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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
**NCN: [2024] EWHC 1051 (Comm)**

No. CL-2023-000457

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday, 18 April 2024

Before:

MR JUSTICE PICKEN

B E T W E E N :

SUCDEN FINANCIAL LIMITED — Claimant

- and -

(1) TMT METALS AG
(2) PRATEEK GUPTA
(3) MINE CRAFT LIMITED — Defendants

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MR J ROBINSON (instructed by Macfarlanes LLP) appeared on behalf of the Claimant.

MR R MACHELL (Jury O'Shea LLP) appeared on behalf of the First Defendant.

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**J U D G M E N T**

MR JUSTICE PICKEN:

## Introduction

1 This is an application for summary judgment which the Claimant ('Sucden') wishes to obtain against the first of three Defendants, namely TMT Metals AG ('TMT'), in respect of what is claimed as a debt in the sum of US$6,637,746.65 - in other words, just over US$6.6 million, plus interest and costs.

2 There was also an application by Sucden to strike out particular paragraphs of TMT's defence, but that is not an application which, in the event, Sucden pursues, given that it primarily, if not exclusively, related to paragraphs of the defence which TMT, represented by Mr Robert Machell, now stands by.

3 There is also before the Court what might be described as a cross-application seeking leave to amend the Defence. I will come on, in due course, to address the appropriate authorities, but the approach that I have adopted in the course of the hearing (and will adopt in this judgment) is to proceed essentially on a *de bene esse* basis, namely a basis which assumes that leave to amend is granted, whilst not formally granting leave to amend, simply because the authorities, again to which I will come in due course, make it clear that on an application for summary judgment the Court should be alert to the possibility that a party - here the Defendant, TMT - can amend its pleadings in order to address any perceived deficiency that might otherwise represent an obstacle in the defence of a summary judgment application.

## Background

4 As I say, I will come back to the authorities in due course, but I should first say something further by way of background. Sucden is a commodity, futures and options trader and broker. It provided a futures and options trading facility to TMT under the terms of a trading facility letter dated 15 February 2010 (the 'Contract'), as amended from time to time. The Contract incorporated Sucden's terms of business. Those terms of business included, amongst other things, the following.

5 At clause 8.1 under the heading, "Margining arrangements", this was agreed:

> "*Margin call*: You agree to pay us on demand such sums by way of margin as are required from time to time under the Rules of any relevant Market (if applicable) or as we may in our discretion reasonably require for the purpose of protecting ourselves against loss or risk of loss on present, future or contemplated Transactions under this Agreement."

6 The terms of business furthermore provided at clause 12 under the heading "Rights on default":

> "*Default*: On an Event of Default or at any time after we have determined, in our absolute discretion, that you have not performed (or we reasonably believe that you will not be able or willing in the future to perform) any of your obligations to us, in addition to any rights under the Netting Clause we shall be entitled without prior notice to you ...
>
> (c) to close out, replace or reverse any Transaction, buy, sell, borrow or lend or enter into any other Transaction or take, or refrain from taking, such other action at such time or times and in such manner as, at our sole

> discretion, we consider necessary or appropriate to cover, reduce or eliminate our loss or liability under or in respect of any of your contracts, positions or commitments."

7 Later, at clause 15.11, this was provided:

"*Rights and remedies*: The rights and remedies provided under this Agreement are cumulative and not exclusive of those provided by law. We shall be under no obligation to exercise any right or remedy either at all or in a manner or at a time beneficial to you. No failure by us to exercise or delay by us in exercising any of our rights under this Agreement (including any Transaction) or otherwise shall operate as a waiver of those or any other rights or remedies. No single or partial exercise of a right or remedy shall prevent further exercise of that right or remedy or the exercise of another right or remedy."

8 The terms of business then went on at clause 32, under the heading "Market disruption" to say as follows:

> "32.1 In the event of severe market disruption and/or price volatilities which may result or may have resulted in the current market value of a commodity which is the subject-matter of any outstanding Transaction moving to an unusual level, we reserve the right to take one or more of the following courses of action:
>
> (i) to close out any Transaction where significant loss has occurred or is expected by us;
>
> (ii) to require an immediate delivery of additional commodity;
>
> (iii) to decline to renew maturing, or enter into new, Transactions."

9 The terms of business make it clear also that the Contract was to be governed and construed in accordance with English law.

10 The position advanced by Mr Jason Robinson on behalf of Sucden is that this is an appropriate case for the grant of summary judgment in favour of Sucden because there can be no doubt that the debt in the sum I have described is due under the Contract by reason of TMT's failure to pay margin calls made by Sucden. Mr Robinson goes on to refer also to TMT having repeatedly, as he puts it, acknowledged that the debt is due: first, by making various part-payments; secondly, by offering Sucden security; and thirdly, and expressly, in the Memorandum (albeit described as a "Memoradum" by mistake) of Deposit dated 19 August 2022, in which recital (a) states as follows:

> "In consideration of the creditor [Sucden] (i) agreeing to forbear certain liabilities which are currently due and payable by the debtor [TMT] to the creditor until 31 December 2022 ..."

That memorandum went on in the definition provision at clause 1.1 to define "Secure liabilities" as meaning:

> "All sums, including interest, commission, charges, expenses, and costs of enforcement, including pursuant to clause 12 ... and the satisfaction of all liabilities,

present or future, absolute or contingent, including liabilities as surety or guarantor, for which the debtor is now, or may at any time after the date of this memorandum be indebted, or liable to the creditor on any account or in any manner whatsoever, in whatever currency and whether alone or jointly with any other person, which as at the date of this memorandum is $7,330,000."

11 Mr Robinson observes that Sucden has also alternative cases in deceit and conspiracy advanced additionally against the Second and Third Defendants, namely Prateek Gupta and Mine Craft Limited, but that those are not cases which, for present purposes, need concern the Court, because the summary judgment application made by Sucden relates exclusively to the claim in debt, alternatively in damages in the same amount as the debt claim.

12 The application is supported by a number of witness statements, including a witness statement from Mr Marc Bailey, dated 5 January 2024. In that witness statement, the business relationship between Sucden and TMT is described, without, as I understand it, having listened to Mr Machell's submissions, any great controversy. The basic concept was that TMT borrowed money from Sucden to fund its trading activities, but was obliged to post cash collateral with Sucden to cover the risk of loss on trade, TMT trading on what is known as "on margin". Specifically, Mr Bailey explained the matter in a little more detail in these terms.

13 At paragraph 2.1 he said as follows:

> "... Among the products traded by Sucden are base metals, including nickel. As such, Sucden is a Category 1 Clearing Member of the London Metal Exchange (the 'LME'), the world's main centre for trading industrial metals. Only LME Members can trade on the LME, and only Clearing Members can enter into trades as a principal with the LME's central counterparty, LME Clear Limited ('LME Clear'). Trades placed through the LME are subject to the LME Rules and Regulations ('LME Rules')."

He went on at paragraphs 2.2 to 2.8 to say the following:

> "2.2 On 15 February 2010, Sucden entered into a Trading Facility letter (the 'Contract') with TMT. As part of the Contract, Sucden granted TMT a futures and options trading facility (the 'Facility') which incorporated the standard Terms of Business, which are amended from time to time (the 'ToBs').
>
> 2.3 In common with those agreed with other clients, TMT's Facility allowed it to trade with Sucden 'on margin'. That means that at the time of entering the trade, TMT was required to deposit cash with Sucden representing a percentage of the value of its trades, and then to borrow money from Sucden to fund its trading activity.
>
> 2.4 During the time a trade is open, the risk that a client may default fluctuates. Accordingly, Sucden's ToBs (including the ToBs incorporated in the Contract) allow it to require a client to put up additional margin whilst a trade is open ...".

Mr Bailey then set out the terms of clause 8.1, which I have already, myself, quoted from. He continued at paragraph 2.5 to say this:

> "As a general matter of policy, Sucden requires clients to maintain a level of 'maintenance margin' relative to the extent a trade is 'out of the money' – i.e., where we predict that the trade is going to require the client to make a payment to close out the trade. If the trade moves against the client, we may make a margin call to bring the maintenance margin into line with our usual policy. Additionally, if a market is undergoing a period of particular volatility, we may require a client to put up additional margin, to guard against the risk of a big change in market prices over a short period."

He went on in paragraph 2.6 to say this:

> "This structure is an entirely standard feature of commodity trading. I believe TMT would have been well familiar with trading on margin, and would have readily understood its obligation to pay margin calls when made by Sucden (or other counterparties)."

He then observed at paragraph 2.7 that:

> "Following agreement of the Contract, TMT and Sucden entered into metals trades from time to time."

14 In early 2022, TMT had established a substantial net short position in nickel through trades brokered by Sucden. The Russian invasion of Ukraine in February 2022 caused a 270% appreciation in the price of nickel on the London Metal Exchange ('LME') over three days, causing a significant margin shortfall in TMT's open ledger positions, which meant in turn that Sucden made significant margin calls on TMT. This is as described by Mr Bailey in his first witness statement, and as pleaded in the Particulars of Claim by Sucden.

15 Continuing with the narrative, on 8 March the LME communicated a temporary suspension of the LME nickel market. TMT closed out its trades over time and incurred losses. It did not pay, or did not pay in full, the margin calls which were made by Sucden to cover those losses. By 24 March 2022, Sucden claims that TMT owed it US$8,381,889.76.

16 This is an aspect to which I return because Mr Machell, in resisting the application for summary judgment, has made certain submissions as to that suggested or alleged liability. However, throughout 2022, it is Sucden's case that TMT sought, as Mr Robinson described it at least, to placate Sucden by offering it security for the debt. Those security arrangements were formalised in the Memorandum of Deposit, to which I have made previous reference, with its recital A in the terms that I have described.

17 By 5 January 2023, furthermore, TMT had made some part-payments of the debt, but US$6.73 million odd, plus interest, by that point remained outstanding. It was on that day, therefore, that a notice of default was served by Sucden on TMT. That notice of default described the secured liabilities, a defined term, as at that point amounting to US$6,940,000 comprising, first, US$6,730,000 in respect of the principal amount of the secured liabilities, and secondly, US$210,000 in respect of interest which had accrued on the secured liabilities up to the date of that notice of default. Again, this is an aspect, namely the precise figure set

out in that notice of default, to which I will return when dealing with one of the submissions which was advanced by Mr Machell on behalf of TMT.

18 Following that notice of default, and again this is relevant to the matter to which I will return, on 17 January 2023 another part-payment was made reducing the debt to US$6.69 million. That is not, however, the amount which is claimed in the Particulars of Claim because, as explained in paragraph 22 of the Particulars of Claim - again this is a matter to which I will return a little later - the US$6.69 million then fell to be reduced by a sum of US$52,253.35 to arrive at the amount claimed and sought in the summary judgment application, namely US$6,637,746.65. The reduction of that relatively modest US$52,000 odd was because Sucden was able to sell certain goods conveyed to it by TMT's sole and managing director, namely Mr Gupta, the Second Defendant, in that amount.

19 I should just mention, furthermore, that interest is claimed under the Contract at the so-called Sucden Cost of Funds Rate, namely the US Federal Funds Rate plus 1% plus 5% per annum, and interest is claimed running from 5 January 2023 being the date when the notice of default was served.

**Applicable legal principles**

20 I pause now to address the matter of the legal principles applicable on a summary judgment application. These are, of course, by now very well known.

21 In particular, it is a well trodden citation to make reference to *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), in which Lewison J, as he then was, set out the principles applicable on an application such as this.

22 In short, the Court must be persuaded that the defence which has been advanced has a realistic, as opposed to a fanciful, prospect of success, namely a prospect of success that carries some degree of conviction and is more than merely arguable.

23 The burden, as Mr Machell points out, is on the applicant for summary judgment to establish that there are grounds to believe that the other party has no real prospect of success and that there is no other reason for a trial.

24 As Mr Machell and Mr Robinson also both observe, the court must be astute to avoid conducting what has been described as a "mini trial" on an application such as this. That was made very clear by Lord Hamblen in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, 103 to 107, and follows on from a similar observation made by Lewison J in the *Easyair* case at paragraph 15.

25 However, as Lewison J also noted, the Court is not obliged to take at face value everything that a respondent to a summary judgment application has to say, particularly if factual assertions made by that party are contradicted by contemporaneous documents. It is not enough, in short, as Mr Robinson correctly observes, for a respondent to a summary judgment application simply to assert that it will make good its evidential case at trial. It is rather, as Moore-Bick LJ put it in *Korea National Insurance Corp v Allianz Global Corporate & Speciality AG* [2007] 2 CLC 748, 14, incumbent on that party "to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial". It must substantiate again, as Moore-Bick LJ put it, any assertion that further evidence will be available at trial by reference to "the nature of the evidence, its source and its relevance to the zzz". The party responding to a summary judgment application cannot merely proceed

on the basis that "something will turn up" or an assertion that "further evidence will or may be available".

26 It is with these principles in mind that I approach the present application. I bear in mind also, however, Mr Machell's reminder to me that in more complex cases it is less likely that it would be appropriate to deal with the matter summarily. In this respect he reminds me that Lord Hope in *Okpabi* made reference to *Three Rivers District Council v Governor & Company of the Bank of England (No 3)* [2003] 2 AC 1 with apparent approval at paragraph 21. Again, I bear that aspect in mind.

27 I also have in mind Mr Machell's reference to *Addax Bank BSC v Wellesley Partners LLP* [2010] EWHC 1094 QB, 46, where Eady J made the observation that where a defendant relies on a defence of set-off which raises a triable issue, again the claimant may be prevented from obtaining summary judgment, whether in whole or in part.

28 Before coming on then to address the parties' respective submissions, I have also been taken by Mr Machell to certain authorities dealing with the cross-application in this case to amend the Defence. I am reminded in particular of the guidance given by Lambert J in *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 QB, 10, and the need to strike a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general if the amendment is permitted.

29 Mr Machell also reminds me that when considering the merits of proposed amendments it is appropriate for the Court to have regard to the prospects of the proposed new case succeeding within the meaning of CPR Part 24. In that respect Mr Machell has taken me to *CNM Estates (Tolworth Tower) Limited v Carvill-Biggs* [2023] EWCA Civ 480, 75, and the observations made in that case by Sir Geoffrey Vos, Master of the Rolls, and Newey LJ.

30 I am also reminded of what was stated in *Kim v Park* [2011] EWHC 1781 QB about the Court needing to consider whether, if there is a defect in a statement of case, that defect is appropriately cured by amendment, rather than either a strike out order being made (not now pursued in the case before me) or summary judgment being granted (the application which is before me).

31 The approach which I adopt with the agreement of Mr Robinson, sensibly in my assessment, is to consider the draft Amended Defence as though, and on a *de bene esse* basis, leave had been granted to amend, whilst not at this juncture actually granting such leave. I do this because, as the authorities indicate, it simply makes no sense for the Court to adopt an artificial stance and consider the position of a respondent to a summary judgment application by reference to the original pleading without also having regard to what it is proposed should be included, if the amendment application is successful, in the amended pleading. Given that the authorities are clear that, in the event that a proposed defence has no prospect of success, then leave should be granted, and given that that is essentially the same test being applied, albeit in a different direction or in a different way on a summary judgment application, to adopt a different approach would be unwise and wrong.

**Discussion**

32 I come then to what it is that is said by TMT in response to the summary judgment application. A number of points have been made, both in the original pleading and in the now proposed draft Amended Defence.

33 The first I can deal with shortly. It is the matter which I have previously alluded to, which was the prime target of the strike out application which is now no longer needing to be pursued. This was a case which entailed the allegation that the debt had arisen from a *force majeure* event; as such, so it was suggested, there is no liability to the debt or in damages equating to the debt. This is a defence which Mr Machell has confirmed that, in fairness, as had previously been indicated, is now no longer pursued. This is in the light of the decision in *R (on the application of Elliott Associates LP) v London Metal Exchange* [2023] EWHC 2969 (Admin), and I, therefore, say no more about it.

34 The next matter, however, I do need to address. This is the argument that Sucden had wrongfully pressured TMT into closing positions thereby locking in the loss and preventing TMT paying the margin which Sucden demanded. That is a reference to the Defence in its original form at paragraph 8(b). When I say "in its original form", it is fair to acknowledge that the proposed draft amendment is in slightly modified terms, as follows:

> "Further or alternatively, during the period 4 March 2022 to 20 May 2022, Sucden did not allow TMT to increase its positions and wrongfully pressured TMT into closing positions (including by the arbitrary doubling of the initial margin), thereby locking in the loss and, in breach of the terms of the Contract, preventing TMT paying the Debt. Accordingly it is denied that Sucden is entitled to payment of the Debt, or any part of it."

35 I should observe that Mr Robinson in his skeleton argument addressed what he understood to be the case then being advanced, namely a claim in economic duress. Mr Machell has helpfully clarified the position, however, and explained that that is not the case which is, or has ever been, sought to be put forward. I, therefore, say no more about economic duress. The case, however, and there is an overlap here with the next matter which I will come on to address, concerning arbitrariness or capriciousness, is that Sucden was under a duty, implied into the Contract, Mr Machell argues, not to prevent performance by TMT of its - that is TMT's obligations - under the Contract. The submission made, and the case sought to be advanced, is that Sucden acted in breach of that implied obligation or duty and as a result TMT is entitled, through the operation of a set-off to defeat the claim in debt / damages which Sucden now seeks to advance.

36 The starting point in relation to this aspect is to ask whether there is indeed to be implied into the Contract a term or duty of the sort which TMT suggests. In this respect I have been taken to a passage in **Lewison - Interpretation of Contracts** (2024 edition) at paragraph 6.128 in these terms:

> "It has been suggested that the duty does not rest upon the implication of a term. There may be a positive rule with the law of contract that conduct to provide the promisor or promisee, which can be said to amount to himself of his own motion bringing about the impossibility of performance is itself a breach of the contract but it has now been held that the prevention principle is not an overriding rule of legal or public policy. Whether it applies, and if so the extent to which it applies, is determined by the ordinary principles applicable to the implication of terms. It is more properly regarded as an implied term because, where appropriate, it involves the interpolation of terms to deal with the matters for which the parties themselves have made no express provision."

Amongst authorities relied upon in this context is *North Midland Building Limited v Cyden Homes Limited* [2018] EWCA Civ 1744.

37 In fact, there is no dispute between Mr Robinson and Mr Machell that the appropriate approach is indeed to ask whether a term is to be implied. I say this because in the proposed draft Amended Defence at paragraph 12C the way in which the term is said to arise is expressed in this way:

> *"It was term of the Contract (implied because it was necessary and/or obvious) that Sucden would not prevent TMT performing its obligations under it."*

38 Although Mr Robinson was inclined, at least at one stage, to suggest that no such term should be implied into the Contract, on reflection and in discussion during the course of his submissions, he was more disposed than originally was the case to acknowledge that such a term should be implied. I am clear that, grudging though that acknowledgement might have been, he was right to change his stance, for I am satisfied that in a contract such as this there should indeed be implied such a term. It is no answer, in my assessment, to look at what are undoubtedly fairly detailed provisions of the terms of business and say that, given that detail, there is no scope for the implication which Mr Machell suggests is appropriate. It seems to me that the duty or implication for which Mr Machell argues is entirely conventional, and so I am satisfied that it does not represent an obstacle to this aspect of the case as far as TMT is concerned.

39 I am, however, otherwise not persuaded by Mr Machell's submissions that the prevention case should be permitted to go to trial. On the contrary, I am satisfied that it is a case which has no real prospect of success, notwithstanding my acceptance that the obligation or duty which I have described is appropriately to be implied into the Contract. I say this for a number of reasons.

40 The first and main reason is that, although Mr Machell was clear that the breach alleged was not a breach that merely entailed Sucden demanding that which was otherwise their contractual entitlement, namely to be paid the debt at any particular point, but that the breach went further than that. I struggle with that proposition. I was taken in particular to the transcript of a telephone discussion that seems to have taken place on 22 March 2022 between, amongst others, a Pooja Nagana of TMT and Charlie Wade and Mike Coomber from Sucden. In that transcript, timed at 15.58, at least when the call started, Mr Coomber is noted as saying at this at one point:

> "No, I mean, when we had, when we had the call last week, you know, we were led to believe that as soon as the market established a reliable two way pricing that that would trigger some physicals to be priced. You start closing out your hedges and to arrange for the payment, yeah. Now that has been reached. We've been pretty, pretty patient up to now and we do need to see some positive action and we, well, we appreciate the 100,000 you sent today, but as you can appreciate that's a very small amount compared with the amount of money that your account owes us. So I think we need a little bit more clarity over exactly what you'll be doing right now to regularise the position, because the conditions exist [to do] that now."

Later on, a page or two further on in the transcript, Mr Coomber is then noted as saying this:

> "... All of our other clients that were stressed through nickel have regularised their position. You're an outlier and the focus is on you, and you really do need to sort the position out. We need some clarity as to how you're going to do that because at the moment you've given indication of what you're going to do, not what you have done, and it's a little bit concerning that already you're pushing the time-line out for payments next week rather than this week, and your position is still open ...".

Then, in a particular passage cited by Mr Machell at the foot of same page, Mr Coomber is recorded as saying:

> "So we do need to put some pressure on to ensure that everyone in your company knows what they need to do to bring this exposure and the amount you owe us down."

That last passage, Mr Machell suggested, represented pressure on the part of Sucden upon TMT. I do not see how that can be the position. On the contrary, I see nothing more in those passages than a creditor, here Sucden, asking for the position to be clarified in relation to monies that were due and owing.

41 I struggle to see how that can be the type of pressure that would justify a conclusion that here the creditor (Sucden) was preventing performance by the debtor, here TMT, of its contractual obligations. Specifically, I have in mind that, notwithstanding the draft Amended Defence that has now been produced, still the allegations of pressure or prevention, perhaps more appropriately now described, remain extremely vaguely described. In paragraph 31 of the draft Amended Defence there is the following alleged:

> "From 4 March 2022 to 20 May 2022, Sucden refused to allow TMT to increase its positions and put pressure on TMT to close the positions it had."

There are then certain particulars given, as follows:

> "a. By an email from Mr Robert Montefusco on 4 March 2022, Sucden informed TMT that it was not allowed to increase its short positions in nickel (and by implication that the only trades which Sucden would allow were those reducing TMT's position). TMT was at that time short 248 Nickel lots. Following the email on 4 March 2022, it bought 75 lots to reduce its net short to 173 lots."

Pausing there, and have looked at the relevant email, I do not detect the type of pressure characterised in sub-paragraph (a). The fact that TMT bought 75 lots does not, it seems to me, bring with it the necessary implication that it only did so because of pressure, as opposed to for other commercial reasons.

Sub-paragraph (b) of the particulars goes on to say this:

> "On 7 March 2022, by an email from its representative Mr Charlie Wade, Sucden informed TMT that it was doubling the initial margin requirement for the LME Nickel contract from USD 13,500 to USD 27,000 per lot (the "Margin Doubling"). In reliance on the Margin Doubling, on 7 March 2022 Sucden purported to demand an extra margin of some USD 2 million. No prior notice of the Margin Doubling was given. The Margin Doubling was

> part of the pressure which Sucden put on TMT to close its positions. On 7 March 2022, TMT bought 18 lots to reduce its net short to 155 lots."

Again, whilst those communications undoubtedly occurred, it does not follow that what then happened, namely the purchase of 18 lots to reduce the net short to 155 lots, was the result of undue or wrongful pressure on the part of Sucden upon TMT.

Then sub-paragraph (c) goes on as follows:

> "This pressure that was exerted on TMT by Sucden was made clear by Mr Mike Coomber, on behalf of Sucden, in a call with representatives from TMT on 22 March 2022 ... TMT was at that time short 155 Nickel lots. Following the call, on 24 March 2022, it bought 67 lots to reduce its net short to 88 lots, and by further trades on 1 April 2022, 11 May 2022 and 20 May 2022 closed the remaining net short completely."

The reference to Mr Coomber exerting pressure in a call is a reference to the call, as I understand it, in the transcript which I have already quoted from.

42 Paragraph 32 goes on to say:

> "As a result of this pressure, TMT closed its positions by 20 May 2022 as set out above."

Then paragraph 33 states as follows:

> "TMT was forced to close out its short positions at prices which were dislocated from (and significantly higher than) the prices which TMT could realise for physical nickel cargoes hedged by its short futures position. The effect of Sucden's action was to lock in TMT's loss and prevent TMT from meeting any obligation it had to pay the Debt ... Sucden did not exercise any discretion it had to require TMT to close its positions rationally for the purpose of mitigating its loss. TMT will set-off its losses caused by Sucden wrongfully, and in breach of the term set out in paragraph 12C of this Defence, causing it to close its positions."

43 I have had regard not only to the underlying material and the inherent plausibilities, but also to the evidence given by Mr Bailey and indeed Mr Gupta in these respects, and nothing that I have there read causes me to reach a different conclusion as to the prospects of the prevention defence succeeding, but I must also bear in mind in this context the rights that the Contract gave Sucden in relation to the calling of margins. Here I have in mind, of course, specifically clause 8.1, and the ability of Sucden to do essentially what it did. I am unpersuaded, in the circumstances, that TMT has sufficiently explained the illegitimate pressure or prevention that Sucden is said to have engaged in. What Sucden did was what, commercially, as Mr Bailey has explained, it considered itself entitled to do, and what the Contract indeed did entitle it to do.

44 It made good commercial sense for Sucden to tell TMT to close its trade. Keeping them open exposed TMT and Sucden for that matter to yet further loss if the market moved against it. This is a matter which Mr Bailey explained at some length in his second witness statement in paragraphs 2.1 to 2.18. I need not set out *in extenso* what he had there to say, but the essential point is that, in order to complete TMT's trades, Sucden had to enter into its

own trades with LME Clear as principal and on a back to back basis, and so Sucden found itself financially exposed not only in a direct sense towards LME Clear, which could call for more margin, but to TMT also, because if TMT short trades went bad due to market price increases after the shorts were placed, then TMT would owe Sucden more money. As a broker, Sucden was in a position where it could not afford for that to happen.

45 In those circumstances, and although there was a faint suggestion made by Mr Machell during the course of his submissions (echoing a point made in his skeleton argument) that it would be helpful for the Court to have the assistance of an expert on these matters, I am wholly unpersuaded that that would be a correct conclusion to reach. It would be for a party, if expert evidence is sought, to explain what it is that that expert should address and, more often than not, one would expect to see pleaded a market practice or custom, or some such expert territory, in order for it to be known, particularly on an application such as this, what it is suggested is the evidence that is going to help the Court. None of that has happened in the present case, and the inevitable conclusion that I draw is that this is not a case where it would be appropriate to say that the matter should go to trial simply so that expert evidence could be adduced. I simply fail to see how it would be helpful or indeed relevant.

46 The other matter to observe is that until the commencement of these proceedings no complaint was made on the part of TMT as to Sucden's conduct. It was not suggested that Sucden did anything by way of exerting wrongful pressure or preventing the performance by TMT of its obligations, and indeed it is only in the context of this summary judgment application that there has been further clarity, such as it is, as to what case has been sought to be advanced. From a practical perspective, if it was thought that there was illegitimate pressure on a contemporaneous basis, one would have expected that to have been complained about. It was not. The Court needs, in such circumstances, to be alive to the practical realities when now considering through lawyers' eyes the points raised in response to this summary judgment application.

47 I turn, then, to the arbitrariness and capriciousness case which Mr Machell advances. Again, I should say that I am in little doubt that Mr Machell is right when he submits that there was indeed an obligation on the part of Sucden not to act in an arbitrary or capricious manner when exercising the contractual entitlement to be found in clause 8.1.

48 Mr Robinson suggests that clause 8.1, with its reference to the discretion that needed to be exercised, as the provision puts it, "reasonably", should be treated as somehow ousting any other obligation to be implied as a matter of the general law. I cannot accept that submission. On the contrary, Mr Machell took me to the *Abu Dhabi National Tanker Company v Product Star Shipping Limited* [1993] WL 965611, page 8, where Leggatt LJ (as it were the first, rather than the second) had this to say:

> "Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application."

49 Mr Robinson took me in this context to *Hays v Willoughby* [2013] UKSC 17, 14, where Lord Sumption stated as follows:

> "A test of rationality ... applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

Mr Robinson suggested that that passage should be taken as support for his proposition that because clause 8.1 expressly refers to "reasonableness", so the Court should proceed on the basis that there is no agreement for the implication of a duty not to act arbitrarily or capriciously. I pointed out to Mr Robinson, however, that earlier in the passage to which he had taken me, Lord Sumption had said as follows:

> "Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime."

There, then, followed the passage to which Mr Robinson took me. My understanding of what Lord Sumption was there saying was that an express reference to reasonableness does not oust an implied obligation not to act arbitrarily or capriciously. That said, Mr Robinson was inclined, in any event, to acknowledge that the requirement for reasonableness to be found in clause 8.1 would itself entail an obligation on Sucden to act in a non-capricious and non-arbitrary fashion.

50 Accordingly, the debate might be somewhat academic. The bigger issue is that I see no real basis on which it can be suggested here that Sucden did act arbitrarily or capriciously or unreasonably. On the contrary, for the reasons I have previously outlined, it seems to me, on the basis of the evidence that I have before me, that such a case has no real prospect of success.

51 There is a further point which is referable not only to this aspect, but also the prevention aspect which I have previously addressed. This is that the timings of various purchases made by TMT, as shown by the appendix 1 to Mr Bailey's second witness statement, do not really support on a causation basis the cases in the two respects which are now advanced. As Mr Robinson puts it, the various sales were not all done in one go, but on the contrary were spread out over a period of some two or two and a half months. Mr Robinson characterised that time period as entailing a somewhat "leisurely" approach to the pressure which he did not accept was being exerted on TMT by Sucden. Whether that is the correct adverb is a matter for some debate, but what is apparent is that the reductions were in a somewhat spread out period which, from a causation perspective, leads me again to doubt the validity of the case, or either of the cases, advanced.

52 There is also the further point in relation to capriciousness and arbitrariness (which is again an echo of the prevention of performance point) which is that nowhere contemporaneously does one see, at least on the evidence before me, any complaint made by TMT, or by Mr Gupta on TMT's behalf, or by anybody on TMT's behalf, as to the conduct in which Sucden was engaging.

53 It is in this further context relevant to note that Mr Machell is inviting the Court to allow the matter to proceed to trial in order that Sucden's witnesses can be cross-examined as to the decision making process in which they were engaged. That, in my assessment, is a classic example of the type of approach which is frowned upon by the cases - without any real basis at all at this juncture for thinking that there was arbitrariness or capriciousness or even unreasonableness, allowing nonetheless the matter to proceed in order that those issues can be explored. There has to be more than that at this juncture to permit this to be a reason for the rejection of a summary judgment application. There is nothing here and, in those circumstances, lastly, in relation to prevention of performance and arbitrariness, capriciousness, unreasonableness, however one describes it, I am satisfied that these summary judgment applications should not be held up.

54 This leads to the final two aspects which I would seek to address relatively shortly. The first is the suggested waiver or estoppel plea that is to be found in the draft Amended Defence at paragraph 8a3 in these terms:

> "Sucden had waived its right to prompt payment of margin by repeated failure to insist on it over the course of its trading relationship with TMT."

The case which here is described in Mr Machell's skeleton as involving the suggestion that, during the lifetime of the Contract, Sucden did not insist on prompt payment by TMT. Mr Gupta in this context explains that Sucden did not over the course of the 12 years of their trading relationship insist on immediate payment of margin calls - that is a reference to paragraph 14 of Mr Gupta's witness statement. The difficulty with this, however, is that the Contract provides in express terms at clause 15.11, as previously set out by me, that no failure on the part of Sucden to exercise or delay by them in exercising any of their rights under the agreement or otherwise "shall operate as a waiver of those or any other rights or remedies". When this clause was put to Mr Machell during the course of his submissions and after reflection, he very fairly acknowledged that it was an answer to this case. It is an answer. There is no way around it, and therefore the waiver and estoppel case which, in any event, I have to say, did not look promising, is one that simply does not get off the ground.

55 The last matter concerns a rather fundamental aspect which, despite its fundamental nature, was only first mentioned - and I say this without the slightest criticism of Mr Machell, whose submissions have been today of the highest standard - in his skeleton argument for today's hearing at paragraph 33. There, in a paragraph which begins by observing that "there are inconsistencies" between the evidence put forward by Sucden and the pleaded case, amongst a list of suggested inconsistencies, the paragraph goes on to say, as part of that list, that "the description of the crystallised debt in Bailey 2, paragraph 2.18, contradicts Sucden's pleaded case relying on a margin call, particulars of claim, paragraph 19".

56 Mr Machell explained in the course of his oral submissions what he meant by that. He specifically highlighted that under the facility letter, rather than the terms of business incorporated into that letter, under the heading "Futures and options facility", there is reference to initial margin, variation margin and "settlement of positions", the last of those being a reference to, as it is described, "all deficit ledger balances and unpaid commissions are payable promptly in full by the client". Mr Machell's submission was that, in such circumstances, it made little sense for Sucden to invoke clause 8.1, concerned as it is with margin calls, and furthermore that, as such, the claim, as described in the Particulars of Claim based on a margin call or margin calls, is a claim which is not the right type of claim.

57 This is a somewhat surprising submission, however, since until the solitary reference in paragraph 33 of Mr Machell's skeleton argument, no reference to this point has ever been made. It was not made when the calls were being advanced by Sucden to TMT; it was not made when the notice of default was served; it was not made when a whole series of part-payments were proffered and paid by TMT to Sucden; nor was it made when the Memorandum, which I have described, was entered into, acknowledging in recital (a) that the monies with which this claim was concerned were due and owing; nor was it made in the original Defence; and nor indeed is it made in the proposed draft Amended Defence.

58 It is not sufficient, with respect, for Mr Machell to say that, nonetheless, Sucden have been put to proof that they are due the money described as the "debt" in the Particulars of Claim. That may well be the case, but this fundamental point, if correct, should have been raised at least in the first Defence, and certainly in the Amended Defence. Being practical and realistic about it, if correct and valid, it should have been raised at a far earlier stage. The fact that it was not causes the Court to be sceptical as to its liability or indeed reliability, but in any event there is an answer to this point, which is to be found in clause 8.1 itself, since, as Mr Robinson highlighted during the course of his reply submissions, this is a provision which is concerned with the making of a demand as Sucden may "in our discretion reasonably require for the purpose of protecting ourselves against loss, or risk of loss, on present, future or contemplated transactions under this agreement".

59 The provision, therefore, is concerned with actual crystallised loss, or risk of loss on present, future or contemplated transactions. As such, it is more than adequate to cover the monies with which these proceedings are concerned, and that, no doubt, is the reason why nobody, until Mr Machell in his skeleton argument and then orally today, has previously raised the point.

60 This brings me to what might ultimately be described as a point of detail. This was Mr Machell's concern, as again highlighted in paragraph 33 of his skeleton argument, that there was, as he was inclined to suggest, a disconnect or an inconsistency between the claim as enumerated in the Particulars of Claim, namely a claim for US$6,637,746.65, and the claim, as described by Mr Bailey in his second witness statement, specifically in paragraph 2.16.8, in which Mr Bailey, having set out the history in the paragraphs beginning at 2.16.2 and culminating at 2.16.8, described the outstanding amount as being US$6,748.132.90. Mr Machell contrasted that figure with the figure, as I say, to be found in the Particulars of Claim, namely US$6,637.746.65. However, there is nothing in this point. As Mr Robinson was at pains to describe in his reply submissions, the explanation, briefly, is as follows.

61 Mr Bailey, in his witness statement at paragraph 2.16.8, with his reference to US$6,748.132.90, was referring to the figure that is to be found at the end of appendix 1 to that witness statement, namely the figure under column BZ referable to close of business, 4 January 2023 - in other words, the day before the notice of default of 5 January 2023. That notice of default, as I have previously mentioned, referred to a rounded figure of US$6,940,000 - in other words, a figure of US$8,000 or so less than the precise figure that is in column BZ. Why there was a rounding down is irrelevant; there was.

62 That rounded down figure was then used when taking account of a payment which was made on 17 January in the sum of US$250,000. Notwithstanding that, the appendix to Mr Bailey's witness statement contains the more precise figure that takes account of the US$250,000, namely US$6,748,132.90. It is the rounded down figure, however, rather than the more precise figure with the extra US$8,000 or so that had the US$250,000 applied to it,

and then finds itself reflected in the Particulars of Claim at paragraph 22, which reads as follows:

> "On 17 January 2023, TMT made a further part-payment of US$250,000 of the Debt to Sucden, reducing the total sum of the Debt to US$6,690,000."

The paragraph then goes on to say as follows:

> "TMT has made no further payments towards the Debt. Sucden has subsequently sold the goods shipped under the B/L (defined below) which was provided by TMT and/or Mr Gupta as purported security for the Debt (as detailed below) for US$52,253.35. This has further reduced the total sum of the Debt to US$6,637,746.65."

63 Those are figures, of course, that I mentioned at the outset of this judgment, but it can be seen that, in the circumstances, there is no discrepancy between what Mr Bailey has to say in his second witness statement and what was claimed in the Particulars of Claim, and what is now sought in this summary judgment application. The explanation is simply that there was a rounding down in a modest amount and then the further payment on 17 January 2023 is applied to the rounded down figure rather than the more precise and slightly higher figure, and that is the reason why the amount claimed is in the amount that it is once the further US$52,000 or so is deducted. In short, Mr Machell's query has been fully explained and answered, and that is not a reason why the summary judgment application should fail.

64 I end by making this further observation, which is something of a repeat of what I have previously said, which is that this is an application relating to a claim that, as before proceedings at least were commenced, involved TMT acknowledging that the money now claimed is due. I repeat that there was no prior suggestion that it was not due. On the contrary, part-payments were made with no such suggestion being made; security was offered and the memorandum of deposit was entered into. Standing back from matters, therefore, the notion that this is money which TMT is not liable to pay Sucden is fanciful. In those circumstances, it seems to me entirely appropriate that summary judgment is granted in the principal amount. We will come to discuss interest and costs shortly.

65 I also, in those circumstances, decline to give leave to amend the Defence. It would be futile to do so, and in any event at least focusing on the main substance of the proposed amendments, my conclusions, as described at some length in this judgment, are that the amendments, at least in the main, have no real prospect of success, and for that reason, apart from the futility of allowing them, the application is refused and dismissed.

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