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Case No: CL-2022-000135
CL-2022-000216

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

Rolls Building
Fetter Lane
London
EC1A 1NL

Date: 23/03/2023

Before :

MR CHRISTOPHER HANCOCK KC
Sitting as a High Court Judge

- -

Between :

CELESTIAL AVIATION SERVICES LIMITED **Claimant**

- and –

UNICREDIT BANK AG (LONDON BRANCH) **Defendant**

and

Between :

(1) CONSTITUTION AIRCRAFT LEASING (IRELAND) 3 LIMITED
(2) CONSTITUTION AIRCRAFT LEASING (IRELAND) 5 LIMITED

Part 8 Claimant

- and –

UNICREDIT BANK AG LONDON BRANCH

Part 8 Defendant

- -
- -

Mark Howard KC and Fred Hobson (instructed by **Quinn Emanuel Urquhart & Sullivan**) for the **Celestial Claimant**
Akhil Shah KC and Leonora Sagan (instructed by **Quinn Emanuel Urquhart & Sullivan**) for the **Constitution Claimants**
Rachel Barnes KC, James Sheehan and Genevieve Woods (instructed by **RPC**) for the **Defendant**

Hearing dates: 28 and 29 September 2022

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Judgment Approved by the court for handing down

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 15:00 on Thursday 23 March 2023.

MR CHRISTOPHER HANCOCK KC
Sitting as a High Court Judge:

1. This is a Part 8 claim in two separate proceedings which have been heard together. In each case, the Claimants claim various forms of relief designed to assist in obtaining payment under standby Letters of credit which were confirmed by the Defendant, **"UniCredit"** the London branch of a German bank, which Letters of credit in turn confirmed Letters of credit issued by an entity called Sberbank Povolzhsky Head Office (**"Sberbank"**).

2. UniCredit was the confirming bank under seven standby Letters of credit under which the Claimant in Action CL-2022-000135 ("**Celestial**") is the beneficiary. The Letters of credit were issued in 2017 and 2020 in relation to leases of aircraft to two Russian companies which were entered into between 2005 and 2014. The seven Celestial Letters of credit subdivide into: (i) the AAL Letters of credit (i.e. the four Letters of credit issued in relation to the leases entered into with AAL, as defined further below) and (ii) the Aurora Letters of credit (i.e. the three Letters of credit issued in relation to the leases entered into with Aurora, as defined further below).

3. In March 2022, Celestial made valid demands under the Letters of credit. It is common ground that – subject to the question of sanctions – UniCredit is liable to pay under the Letters of credit.

4. UniCredit is also the confirming bank under standby Letters of credit issued to the Claimants in Action CL-2022-000216, (**"Constitution"**). Those Letters of credit were issued in relation to leases of aircraft as detailed below. Once again, valid demands were made under those Letters of credit, on dates set out below. Once again, it is common ground that – subject to the question of sanctions – UniCredit is liable to pay under the Letters of credit.

5. All of the Letters of credit are payable in US Dollars.

6. UniCredit refused to pay under the various Letters of credit, alleging that it is prohibited from making payment by reason of the operation of sanctions affecting Russia which were imposed by the UK, the EU, and the US in response to the conflict in Ukraine.

<u>The Celestial leases.</u>

7. Celestial is a company incorporated in the Republic of Ireland which provides services in connection with the leasing of aircraft. Celestial is a wholly-owned subsidiary of AerCap Holdings N.V. ("**AerCap**"), a Dutch company which is the world's largest aircraft leasing company.

8. The Celestial case relates to a number of leases of aircraft which were entered into in the period from 2005-2014 between (i) certain subsidiaries of AerCap as lessors and (ii) two Russian lessees. The leases were the subject of certain novations and amendments. In their most recent form:

    (1) Two aircraft were leased to AirBridge Cargo Airlines LLC ("**AAL**"), which is a Russian company, under the following leases (the "**AAL Leases**"):

        (a) Celestial Aviation Trading Ireland Limited ("**CATIL**"), a subsidiary of AerCap, and AAL were party to an Aircraft Specific Lease Agreement dated

21 December 2005 (as subsequently amended and novated). CATIL leased to AAL a Boeing 747-400ERF aircraft with serial number 35420 (the "**35420 Lease**").

(b) CATIL and AAL were party to another Aircraft Specific Lease Agreement dated 21 December 2005, by which CATIL leased to AAL a Boeing 747-400ERF aircraft with serial number 35421 (the "**35421 Lease**").

(2) Three aircraft were leased to JSC Aurora Airlines ("**Aurora**"), a Russian company, under the following leases (the "**Aurora Leases**"):

(a) Celestial Aviation Trading 33 Limited ("**CAT33**"), a subsidiary of AerCap, and Aurora entered into an Aircraft Specific Lease Agreement dated 21 October 2013, by which CAT33 leased to Aurora an Airbus A319-100 aircraft with serial number 2222 (the "**2222 Lease**").

(b) CAT33 and Aurora entered into an Aircraft Specific Lease Agreement dated 11 December 2013, by which CAT33 leased to Aurora an Airbus A319-100 aircraft with serial number 2243 (the "**2243 Lease**").

(c) Celestial Aviation Trading 32 Limited ("**CAT32**"), another subsidiary of AerCap, and Aurora entered into an Aircraft Specific Lease Agreement dated 15 August 2014, by which CAT32 leased to Aurora an Airbus A319-100 aircraft with serial number 3838 (as amended, the "**3838 Lease**").

(d) These leases are referred to, together, as the "**Celestial Leases**".

The Celestial Letters of Credit

9. On 21 August 2017, Sberbank (who are a Russian bank) issued four irrevocable standby Letters of credit, two of which were issued in relation to the 35420 Lease and two of which were issued in relation to the 35421 Lease. These were the AAL Letters of credit. On 23 August 2017, UniCredit confirmed each of these Letters of credit. UniCredit is a German bank which, so far as relevant for the purposes of this claim, operates through its branch in London.

10. On 23 November 2020, Sberbank issued three irrevocable standby Letters of credit in relation to the 2222 Lease, 2243 Lease and 3838 Lease. These were the Aurora Letters of credit. On 25 November 2020, UniCredit confirmed each of these Letters of credit.

11. In relation to each of these Letters of credit:

(1) Celestial is the beneficiary under each letter of credit.

(2) Each of the Letters of credit is governed by English law.

(3) In relation to each of the Letters of credit, Celestial was entitled to draw on the letter of credit by making a demand in the required form as specified in the letter of credit. In summary, this required Celestial to state that it was drawing upon the letter of credit due to the failure of the lessee (i.e. AAL or Aurora) to comply with its obligations under the relevant lease.

(4) The making of a demand in the specified form crystallised the relevant payment obligation under each of the Letters of credit and UniCredit was required to make

payment within four business days (in the case of the AAL Letters of credit) or five banking days (in relation to the Aurora Letters of credit) following receipt of a conforming demand.

(5) Each of the Letters of credit (i) stated that it created primary obligations which were independent from the underlying lease and (ii) was subject to and incorporated the Uniform Customs and Practice for Documentary Credits (2007 Revision, International Chamber of Commerce Publication no. 600) ("**UCP**").

The Celestial Demands for Payment

12. On 2 March 2022, Celestial made a written demand for payment on UniCredit in respect of the AAL Letters of credit. In summary, each of the demands stated that Celestial was drawing upon the relevant letter of credit due to AAL's failure to comply with its obligations under the relevant lease. The amounts demanded were in the total amount of USD44,527,383.98. The demands stipulated payment to an account held in London.

13. On 4 March 2022, Celestial made a written demand for payment on UniCredit in respect of the Aurora Letters of credit. Again, each of the demands stated that Celestial was drawing upon the relevant letter of credit due to Aurora's failure to comply with its obligations under the relevant lease. The amounts demanded were in the total amount of USD1,302,000. The demands stipulated payment to an account held in Dublin.

14. Initially two of the demands were not compliant but amended demands were submitted in the required form, as is common ground between the parties.

15. UniCredit was therefore required to pay USD 44,527,383.98 to Celestial within four business days of 2 March 2022 (i.e. 8 or at latest 10 March 2022) and USD 1,302,000 within five banking days of 4 March 2022 (ie 11 or at latest 14 March 2022).

Termination of the leasing of the aircraft

16. Events of Default under the Leases arose following the imposition of sanctions as a result of the conflict in Ukraine in February 2022. As a result, Celestial terminated the leasing of the aircraft on 3 and 4 March 2022. As at 19 August 2022, four of the five aircraft were located in Russia, but any continued use of or access to the aircraft is, as is common ground, without Celestial's consent (and in breach of the terms of the lease). One of the aircraft was outside Russia at the time of termination of its leasing and AerCap has been able to repossess it.

UniCredit's refusal to pay under the Letters of credit

17. On 7 and 11 March 2022, UniCredit informed Celestial that it refused to make payment of the amounts due under the Letters of credit. According to UniCredit, it was prohibited from doing so by reason of Regulation 28 of the Russia (Sanctions) (EU Exit) Regulations 2019 No. 855 (the "**UK Regulations**") as amended on 1 March 2022 by Regulation 4(2)(d) of the Russia Sanctions (EU Exit) (Amendment) (No.3.) Regulations 2022/195.

18. Celestial filed the present Part 8 claim on 15 March 2022.

19. UniCredit subsequently asserted that US sanctions were another reason why it was prohibited from paying USD sums under the Letters of credit absent from the OFAC, with effect from 26 March 2022 or 13 April 2022.

20. UniCredit relied on two further provisions of the Regulations, namely the asset freeze provisions under regulations 11 and 13.

Constitution's claims.

21. In this case, the Claimants are Irish-incorporated entities operating in the aviation industry as aircraft lessors. In 2008 and 2014 they each entered into an aircraft leasing agreement with the Russian cargo airline AAL (the "**Leases**").

22. Again the Defendant, UniCredit, is the London branch of a bank incorporated in the Federal Republic of Germany.

23. On 8 February 2018 and 24 December 2020, Sberbank issued five irrevocable standby Letters of credit to secure AAL's obligations to Constitution under the Leases (the Letters of credit). Each of the Letters of credit was confirmed by UniCredit on 12 and 13 February 2018 and 4 January 2021.

24. Each of the Letters of credit is governed by English law and expressly incorporates the UCP.

25. On 24 February 2022 the Russian Federation invaded Ukraine. On the following day, the Council of the European Union implemented sanctions against Russia by way of Council Regulation (EU) 2022/328 (the "**EU Regulation**") which came into force on 29 March 2022. Further sanctions were implemented by the US on 24 February 2022 (taking effect on 26 March 2022) and the UK on 28 February 2022 (taking effect on 1 March 2022).

26. The EU Regulation effected a change in law relevant to the operation of the Leases, and on 28 February 2022 and 3 March 2022 the Constitution notified AAL of the change in law and required AAL to cease the operation of the aircraft.

27. Following a number of Events of Default by AAL, the Claimants terminated the leasing of the aircraft under the AAL Leases on 4 and 25 March 2022.

28. It is common ground that Constitution made conforming demands for payment under one of the Letters of credit on 11 March 2022 and four Letters of credit on 24 March 2022.

29. UniCredit was therefore required to pay USD 2,604,737.03 and USD 8,181,376.06 to Constitution 3 within 5 banking days of 11 March and 24 March 2022 respectively (ie 18 or at latest 21 March 2022 in relation to the first demand and 31 March or at latest 1 April in relation to the second) ; and USD 12,706,396.84 to Constitution 5 within 5 banking days of 24 March 2022, (ie by 31 March or at latest 1 April 2022).

30. UniCredit again refused to make payment absent a licence, relying initially on UK Regulation 28 and EU Sanctions imposed by Article 3c of the EU Regulation. In subsequent correspondence and its evidence before this Court it has also sought to rely on US Sanctions, and, more recently, on UK Regulations 11 and 13.

31. Thus, UniCredit's defence in this action raises exactly similar issues to those raised in the Celestial action.

UniCredit's licence applications

32. UniCredit applied for licences to permit payment to Celestial and Constitution, on the assumption that payment would otherwise be prohibited under the relevant sanctions. The position in relation to UniCredit's licence applications is as follows:

    (1) *UK sanctions*. UniCredit applied to OFSI (Office of Financial Sanctions Implementation, which administers financial sanctions) and the ECJU (Export Control Joint Unit, which administers licence applications for trade sanctions) on 24 March 2022. UniCredit applied to OFSI for a licence under Regulations 11 and 13 on 11 April 2022. On 22 September 2022, the ECJU granted a licence subject to OFSI doing likewise. On 13 October 2022, after the date of the hearing before me, OFSI granted a licence under Regulations 11 and 13. It was the Claimants' case that the application was misleading, in that it suggested that the grant of a licence to make payment to the Claimants should be dependent on the grant of a licence for payment by Sberbank to UniCredit.

    (2) *EU sanctions*. UniCredit applied to the Bundesbank for a licence on 14 April 2022. A licence was granted on 12 May 2022.

    (3) *US sanctions*. On 29 April 2022, UniCredit submitted an application to OFAC (Office of Foreign Assets Control). As at the date of the hearing before me, a response was awaited. As I understand it, a response is still awaited as at today's date. Again, it was the Claimants' case that the applications were misleading, in that it suggested that the grant of a licence to make payment to the Claimant should be dependent on the grant of a licence for payment by Sberbank to UniCredit.

33. The following main developments have taken place since the hearing:

    (1) As noted above, on 13 October 2022, OFSI granted a licence under Regulations 11 and 13 authorising payment under all Letters of credit. As a result, the ECJU licence under Regulation 28 which had been granted on 22 September 2022 in respect of all the Letters of credit came into effect.

    (2) Shortly thereafter, on 14 October 2022, UniCredit made payment to Celestial in USD under three of the seven Celestial Letters of credit.

    (3) On 9 November 2022, UniCredit offered (on an open basis) to make voluntary payment to both Constitution and Celestial in settlement of liabilities arising from all remaining Letters of credit (excluding interest and costs) by way of payments of equivalent sterling amounts in London to accounts held at non-US banks.

    (4) On 12 November 2022, Constitution accepted UniCredit's offer, without prejudice to its position on interest and costs. Payment was made on 21 November 2022 to Constitution's solicitors' account.

    (5) On 18 November 2022, Celestial also accepted UniCredit's offer, without prejudice to its position on interest and costs, provided payment was made by 25 November 2022 to an affiliate's account in London. As I understand it, payment was so made.

Summary of the present position on payment.

34. So far as the Celestial Letters of credit are concerned:

    (1) Following the receipt of the OFSI licence on 13 October 2022, UniCredit made payment of the principal amounts due under three of the seven Letters of credit. These are three of the four AAL Letters of credit, numbered 2-4 in schedule 3 to Celestial's skeleton argument. These payments were made in USD in accordance with the demands served under the relevant Letters of credit to the bank account in London specified in the demands. No interest was paid in respect of those Letters of credit.

    (2) The remaining AAL LC and the three Aurora Letters of credit (namely, those numbered 1, 5, 6 and 7 in schedule 3 to Celestial's skeleton argument) remained unpaid. However, as noted above, on 18 November 2022, Celestial accepted UniCredit's offer to settle liabilities arising from the four outstanding Letters of credit (excluding interest and costs) by way of payment of an equivalent sterling amount to an account held in London at a non-US bank. Payments were made on 25 November 2022.

35. So far as the Constitution Letters of credit are concerned, payment in settlement of these liabilities (excluding interest and costs) was made on 21 November 2022.

What remains to be resolved.

36. As explained above, the parties now have reached agreement in relation to the principal amounts owing under the Letters of credit. That leaves costs and interest to be resolved. As explained below, however, the issues of costs and interest require resolution of a number of underlying matters which remain in dispute.

37. In particular, the following matters remain in issue, which I have been asked to determine:

    (1) Did the UK Regulations prohibit payment under the Letters of credit in the period prior to 13 October 2022 (as UniCredit alleges)? Following the OFSI licence granted on 13 October 2022, it is common ground that payment was permitted under the UK Regulations in the period from 13 October 2022 onwards. However, the position of Celestial and Constitution is that payment has never been prohibited by the UK Regulations. The issue whether the UK Regulations prohibited payment in the period prior to 13 October 2022 remains relevant to questions of interest and costs (which will be matters for a consequentials hearing). This Court's decision on that question is also likely (I am told) to be of more general assistance to market participants and practitioners. I am therefore invited to determine that question at this stage, notwithstanding the grant of the OFSI licence on 13 October 2022.

    (2) If the answer to issue (1) is "no", did UniCredit nevertheless have a reasonable belief that the UK Regulations prohibited payment in the period prior to 13 October 2022? This is relevant to the application of the Sanctions and Anti Money-Laundering Act 2018 ("**SAMLA**") s.44. UniCredit submits that SAMLA s.44 is relevant to the question of interest and costs. I am told that the parties intend to make submissions in relation to interest and costs and the relevance (if any) of SAMLA s.44 in this regard, as part of addressing consequential matters in the light of the Court's judgment.

(3) Does US law have the effect of suspending or otherwise excusing non-performance of UniCredit's obligation to pay in USD under the Letters of credit? This involves the following sub-issues:

(a) Is US law relevant to the enforceability of the English law-governed payment obligations under the Letters of credit? This is the threshold *Ralli Bros* point, addressed below.

(b) Does US law provide a defence in circumstances where the relevant US sanctions applied *after* the payment obligations crystallised under the Letters of credit?

(c) Did UniCredit make reasonable efforts to obtain a US licence? If not, can UniCredit rely on foreign law illegality?

(d) As a matter of US law, does US law prohibit payment in USD under the Letters of credit?

38. The issue of US law, it is said, remains relevant. The claim was for payment in USD in accordance with the demands. Thus, this issue will be relevant to the question of interest and costs. The incidence of costs in relation to the US law issue is likely to depend on the Court's resolution of the underlying issue. Secondly, the Court's decision on this question is likely to be of more general interest to market participants and practitioners (including on the *Ralli Bros* point).

39. If the answers to the US law issues are "yes", there might then arise a further question whether UniCredit was required to make payment in an equivalent sterling sum in accordance with the Demands, i.e., to accounts at US banks (as reflected in the draft amendments made to Celestial's claim). The parties do not suggest that I need, at least at this stage, resolve that issue. As noted above, UniCredit has offered to settle liabilities arising from the remaining Letters of credit by way of payment in an equivalent sterling amount in London to accounts at non-US banks, and Celestial and Constitution have accepted that offer. As matters stand, therefore, this is not a live question that requires resolution; should this issue become relevant (for example, on the question of interest and costs), the parties' submission is that it would most appropriately be addressed following judgment on the preceding issues.

40. Finally, there remains an issue in relation to EU sanctions (see below). All parties agree that the analysis in relation to the relevant EU sanctions is materially the same as in relation to the UK Regulations, so (in practice) no separate issue is likely to arise following the Court's decision in respect of the UK Regulations. Moreover, the position of Celestial and Constitution is that the EU law analysis is irrelevant to the issues which arise.

41. As regards the remaining issues, UniCredit's position is as follows:

(1) **UK law**. From (i) 1 March 2022, i.e., prior to the accrual of payment obligations under the Letters of credit[1] until (ii) the grant of the OFSI licence on 13 October 2022, payment was prohibited under Regulation 28 of the UK Regulations. Separately from (i) 6 April 2022 until (ii) the grant of the OFSI licence on 13

[1] It is common ground that the payment obligations accrued before proceedings were issued, but the precise date may need to be a matter addressed at the consequentials hearing.

October 2022 payment was prohibited under Regulations 11 and 13 of the UK Regulations.

(2) **US law**.

(a) In the period from 26 March 2022 onwards, US sanctions have prohibited, and continue to prohibit, payment in USD under the Letters of credit other than the three which were paid on 14 October 2022 by reason of the CAPTA sanctions under Directive 2 of E.O. 14024, because payment under those Letters of credit would be deemed to "involve" Sberbank.

(b) In the period from 13 April 2022 onwards, US sanctions have prohibited, and continue to prohibit, payment in USD by reason of the Blocking Sanctions imposed on Sberbank because payment under the Letters of credit other than the three paid on 14 October would be deemed to be "dealing in" Sberbank's "property or interests in property" (defined in the Russian Harmful Activities Sanctions Regulations 31 CFR §587.311).

(c) The voluntary offer made by UniCredit to settle liabilities (excluding interest and costs) arising under the Letters of credit by way of a payment in sterling in London to an account at a non-US bank was designed (i) to remove any US nexus and therefore the application of US sanctions; and (ii) to limit activity to the UK, where the OFSI and ECJU Licences apply.

(3) **EU law**. EU sanctions came into effect on 26 March 2022, and a licence was granted by the Bundesbank on 12 May 2022. In the period between 29 March and 12 May 2022, EU sanctions prohibited payment under the Letters of credit.

42. The position of Celestial and Constitution is as follows:

(1) **UK law**. The Regulations have at no time prohibited payment under the Letters of credit.

(2) **US law**.

(a) US law is irrelevant since the place of performance of the payment obligations is England or Ireland. This is the *Ralli Bros* point.

(b) In any event, US law sanctions took effect *after* the payment obligations arose under the Letters of credit (albeit before the deadline for payment under four of the five Constitution Letters of credit). On any view, therefore, UniCredit acted in breach of contract by failing to pay under those Letters of credit before US sanctions were engaged.

(c) In any event, UniCredit failed to make reasonable efforts to apply for a licence from OFAC and cannot therefore rely on foreign law illegality.

(d) In any event, US law does not prohibit payment under the Letters of credit.

(3) **EU law**. The EU law analysis is materially the same as under the UK Regulations.

The most important elements of the chronology.

43. I turn to set out the most important elements of the chronology, which I take from the chronology agreed between the parties.

44. On 1 March 2022 the Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations amended Regulation 28 UK Regulations ("**Regulation 28**") to apply to "restricted goods" including civilian aircraft with immediate effect.

45. On 2 March 2022 Celestial made written demands for payment under 4 Letters of credit numbered 285, 329, 276 and 338. These were the AAL Letters of credit.

46. On 3 March 2022, the leasing of the Aurora 2243 aircraft was terminated.

47. On 4 March 2022, the leasing of the Aurora 2222 and 3838 aircraft was terminated.

48. Also on 4 March 2022, Celestial made written demands on three other Letters of credit, numbered 1177, 1186 and 1195. These were the Aurora Letters of credit.

49. On 4 March, again, Constitution gave notice to AAL of the termination of the leasing of the 35233 Aircraft.

50. On 7 and 11 March 2022, UniCredit stated that it believed that it would be a breach of Regulation 28 for it to make or receive payment under the AAL Letters of credit (7 March letter) and the Aurora Letters of credit (11 March letter).

51. On 9 March 2022, Sberbank transferred the sum of USD 7,207,360 in partial satisfaction of its obligations to UniCredit under the Celestial Letters of credit.

52. On 11 March 2022, Constitution made a written demand for payment under the 202 letter of credit. On the same day, UniCredit wrote to Sberbank asking that it not make any further payment since UniCredit was concerned that it would be a breach of Regulation 28 for it to receive payment.

53. The deadline for the payment of the Celestial Letters of credit expired on the dates set out above. Celestial commenced Part 8 proceedings on 15 March 2022.

54. On 17 March 2022 UniCredit wrote to Constitution stating that it believed that it would be a breach of Regulation 28 for it to make or receive payment under the Constitution Letters of credit.

55. By 18 March 2022 the deadline for payment under the Constitution letter of credit 202 had expired.

56. On 18 March 2022 Sberbank transferred to UniCredit the sum of US 17,866,275.21 in partial satisfaction of its obligations under the Celestial Letters of credit.

57. On 21 March 2022 UniCredit wrote to Sberbank asking that it not make any further payment since UniCredit was concerned that it would be a breach of Regulation 28 for it to receive payment.

58. On 24 March 2022 Constitution made written demands for payment under each of the 007, 008, 009 and 010 Letters of credit.

59. On that same day (24 March 2022) UniCredit applied for a licence to OFSI and ECJU pursuant to the UK licencing regime.

60. On 25 March 2022, Constitution gave notice of termination in relation to the 35237 Aircraft.

61. On 26 March 2022, OFAC's Directive 2, referred to above, became effective, prohibiting all US financial institutions from processing any transaction involving Sberbank.

62. On 28 March 2022, the EU Regulation referred to above came into force at the end of a suspension period.

63. On 29 March 2022, UniCredit wrote to Constitution stating that it believed that it would be a breach of Regulation 28 for it to make or receive payment under the Constitution Letters of credit.

64. By 31 March 2022 at the latest, the deadline for payment of the Constitution Letters of credit numbered 007, 008, 009 and 010 had passed.

65. On 6 April 2022, the UK designated Sberbank for the purposes of asset freezing measures under Regulations 11 to 15 of the UK Regulations.

66. On that same day, OFAC added Sberbank to the Specially Designated Nationals and Blocked Persons List, but also issued General Licence 22 which permitted US persons to engage in wind down transactions with Sberbank until 13 April 2022.

67. On 8 April 2022, EU Regulation 2022/576 introduced Article 3c(6) which allowed the responsible regulators of EU Member States to issue licences in respect of Article 3c.

68. On 13 April 2022, OFAC's General Licence 22 expired.

69. On 14 April 2022, UniCredit applied to the Bundesbank (the German EU regulator) for a licence.

70. On 27 April 2022, Constitution commenced Part 8 proceedings against UniCredit.

71. On 29 April 2022, UniCredit applied to OFAC for a licence. I believe that this was in relation to both Celestial and Constitution.

72. On 12 May 2022, UniCredit obtained a licence from the Bundesbank to pay Celestial and Constitution.

73. On 22 September 2022, UniCredit obtained a licence under Regulation 28 from ECJU to make payment to Celestial and Constitution, subject to OFSI providing a licence.

74. On 13 October 2022, OFSI provided a licence under Regulations 11 and 13, as I have noted.

75. As I have also noted, OFAC have still not provided a licence. However, payment has been made, but in currencies other than dollars, by agreement.

The issues in outline.

76. The issues in outline can therefore be summarised as follows:

    (1) UK law.

(a) What are the relevant principles of statutory interpretation?

(b) What is the proper construction of Regulation 28 and how does it apply here?

(c) What is the proper construction of Regulation 11 and how does it apply here?

(d) What is the proper construction of Regulation 13 and how does it apply here?

(2) US law.

(a) Did any US sanctions arise after the payment obligations fell due, and if so, what is the effect of this fact?

(b) Is US law relevant to the issues in this case?

(c) Did UniCredit make reasonable efforts to obtain US licences?

(d) Does US law (if applicable) prohibit payment under the Letters of credit?

77. My understanding is that I am not asked to make any determination as to EU law at this stage.

UK law.

Principles of statutory interpretation.

The Claimants' contentions.

78. During the course of this judgment, where I make reference to the Claimants' contentions, the reference is to the submissions made by Celestial, which were adopted orally by Constitution. It is only if Constitution's written argument made independent points that I refer to those arguments.[2]

79. The Claimants' contentions were as follows:

(1) In interpreting legislation, the starting-point is to identify its purpose. The central importance of a purposive approach to statutory interpretation is firmly established: see the citations referred to by Lord Briggs and Lord Leggatt in *Rossendale Borough Council v Hurstwood Properties* [2022] AC 690 at [10]. According to Lord Burrows writing extra-judicially: *"there is only one correct modern approach [to statutory interpretation] – that one must ascertain the meaning of the words in the light of their context and the purpose of the provision"*.[3]

[2] Mr Shah, on behalf of Constitution, largely confined his oral submissions to the issue of whether payment in USD would in fact constitute a breach of US law. .

[3] Sir Christopher Staughton Memorial Lecture 2022, 'Statutory Interpretation in the Courts Today' (24 March 2022).

(2) A purposive approach is particularly apt in construing the language *"in pursuance of or in connection with"*. The phrase 'in connection with' is a *"protean one which tends to draw its meaning from the words which surround it"*: *Coventry and Solihull Waste Disposal v Russell* [1999] 1 WLR 2093 at 2013 per Lord Hope. The same is equally true of the phrase 'in pursuance of'. These are not phrases which can be said to have a fixed or natural meaning divorced from their surrounding context. One can only answer whether X is connected with Y once one understands the purpose for which the question is being asked.

(3) The purpose of the Regulations as a whole is to encourage Russia to cease its invasion of Ukraine. Put at its most basic, the sanctions are intended to have some adverse impact on the Russian state, Russian industry or Russian persons – whether that is in the form of freezing assets, cutting off financing or removing market access. It is axiomatic that the Russian state, Russian industry or Russian persons are the targets on whom the consequences of any sanctions are intended to be felt – otherwise the sanction could have no conceivable dissuasive effect on Russia's actions.

(4) More specifically, the key purpose of the trade sanctions in Chapter 2 of Part 5 is to stop the supply of restricted goods, including aircraft, to Russia. That is one of the tools used to exert pressure on Russia and degrade its industrial and military capability.

(5) Focusing in still further, the purpose of Regulation 28 is to cut off the supply of financing by means of which to obtain restricted goods. This is ancillary to, and in service of, the central purpose of Chapter 2 of Part 5, namely to stop the supply of restricted goods to Russia. The rationale is straightforward: the purpose of cutting off financing is a means to the end of restricting Russia's access to restricted goods.

(6) Therefore, the purpose of Regulation 28(3) is to prevent a person from providing financing which is capable of enabling the supply of restricted goods (including aircraft) to Russia.

80. Turning to the present case:

(1) The relevant prohibition under Regulation 28(3) came into force on 1 March 2022. The prohibition is by its nature prospective: it is designed to stop any access to restricted goods from that time on. The five aircraft were provided to Russian companies (AAL and Aurora) under leases long before March 2022. The Letters of credit were similarly issued long before March 2022. Therefore, as of March 2022, the aircraft had long since been provided to Russian companies for use in Russia.

(2) The payment obligation under the Letters of credit requires UniCredit (a German company, acting by its London branch) to pay Celestial (an Irish company) and Constitution (an Irish company). Performance of that obligation will not in any way enable or facilitate the supply of aircraft to Russia or to Russian persons. By the time that the payment obligation under the Letters of credit had accrued, the aircraft had long since been supplied to Russian companies. There is no relevant causal link between payment under the Letters of credit and supply of aircraft to Russia.

(3) The position is *a fortiori* in circumstances where leasing of aircraft has now terminated. The performance or non-performance of UniCredit's payment obligations under the Letters of credit will have no effect – whether contractually or in fact – on whether aircraft are supplied (or will continue to be supplied) to Russian companies or for use in Russia.[4]

(4) In those circumstances, it would be a bizarre result for Regulation 28(3) to be read as prohibiting UniCredit from paying Celestial under the Letters of credit. That would in no way further the policy objective underlying Regulation 28, which is to restrict Russia's access to aircraft and other restricted goods. It would serve only to penalise Celestial (and give UniCredit a corresponding windfall) – and absolutely no consequences would be felt in Russia or by Russian persons.[5]

(5) Such an interpretation would be contrary to the purpose of the Regulations. The correct analysis is that payment by UniCredit under the Letters of credit cannot be regarded as being *"in pursuance of or in connection with"* the supply of aircraft under the Leases.

81. The importance of a purposive approach to construing sanctions legislation is illustrated by *R (on the application of M) v HM Treasury* [2008] 2 All ER 1097. In that case, the relevant sanctions prohibited any funds being made available *"for the benefit of"* a designated person. The question arose whether the spouse of the designated person was entitled to receive social security payments. HM Treasury took the view that the spouse's receipt of social security benefits would breach the sanctions (without a licence) since the benefits would be spent on running the family household from which the designated person would benefit. Lord Bingham rejected that argument, principally by reference to the purpose of the sanctions; see [12]:

> *"The committee's opinion is that this intrusive regime is not required by art 2(2) of the 2002 Regulation. First, it is not required to give effect to the purpose of the Security Council resolution, which was obviously to prevent funds from being used for terrorist activities. Indeed, the licence tells Mrs M that the licence conditions are 'to provide safeguards against the risk of these funds being diverted to terrorism'. It is however hard to see how the expenditure of money on domestic expenses, such as buying household food, from which Mr M derives a benefit in kind, can create any risk that he may divert funds to terrorism."*

82. That conclusion was supported by other considerations as addressed at [13]-[16] in the judgment of Lord Bingham, including the *"disproportionate and oppressive result"* to which HM Treasury's interpretation would give rise.

83. While that case concerned a different issue of construction, two general points are to be noted. The <u>first</u> is again the focus on a purposive approach. The core of Lord Bingham's

[4] By way of analogy, regulation 29A of the Regulations provides that a person must not provide insurance services relating to aviation to a person connected with Russia or for use in Russia. The guidance on Russian sanctions states at p.19 that this prohibition does not apply *"where the items either remain in Russia as the result of the termination of a lease and against the lessor's will; or are being flown out of Russia in the process of returning them to their owner"*. This is fully consistent with Celestial's submission that the Regulation 28 cannot be read as having any effect once the leasing of aircraft has terminated.

[5] Save that if UniCredit is not required to pay, Sberbank would in turn not be required to reimburse UniCredit. Therefore, UniCredit's construction would have the wholly perverse consequence of benefiting Sberbank (a Russian designated person).

analysis is that the language *'for the benefit of'* was to be understood by reference to the purpose of the sanctions, namely to prevent funds being diverted to terrorism. Since the spouse's domestic expenditure created no risk that the designated person would divert funds to terrorism, it followed that receipt of social security benefits was not to be regarded as 'for the benefit of' the designated person. A similar approach is apposite in this case. As explained above: (i) the purpose of Regulation 28 is to stop the supply of aircraft to Russia; (ii) payment under the Letters of credit creates no risk of aircraft being supplied to Russia. Second, Lord Bingham was concerned to arrive at an interpretation which, consistent with the purpose of the sanctions, would avoid a disproportionate or intrusive effect. Yet that is precisely the effect which Regulation 28 would have on Celestial on UniCredit's interpretation.

UniCredit's contentions.

84. UniCredit contended that:

(1) General principles of interpretation that apply to Acts apply equally to delegated legislation with the additional consideration that since delegated legislation derives its authority from the enabling Act it must be interpreted in light of that Act.[6]

(2) The starting point for statutory interpretation is thus the words of the provision in their statutory context, since the words used are the ones chosen by the legislator as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascribed.[7] Context means the entire statutory scheme within which the particular provision is contained.[8]

(3) Where Parliament or delegated legislation has used broad terms, these should generally be construed broadly. The governing legal maxim is *generalia verba sunt generaliter intelligenda*: general words are to be understood generally.[9]

(4) Statutory provisions are presumed not to be otiose or redundant[10].

(5) Words or phrases used in legislation are presumed to have the same meaning throughout the legislation.[11]

(6) There are differences of approach to statutory interpretation in EU and English law. In EU statutory interpretation the teleological or purposive methodology commands greater emphasis, while the English approach places relatively more

[6] Bennion, Bailey and Norbury, Bennion on Statutory Interpretation, 8th ed.Ed. (2020), p114, s3s.3.17.
[7] *R (PRCBC) v Home Secretary* [2022] 2 WLR 343, 353D-F [29] per Lord Hodge. See also *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at [463], [465] and [473]: "*Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context*…"
[8] See e.g. *Rossendale BC v Hurstwood Properties (A) Ltd* [2022] AC 690, 704F-G [16] per Lord Briggs and Lord Leggatt warning against "tunnel vision" in statutory interpretation.
[9] Bennion, p1168, s.356.
[10] Bennion, p18 at s. 1.53, referring to s. 21.2: "every word in an enactment is to be given meaning".
[11] Bennion, p18 at s. 1.53, referring to s. 21.3.

weight on language.[12] English doctrine is more literalist and "*permits a strained construction only in comparatively rare cases*".[13]

My conclusions.

85. In general, it seemed to me, the parties' position on this topic did not differ to any material degree. The only real difference in emphasis was that the Claimants placed more weight on the importance of a purposive interpretation, whereas UniCredit emphasised the importance of a literal approach. In my judgment, it is important to approach the wording of the statute in the light of its purpose, and I prefer the Claimants' approach in this regard.

The principle of autonomy and its relevance.

86. The Claimants placed significant reliance on this (undoubted) principle, whilst UniCredit said that this reliance was misplaced.

The Claimants' contentions.

87. The Claimants argued that it is fundamental to the nature of a letter of credit that it gives rise to autonomous payment obligations which operate independently of the underlying transaction. The payment obligations under a letter of credit are thus commonly described as equivalent to cash[14] and it is often said that Letters of credit are the *"lifeblood of international trade"*.[15]

88. The bank is under a primary obligation to pay against the presentation of stipulated documents. The bank's payment obligation under a letter of credit is not triggered by, and is not concerned with, any breach in respect of the underlying transaction.[16] This autonomy principle is reflected in article 4(a) of the UCP:

> *"A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary."*

89. That principle is reflected in authorities such as *Salam Air v Latam Airlines* [2020] EWHC 2414 per Foxton J at [23]-[26], *Brindle & Cox, Law of Bank Payments* at 7-008 and *Jack, Documentary Credits* (4th ed.) at 1.34. The exceptions to the autonomy

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[12] *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v International Military Services Limited* [2019] EWHC 1994, [2019] 1 WLR 6409 at [37]

[13] *R (on the application of Certain Underwriters of Lloyd's London), v HM Treasury [2021] 1 WLR 387, 400F* , at [34].

[14] See, e.g., *Power Curber v National Bank of Kuwait* [1981] 1 WLR 1233 at 1241 per Lord Denning; *Salam Air v Latam Airlines* [2020] EWHC 2414 per Foxton J at [25].

[15] See e.g. *Hong Kong and Shanghai Banking Corp v Kloeckner* [1990] 2 QB 514 at 525. As explained in *Jack* at 1.34: *"The principle [of autonomy] is fundamental to credit transactions, and it is essential to the continuance of the documentary credit system as the primary means of payment in international trade that it should be scrupulously observed"*.

[16] See further Brindle & Cox at 7-001 and 7-002.

principle are strictly limited and none have any bearing on the present case:[17] in particular, there is no illegality or fraud affecting the underling Leases.

90. Since the payment obligations under the Letters of credit are by their nature free-standing and wholly independent of the Leases, it was said that this supports the analysis that UniCredit's payment under those Letters of credit cannot be regarded as *"in pursuance of or in connection with"* the supply of aircraft under the Leases.

91. It is no answer to this point, the Claimants argued, for UniCredit to point to the definition of "funds" as including a letter of credit. That is concerned with the *issuance* of a letter of credit as a means of financing. Regulation 28 prohibits the provision of a letter of credit, where that is *"in pursuance of or in connection with"* the supply of restricted goods to Russia. If a letter of credit were now sought to be issued for the purpose of financing a supply of restricted goods, that would plainly be prohibited by Regulation 28. The analysis is quite different, however, in circumstances where (as in this case) the Letters of credit were lawfully issued and the only question is whether payment can now be made thereunder. Those payment obligations are autonomous; discharge of those payment obligations cannot be regarded as in connection with the underlying supply of goods.

UniCredit's contentions.

92. UniCredit, for its part, accepted the autonomy principle, and argued that it normally causes no difficulty in cases in which it arises; but argued that here it does not arise. UniCredit does not contend, for example, that doubts over its ability to be reimbursed by Sberbank affect its own obligations owed to the Claimants as confirming bank, or that it is not liable because of an absence of default in relation to the underlying contract.

93. Instead, UniCredit contended, this case is about whether sanctions legislation imposed in response to Russia's invasion of Ukraine has the effect of suspending performance by UniCredit of its own payment obligation. This is not, it was said, a question of contract law, but of criminal law. The issue is not whether the terms of the Letters of credit require payment but whether the terms of the applicable sanctions legislation prevent it. UniCredit submitted that they do. In this regard, it was argued that it is important to appreciate the interconnected nature of the various obligations in the arrangement. For example:

    (1) It is well established that a payment by the issuing bank under a letter of credit has the effect of discharging the applicant's debt to the extent of the payment.[18]

    (2) By the same token, a payment by the confirming bank discharges the corresponding obligation of the issuing bank, the two obligations being joint and several.[19]

[17] See *Salam Air* [26].
[18] *Ibrahim v Barclays Bank plc* [2013] Ch 400 per Lewison LJ at [59]; *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388 per Bingham J at 392.
[19] Ellinger, Law and Practice of Documentary Letters of credit (2010) at p113. This underpins the rule that the confirming bank may claim reimbursement from the issuing bank once, and only once, the confirming bank has actually paid out under the letter of credit: *Deutsche Bank AG London v CIMB Bank Berhad* [2017] Bus LR 1671

(3) Once a compliant demand is made on a confirming bank, that bank is obliged to forward the documents to the issuing bank: UCP , Article 15(b). This enables the issuing bank to assess for itself whether liability under the letter of credit has been triggered, and reflects the ministerial or agency role played by the confirming bank in assessing whether documents comply, a role succinctly expressed by Sir Christopher Staughton in *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 All ER (Comm) 172 at 180a.[20]

(4) This also reflects the well-established principle of strict compliance. This means not just that a demand must conform precisely to the requirements set out in the letter of credit in order for it to be valid, but also that the confirming bank is not authorised to accept a demand which does not strictly comply.[21]

(5) Although the confirming bank's obligation is independent from the obligations of the issuing bank, the terms of the former's obligation may not be amended without the consent of the latter: UCP , Article 10(a). In this way, the issuing bank has a direct interest in the terms of the arrangement between confirming bank and beneficiary.

My conclusions.

94. I have concluded that the Claimants are correct in their contention that the autonomy principle supports their position, although I think that this is easier to explain when I turn to Regulation 28 itself, as I am just about to do. However, I would make one overarching comment. That is that I do not accept that this is not a matter of contract, but of criminal law. It is both. The question is whether, because compliance with a contractual obligation would involve the commission of a criminal offence, compliance is excused.

Regulation 28.

The Claimants' contentions.

95. The primary legislation for the UK Russian sanctions regime is found in SAMLA. Section 1 of SAMLA provides that an appropriate Minister may make regulations imposing financial or trade sanctions for one of a number of specified purposes.

96. The UK Regulations were made by the Secretary of State on 10 April 2019 in the exercise of the powers conferred by SAMLA. The UK Regulations were originally made to replace, with substantially the same effect, the EU sanctions regime relating to Russia that (prior to Brexit) were in force under EU legislation and related UK regulations. In particular, EU Regulation No. 833/2014 was enacted on 31 July 2014 in response to Russia's occupation of Crimea.

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[20] Also reflected in the US jurisprudence: see e.g. *Nassar v Florida Fleet Sales, Inc.,* 79 F.Supp.2d 284 (S.D.N.Y. 1999) at [7].

[21] As Viscount Sumner held in *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Lloyd's Rep 49 at 52, "*the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk*."

97. The UK Regulations have since been amended on several occasions, most recently on 21 July 2022. Most relevant for present purposes, the UK Regulations were subject to substantial changes following the start of the conflict in Ukraine in February 2022.

98. The purposes of the UK Regulations are stated in regulation 4 of the UK Regulations as follows:

> *"The regulations contained in this instrument that are made under section 1 of [SAMLA] are for the purposes of encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine."*

99. The purpose of the UK Regulations was elaborated upon in the report provided by the Minister of State for Europe pursuant to section 2(4) of SAMLA. Para 6 of the report described the purpose of the UK Regulations in materially the same terms as stated above. Para 8 of the report stated that: *"Sanctions are intended to increase pressure on Russia to achieve the outcome of Russia ceasing actions which are destabilising Ukraine, or undermining Ukrainian sovereignty"*. According to para 13(a) of the report, the intention of the financial and immigration sanctions on designated persons was as follows:

> *"The intention is to apply pressure in order that the Government of Russia changes its behaviour, and to send a strong message that actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine will not be tolerated. Applying these restrictions to individuals involved in this destabilising activity is intended to both directly and indirectly bring about behaviour change in the Government of Russia."*

100. Para 13(b) explained that the purpose of the trade sanctions was to curtail Russian access to certain equipment and services, in particular those affecting the defence and energy sectors *"to exert greatest pressure on the Russian State, and thereby increase the costs to Russia in respect of Russian action in Ukraine"*.

101. Regulation 28 forms part of Chapter 2 of Part 5 of the UK Regulations. Part 5 is concerned with trade. Within that, Chapter 2 is concerned with restricted goods, restricted technology and related activities.

102. *"Restricted goods"* comprises eight categories of goods: critical-industry goods, dual-use goods, military goods, aviation and space goods, oil refining goods, quantum computing and advanced materials goods, defence and security goods, and maritime goods. *"Aviation and space goods"* is in turn defined as including aircraft. *"Restricted technology"* refers to technology or software associated with these goods.

103. The central purpose of the trade sanctions in Chapter 2 of Part 5 of UK Regulations is to stop the supply of restricted goods or restricted technology to Russia. Hence: Regulations 22 and 24 prohibit the export or supply of restricted goods to Russia; Regulation 25 prohibits a person from making available restricted goods or technology to a person connected with Russia; Regulation 26 prohibits a person from transferring restricted technology to a place in Russia or to a person connected with Russia; and

Regulation 27 prohibits a person from providing technical assistance relating to restricted goods/technology to a person connected with Russia or for use in Russia.

104. Regulation 28 concerns the provision of financing for the supply of restricted goods/technology. It provides as follows:

"Financial services and funds relating to restricted goods and restricted technology

(1) A person must not directly or indirectly provide, to a person connected with Russia[22], financial services in pursuance of or in connection with an arrangement whose object or effect is—
(a) the export of restricted goods,
(b) the direct or indirect supply or delivery of restricted goods,
(c) directly or indirectly making restricted goods or restricted technology available to a person,
(d) the transfer of restricted technology, or
(e) the direct or indirect provision of technical assistance relating to restricted goods or restricted technology.

(2) A person must not directly or indirectly make funds available to a person connected with Russia in pursuance of or in connection with an arrangement mentioned in paragraph (1).

(3) A person must not directly or indirectly provide financial services or funds in pursuance of or in connection with an arrangement whose object or effect is—

(a) the export of restricted goods to, or for use in, Russia;

(b) the direct or indirect supply or delivery of restricted goods to a place in Russia;

(c) directly or indirectly making restricted goods or restricted technology available—
(i) to a person connected with Russia, or
(ii) for use in Russia;

(d) the transfer of restricted technology—
(i) to a person connected with Russia, or
(ii) to a place in Russia; or

(e) the direct or indirect provision of technical assistance relating to restricted goods or restricted technology—
(i) to a person connected with Russia, or
(ii) for use in Russia.

…

(6) Paragraphs (1) to (3) are subject to Part 7 (Exceptions and licences).
…"

[22] *"A person connected with Russia"* is defined in Regulation 21(2). In summary, it refers to an individual resident or located in Russia, or an entity incorporated or domiciled in Russia.

105. "Financial services" and "funds" are defined in sections 60 and 61 of SAMLA. "Funds" means *"financial assets and benefits of every kind"*. A non-exhaustive list is set out in section 60, which includes e.g. cash, payment instruments, deposits, securities and debt instruments and Letters of credit. "Financial services" means any service of a financial nature, e.g. insurance and banking services.

106. Breaking Regulation 28(3) down into its constituent elements, this involves the following elements (in summary):

    (1) a person provides financial services of funds

    (2) in pursuance of or in connection with

    (3) an arrangement whose object or effect is the supply of restricted goods to, or for use in, Russia, or to a Russian person.

107. So far as element (1) is concerned, the transaction in question (i.e. payment by UniCredit under the Letters of credit) plainly involves a provision of funds. That is the provision of funds by UniCredit to Celestial, i.e. discharge of the payment obligations under the Letters of credit.

108. So far as element (3) is concerned, the Claimants accepts that each of the Leases was (until termination of the leasing) an arrangement whose object or effect was the supply of restricted goods to, or for use in, Russia, or to a Russian person. There was therefore a relevant *"arrangement"* for the purposes of Regulation 28(3) until termination of the leasing.

109. The critical dispute focuses on element (2). The question is whether payment by UniCredit to Celestial under the Letters of credit is *"in pursuance of or in connection with"* the supply of aircraft under the Leases, for the purposes of Regulation 28(3).

UniCredit's contentions.

110. Much of the above was common ground. UniCredit accepted that SAMLA was passed in 2018 in anticipation of the UK exiting the EU because the UK's implementation of UN and other multilateral sanctions regimes was hitherto largely dependent upon the European Communities Act 1972[23]. As set out in its preamble, the purpose of Part 1 of SAMLA is to:

    "make provision enabling sanctions to be imposed where appropriate for the purposes of compliance with United Nations obligations or other international obligations or for the purposes of furthering the prevention of terrorism or for the purposes of national security or international peace and security or for the purposes of furthering foreign policy objectives".

111. As part of the transition process, the existing EU sanctions framework was in large part replicated in UK law by way of numerous regulations made under SAMLA, which came

[23] SAMLA Explanatory Notes paras 2, 7, 9, 12

into force on 31 December 2020. Thus, the UK Regulations were made and came into force on that date, and revoked the relevant retained EU legislation.[24]

112. SAMLA requires that regulations made pursuant to it state their purpose or purposes (s.1(3)). UniCredit also relied on Regulation 4, cited above, in this context.

113. In keeping with the UK's general sanctions framework, UniCredit argued that the UK Regulations establish a regime of both prohibition and control, in which the blunt effects of widely drawn restrictive measures may be moderated by its licensing regime. UniCredit contended that this is an integral part of the scheme of the UK Regulations.[25] The importance of the licensing regime to "*mitigate any unintended negative consequences*", it was said, is expressly recognised in the Statutory Report accompanying the UK Regulations.[26] The Report also acknowledges that, by tempering the effects of the widely drawn restrictive measures, the licensing regime serves to ensure its application was reasonable.

114. The prohibitions in Regulation 28 (aviation trade sanctions) and Regulations 11 and 13 (asset freezing measures), both have at their centre the terms "*funds*" and "*financial services*", phrases which I have already addressed.

115. UniCredit argued that both phrases are defined in the broadest terms. The examples that follow these definitions comprise illustrative, non-exhaustive lists. The term "*funds*" explicitly includes "*Letters of credit*"[27], "*guarantees*" and "*other financial commitments*".[28] The term "*financial services*" expressly includes "*banking and other financial services consisting of – (ii) … financing of commercial transactions …(v) providing guarantees or commitments*" (SAMLA s.61(1)(b)).

116. Since February 2022, the UK Regulations have been amended 14 times. The first amendment came into force in the lead up to the invasion,[29] the second on 1 March 2022 in response to the invasion. This introduced new aviation sanctions into Regulation 28. This rapid introduction of the UK sanctions was against the wider backdrop of similar sanctions measures being introduced in other jurisdictions, such as the EU and the US. The provisions of Regulation 28 have been set out above.

117. A breach of trade sanctions is a criminal offence punishable upon conviction by a sentence of up to 10 years' imprisonment or a fine (or both).[30] Civil penalties may also be imposed, up to a maximum of the greater of either £1,000,000 or 50% of the estimated value of the funds or resources[31] now on a strict liability basis.[32] It is also an

[24] The relevant retained EU law is set out in Regulation 98, namely Council Regulation (EU) No 269/2014 of 17 March 2014 (concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine), Council Regulation (EU) No 692/2014 of 23 June 2014 (concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol) and Council Regulation (EU) No 833/2014 of 31 July 2014 (concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine).
[25] Cf. *R (Certain Underwriters at Lloyd's London)*. [2021] 1 WLR 387
[26] The Report similarly acknowledges the scope for negative or counter-productive impacts of the asset freezing measures and the role of the licensing regime in mitigating these.
[27] SAMLA s60(1)(f).
[28] SAMLA s60(1)(e).
[29] On 10 February 2022, Russia (Sanctions) (EU Exit) (Amendment) Regulations 2022/123.
[30] Regulation 80(2)(d)
[31] Policing and Crime Act 2017, s.146
[32] Supra, fn. 11.

offence intentionally to engage in activities with the object or effect of (directly or indirectly) circumventing sanctions or enabling or facilitating the circumvention of sanctions.[33]

118. UniCredit contended that the key issue for me to resolve is whether payment to the Claimants as beneficiaries under the Letters of credit would constitute the provision of financial services or funds in connection with relevant arrangements under Regulation 28(3), a question of statutory interpretation.

119. UniCredit argued as follows:

(1) First, the words "*in connection with*" "*are broad. They are ordinary words of the English language and have no technical or restricted meaning*".[34] Indeed, it is difficult to think of a broader statutory formulation for linking A with B, as observed by David Richards J in *HMRC v Barclays Bank plc* [2006] EWHC 2118 (Ch) at [38], who continued: "[*i*]*t is a question of fact whether a connection exists within the meaning of the statutory provision in question*". As a matter of fact, the Letters of credit are plainly "*in connection with*" the underlying Leases; were it not for the Leases they would not have come into existence. Further, all bar 3 of the Letters of credit state on their face that they are "*in connection with*" the relevant lease; and similarly they all identify the aircraft to which they relate. These facts are not altered by the legal nature of the obligations established under the Letters of credit. Similarly, payments under the Letters of credit are *in connection with* arrangements, the Leases and the Letters of credit themselves, that directly or indirectly operate to make aircraft available to persons connected with Russia and/or for use in Russia.

(2) Secondly, the statutory context does not justify a reading down of the words "*in connection with*" to a narrow legalistic formulation based on the operation of the autonomy principle. Rather, the context of the statutory scheme as a whole, which includes the licensing provisions, supports the broad, ordinary meaning of the words "*in connection with*" since it allows the competent licencing authorities the opportunity to scrutinise the detail of the transaction and disapply the sanctions where appropriate. There is no indication that the legislator intended to reduce the scope of the provision; to the contrary, the use of the broad phrase "*in connection with*" shows that the legislator has cast the net widely, and then drawn it in by establishing the licensing regime.[35]

(3) Thirdly, a construction of Regulation 28(3) which captures only payments with a causal connection (rather than simply a connection) with the underlying arrangement would render redundant the phrase "*in connection with*" and leave the provision limited to financial services or funds "*in pursuance of*´ the arrangement. This is contrary to the presumption that legislation does not contain otiose words.

(4) Fourthly, the words of Regulation 28(3) and its statutory context do not support Constitution's argument that the Leases ceased to be relevant "*arrangements*" upon termination. "*Arrangement*" is broadly defined in Regulation 2 to include "*any agreement, understanding, scheme, transaction or series of transactions,*

[33] Regulation 55
[34] *R v Smith (Andrew)* [2020] 1 WLR 4921 at [30] (in the context of s.6(1) of the Fraud Act which criminalises the possession of any article for use in the course of or in connection with any fraud).
[35] *Barclays Bank v HMRC* [2007] EWCA Civ 442 per Arden LJ at [30].

whether or not legally enforceable". The object or effect of the Leases and the Letters of credit was the direct or indirect supply or delivery of restricted goods[36] to a place in Russia and thereafter to make restricted goods or technology available, directly or indirectly, to a person connected with Russia or for use in Russia. That is still the case notwithstanding the termination of the Leases. The applicants under the Letters of credit, to whom the aircraft and related parts were delivered and in whose control all but two of the aircraft remain, are persons connected with Russia, being various Russian companies. The aircraft were leased for use in Russia. Five of the aircraft remain in Russia.

(5) Fifthly, the Claimants' construction relied on an overly narrow view(s) of the purpose of Regulation 28(3) and the trade sanctions within the UK Regulations. The trade sanctions are not only concerned to stop the supply of restricted goods (here, aircraft) to Russia or persons connected with Russia. UK trade sanctions also seek to exert control over restricted goods outside the UK.[37]. Regulation 28 therefore includes a prohibition relating to the "making available" of aircraft in addition to a prohibition on export and supply. Whether in this particular instance that purpose is furthered or not is, as the ECJU identifies in the Russia Guidance[38], a matter for them to consider when exercising their licensing powers.

120. The licensing scheme is a specific aspect of Regulation 28.[39] As such, it is a part of its purpose.[40] The trade licensing regime in the UK Regulations is a mechanism to address the issue of transactions which the Government considers do not undermine the purposes of the regime, but which are caught by the wording of the Regulations as a result of its broad scope. The licensing framework provides for categories of exceptions by way of General Licences and permits individual scrutiny of transactions and specific exemptions where appropriate.

121. The creation of the licensing regime necessarily implies that there are transactions or activities which fall within the scope of the Regulations by reason of its broad application, but which the authority recognises ought to be permitted at its discretion. This recognises that the broad drafting of the Regulations means that some conduct will be caught which there are policy or other reasons to permit, or other factors specific to each case which mean that intervention by the authority is appropriate.

122. Thus, the statutory guidance, the 'Russia Guidance' issued on 25.03.22, stated, in respect of the trade sanctions:

"For some prohibitions there are some specific activities that DIT considers are likely to be consistent with the aims of the sanctions. These are set out in the table below. If you think that your proposed activity falls within one of these specific descriptions you should make this clear and explain why you believe this to be the case in your application for a licence.

[36] The Claimants do not contest that the aircraft fall within the Regulations' definition of "*restricted goods*", which includes "*aviation and space goods*" and "*aviation and space technology*", as specified in Schedule 2C of the UK Regulations.
[37] See SAMLA sched. 1.
[38] Russia sanctions: Government Guidance (21 July 2022) s.3.3
[39] Regulation 28(6).
[40] Cf. *R (Certain Underwriters of Lloyd's London)supra.*

You should not assume that a licence will be granted or engage in any activities prohibited by trade sanctions until your licence has been granted."

123. This iteration of the Guidance stated:

"A licence may be granted for the provision of technical assistance, brokering services, financial services or funds related to aviation and space goods and technology if the Secretary of State is satisfied that the technical assistance, brokering services, financial services or funds are necessary for the execution of obligations arising from contracts concluded before 8 March 2022, or ancillary contracts necessary for the execution of such contracts, provided that the activity is completed before 28 March 2022. This licensing ground will no longer be available for use from 28 March 2022."

124. This guidance indicates that the provision of funds or financial services after the commencement date in connection with arrangements which were entered into before that commencement date fall within Regulation 28 and individual licences are thus required where the contracts were concluded before the commencement provisions.[41] This undermines the Claimants' argument that the purpose of the trade sanctions was to apply restrictions only to *prospective* trade or financial support once the sanctions had been implemented and that, therefore, had no retrospective application. To the contrary, the scheme of the sanctions demonstrates that such transactions would be caught by the sanctions but would likely be amenable to the licensing regime.

125. The Claimants' reliance on suggested policy reasons why payment should not be caught by the Regulations (e.g. the timing of the sanctions in relation to the provision of the restricted goods, the fact that the transactions have now been terminated, the independence of the obligations under the Letters of credit, the fact that payment to the Claimants will not result in payment to a person connected with Russia or a designated person) may all be reasons in support of the grant of a licence to permit the payments to be made within the existing framework, as underscored by the ECJU licence issued on 22 September 2022. However, they are not matters relevant to the statutory interpretation of Regulation 28. The Claimants' complaints about the administration of the licensing regime likewise do not assist in the interpretation of the scope of the prohibitions within Regulation 28.

My conclusions.

126. I have come to the clear conclusion that UniCredit was not relieved of the obligation to make payment to the Claimants under the various Letters of credit by reason of Regulation 28. I reach this conclusion for the following reasons.

    (1) I accept the Claimants' contention that the starting point is to identify the purpose of the regulation. Here that purpose is clear. Plainly, the intention of the legislature was to ensure that financial assistance was not provided to Russian parties in relation to, *inter alia*, the supply of aircraft.

[41] This use of the licensing regime is in contrast to the construction of EU Regulation 833/2014, as amended by EU Regulation 2022/328, which provided that the prohibitions related to aviation goods did not apply to the performance of contracts entered into before 26.02.22, until 28.03.22.

(2) That regulation, as would normally be expected, operated prospectively and not retrospectively. It therefore looked to the time at which financial assistance was provided to the relevant party. Here, the issuance of a letter of credit to enable the supply of aircraft to a Russian party after the date on which the Regulation came into force would plainly come within the prohibition, as both parties accepted.

(3) That is not, however, this case. Here, the aircraft had been supplied long before the prohibition came into effect, at a time when it was perfectly lawful to make such a supply. Likewise, the provision by UniCredit of financial services to the Russian lessees was made when they issued the Letters of credit which served as a mechanism for the satisfaction of the payment obligations of the lessees; and again, at the time of the provision of the services, that provision was perfectly lawful.

(4) All that remained to be done, as at the time that the prohibition in Regulation 28 came into effect, was for the obligation undertaken long before to be fulfilled. The fulfilment of that obligation benefitted the Claimants. Although this fulfilment may also have had the collateral result of discharging the independent obligations of the lessees and Sberbank towards the Claimants, that was a wholly collateral matter. Moreover, because UniCredit remained able to claim against Sberbank, Sberbank were not benefitted; and nor were the lessees, since they remained liable to Sberbank.

(5) Finally, in this regard, I do regard the autonomy principle as of importance. The claim on the Letters of credit was a claim by the Claimants against UniCredit, pursuant to an obligation which had been undertaken by UniCredit wholly independently from any of the other elements of the transaction. Whilst a letter of credit transaction involves various interconnected strands, those strands all involve independent contractual obligations.

127. I also accept the Claimants' submission that it is important to take a step back in this regard and ask whether the fulfilment of an independent obligation owed by a German bank to Irish companies can be said to be intended to benefit the Russian entities who happen to be involved in other elements of the overall transaction. In my judgment, the answer to this question is quite clear – it cannot.

128. Nor, lastly, do I accept UniCredit's submission that the Regulation should be read broadly on the basis that any vagaries that such a reading might lead to can be assuaged by the use of the licensing system. Indeed, the extracts from the guidance relied on by UniCredit seem to me to militate against such an approach. Those extracts suggest that the licencing authorities may take the view that prohibited transactions may nonetheless be licenced if they are thought to be "consistent with the aims of the sanctions"; but that in turn indicates that a licence may be granted in relation to transactions even though they are prohibited on a proper reading of the sanctions, not that the sanctions should be regarded as all embracing, subject only to the licencing regime.

Regulation 11

The Claimants' contentions.

129. Regulation 11 provides:

***"11.**—(1) A person ("P") must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources. …*

…(4) For the purposes of paragraph (1) a person "deals with" funds if the person—

(a)uses, alters, moves, transfers or allows access to the funds,

(b)deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or

(c)makes any other change, including portfolio management, that would enable use of the funds.

(5) For the purposes of paragraph (1) a person "deals with" economic resources if the person—

(a)exchanges the economic resources for funds, goods or services, or

(b)uses the economic resources in exchange for funds, goods or services (whether by pledging them as security or otherwise).

(6) The reference in paragraph (1) to funds or economic resources that are "owned, held or controlled" by a person includes, in particular, a reference to—

(a)funds or economic resources in which the person has any legal or equitable interest, regardless of whether the interest is held jointly with any other person and regardless of whether any other person holds an interest in the funds or economic resources;

(b)any tangible property (other than real property), or bearer security, that is comprised in funds or economic resources and is in the possession of the person.

(7) For the purposes of paragraph (1) funds or economic resources are to be treated as owned, held or controlled by a designated person if they are owned, held or controlled by a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person".

130. Thus, Regulation 11 provides (in relevant part) that a person *"must not deal with funds or economic resources owned, held or controlled by a designated person…"*. Sberbank is a designated person. Sberbank is, of course, the issuing bank in respect of the Letters of credit. However, UniCredit's payment obligation to pay Celestial under the Letters of credit (as the "confirming bank") is separate and independent from that of the issuing bank.[42] Discharge of that payment obligation will not in any way involve UniCredit dealing with funds or economic resources owned, held or controlled by Sberbank.[43]

[42] See Brindle & Cox on the Law of Bank Payments at 7-014.

[43] Sberbank has a separate obligation to UniCredit to reimburse UniCredit in respect of UniCredit's payment under the Letters of credit. Regulation 11 may therefore have the effect of preventing UniCredit from receiving funds from Sberbank. But that is irrelevant to whether UniCredit is required to pay Celestial. UniCredit's payment obligation to Celestial is in no way dependent upon performance by Sberbank of its payment obligation

UniCredit's contentions.

131. On 6 April 2022, Sberbank was designated under Regulation 5 of the UK Regulations for the purposes of asset freezing measures and it would constitute a breach of Regulations 11 and 13 for UniCredit to make payment under the Letters of credit prior to obtaining a relevant licence from OFSI. Accordingly, on 11 April, UniCredit amended its extant licence application to OFSI.[44]

132. Regulation 11 operates to prevent payment to the Claimants under the Letters of credit irrespective of whether any funds are received from Sberbank. As with Regulation 28(3), the correct approach for establishing the meaning of the provision is to start with its words, read in its statutory context and in light of the legislative purpose.

133. Regulation 11 prohibits dealing with funds or economic resources "*owned, held or controlled by a designated person*". As noted above, "*funds*" means "*financial assets and benefits of every kind*" including Letters of credit.[45] Letters of credit constitute "*funds*" under s.60(1)(f) of SAMLA, and funds are "*owned, held or controlled by a designated person*" where the person has any legal or equitable interest in them, regardless of whether any other person holds such an interest.[46] Those interests are not extinguished by the presence of other co-existing interests. In this case, the Letters of credit are "*owned held or controlled*" by Sberbank within the meaning of those terms because Sberbank retains a legal interest in them, including, but not only, rights to preserve their terms.

134. "*Dealing with*" funds is defined in Regulation 11(4). The term includes dealing with the funds in any way which would result in a change in their character, as well as making a change to enable use of the funds. Prohibited "*dealing with*" funds of a designated person is not restricted to conduct which enables use of the funds by the designated person. The provision is widely drafted to cover use of the funds etc. by any person. If UniCredit paid the Claimants, this would change the character of the Letters of credit since, amongst other things, it would extinguish the obligation of Sberbank to pay the Claimants, trigger Sberbank's reimbursement obligation, and enable the funds in question to be used. That those funds would be used by the Claimants rather than directly by the designated person, Sberbank, may be a point in favour of the grant of a licence permitting such use but, again, it does not assist in a narrow construction of the provision itself.

135. The exemption in Regulation 58 of the sanctions regulations does not remove the Letters of credit from the scope of Regulation 11 as the Claimants contend. That Regulation provides as follows:

> *"**58.**—(1) The prohibition in regulation (asset-freeze in relation to designated persons) is not contravened by an independent person ("P") transferring to another person a legal or equitable interest in funds or economic resources where, immediately before the transfer, the interest—*

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to UniCredit. Thus, the UniCredit → Celestial payment obligation is entirely distinct from the Sberbank → UniCredit payment obligation.

[44] Separately, the receipt of funds from Sberbank would require assets owned by Sberbank to be transferred, in breach of Regulation 11, and thus the amended licence application addressed this as well.

[45] SAMLA s. 60(1)(f).

[46] Regulation 11(6)(a).

(a)is held by P, and

(b)is not held jointly with the designated person."

136. This is because UniCredit would not be transferring an interest it holds in the Letters of credit to the beneficiaries if it made payment, which is what the exemption in Regulation 58(1) envisages. It would, instead, be discharging its obligation under the letter of credit with the result that the character of the letter of credit is changed.

My conclusions.

137. I can deal with this contention briefly. Again, in my judgment, UniCredit's contentions are ill-founded.

(1) First, it was common ground that UniCredit's obligations matured on 14 or 15 March 2022 (at the latest) in relation to the Celestial Letters of credit and 31 March or 1 April 2022 in relation to the Constitution Letters of credit. Sberbank was only designated under Regulation 11 on 6 April 2022. Hence, since any sanction imposed under Regulation 11 did not come into force until after the date on which the obligation to make payment under the Letters of credit matured, that sanction cannot have impacted on the relevant obligation.

(2) Secondly, I accept the Claimants' arguments that the sanction in Regulation 11 did not in any event prohibit payment under the letter of credit under which UniCredit owed obligations to the Claimants. That is essentially because UniCredit was not dealing with Sberbank's property when making payment under the Letters of credit. UniCredit was instead satisfying its own independent contractual obligations. Sberbank's property was not in any way interfered with. In this connection, UniCredit's argument was, in essence, that because UniCredit could not unilaterally vary the letter of credit obligations, but had to have Sberbank's consent to a variation, that in turn gave Sberbank a proprietary interest in the contractual obligation owed by UniCredit to the Claimants. This is, in my judgment, a *non-sequitur*. The correct analysis under the UCP is that any variation of the obligations by the confirming bank relieves the issuing bank of its obligations; that does not give the issuing bank a proprietary interest in the obligation owed by the confirming bank.

Regulation 13

The Claimants' contentions.

138. Regulation 13 provides as follows:

***"13.**—(1) A person ("P") must not make funds available to any person for the benefit of a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available. ...*

... (4) For the purposes of this regulation—

(a)funds are made available for the benefit of a designated person only if that person thereby obtains, or is able to obtain, a significant financial benefit, and

(b)"financial benefit" includes the discharge (or partial discharge) of a financial obligation for which the designated person is wholly or partly responsible."

139. The Claimants argued that this Regulation was again not engaged. The payment obligation under the Letters of credit crystallised upon a conforming demand being made. Such a demand was made on UniCredit; hence the crystallisation of UniCredit's payment obligation as confirming bank. No such demand was made by the Claimants on Sberbank. Sberbank therefore has no extant payment obligation towards the Claimants.

140. Even if Sberbank (as issuing bank) did have a payment obligation to the Claimants, Sberbank would not be enriched as a result of UniCredit discharging its payment obligation. In those circumstances, Sberbank would be required to reimburse UniCredit, as UniCredit accepts. Sberbank would therefore receive no relevant 'benefit' by virtue of UniCredit's payment to the Claimants – payment by UniCredit would simply substitute Sberbank's obligation to the Claimants with an equivalent obligation to UniCredit.

141. Moreover, any payment obligation which Sberbank (as issuing bank) would have towards the Claimants would be unenforceable by reason of the asset-freeze restrictions. That is a further reason why there is no relevant enrichment to Sberbank as a result of UniCredit's discharge of its payment obligations. As things stand, the Claimants would have at most an unenforceable right against Sberbank. In those circumstances, it would be unreal to suggest that discharge of UniCredit's payment obligation confers any relevant benefit on Sberbank.

142. Standing back, there is a fundamental artificiality about UniCredit's reliance on regulation 13. Regulation 13 is intended to stop a payment being made for the benefit of a designated person. Viewing the matter with any degree of commercial realism, the payments under the Letters of credit are made for the benefit of the Claimants. Even if there were any benefit to Sberbank (which there is not, as explained above) that benefit would be no more than collateral or incidental.

143. Finally, Sberbank did not become a designated person until 6 April 2022. Regulation 13 cannot therefore excuse non-payment prior to 6 April 2022. The Claimants would therefore be entitled to claim damages for non-payment prior to that date.

<u>UniCredit's contentions.</u>

144. Making payment under the Letters of credit after the relevant date would also constitute a breach of Regulation 13, by "*making funds available for the benefit of [Sberbank,] a designated person*". This is because:

    (1) Funds are made available for the benefit of a designated person if that person thereby obtains or is able to obtain a significant financial benefit.[47]

    (2) The term "*financial benefit*" is defined in Regulation 13(4(b) as including "*the discharge (or partial discharge) of a financial obligation for which the designated person is wholly or partly responsible*".

[47] Regulation 13(4)(a).

(3) Making the payment would discharge the contingent liability which Sberbank owes to the Claimants under the Letters of credit. This would amount to a significant financial benefit for Sberbank. This is the case regardless of whether Sberbank remains liable to reimburse UniCredit for the payment. The argument that Sberbank would not obtain a significant financial benefit because there would be simply a change in the identity of its creditor ignores the terms of the definition, as well as the fact that in this situation Sberbank may realise significant benefit vis-à-vis UniCredit by way of access to capital for the period prior to discharging its liability to UniCredit.

(4) By way of analogy, if a respondent to a freezing order which prevents any dealing with a certain asset proposes to sell the asset for full value with the proceeds remaining frozen, the court would likely grant a variation to the order to permit the sale. But that is not to say that the sale would be permitted in any event.

(5) The Claimants' reliance on *R (M) v HM Treasury* [2008] All ER 1097 is misplaced. First, the House of Lords was concerned with the interpretation of EU legislation, not English domestic law. The exercise of statutory interpretation therefore started from a different point, namely a strictly teleological one. Secondly, in the Committee's analysis (given by Lord Bingham), social security payments to the designated person's wife, which were exclusively spent on maintaining their household, did not fall within article 2(2) of the EU legislation because the purpose of the asset freezing measures in the UN's Taliban and al-Qaida sanctions regime, as expressed in the relevant UN Security Council resolution which the EU legislation sought to implement, was to prevent listed persons having access to funds which could be used for terrorist purposes.[48] The social security payments to M would not result in funds being made available to the designated person but only benefits in kind (such as accommodation and meals).[49] Thirdly, HM Treasury's construction to the contrary required effectively changing the words "*made available … for the benefit of*" to "*applied*" or "*expended for the benefit of*"[50], and so was inconsistent with the plain meaning of those words. The decision cannot be applied to the present, very different, situation.

My conclusions.

145. Once again, I can deal with UniCredit's case briefly.

(1) Again, since Regulation 13 did not come into force until 6 April 2022, it can have had no impact on UniCredit's obligations, which had matured before that date.

(2) Whilst the question in relation to Regulation 13 is not the same as in relation to Regulation 11, since one deals with dealing with funds owned or controlled by a sanctioned entity and the other deals with making funds (including financial benefits) available to a sanctioned entity, the legal issues which arise are substantially similar. Thus, I accept again that here the payment by UniCredit does not lead to the discharge, in whole or in part, of Sberbank's obligations. Whilst Sberbank's independent obligation to make payment to the Claimants may

[48] *R (M) v HM Treasury* [2008] 2 All ER 1097, 1101c-d [12].
[49] *Ibid.*
[50] *Ibid* p1097f-g [14].

now have been satisfied, it remains under an equal obligation to reimburse UniCredit. There is no reduction in its overall liability; it is simply now obliged to one party and not two.

146. Overall, therefore, I reject UniCredit's case based on Regulation 13.

Section 44 of SAMLA

147. As I understand the position, I am not asked to reach any conclusions in this judgment as to s.44, which the parties believe will only arise as part of a judgment on consequential matters. Accordingly I do not consider this further.

US law.

The timing of the US sanctions.

The Claimants' contentions.

148. On UniCredit's own case, US sanctions had no relevant effect until either 26 March 2022 or 13 April 2022.

149. Here, the position does differ slightly, as I understand it, between Celestial and Constitution. As regards Celestial, it was said that even if it were the case that payment under the Letters of credit is now prohibited under US sanctions, US sanctions can provide no defence to the non-payment prior to 26 March 2022. The Claimants are accordingly entitled to damages (which may be given in sterling) for non-payment prior to 26 March 2022, or to payment. All of the obligations to make payment to Celestial accrued prior to 26 March, as noted above. Neither US measure could affect such obligations, on the face of things, Celestial argued.

150. As to Constitution, then it was argued that the second US sanction could have no impact on the payment obligations, since all of those had matured prior to 13 April 2022. As regards the first sanction, which came into force on 26 March 2022, then some of the payment obligations might be affected, but the first one could not be.

UniCredit's contentions.

151. UniCredit's written argument did not address this issue. In oral argument, as I understood the position, their argument was that, even if the US sanctions did not give them a defence as at the time that the payment obligations had to be fulfilled, if, as at the time that those obligations arose s.44 of SAMLA gave them a defence to the claim, then they could rely on the US sanctions in force as at the moment when they ceased to satisfy the provisions of s.44.

My conclusions.

152. I can express my conclusions on this issue briefly in the light of what has been said above.

    (1) In my judgment, at the moment that the payment obligations accrued, there was no relevant prohibition under US law, as regards Celestial. At the moment the first obligation to make payment to Constitution matured, there was no relevant

prohibition. There was, however, a potentially relevant prohibition (namely the 26 March prohibition) which might affect the later payment obligations. That would depend on whether that earlier prohibition in fact made payment in the US unlawful, and whether any such unlawfulness is relevant.

(2) Whether s.44 applies so as to mean that the payment obligations of UniCredit were somehow deferred, and, if so, whether UniCredit would be entitled to rely on changes in US law coming into effect during the period of such deferral are questions that the parties do not wish me to rule upon at this stage, preferring that such matters should be addressed as part of any consequentials hearing.

(3) Accordingly, I say nothing further on this topic at this stage.

(1) Is the question of lawfulness under US law of any relevance to this claim?

The Claimants' contentions.

153. UniCredit says that it would commit an offence under US law if it made payment to the Claimants under the Letters of credit. The sole connection which the payment has to the US is that the payment obligation is in USD. According to UniCredit, it would be committing an offence under US law by making a USD payment.

154. The answer to this question, the Claimants say, is 'no'. The Letters of credit are governed by English law. The starting-point is that questions about whether the Letters of credit are valid and enforceable are decided by reference to the law which governs those Letters of credit i.e. English law. The fact that the Letters of credit or their performance would be regarded as unlawful under the law of some other country *"is generally speaking irrelevant"*: see e.g. *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] 2 CLC 735 at [46] per Leggatt J; *Banco San Juan Internacional v Petroleos de Venezeula SA* [2020] EWHC 2937 (Comm) at [76] per Cockerill J.

155. The principle in *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287 operates as a *"limited exception"* to that general rule.[51] The rule in *Ralli Bros* provides that the English court will not enforce an obligation which requires a party to do something which is unlawful by the law of the country in which the act has to be done: see *Dana Gas* at [79]. Thus, the rule is engaged only if performance of the obligation would require the performing party to act unlawfully in the required place of performance.

156. The authorities distinguish between situations where (i) performance necessarily involves an act which is unlawful by the law of the country in which that act takes place and (ii) the party equips itself for performance by an illegal act in another country. Only the first of these situations would engage the *Ralli Bros* rule: see *Libyan Arab Foreign Bank v Bankers Trust* [1989] QB 728 at pp.744-5. The Claimants argued that the current case was akin to *Kleinwort Sons & Co v Ungarische Baumwolle Industrie* AG [1939] 2 KB 678, in which the Court of Appeal held that since payment was to be made in England, the place of performance was England, such that unlawfulness under Hungarian law was irrelevant. The *Ralli Bros* principle was therefore not engaged. MacKinnon LJ held at p.694: *"Here it is said that to pay this money in London is unlawful by the law of Hungary. If this contract had been to pay money in Budapest, no doubt that principle would have applied, and the law of Hungary would have been the lex loci solutionis, but the payment of the money was to be made in England, and the law*

[51] See *Banco San Juan* at [57]

of England is the lex loci solutionis. Therefore the exception where the performance is unlawful by the law of the country where the contract is to be performed does not arise, and the defendants can base no defence on that principle". To similar effect, Atkinson J held at p.700: *"In this contract the obligation is to pay certain money in London, and the contract is not concerned with the steps which the debtors may have to take to put themselves in a position to pay. It is concerned only with the payment itself, which is to be made in this country"*.[52]

157. The same principle, the Claimants argued, is illustrated in *Libyan Arab Foreign Bank*. The Libyan Bank sought to withdraw USD funds from its dollar account held in London with the London branch of a US bank (Bankers Trust). The US had imposed sanctions against Libya, to which Bankers Trust (as a US entity) was subject; this made it illegal under US law for Bankers Trust to make a payment in London to the Libyan Bank. In reliance on *Ralli Brothers*, Bankers Trust contended that it was excused from making payment on the basis that this would necessarily involve performance in New York. Staughton J rejected the bank's argument that performance of its payment obligation in England would necessarily involve performance of an unlawful act in New York – for example, the judge held that it would be possible for Bankers Trust to pay by delivery of cash in the form of dollar bills which would not require any unlawful action in New York (see p.764). According to Dixon: Goode on Payment Obligations in Commercial and Financial Transactions (4th ed.) at 5-46:

> *"This decision demonstrates the importance of identifying the due place of payment because, as has been shown, the law of that place may have an impact the enforceability of the bank's repayment obligation. This will, however, usually be the place where the account is held. In the Libyan Arab case, New York may be described as the place of settlement but, given the analysis adopted above, illegality in that place does not detract from the validity and enforceability of the bank's obligation to repay the deposit. London was the due place of payment."*

158. Here, UniCredit was required to make payment to an account in London in the case of the Celestial AAL Letters of credit, and to an account in Dublin in the case of the Aurora Letters of credit and in Dublin in the case of Constitution. The place of performance of the payment obligations is therefore England and Ireland respectively.[53] As such, the position is analogous to *Kleinwort Sons*. The place of performance of the payment obligation is England or Ireland.

159. It bears emphasis that the *Ralli Bros* rule is engaged only if it is *illegal* for the performing party to perform in the place of performance. It is not enough for UniCredit to say that it would be practically impossible for it successfully to make a USD payment because correspondent banks would in practice block the payment. This is reflected by the reasoning of Cockerill J in *Banco San Juan*. This was a claim brought by a Puerto Rican bank (BSJI) against PDVSA, a Venezuelan state-owned company, for repayment due under loan facilities. The loan facilities were English law governed. The loan facilities required repayment to be made in USD to a stipulated account held in New York. The US had imposed sanctions on Venezuela. PDVSA sought to resist payment on the grounds that the sanctions prohibited payment to be made in USD to the designated

[52] A similar analysis was adopted in *Toprak Mahsulleri Ofisi v. Finagrain Compagnie Commercial Agricole et Financiere S.A.* [1979] 2 Lloyd's Rep. 98.
[53] See *Cargill International Trading v Uttam Galva Steels* [2019] EWHC 476 (Comm) at [124] per Bryan J.

account in New York. The judge said, *obiter*, at [107] that it was not illegal or a breach of US sanctions for PDVSA (a non-US entity based outside the US) to make payment, in the sense of taking steps it would need to take to make the payment to BSJI in the stipulated account. The judge said at [110] that had she been required to decide the point, she would have rejected the defence based on illegality. The judge also observed at [106] and [111] that the real underpinning of PDVSA's case was factual impossibility rather than illegality.[54] That is not within the scope of the *Ralli Bros* rule: see [106].

160. In the alternative, the Claimants argued that if (i) the question of lawfulness under US law is relevant to the enforceability of the Letters of credit and (ii) UniCredit would commit an offence under US law if it made payment in USD, this would not provide UniCredit with a defence to the claim. The only reason why the US law position is arguably relevant is because payment is to be made in USD. If payment were instead made in Euros or sterling, no issue of US law would arise. However, I understand that the parties do not wish me to deal with this argument in this judgment, but to leave it for any argument at the stage of consequentials. I therefore say no more about it at this stage.

UniCredit's contentions.

161. The governing law of each of the Letters of credit is English law. It is a well-recognised principle of English law – known as the principle in *Ralli Bros* – that the Court will not compel performance of an obligation (or award damages for its breach) where this would require an unlawful act in the place of performance. As explained by Staughton J in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728 ("***LAFB***") at 743F, "*Performance of a contract is excused if…it necessarily involves doing an act which is unlawful by the law of the place where the act has to be done*."

162. In this regard, a distinction is drawn between acts undertaken to equip a party to perform the contract and performance itself.

163. Where the *Ralli Bros* principle is not engaged, considerations of public policy may still militate against the enforcement of a contract where a sufficiently serious breach of foreign law is involved which reflects important policies of the foreign state such that enforcement would be contrary to public policy. This is a more flexible principle. If the principle in *Ralli Bros* is engaged, the contract will not be enforced. If the principle is not engaged, then the Court goes on to consider whether the more flexible principle nevertheless militates against enforcement.[55]

164. Here, the following matters arise on the face of the Letters of credit:

    (1) The currency of each of the Letters of credit is USD. This is the currency of account and the currency of payment. The majority of the Letters of credit authorise the beneficiary to draw on UniCredit "*an amount or amounts not exceeding a total of US Dollars [amount]*". The remainder use different wording but similarly specify USD as their currency in express terms.

[54] See the Judge's discussion of impossibility and unlawfulness at [78].
[55] See *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) per Cockerill J at [321]–[332]; *Ryder Industries Limited v Chan Sui Woo* [2016] 1 HKC 323 per Lord Collins of Mapesbury at [39] and [56]–[59].

(2) UniCredit's payment obligation arises – only – in the event of a demand precisely in the format set out in the relevant letter of credit. In each case and without exception, this requires the beneficiary to demand payment in USD into a specified account. The doctrine of strict compliance, which is also expressly reflected in the terms of the Letters of credit and UniCredit's confirmation of them, is such that the beneficiary has no right to demand payment (and UniCredit has no authority to pay) in any other currency.

(3) Thus payment must be made by UniCredit in USD, into the account specified in the demand. Each of the demands identified a USD beneficiary account – four in London, eight in Dublin. In addition, those demands which specified a Dublin beneficiary account also specifically identified a correspondent account in the US through which payment was required to be made.

(4) The unchallenged evidence is that payment could not be made in accordance with these demands except via a correspondent bank in the US. This is in any event well known as a matter of banking practice, and underpins the decision of Staughton J in *LAFB*, in which the relevant payment systems were analysed in detail.

165. In *LAFB*, a Libyan bank (the customer) held accounts with Bankers Trust (the banker) in both New York and London. Against the backdrop of sanctions imposed by the US government targeting Libyan persons and assets, the customer demanded repayment of USD balances standing to the credit of its London account. The demands made in that case were expansive and presented on various alternative bases – first USD in cash or by banker's draft, then USD by any commercially recognised method, and finally in sterling.

166. Staughton J tested each payment method against the question of whether it would necessarily involve an act in the USA, where it would have been unlawful by reason of the sanctions. He held that any payment which involved clearing through the US would necessarily involve an act in the USA, which would be illegal there. This was also the case in respect of any clearing system outside the USA, since clearing would still ultimately be required in the USA. The judge also inclined to the view that payment by banker's draft would give rise to the same problem, though it was unnecessary for him to decide the point.

167. The essence of Staughton J's decision thus far is correctly summarised in Brindle & Cox, The Law of Bank Payments, 5th Ed. (2017) at para 3-020:

"the withdrawal or transfer of funds from an account governed by English law can be blocked by the law of any foreign state through whose jurisdiction the funds must necessarily pass. As has already been noted above, even an offshore transfer of funds may necessitate those funds passing through the country of the currency of the transfer so that the transaction is partly performed in that country."

168. In *LAFB* itself, this difficulty was ultimately sidestepped by the judge's conclusion that the customer was entitled to demand (a) payment of USD in cash in London, which it was accepted would not involve any illegal action in New York (764F), alternatively (b) payment in sterling (766H). UniCredit argued that neither possibility arises in this case: neither method would comply with the terms of the Letters of credit or the demands made under them.

169. Accordingly, the *Ralli Bros* principle is squarely engaged. The suggestion in the Claimants' skeleton arguments that the use of a correspondent bank in the US is merely preparatory to performance is clearly wrong both on the evidence (UniCredit's act of performance is to issue a payment instruction nominating the beneficiary's destination account, an instruction which then causes funds to flow inevitably through a correspondent bank account in the US) and fails to engage with the actual decision in *LAFB*, which is indistinguishable.

170. There is accordingly no need – and no room – for consideration of the more flexible principle which may operate where the *Ralli Bros* rule does not apply. Even if this is wrong, however, the more flexible principle leads to the same result.

My conclusions.

171. In order to consider this issue fully, I think it is necessary to examine the *LAFB* decision carefully. I start with the headnote in the case, which provides as follows:

> *"The plaintiffs, a Libyan bank, had a call account with the London branch of the defendants, an American bank. They also had a demand account with the defendants' New York branch. The arrangement was that the plaintiffs maintained a peg balance of U.S.$500,000 in the New York account. Each morning, in the light of the balance of the New York account at the end of the previous day's trading, funds were transferred to or from London so that the peg balance was maintained. At 2 p.m. each day the balance of the New York account was again determined and similar transfers made between the two accounts. At 2 p.m. on 7 January 1986 a sum of U.S.$165.2m. was available for transfer to London and at 2 p.m. on 8 January there was a sum of U.S.$161.4m. available. Neither sum was transferred. At 4 p.m. on 8 January 1986 the President of the United States of America signed an executive order freezing all Libyan property in the United States or in the possession or control of United States persons including overseas branches of United States persons. The plaintiffs demanded payment of U.S.$131m., the balance standing to the credit of the London account at the close of business on 8 January 1986 and a further U.S.$161m. on the basis that that sum should have been transferred from the New York to the London account on 8 January. Payment was demanded by banker's draft, in cash or by any other commercially recognised method of transferring funds. The defendants refused to pay contending that it would be impossible for them to make any payment to the plaintiffs without committing an illegal act in the United States. The plaintiffs commenced proceedings, claiming the sums in debt or damages or, alternatively, on the ground that the contract had been frustrated:-*
>
> *Held, giving judgment for the plaintiffs,*
>
> *(1) that the defendants would be excused from complying with the plaintiffs' demands for payment if the payment was illegal by the proper law of the contract or it involved doing an act which was unlawful in the place in which it was to be performed; that there was only one contract between the parties in respect of the New York and London branches of the defendants but the contract was governed by both English and New York law; and that, applying the general rule that the contract between a bank and its customer was governed by the law of the place where the account was kept, the rights and obligations of the parties in respect of the London account were governed by English law.*

(2) That the plaintiffs had to show that they had made a demand for payment with which the defendants were obliged to comply; that, in respect of their credit balances with the London branch the plaintiffs had a personal right to demand cash or an account transfer; that, since by making a demand for payment the plaintiffs had exercised their right unilaterally to determine the management account arrangement, it was no longer a term of the contract that all transactions should pass through New York; that no such term could be implied from the usage of the international market in Eurodollars, and that, therefore, the London branch had obligations to make transfers from that account on the instructions of the plaintiffs which did not involve infringement of United States law in the United States.

(3) That, although the plaintiffs demanded a banker's draft on the defendants' London office, a draft for the sums demanded would not have been eligible in the circumstances for London dollar clearing and, therefore, the defendants were not obliged to comply with the demand for a banker's draft; but that a demand for cash was an assertion of a customer's fundamental right and delivery by the defendants of cash in London of the sums claimed would not have involved illegal action in New York, and that, therefore, since the plaintiffs had made a demand for cash, they were entitled to receive payment in dollars or, if payment in dollars was impossible, in sterling and, accordingly, the defendants were liable to the plaintiffs for breach of their obligation to provide cash on the plaintiffs' demand.

(4) That the defendants were in breach of contract in failing to transfer U.S.$165.2m. to the London account at 2 p.m. on 7 January and in not transferring U.S.$161.4m. to London at 2 p.m. on 8 January as a result of which there had been a net loss to the London account of U.S.$161.4m.; that, but for the breaches of contract that sum would have been recoverable by the plaintiffs from the London account; and that therefore, the plaintiffs were entitled to recover a further U.S.$161.4m.

(5) That the effect of the Presidential order was to suspend the defendants' contractual obligation; that the parties had not been altogether discharged from further performance of the contract; and that, accordingly, the contract had not been frustrated."

172. The judge's reasoning was set out in a series of paragraphs. As UniCredit indicated, in the earlier paragraphs of his judgment, the judge dealt with a series of propositions as to how payment might have been effected. However, in my judgment, the *ratio decidendi* of that judgment is to be found at the end of the judgment. I do not accept that the judge "sidestepped" any issue.

173. I have to say that it is perhaps somewhat artificial and unsatisfactory to be asked to deal with these arguments piecemeal. However, since that is what the parties have asked me to do, I leave out of account for present purposes that part of the judgment which deals with payment in a currency other than dollars (which is that part numbered (x) in his judgment) and concentrate instead on the paragraphs dealing with dollar payments in cash. Here, the judge said as follows:

"(ix) Cash - dollar bills

Of course it is highly unlikely that anyone would want to receive a sum as large as U.S. $131m. in dollar bills, at all events unless they were engaged in laundering the proceeds of crime. Mr. Osbourne said in his report:

"As to the demand for payment in cash, I regard this simply as the assertion of a customer's inalienable right. In practice, of course, where such a large sum is demanded in this manner, fulfilment of the theoretical right is unlikely, in my experience, to be achieved. A sensible banker will seek to persuade his customer to accept payment in some more convenient form, and I have yet to encounter an incident of this nature where an acceptable compromise was not reached, even where the sum was demanded in sterling."

I would substitute "fundamental" for "inalienable"; but in all other respects that passage accords with what, in my judgment, is the law. One can compare operations in futures in the commodity markets: everybody knows that contracts will be settled by the payment of differences, and not by the delivery of copper, wheat or sugar as the case may be; but an obligation to deliver and accept the appropriate commodity, in the absence of settlement by some other means, remains the legal basis of these transactions. So in my view every obligation in monetary terms is to be fulfilled, either by the delivery of cash, or by some other operation which the creditor demands and which the debtor is either obliged to, or is content to, perform. There may be a term agreed that the customer is not entitled to demand cash; but I have rejected the argument that there was any subsisting express term, or any implied term, to that effect. Mr. Sumption argued that an obligation to pay on demand leaves very little time for performance, and that U.S. $131m. could not be expected to be obtainable in that interval. The answer is that either a somewhat longer period must be allowed to obtain so large a sum, or that Bankers Trust would be in breach because, like any other banker they choose, for their own purposes, not to have it readily available in London.

Demand was in fact made for cash in this case, and it was not complied with. It has not been argued that the delivery of such a sum in cash in London would involve any illegal action in New York. Accordingly I would hold Bankers Trust liable on that ground."

174. In my judgment, this case is authority for the proposition that where a dollar payment is required under the contract, then the customer is entitled to demand such payment in cash. That is so whether or not performance of the obligation by tender of cash involves an unlikely situation. I would reject the argument that the terms of the letter of credit preclude an obligation to pay in cash. Clearly the Letters of credit anticipate that payment will be made through a correspondent bank. However, that does not mean that the bank is entitled to insist on making payment in this way, despite the fact that such a payment cannot in fact be made or lawfully made.

175. UniCredit's further argument is that the LAFB case turned on the fact that a demand was made for payment in cash, whereas here no such demand was made, at least at the outset. In my judgment, this is to confuse the trigger for the obligation (the demand) with the manner in which that obligation (to make payment) may have to be fulfilled. It may be that the demand made upon UniCredit assumed that payment would be made through a correspondent bank. However, that did not mean that UniCredit could not choose to perform in any other way, including via the tender of cash. Where the fundamental obligation is to make payment, and where it is possible to make such payment, then the bank must do so.

The contents of US law.

CAPTA sanctions

176. As I have noted above, the later "blocking" sanction relied on by UniCredit only came into force on 13 April, after all of the relevant payment obligations in this case had matured. For the purposes of this judgment, therefore, I concentrate on the earlier CAPTA provisions, on the footing that these may arguably be relevant to some of the Constitution obligations, if I am wrong in my conclusions as to the relevance of US law.

177. In view of the fact that these conclusions involve consideration of factual issues (foreign law being an issue of fact) and in view of the fact that my consideration herein is *obiter*, I will try to deal with this matter briefly.

178. Directive 2 under E.O. 14024 prohibits (inter alia) "*the processing of a transaction [by a US financial institution] involving foreign financial institutions determined to be subject to the prohibitions of this Directive, or their property or interests in property*".[56] The central issue here is whether a payment by UniCredit as confirming bank would "*involve*" Sberbank, or its property or interests in property.

The Claimants' contentions.

179. The Claimants' summarised the views of the experts on CAPTA as follows:

    (1) In Mr Fleming's view, the USD payments under the Letters of credit were prohibited from 26 March 2022 by virtue of the CAPTA sanctions under Directive 2 of E.O. 14024, because payment under the Lettera of Credit would be deemed to "involve" Sberbank.

    (2) Mr Wall disagrees with Mr Fleming's conclusions on the CAPTA sanctions because those sanctions did not prohibit payment under the Letters of credit because such payments cannot be said to "involve" Sberbank. To read CAPTA Sanctions as prohibiting payment under the Letters of credit, it was contended, would give them the effect that only more extreme Blocking Sanctions could possibly have. The CAPTA Sanctions were intended only to sever direct links between US financial institutions and sanctioned entities, thereby cutting Russia off from the US financial system.

    (3) Irrespective of OFAC's approach to the construction of the relevant US Sanctions, UniCredit could have engaged proactively with OFAC ahead of time in order to obtain the agency's consent to the payments being made.

180. Dealing first with OFAC's general approach to implementing sanctions, the Claimants pointed out that OFAC is the agency primarily responsible for the imposition and enforcement of US Sanctions. Both experts agree that OFAC is afforded a wide margin of discretion in interpreting sanctions legislation, and that the Courts afford a degree of deference to its conclusions.

181. However, OFAC's determinations are ultimately subject to the supervision and final legal determination of the US Courts, which have the power to overrule its substantive

[56] Sberbank is a foreign financial institution falling within the scope of Directive 2: see Annex 1.

decisions and are the final arbiters as to the meaning of legislation.[57] Mr Wall therefore rightly notes the importance of distinguishing between the law itself as established in statutes and regulations and articulated by the courts on the one hand and the administrative agency's discretionary interpretation of the law on the other. By contrast, Mr Fleming focussed throughout his report on what OFAC would do without addressing the question as to whether the US Courts would endorse or overturn its approach.

182. The CAPTA Sanctions were issued on 24 February 2022, but did not take effect until 26 March 2022. At that point they prohibited U.S financial institutions from *"(1) opening or maintaining a correspondent account or payable-through account for or on behalf of foreign financial institutions determined to be subject to the prohibitions of the Directive;* and (2) *"processing transactions involving foreign financial institutions determined to be subject to the prohibitions of this Directive, or their property or interests in property."* (emphasis added). Sberbank was listed as being subject to Directive 2 from its inception.

183. It is only the second prohibition that is arguably engaged in this case, as there is no suggestion that payment under the Letters of credit required the correspondent banks to open or maintain an account with Sberbank (as distinct from UniCredit). The key question is therefore whether payment by UniCredit to Constitution under the Letters of credit is a transaction "involving" Sberbank, its property, or its interests in property.

184. On this question, the Claimants argued that the opinion of Mr Wall was to be preferred to that of Mr Fleming:

    (1) Mr Fleming's analysis (which suggests that CAPTA Sanctions prevented transactions in which Sberbank was connected in any way) effectively collapses CAPTA Sanctions into Blocking Sanctions. Mr Wall however explains that while the purpose of the CAPTA Sanctions was to cut off Sberbank's direct access to the US financial system by preventing US institutions from opening or maintaining a correspondent account with it, they were not intended to prevent transactions between non-sanctioned foreign parties.

    (2) FAQs on the topic reveal that the involvement of US institutions in indirect payments (i.e. payments where a sanctioned entity is the ultimate beneficiary) were expressly envisaged and permitted so long as any direct transaction with a sanctioned entity took place between non-US third-party intermediary institutions. The position where no sanctioned entity is either the payor or beneficiary (as under the Letters of credit) must, therefore, be *a fortiori.*

    (3) Mr Fleming relies for his contrary conclusion almost entirely on the previous OFAC enforcement case against Union de Banques Arabes et Francaises ("**UBAF**") although elsewhere he acknowledges that *"while OFAC guidance and enforcement decisions provide useful insight into how OFAC typically interprets and applies its economic sanctions regulations, they do not establish a binding precedent for OFAC's future enforcement decisions".*

    (4) However, the UBAF case arose in circumstances where the bank was transacting directly with fully blocked Syrian entities and does not address the narrower set of

[57] The experts were agreed that a court will set aside an agency's actions, findings and conclusions when they are "*arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.*"

CAPTA Sanctions. Further, the sanctioned bank in the UBAF case had operated US dollar accounts on behalf of the sanctioned entities themselves.[58] In the present case, there is no engagement with Sberbank whatsoever. For the letter of credit violations, the enforcement release notes that *"a sanctioned Syrian entity was the beneficiary…or the applicant"* or that UBAF issued or confirmed the letter of credit on behalf of a party who had already been sanctioned. None of these facts apply in the present case.

(5) Finally, US substantive law recognises the independence of payment obligations created under Letters of credit. The fact that the confirming bank would pay with its own funds effectively means that Sberbank is not "involved" in payment under the Constitution Letters of Credit.

UniCredit's contentions.

185. UniCredit contended as follows:

(1) This is a question on which OFAC's view on the application of the sanctions provisions is essentially determinative of US law. It bears emphasis that the primary focus here is on OFAC's likely position as to whether its own sanctions regulations are engaged in any particular scenario. OFAC not only enforces the sanctions, but also administers and implements them.

(2) The correct approach was set out by the United States Court of Appeals in *Consarc Corporation v Iraqi Ministry Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 701-2 (D.C.Cir.1994). The US Court pays particular deference to OFAC's construction and application of its regulation, which "*must prevail unless plainly inconsistent with the regulation*". The Court "*thus [has] warrant only to inquire whether OFAC's construction of the regulatory terms so far departed from common usage as to be plainly wrong*."

(3) UniCredit's expert, Mr Fleming, explains that OFAC would view the processing of USD payments under the Letters of credit as a prohibited **service** provided, at least in part, for the benefit of Sberbank. He refers to OFAC's previous enforcement action against UBAF, a French bank which in 2021 entered into a USD 8.5 million settlement with OFAC, which considered UBAF to have violated blocking sanctions by, among other things, paying out as confirming bank under Letters of credit issued by sanctioned parties through USD-cleared transactions.

(4) In any event, as a matter of analysis, UniCredit submitted that it is clear that payment out under a letter of credit "*involves*" Sberbank or its property or interests in property.

(a) The reasons for this are not difficult to identify when the text of the sanctions regulations is considered. The terms "*property*" and "*property interest*" are very broadly defined, to include (for example) indebtedness, obligations, Letters of credit and any documents relating to any rights or obligations

[58] *"Between August 2011 and April 2013, UBAF operated US dollar accounts on behalf of sanctioned Syrian financial institutions."; "For 45 of the 114 internal transfers, UBAF processed a USD transfer between two of its clients – one sanctioned Syrian entity and one non-sanctioned client…"*

thereunder, accounts payable, services of any nature whatsoever, contracts of any nature whatsoever, and any present, future or contingent interests. The definitions thus include many things (not least, obligations) that might not be considered to fall within them as a matter of ordinary language.

(b) Here, payment by UniCredit to the beneficiaries would result in "*dealing in*" a number of Sberbank's rights and obligations falling squarely within this expansive definition of property and property interests. For example:

1. It has payment obligations which are joint and several with UniCredit's obligations under the same Letters of credit. Those obligations are independent (i.e. they are several), but the discharge of one entails the discharge of the other (i.e. they are joint).

2. Payment by UniCredit triggers a reimbursement obligation on the part of Sberbank. This point and the previous point cannot be regarded as cancelling each other out for these purposes, as the Claimants appear to suggest. That may or may not be the economic effect of the transactions, depending on the facts; but the sanctions are not concerned with economic effect but the very different question of whether there is a dealing in property or a property interest, as defined.

3. The presentation of a demand on UniCredit triggers a right on the part of Sberbank to be provided with the demand documents, reflecting UniCredit's ministerial role in the transaction as Sberbank's agent in fact, if not in law.

4. Sberbank also has a direct interest in the limb of the Letters of credit involving UniCredit as confirming bank. It has ultimate control over the terms of the arrangement between UniCredit and the beneficiaries, which may not be amended without its consent.

(c) Mr Wall seems to suggest that this is because of OFAC's tendency to adopt a broad interpretation, and holds on to the possibility that it is "*by no means certain*" that a US Court would agree. This is unconvincing, and does nothing to detract from the obvious conclusion that it is more likely than not that OFAC's interpretation would be upheld by the Courts:

1. It is not simply OFAC's interpretative approach which is broad, but the definitions themselves.

2. Mr Wall suggests that this is ultimately a question of law. However, OFAC has a wide discretion in the interpretation of its regulations, and even more so when it comes to their application to the facts. It is very rare that OFAC's interpretation is even challenged.

3. It is therefore clearly wrong to suggest that the Court would start with its own analysis. It may be right, so far as it goes, that the Court would not allow OFAC to 'create' a property interest where there is none. But nothing of the sort would be involved here. The question of whether there is a property interest involves applying the expansive definition to the facts. It is not difficult from the above

analysis to see how this question would be answered in the affirmative.

(d) The seeds of doubt which Mr Wall seeks to sow rest on the *Semetex* case.[59] There, the US Court considered that the confirming bank was able to make payment to the beneficiary notwithstanding that the issuing bank was a sanctioned entity. However, the critically important fact in *Semetex* was that OFAC had granted a licence to allow payment. Without such a licence, the Court stated, it might have accepted the confirming bank's argument that payment was prohibited.

(e) Both Mr Wall and Constitution rely on the *Centrifugal* case, but without addressing the facts or the basis for the decision, which was that the applicant under a letter of credit did not have a property interest in monies received by the beneficiary based merely on a potential claim for breach of the underlying contract. It is not clear why the case is said to have any relevance here.

(5) Mr Wall's reasoning is unconvincing:

(a) He suggests that Directive 2 "*simply prevents U.S. financial institutions from maintaining correspondent accounts with Sberbank*" but that a transaction involving Sberbank only indirectly would be permitted. The first limb of the Directive refers to correspondent accounts, but Mr Wall has ignored the second limb, which prohibits transactions "*involving*" foreign sanctioned parties (or their property or interests in property) and has no carve-out for 'indirect' involvement.

(b) Mr Wall seeks to support his interpretation by referring to various general licences. Whilst none of the licences applies on these facts, they each essentially permitted transactions indirectly involving foreign sanctioned entities, as long as such entities had no direct involvement. The licences were necessary precisely because such indirect transactions would otherwise have been prohibited.

(c) Mr Wall also attempts to downplay the parallels between this case and UBAF's case on two bases, neither of which is justified:

1. First, that UBAF was a blocking sanctions case and CAPTA sanctions are different: this is a distinction without a difference. The importance of UBAF's case lies not in the nature of the sanctions but in the question of whether a payment by the confirming bank in any way "*involves*" the issuing bank. OFAC answered "yes" to that question in UBAF's case and would do the same here.

2. Secondly, that UBAF dealt more closely with sanctioned entities than UniCredit would do by paying out as confirming bank on the Letters of credit issued by Sberbank: this is correct so far as it goes, but does not change the fact that OFAC considered such a payment itself to be prohibited. Again, it would do the same in this case.

[59] *Semetex Corp. v UBAF American Bank*, 853 F.Supp. 759, 768 (S.D.N.Y. 1994).

My conclusions.

186. It is never easy to determine questions of foreign law without having the ability to hear from the experts and explore the rationale for their views. However, doing the best that I can on the basis of the materials available, I am not satisfied that UniCredit, on whom the burden clearly rests, have established that the provisions of CAPTA applied to the Constitution Letters of credit so as to prohibit performance of UniCredit's payment obligations thereunder.

187. I reach this conclusion for the following reasons:

(1) I accept that the views of OFAC are entitled to great weight. However, I also take the view that those views are subject to judicial control, at least where the issues in question involve questions of law. Put another way, whilst I accept that the US Courts will treat the views of OFAC with great deference, in the final analysis the question for those Courts, and for me, is what US law in fact provides.

(2) Here, there is no learning to which I have been referred dealing with CAPTA. Instead, the views of Mr Fleming are really based almost entirely on his interpretation of the UBAF case, a case dealing with Syrian sanctions and not CAPTA.

(3) I have heard no evidence as to principles of statutory interpretation under US law. I therefore approach the matter on the basis that the US Courts would approach such questions in a similar way to the Courts of this country.

(4) On this basis, I consider that the UBAF case is clearly distinguishable from the current case. In that case, UBAF was doing business directly with the sanctioned entities. Thus, as the report with which I was provided states:

"In total, UBAF engaged in 127 Apparent Violations. This includes UBAF's processing of 114 internal transfers on behalf of Syrian entities totalling $1,297,651,825.61 that were followed by approximately 114 corresponding funds transfers through a US bank. For 45 of the 114 internal transfers, UBAF processed a USD transfer between two of its clients – one sanctioned Syrian entity and one non-sanctioned client – on UBAF's own books. UBAF then processed one or more USD transfers on behalf of the non-sanctioned client that cleared through a US bank and whose transaction dates and amounts correlated closely to the related internal transfers reflected on UBAF's books. For the remaining 69 of 114 internal transfers, UBAF conducted a foreign exchange (FX) transaction with a sanctioned Syrian customer on UBAF's books, debiting an account in one currency and crediting the same sanctioned customer's account in another currency. UBAF then conducted a US cleared FX transaction with a non-sanctioned third party that correlated closely with the original FX transaction involving the sanctioned customer.

The remaining 13 Apparent Violations were either "back to back" letter of credit transactions or other trade finance transactions involving sanctioned Syrian parties, all of which were processed through a US bank. For the back-to-back letter of credit transactions, a sanctioned Syrian entity was the beneficiary of export Letters of credit or the applicant for import Letters of credit that did not involve USD clearing, but the intermediary entered into or received one or more

corresponding USD Letters of credit to purchase or sell the same goods. For the other trade finance transactions, UBAF either issued a USD denominated letter of credit on behalf of a sanctioned party or confirmed a USD denominated letter of credit issued by a sanctioned bank and paid on the letter of credit through a US cleared transaction."

(5) Looking at this report, I would conclude that UBAF were held to be in breach of the sanctions legislation because they were clearly dealing directly with the sanctioned entities, whether the buyer, seller or intermediary bank. That is clearly to be contrasted with the current case, where UniCredit were not dealing directly with the sanctioned entity in making payment under the confirmed standby letter of credit, but were instead dealing only with a non-sanctioned entity, namely Constitution.

188. To sum up, therefore, I hold, as a matter of fact that:

(1) The final arbiter as to what US law is is the US Court. Whilst it will give deference to the views of OFAC, in the final analysis the decision maker must be the Court itself, particularly in relation to issues of law.

(2) Here, the issue would be whether, as a matter of US law, the Court was satisfied that payment under the confirmed standby letter of credit would breach the terms of CAPTA.

(3) I am not satisfied that UniCredit has satisfied the burden of showing this. That burden, as a matter of law, is clearly on UniCredit.

(4) As a matter of the expert evidence, I have concluded that Mr Fleming's reliance on the UBAF case as a governing "precedent" is misplaced. I conclude that that case is clearly distinguishable.

Reasonable efforts.

189. As noted in the summary of the parties' arguments, the Claimants argue the *Ralli Bros* rule does not excuse a party from performance unless and until that party makes reasonable efforts to apply for or is refused a licence: see *Banco San Juan* [84], [90]. Since this issue is heavily fact dependent, and does not arise in the light of my earlier decisions, then in a case in which I am being asked to give judgment simply as a guidance to the market, I do not consider it useful to consider or determine questions of fact. Accordingly, I do not consider this issue further.

EU law

190. Again, my understanding is that I am not asked to reach any conclusions as to EU law at this stage and thus I do not consider this further.

Final conclusion.

191. I should finish by thanking all Counsel involved for their illuminating and helpful arguments. I hope that I have dealt in this judgment with all of the matters that the parties wished me to deal with at this stage. I would be grateful if the parties could seek

to agree an order to give effect to this judgment, and to identify what, if anything, remains to be dealt with.