might be said to be an indication that the continuing obligation to pay the Daily Lump Sum was intended to be a consequence of breach. That impression is also reinforced by the final sentence of clause 3.1(b), to the effect that the Daily Lump Sum was intended as “a fair reflection of the value to the Claimants of ensuring compliance”. Nevertheless, it seems to me that the correct interpretation of these provisions is that they are not a trigger for the obligation to pay the Daily Lump Sum, so as to attract the operation of the rule against penalties, but simply define the period during which that sum accrues due.
91. However, to the extent that the service of a notice under clause 7.1 consequent on breach makes the Defendants liable to pay the Daily Lump Sum calculated up to 15 February 2021, even if that payment obligation had not by then accrued due, that provision seems to me to be akin to the “minimum payment” clauses which used to be found in Hire Purchase agreements prior to the decision of the House of Lords in *Bridge v Campbell Discount Co Limited*⁴⁰ and of the Court of Appeal in *Financings Limited v Baldock*⁴¹.
92. To that extent, and to that extent only, it therefore seems to me that these provisions are capable of falling within the scope of the penalty doctrine. Beyond that, the rule against penalties can have no application to the obligation to pay the Daily Lump Sum.

Disproportionate detriment

93. That conclusion makes it unnecessary for me to consider the question of whether the Daily Lump Sum imposes a detriment on the Defendants out of all proportion to any legitimate interest of the Claimants in the enforcement of the primary obligations under the Settlement Agreement.
94. That is because the fact that the acceleration provisions of clause 7.1 are to an extent penal (and so, to that extent, maybe unenforceable) does not affect the validity of the provisions of clause 3.1(b), under which the Daily Lump Sum continues as a primary obligation to accrue from day to day until the June Settlement is terminated or the EUR 69m is paid, or the obligations under the June Settlement merge into a judgment.
95. In that connection, I do not accept Mr Anderson’s submission that the date of 15 February 2021 specified in clause 7.1(b) provides a terminus beyond which the Daily Lump Sum ceases to accrue. That is the date up to which the service of a notice under

⁴⁰ [1962] AC 600.

⁴¹ [1963] 2 QB 104. See, more recently, *Lombard North Central plc v Butterworth* [1987] QB 527 dealing with a lease which, like the June Settlement, contained a provision making time of the essence, and which held that in such a case the proper comparison at stage 2 was with loss of bargain damages, and not simply with the instalments accrued to the date of termination.

clause 7.1 can accelerate the obligation to pay the Daily Lump Sum. It does not limit the continuing basic obligation to pay the Daily Lump Sum under clause 3.1(b).

96. Had it (contrary to the conclusions which I have reached at stage 1) been necessary for me to go on to stage 2 and to consider the question of disproportionate detriment, I would have determined that that was a matter which needed to be dealt with at trial rather than on this summary application.
97. In the course of his submissions, Mr Salzedo told me that his team had calculated that, on the EUR 69m principal of the Second Amount, the Daily Lump Sum was equivalent to a rate of 6.1% per month or 73% per annum. I cannot on the limited evidence before me say that it is not at least properly arguable that that rate is disproportionate to the Claimants' legitimate interests. These matters were not fully explored in the evidence before me, and I am not attracted by the suggestion that the recital at the end of clause 3.1(b) determines the issue of disproportion in the Claimants' favour under the doctrine of contractual estoppel. My present inclination (though, as the matter was not fully argued, I express no concluded view) would be to say that such an approach would be inconsistent with the public policy basis of the penalty doctrine. In the circumstances, had it been necessary for me to consider the question of disproportion, I would have held that the right course was for me to leave that question to be more fully explored at trial.

Disposition

98. For the reasons which I have given above, none of the grounds of defence advanced by the Defendants has in my judgment any real prospects of success. The Claimants' application therefore succeeds in principle.
99. I invite the parties to attempt to agree the terms of a Minute of Order giving effect to this judgment and dealing with all consequential matters. In the event that agreement cannot be reached by 4pm on Friday 3 September 2021, the parties should so inform the court and should lodge written submissions in relation to the points of disagreement by 4pm on Wednesday 8 September 2021. I will then either give a ruling by email or direct a short further hearing by video conference. Pursuant to CPR PD 52A 4.1(a), I adjourn any application for permission to appeal together with all other consequential applications to be determined in that way and extend time under CPR 52.12(2)(a) until 21 days after that determination.
100. In accordance with the Covid-19 Protocol, this judgment will be handed down remotely by circulation to the parties' representatives by email and release to BAILII. No attendance by the parties is necessary.