



Neutral Citation Number: [2024] EWHC 2285 (Comm)

Case No: CL-2023-000754

**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, EC4A 1NL

Date: 6 September 2024

**Before :**

**MR SIMON SALZEDO KC (sitting as a Judge of the High Court)**

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**Between :**

**AUGUSTA ENERGY S.A.**

**Claimant**

**- and -**

**TOP OIL AND GAS DEVELOPMENT COMPANY  
LIMITED**

**Defendant**

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**Simon Milnes KC** (instructed by Tatham & Co) for the Claimants  
**Chinonso Ijezie** (instructed by Piperjuris Solicitors & Advocates) for the Defendants

Hearing dates: 15 July 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 6<sup>th</sup> September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**MR SIMON SALZEDO KC (sitting as a Judge of the High Court) :**

**Introduction**

1. These proceedings were commenced by the Claimant, Augusta Energy SA (“**Augusta**”) against the Defendant, Top Oil and Gas Development Company Limited (“**Top Oil**”) by a Claim Form dated 18 October 2023 supplemented by Particulars of Claim dated 16 January 2024. The Claim Form sets out that the parties were party to a sale contract concluded in about April 2015 (the “**Contract**”) by which the Claimant and Defendant contracted for the sale by the Claimant to the Defendant of 10,000 metric tonnes (+/- 10%) of automotive gasoil (“**AGO**”) CIF Lagos, which was subject to long-form sale contract terms issued on 29 April 2015 (the “**Detailed Terms**”), that included at clause 17 an exclusive jurisdiction agreement in favour of “the High Courts in London” (“**Clause 17**”).
2. The Claim Form seeks three heads of substantive relief: (i) a final anti-suit injunction restraining Top Oil from continuing Suit No FHC/L/CS/775/2021: Top Oil and Gas Development Company Limited v. Augusta Energy S.A. at the Federal High Court of Nigeria, Lagos Division (the “**Nigerian Proceedings**”), or commencing or continuing other proceedings in breach of Clause 17; damages caused by Top Oil’s breach of Clause 17 in commencing the Nigerian Proceedings; and a declaration that Augusta has no liability to Top Oil in connection with the Contract.
3. I am required to determine two applications that the parties have made in these proceedings.
4. First, by an application notice dated 20 October 2023, Augusta applied for an interim anti-suit injunction restraining Top Oil from commencing or pursuing claims outside this jurisdiction against Augusta or its agents arising out of or in connection with the Contract. Pending the determination of this application, Top Oil undertook not to advance the Nigerian Proceedings, as recorded in a Consent Order of Calver J dated 1 February 2024.
5. Secondly, by an application notice dated 6 March 2024, Top Oil applied for a retrospective extension of time to challenge this Court’s jurisdiction and a declaration that this Court does not have or should not exercise any jurisdiction over the Claimant’s claims or an order staying these proceedings pending the final determination of the Nigerian Proceedings. In the alternative, Top Oil sought an extension of time to file its Defence and any Counterclaim, which Augusta does not oppose in principle.

**Facts**

6. On these interlocutory applications, I naturally do not make final findings of fact. In this section of the judgment I set out the parts of the relevant factual background as it appears from the written evidence before the Court and supported by the copy documents in the bundle.
7. From around 2012, Augusta (acting by Mr Cédric Cloché, who has provided evidence in support of Augusta’s application) regularly sold cargoes of AGO to Nigerian buyers. These included nine transactions in which the buyer was a Nigerian company, Cast Oil & Gas Limited (“**Cast Oil**”), whose managing director was Mr Tunji Amushan.

8. Mr Cloché's evidence as to this course of dealing was the following:

“In the oil trading industry, especially when an international trader sells to a domestic buyer, the detailed terms of the sale and purchase contract will virtually invariably be the international trader's terms. The detailed terms are not usually agreed on at the outset, but at a later stage once the basic terms of the transaction have been agreed. Only when both parties have agreed on the basic parameters of a deal so it is clear that the business will proceed does it make sense to circulate detailed terms. The way in which contracts were concluded was basically the same for all buyers. There would be some form of initial agreement to the very basic parameters of the deal, though not necessarily with enough specificity for it to be a binding contract at that stage. I would sometimes (but not necessarily always) summarise the key elements in a short recap email. We might also use a pro-forma invoice to indicate the parameters and facilitate the buyer obtaining a letter of credit. Usually, the opening of a letter of credit marked the confirmation of a binding contract. Thereafter, one of my colleagues in the operations department would send the final form of the contract (which was broadly on the same terms on each occasion) that would take the form of a sale contract including more detailed terms, including and allowing the buyer the option of trigger pricing (and with an English law and jurisdiction clause as one of those terms). Each of the nine previous contracts with Cast Oil had been arranged in that way, as was normal.”

9. Mr Cloché says that in early April 2015, Cast Oil approached him with a request for a further transaction, in which Cast Oil would act on behalf of Top Oil, on whose behalf a letter of credit would be issued. Mr Cloché's evidence is that such fronting arrangements were common in this market and the deal was progressed on both sides in a standard manner.
10. At Cast Oil's request Augusta issued a Pro Forma Invoice dated 9 April 2015 for 10,000 MT of AGO to be purchased by Top Oil for delivery at “Integrated Jetty, Apapa, Lagos” (the “PFI”). The PFI stated that the quoted price of USD 5,802,500 +/- 10% “is indicative and based on one day Platts close price and is subject to final contractual agreement, based on actual mother vessel Bill of Lading.”
11. The Chairman and an investor in Top Oil was Chief Don Etiebet, who has provided witness evidence for Top Oil. He states that he travelled to London on 16 April 2015 for medical treatment, leaving the Managing Director, Mr Offiong, “in charge of the company's operations with the sole signing authority to Top Oil's accounts with Access Bank Plc.”
12. In April 2015, Cast Oil and Top Oil entered into a Memorandum of Understanding dated 20 April 2015 (the “MoU”) by which they agreed that Cast Oil could use Top Oil's Letter of Credit facility with Access Bank Plc to import 10,000 metric tonnes of AGO. On Top Oil's side, the MOU was signed by its Managing Director, Mr Sunny Offiong, as “Director” and by its Chief Operations Officer, Mr Emmanuel Archibong,

who signed over the word “Secretary”. Mr Archibong has given evidence that he understood he was being asked by Mr Offiong to witness Mr Offiong’s signature, but his evidence also makes clear that he understood correctly the nature of the document.

13. The MoU set out at clause A that Cast Oil would provide to Top Oil the “5% equity contribution and associated LC charges” required under the Access Bank Plc facility, estimated to be about Naira 70 million. Clause B provided that Cast Oil would pay to Top Oil a premium of Naira 40 million at the end of the transaction. Clause C provided “CAST will clear, store and sell imported product on open market at its designated depot without any encumbrance from TOP OIL, Access Bank or appointed agent.” By Clause D, Cast Oil would repay Access Bank from the proceeds of the sale of the AGO (or otherwise). Clause E stated that Top Oil agreed “to warehouse the equity contribution of N58,025,000.00 made by CAST and transfer with immediate effect the supposed equity contribution to CAST nominated account upon the completion and payment of the LC opened for the transaction.”
14. By 23 April 2015, Access Bank had issued the letter of credit on behalf of Top Oil for the benefit of Augusta. The amount of the letter of credit was USD 5,802,500 +/- 10%. Over the next few days, Augusta identified a suitable vessel (the MV Adela (the “Vessel”)) and arranged a charterparty. Detailed terms for the transaction were discussed during the same period between Mr Cloché and Mr Amushan. On 28 April 2015 Mr Amushan asked for Augusta to “forward the sale contract” and the Detailed Terms were provided the next day as an attachment to an email between Augusta and Cast Oil.
15. As I have mentioned at the start of this judgment, the Detailed Terms included at Clause 17, the following exclusive jurisdiction agreement in favour of the High Court in London:

“THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF ENGLAND (WITHOUT REFERENCE TO ANY CONFLICT OF LAWS RULES). THE PARTIES HERETO IRREVOCABLY AGREE THAT THE HIGH COURTS IN LONDON ARE TO HAVE EXCLUSIVE JURISDICTION TO SETTLE ANY DISPUTES OR CLAIMS WHICH MAY ARISE OUT OF OR IN CONNECTION WITH THIS AGREEMENT AND SUBMIT TO THE EXCLUSIVE JURISDICTION OF THOSE COURTS, WITHOUT RECOURSE TO ARBITRATION.”

16. Mr Cloché states as follows:

“In the oil trading industry, especially where an international trader sells to a domestic purchaser, it is normal for the detailed terms of the contract to be the international trader’s terms. These are normally circulated shortly after the initial main terms are agreed (as was the case here). The most usual way is that unless there is any objection to the international trader’s terms, the business just proceeds without further discussion of the detailed terms. If the domestic buyer objects to anything in the

international trader's detailed terms, this will be raised promptly in order to be settled by discussion or negotiation. However, it is usual that there are no such objections. Augusta's standard format for circulating the detailed terms does not envisage the buyer signing back the detailed terms document (and this was the case here). I therefore did not expect Top Oil to send back a signed copy of the detailed terms, and when by a couple of days later we had heard nothing back in objection to the detailed terms, I assumed they were agreed and accepted by Top Oil. The transaction was then carried out in accordance with those terms, by both sides."

17. The Vessel tendered Notice of Readiness on 1 May 2015, and on 10 and 11 May 2015 she discharged 9,512.45 MT of AGO at Lagos, Nigeria. The discharge was made on Cast Oil's instructions as to 6,512.45 MT at Kata Storage Ibafo, Lagos and as to 3,000 MT at Total Storage Ibafo Lagos. The parties do not agree about whether these locations are properly described as "Apapa", nor about whether the location in the PFI – "Integrated Jetty" – existed, but what is material is that the AGO was delivered to the locations ordered by Cast Oil.
18. Top Oil points out that discharge was made against a Letter of Indemnity, rather than original documents and claims that this was all done to divert the cargo away from Top Oil, to whom it was due. Mr Cloché's evidence is that Top Oil as the named buyer would have had to be involved in the process of discharge in order to obtain the necessary permits from the Nigerian authorities and he refers to the written statement of Mr Seyi Sanni of Cast Oil in some Nigerian criminal proceedings (to which I will refer further below) which states that Top Oil personnel were indeed involved in the discharge of the AGO.
19. Under the "trigger pricing" provisions of the Detailed Terms, the pricing of the cargo was fixed in separate lots by reference to benchmark prices on different dates up to 4 June 2015. The pricing was then confirmed in an exchange of emails between Augusta and Cast Oil, at a total value of USD 6,110,990.50. Mr Ijezie for Top Oil makes the point that the emails do not show Cast Oil asking for trigger pricing, but they are entirely consistent with trigger pricing having been asked for orally, especially an email from Cast Oil asking "Please provide the details of the prices and quantities the total cargo was locked." Mr Cloché provided the prices and dates and Cast Oil acknowledged receipt.
20. In addition to this, Mr Cloché states that Augusta invoiced the sum of USD 105,736.25 for "demurrage" (meaning additional hire charges), customs charges and SGS charges. Thus, the sum due to Augusta was USD 6,216,726.75. Mr Cloché says that he then agreed with Mr Amushan that the amount to be invoiced would be the maximum under the letter of credit of USD 6,382,750 (USD 5,802,500 + 10%), with the difference between that sum and the amount due being a "buffer" which, Mr Cloché says, would be a sum that Cast Oil could then use on other transactions with Augusta. Mr Cloché further states that "I assumed then (and still believe now) that in the ordinary course Top Oil would have been reimbursed out of the sale proceeds for the full amount paid out under the LC."

21. On 4 June 2015, Augusta issued its commercial invoice for USD 6,382,665.71 (slightly less than the maximum under the letter of credit) and presented documents for payment under the letter of credit. On 24 June 2015, Cast Oil asked for a further 30 days to pay, which Mr Cloché says he agreed for a further charge of USD 2 per MT, totalling USD 19,024.91. I calculate the final “buffer” as being USD 6,382,665.71 – (6,110,990.50 + 105,736.25 + 19,024.91) = USD 149,914.05, though Mr Cloché gives a figure of USD 139,407.
22. Mr Offiong of Top Oil wrote to Access Bank to confirm the 30 day extension, and Cast Oil provided a copy of this email to Augusta. Payment was duly made to Augusta by Access Bank UK Limited at the end of July 2015.
23. Mr Archibong’s evidence on behalf of Top Oil is to the effect that the understanding he received from Mr Offiong of the transaction is that Top Oil was itself buying AGO from Augusta, with Cast Oil acting merely as an intermediary. Mr Archibong says that he was told by Mr Offiong in early May 2015 that Mr Amushan had told Mr Offiong that Cast Oil had taken delivery of the AGO, sold it and would pay for it. However, Cast Oil did not pay.
24. Chief Etiebet says that when he returned to Nigeria in June 2015, Mr Offiong told him that Mobil Oil Nigeria Plc (“**Mobil**”) had ordered 10,000 MT of AGO which had been delivered to them, but that they had failed to pay. Chief Etiebet says that Mr Offiong later produced an offtake offer acceptance letter dated 8 May 2015 purporting to be signed for Mobil, which turned out to be a forgery.
25. Mr Archibong exhibits a letter dated 4 August 2015 signed by Mr Amushan for Cast Oil addressed to Top Oil, stating that Cast Oil was unable to fulfil its obligation to pay the sum of Naira 1,321,431,000 (equivalent to about USD 6.6 million at the time) and offering to do so in three instalments during the month of August. Next, there is exhibited a letter dated 27 August 2015 from Mr Offiong for Top Oil to the Director General of the Department of State Security (“**DSS**”) in Abuja Nigeria headed “Complaint against Cast Oil & Gas Limited”. This letter asserted that in April 2015, Top Oil imported 9,500 MT of AGO “for Cast Oil” for which Cast Oil agreed to pay Naira 1,321,431,000 by 28 June 2015, but that Cast Oil had so far paid only Naira 100 million.
26. Chief Etiebet says that in October 2015 Mr Offiong confessed to him that there had been no order from Mobil, but that “the AGO was delivered to Cast Oil to sell in the open market and return the proceeds to the Top Oil account with Access Bank”. Chief Etiebet’s evidence is that at this time Mr Offiong showed him the letter of 4 August 2015 and the complaint to the DSS and that Chief Etiebet then became involved in seeking to recover the money from Cast Oil.
27. On 14 October 2015, there was made a “Memorandum of Agreement” between Cast Oil and Top Oil in which Cast Oil acknowledged its indebtedness to Top Oil in the sum of Naira 1,321,431,000 and agreed to deliver 10,000 MT of AGO by the first week of November 2015. Cast Oil provided post-dated cheques amounting to the total Naira sum owing, to be returned to Cast Oil when the AGO had been sold for the required sum. Cast Oil also agreed to pay interest at 24% from 1 August 2015 until the sum owing was satisfied. The agreement also recorded that Cast Oil had already paid “equity

contribution” of Naira 70 million and 100 million, which would be reconciled later with bank charges.

28. Mr Archibong says that the post-dated cheques were returned unpaid and he and Chief Etiebet say that the DSS found Mr Amushan and arrested him in March 2016 and that Mr Amushan then provided further post-dated cheques which were again returned unpaid. The DSS then transferred the complaint to the Economic and Financial Crimes Commission (“**EFCC**”) which detained Mr Amushan who made further promises to pay in 2017.
29. In the meantime, Chief Etiebet says that Mr Offiong hid the MoU from the Company Secretary, Ms Akpan, and himself “until it was dug out of him at the start of investigations in 2016.”
30. Chief Etiebet exhibits a letter dated 9 February 2017 written by Mr Amushan at Chief Etiebet’s behest to Access Bank, confirming Cast Oil’s indebtedness to Top Oil in the sum of USD 6,382,1665.71 (Naira 1,321,431,000) being the cost of 10,000 MT of AGO imported from Augusta by Top Oil for Cast Oil as per the MoU dated April 20, 2015, explaining the difficulties in paying so far and promising to make payment by instalments.
31. Chief Etiebet also appears to have given a personal undertaking dated 9 November 2016 to Access Bank to repay the outstanding debt.
32. In about January 2018 Mr Offiong for Top Oil made a complaint to the Special Fraud Unit of the Nigerian Police (“**SFU**”), which investigated the matter culminating in a report dated 9 December 2018 and criminal charges being brought against several suspects.
33. Mr Archibong says that during the 2018 investigation, it dawned on him for the first time that the entire transaction had been a fraud on Top Oil and that Augusta had provided Cast Oil with a second set of shipping documents which Cast Oil used to clear the cargo. Mr Archibong states that Cast Oil did indeed pay to Top Oil the Naira 70 million mentioned in the MoU as a required “equity contribution”.
34. Mr Archibong also states that Top Oil never received the Detailed Terms and that his experience, contrary to Mr Cloché’s evidence, is that any necessary terms of the transaction are agreed before a letter of credit is issued.
35. Chief Etiebet similarly states that it was only during the investigation in 2018 that he understood the truth of what had happened, which was that Mr Amushan had offered Mr Offiong an unspecified personal inducement to cause Top Oil to enter into the MoU and permit Cast Oil to use the Access Bank facility. Chief Etiebet’s evidence is very fulsome on the point that the MoU was a dishonest document on the part of Mr Offiong and Cast Oil, giving as supporting reasons that it contravened internal procedures at Top Oil and that it was kept secret from Ms Akpan and himself. Chief Etiebet further draws the inference that Augusta was chosen by Mr Offiong and Mr Amushan as a partner “who would go along with their schemings”. Chief Etiebet suggests that the inference that Augusta was “complicit in the fraud against Top Oil by Cast Oil” may be drawn from the fact that Augusta delivered the original shipping documents to Cast Oil rather than to Top Oil.

36. The SFU investigation resulted in a report dated 9 December 2018. The report concluded that the entire transaction was a fraud carried out against Top Oil by Mr Amushan, Mr Offiong, Access Bank (including its managing director and two other named individuals) and Augusta. I have taken account of such relevant factual evidence as the report contains in reciting the facts in this section of my judgment. The opinions of the investigators as to what inferences should be drawn from the facts are not relevant to my consideration.
37. Following the SFU report, criminal charges were brought by the Nigerian Police against Cast Oil, Augusta, Mr Amushan, Mr Offiong, Mr Cloché and several other individuals. I am told that these proceedings are continuing, but Mr Cloché's evidence is that Augusta and its officers have never been contacted officially in relation to the criminal charges and have not been served with process in that respect. The evidence before me includes a copy of what appears to be the front page of a "third amended information" dated 26 March 2024, relating to charge number ID/8795C/2019 by which the Commissioner of Police raises complaints against Cast Oil, Mr Amushan, Mr Offiong and Augusta for defrauding Top Oil and Chief Etiebet.
38. Mr Cloché has exhibited to his first witness statement the Defence and Counterclaim filed in other proceedings in this Court, CL-2018-00487, which are a claim by Access Bank against Chief Etiebet. This statement of case on behalf of Chief Etiebet dated 28 February 2019 alleges that Access Bank converted the outstanding balances under its facilities with Top Oil into a new facility in July 2017, supported by a personal guarantee from Chief Etiebet. Access Bank purported to call in the outstanding loans in June 2018 and purported to call on Chief Etiebet's personal guarantee on 29 June 2018. Top Oil and Chief Etiebet relied on the SFU investigation to deny Access Bank's claims, both in correspondence in 2018 and in their Defence filed in February 2019.
39. On 31 July 2019, Nigerian Lawyers for Top Oil and Chief Etiebet, Udochi Iheanacho Partnership, sent a letter to Augusta (in Geneva, Switzerland) setting out a claim. This letter set out that Access Bank issued the letter of credit on the instructions of Top Oil and "based on the Agreement between [Top Oil] and [Augusta] that the said 10,000MT of AGO would be delivered to Top Oil". The letter set out that Augusta never delivered the AGO to Top Oil, but still proceeded to extract payment from Access Bank, using fraudulent misrepresentations and forged documents. Top Oil demanded repayment of the sum of USD 6,382,750 plus interest and threatened proceedings "in Nigeria or elsewhere" if the demand was not met. The letter did not mention Cast Oil.
40. Augusta replied on 15 August 2019 setting out its case that Cast Oil told Augusta that it had arranged with Top Oil to import the AGO for the mutual benefit of Cast Oil and Top Oil, the AGO was delivered, documents were duly presented by Augusta at Access Bank's branch at Northwich, Cheshire, England and payment was duly made by The Access Bank UK Limited. Augusta made the point that in Nigerian media in May 2019, it was reported that Chief Etiebet's complaint was that Cast Oil had not made timely payments to Top Oil. Augusta suggested that if Top Oil wished to pursue allegations of fraud in the presentation of documents to Access Bank, then it should report the matter to the police in Northwich, Cheshire, with whom Augusta would co-operate.
41. In a short response dated 13 September 2019, Udochi Iheanacho Partnership repeated that Augusta had "never honored or performed on the Contract" with Top Oil and invited it to provide evidence of Augusta's performance.



42. Top Oil commenced some proceedings FHC/L/CS/643/2020 in Nigeria in 2020 against Augusta and its Chairman, Mr Carles. Top Oil purported to serve them on Augusta in Switzerland, but did not use the proper channels to do so and this action was discontinued in 2021.
43. In July 2021, Top Oil commenced suit FHC/L/CS/775/2021 in Nigeria (ie, the Nigerian Proceedings) against Augusta and Mr Carles, as First and Second Defendant respectively. The Statement of Claim in the Nigerian Proceedings alleges in outline:
- i) “In April 2015, for the purpose of furthering its [Top Oil’s] business the erstwhile Managing Director of [Top Oil], Mr Sunny Amos Offiong decided to explore collaboration with [Cast Oil] for the purpose of effectively utilizing the” Access Bank facility (called in the pleading, the “**IFF**”).
  - ii) Top Oil and Cast Oil entered into an “understanding” to utilise the IFF to import 10,000 MT of AGO for supply to Mobil.
  - iii) Cast Oil caused Augusta to issue the PFI dated 9 April 2015 in favour of Top Oil for the importation of 10,000 MT of AGO.
  - iv) Mr Amushan procured an offer letter purportedly from Mobil dated 8 May 2015. The offer letter was a sham to give the impression to Top Oil that there was a genuine transaction.
  - v) Based on these documents, Top Oil applied for the letter of credit from Access Bank and advised this to Augusta. Thereafter Augusta never forwarded shipping documents to Top Oil “but only briefly communicated with [Top Oil] via email regarding the purported plans for the shipment of the AGO.” Top Oil waited to receive confirmation of shipment etc, but this never came because Augusta cut off Top Oil from communications.
  - vi) In view of those developments, Top Oil “was forced to follow up and demand for updates on the progress of the purported shipment and the shipping documents only from ... Mr Amushan” who represented himself as Augusta’s representative in Nigeria.
  - vii) Mr Amushan later told Mr Offiong that the vessel had arrived and discharged the AGO to Mobil Oil Nigeria Plc, which would later pay Top Oil.
  - viii) Top Oil later discovered that Augusta had claimed under the letter of credit by falsely claiming to have delivered the AGO to Top Oil.
  - ix) Mr Amushan gave undertakings to pay, but he only paid 100 million Naira, which was paid in August 2015.
  - x) Top Oil “avers and shall contend at the Trial of this suit that Cast Oil and Mr. Amushan were not parties to the PFI and the Letter of Credit between the Plaintiff and the 1st Defendant and as such there is no privity of contract between Cast Oil and/or Mr Amushan and the Defendants in respect of this transaction to warrant the Defendants transacting with and/or taking instructions

from Mr. Tunji Amushan/Cast Oil in respect of the Plaintiff's Letter of Credit instead of the Plaintiff.”

- xi) Augusta deliberately excluded Top Oil from correspondence and shipping documents as part of a conspiracy between Augusta and Cast Oil to defraud Top Oil.
  - xii) During an interrogation of Mr Amushan in June 2019 he confessed that Augusta had co-operated with him to defraud Top Oil.
  - xiii) Top Oil avers “that the Agreement for the supply of 10,000 MT of AGO and for which the LC was established was strictly between the Plaintiff and the 1st Defendant and the LC Agreement did not give rights to or authorise benefit/communication to any other party except the provider of the financing, Access Bank PLC and who was instructed to be named as Consignee in the LC.”
  - xiv) The PFI and the letter of credit did not authorise Augusta to discharge the cargo other than at the agreed place of discharge and other than to Top Oil. The AGO was in fact delivered at a different part of Apapa Port as part of the scheme to defraud Top Oil. 3,000 MT of the AGO was delivered to Total Oil to fulfil other orders from Cast Oil in which Top Oil was not involved.
44. Most of the allegations in the Statement of Claim are made against Augusta and Mr Carles jointly. All 16 of the sub-paragraphs of the prayer for relief at paragraph 71 of the Statement of Claim are prefaced by the words: “Whereupon the Plaintiff claims against the Defendants jointly and severally ...”. The second such sub-paragraph seeks a declaration that Mr Carles is “jointly liable for the defrauding of the Plaintiff by the 1<sup>st</sup> Defendant ...”. It is clear on a fair reading of the Statement of Claim as a whole that Mr Carles is joined substantially on the basis of the allegation at paragraph 2 that he was “the alter ego and controlling mind of” Augusta, rather than on the basis of any more specific allegations concerning his own conduct.
45. The Nigerian Proceedings were eventually served on Augusta on or around 13 July 2023. Upon proper service of the Nigerian court processes on Augusta, it filed a preliminary objection to jurisdiction in the Nigerian Proceedings on 14 August 2023.
46. The present claim in this Court was issued by Augusta on 18 October 2023 and the application for an interim anti-suit injunction was issued on 20 October 2023.
47. Following service of the Claim Form, Top Oil instructed Penningtons Manches Cooper LLP (“**Penningtons**”), who filed an Acknowledgement of Service dated 19 December 2023 indicating an intention to challenge jurisdiction. However, an application to contest jurisdiction within time was not filed within time, which expired on about 16 January 2024.
48. As I have already noted, Top Oil undertook not to advance the Nigerian Proceedings, as recorded in a Consent Order of Calver J dated 1 February 2024 and I am informed that no substantive steps have been taken in those proceedings.
49. On 19 February 2024, a partner at Penningtons sent an email to Tatham Law in the following terms:

“I write further to our telephone conversation on Thursday. Are you able to respond on the question of whether my clients should be obliged to serve a defence in advance of the full hearing of your clients’ application?”

If you need more time to consider with your clients’ counsel, would your clients as an interim measure agree to say a 4 week extension of time? As you know, our view is that there should be no need for an exchange of pleadings prior to the application being heard, and my clients are concerned not to waste costs.”

50. On 26 February 2024, Penningtons Manches Cooper LLP filed an application to come off the record. On Monday, 5 March 2024, Top Oil instructed Piperjuris Solicitors & Advocates Ltd (“**Piperjuris**”) to represent them in the case following consultation meetings held over the weekend, from 1 to 3 March 2024. On 6 March 2024, Piperjuris filed Top Oil’s application challenging jurisdiction.

### **Analysis and decision**

51. It is convenient first to consider whether Augusta has demonstrated that there is a high degree of probability that Top Oil is bound by the exclusive jurisdiction agreement at clause 17 of the Detailed Terms. There is no dispute that “high degree of probability” is the test for me to apply in relation to Augusta’s application for an anti-suit injunction. If that test is met, then the lower test of “good arguable case” that could be relevant to Top Oil’s application to stay the proceedings on the ground of forum non conveniens would also be satisfied.
52. Top Oil points out that the Detailed Terms were produced at a late stage of the transaction and were never expressly agreed on behalf of the buyer. Augusta relies on what it says is a general practice as I have set out from Mr Cloché’s evidence and on the fact that the Detailed Terms were requested by Cast Oil and the transaction was proceeded with by Cast Oil after receiving them. This would ordinarily amount to acceptance by conduct. It seems to me that Augusta is right to point out that the exercise of the trigger pricing option contained in the Detailed Terms, but not in any earlier document, puts the matter sufficiently beyond doubt plainly to exceed the test of high degree of probability. Accordingly, I conclude that the Detailed Terms were agreed as between Augusta and Cast Oil.
53. The real question is whether Cast Oil agreed the Detailed Terms as agent for Top Oil so that Top Oil is bound by them. Augusta argues that Top Oil’s own case in the Nigerian Proceedings is that Augusta and Top Oil contracted for the sale of the AGO. That is right, but Top Oil’s case is that the contract that it entered into was on the terms of the PFI alone, of which it was aware, and that the Detailed Terms were not agreed on its behalf. This case has difficulty because the PFI itself stated that the price was “subject to final contractual agreement”, which clearly implies that some other terms were to be agreed before the arrangement would be “contractual”. However, while that point casts doubt on Top Oil’s case that the PFI was the governing document, it does not establish that Top Oil was bound by the Detailed Terms.
54. Top Oil makes the point that it did not hold out Cast Oil to Augusta as being its agent. Augusta argues that Cast Oil had actual authority from Top Oil to contract with Augusta

on Top Oil's behalf based on the MoU, while accepting that it was not aware of the MoU at the time.

55. The principal objection made by Top Oil to Augusta's reliance on the MoU is an argument that Mr Offiong did not have Top Oil's authority to conclude the MoU with Cast Oil. Mr Ijezie for Top Oil refers to:

- i) Top Oil's Articles of Association at Article 27, which provides that the Directors may appoint a Managing Director upon such terms and with such powers as they see fit;
- ii) The Investment Agreement relating to Top Oil dated 17 June 2005, which provided that Chief Etiebet would be Chairman of Top Oil and Mr Offiong would be Managing Director and Ms Akpan would be Company Secretary and Legal Adviser and that -

“4.2 All financial, banking and other major decisions in relation to the management of the Company shall at all times be made by the Managing Director after consultation with and advice from the Chairman in writing.

4.3 The Management and control of the Company shall at all times revolve around Sunny Amos Offiong or the family of Chief Don Obot Etiebet or as may be mutually agreed between all the parties.”

and

- iii) The evidence of Chief Etiebet and Ms Akpan that the MoU was not the subject either of consultation with Chief Etiebet as Chairman, or of approval by Ms Akpan as Secretary.

56. Mr Milnes KC for Augusta argues that it is not clear whether the Investment Agreement was being applied in 2015 (though it was expressed to have an initial ten year term, which would have been current in April 2015) and that entry into the MoU for the purchase of 10,000 MT of AGO would not qualify as a “financial banking and other major decision in relation to the management of the Company.” He also draws attention to the evidence that Mr Offiong was running the company at the relevant time, recalling Chief Etiebet's evidence that when he went to London on 16 April 2015, he left Mr Offiong “in charge of the company's operations with the sole signing authority to Top Oil accounts with Access Bank Plc.” This last point seems to me to have considerable force whereas the first two are of little weight.

57. Augusta also relies on the “indoor management rule” of company law, which it is accepted by Top Oil represents Nigerian law as well as English law. Thus, whatever limitations may have been imposed on Mr Offiong's actual authority, he was held out by Top Oil to Cast Oil as having all the usual authority of a Managing Director of such a company. On that basis, Augusta argues, Cast Oil reasonably relied on Top Oil's holding out of Mr Offiong as Top Oil's Managing Director to contract with Top Oil on the basis of Mr Offiong's signature; and thus if the MoU were challenged by Top Oil, Cast Oil would be able to rely on the doctrine of ostensible authority to bind Top Oil.

58. Of course, if Top Oil is correct that the MoU was an instrument of a dishonest scheme cooked up between Cast Oil and Augusta (and in some of its complaints, Access Bank too) to defraud Top Oil, then Augusta could not now rely on the MoU to establish the actual authority of Cast Oil to contract on Top Oil's behalf. However, the evidence before this Court (as opposed to assertions and opinions) is consistent with Augusta's case that it understood the transaction to be one in which Cast Oil was "fronting" for Top Oil to take advantage of Top Oil's finance facility. Augusta, as far as the evidence shows, had no more detailed understanding than that of the commercial arrangements between Cast Oil and Top Oil.
59. Mr Ijezie for Top Oil has argued (in Top Oil's skeleton argument at paragraph 22) that Augusta was on inquiry that the transaction was suspicious and it therefore cannot rely on the indoor management rule. This argument confuses two separate points. The indoor management rule is one of the bases upon which Augusta submits that Mr Offiong had apparent or ostensible authority as managing director of Top Oil to make the MoU with Cast Oil (see the explanation of these concepts in The Law Debenture Trust Corpn Plc v Ukraine [2024] AC 411 at paragraphs 38 to 42). That question does not depend on any state of mind of Augusta, though the knowledge of Cast Oil might be relevant to it. The distinct second point is whether Augusta can rely on the actual authority conferred by the MoU to show that an agreement made between Augusta and Cast Oil binds Top Oil. Again, that does not depend on Augusta's state of mind: if there was actual authority, then the third party to the agency relationship (Augusta) does not need to establish anything further.
60. I therefore need to return to the question whether Cast Oil (rather than Augusta) had knowledge that meant that the MoU did not bind Top Oil. While the question is distinct, the answer is similar. The evidence (as opposed to assertion) does not support Top Oil's allegation that the MoU was part of a fraudulent scheme cooked up between Mr Offiong and Mr Amushan. The evidence before this Court is consistent with the MoU being a genuine attempt by Mr Offiong to generate profit for Top Oil by permitting Cast Oil to use the Access Bank facility in return for a fixed fee or commission. Cast Oil then failed to pay what was due to Top Oil. I am not prepared to infer that there is a substantial likelihood (that would reduce the probability that the MoU was binding below the "high degree" required at this stage) that the arrangement was corrupt from the start because (as Top Oil now alleges) Cast Oil knew that Mr Offiong had been bribed or otherwise suborned by Mr Amushan to act in his own interests rather than those of Top Oil.
61. In any event, the MoU has been adopted by Top Oil as its own act. Chief Etiebet's evidence is that Mr Offiong told him in October 2015 that the transaction was for the AGO to be delivered to Cast Oil to sell in the open market and return the proceeds to the Top Oil account with Access Bank, which are the key terms of the MoU, and that the MoU itself was revealed to him in 2016. Chief Etiebet makes clear in his evidence that he persuaded Mr Amushan to write the letter of 9 February 2017 to Access Bank acknowledging that Cast Oil was indebted to Top Oil for the price of the 10,000 MT imported from Augusta pursuant to the MoU. This was conduct that was consistent only with the MoU being adopted by Top Oil as its act and not repudiated. By the time this conduct took place, Chief Etiebet knew all the essential facts about the MoU including (if they be facts) that Mr Offiong had not obtained either his or Ms Akpan's approval for it, that the existence of the MoU had been concealed and that the explanation of a sale to Mobil was a false explanation. If those facts are sufficient to infer initial

corruption, as Top Oil now suggests, then the MoU was ratified by Top Oil after they came to light.

62. For all of these reasons, taking them together to assess the overall likelihood, I find that Augusta has established a high degree of probability that the MoU was a binding agreement as between Top Oil and Cast Oil.
63. The MoU was governed by Nigerian law, but the parties have not submitted that there is any principle of Nigerian law that affects how I should understand the meaning of the document. The MoU recited that, by its execution, Top Oil agreed to allow Cast Oil to use Top Oil's facility with Access Bank to import 10,000 MT of AGO based on the PFI from Augusta. The principal provisions of the MoU were that:
  - i) Cast Oil would pay the equity contribution and charges required by the Access Bank Facility (which Mr Archibong says was done);
  - ii) In consideration for utilizing the facility, Cast Oil would pay Top Oil a premium of Naira 40 million at the end of the transaction;
  - iii) Cast Oil would sell the product "on open market" "without any encumbrance from Top Oil, Access Bank or appointed agent";
  - iv) Cast Oil would repay the debt that arose from using Top Oil's facility.
64. The MoU is thus consistent with Augusta's understanding that Cast Oil would take the commercial risks and benefits of the purchase and sale of the AGO, but that Top Oil would be named as the buyer since it was Top Oil's finance facility that would be utilised. This would occur, under the MoU, on the basis of Cast Oil paying a fixed fee to Top Oil (of Naira 40 million). Clause C, providing that Cast Oil would sell the product "on open market" and "without any encumbrance" implies that the AGO would not be delivered to Top Oil itself, but would be sold to some other buyer.
65. In the event, this is exactly what appears to have happened. Even on Top Oil's case, Augusta did indeed deliver the AGO to Cast Oil's order and – as far as anybody knows – Cast Oil sold it. The part of the agreement under the MoU which appears not to have been fulfilled is that Cast Oil has not repaid the facility, as it promised to do. That is, indeed, the real nub of the complaints that Top Oil has been consistently making in all available forums.
66. On this basis, I find that there is a high degree of probability that it would be found at trial that Augusta was dealing with Cast Oil as Top Oil's agent and Top Oil is bound by agreements made on its behalf by Cast Oil. If so, then Cast Oil's authority on behalf of Top Oil extended to agreeing the particular terms of the transaction with Augusta, and the Detailed Terms – as I have already found – were binding, including clause 17.
67. In my judgment it is clear that the Nigerian Proceedings concern disputes or claims which arise "out of or in connection with" the agreement contained in the Detailed Terms. That finding applies equally to the claims against Mr Carles as it does to the claims against Augusta.

68. In Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd [2019] EWHC 2284 (Comm), [2020] 1 All ER (Comm) 61, Mr Andrew Burrows QC sitting as a Judge of the High Court, after extensive discussion of the principles and earlier authority, held at paragraph 23(ii) that in a case such as this, where the question is whether the contracting party (Augusta) can enforce an exclusive jurisdiction clause by anti-suit injunction so as to restrain tort proceedings by the other contracting party (Top Oil) against a third party (Mr Carles):
- “If, as a matter of interpretation, the jurisdiction clause does extend to cover the tort proceedings against the third party, the contractual basis for an anti-suit injunction applies so that, as regards an application by the contracting party (B), the injunction will be granted unless there are strong reasons not to do so.”
69. I adopt the reasoning and conclusions of Mr Burrows QC on this issue and I therefore hold that the contractual basis for an anti-suit injunction applies to Augusta’s claim for such relief for the benefit of itself and Mr Carles as defendants to the Nigerian Proceedings (or any similar proceedings that might be brought).
70. It is convenient next to consider Top Oil’s application to challenge jurisdiction.
71. Mr Milnes KC submits that there is no escape for Top Oil from the statutory waiver provided for by CPR 11(4) which provides that a defendant who does not make a jurisdiction application within the period specified in the rules “is to be treated as having accepted that the court has jurisdiction to try the claim.” However, Mr Milnes KC has also properly and helpfully pointed out in his skeleton argument that there are arguably conflicting authorities as to whether the Court retains discretion to permit a late application to extend time. In circumstances where there was no time for oral argument on this issue and where it is not decisive because of the view I have formed on other points, I will not enter into this difficult area.
72. On the assumption that the issue is not closed by CPR 11(4), I accept Augusta’s case that the actions of Top Oil (including through Penningtons) of failing to make an application within time, not indicating any intention to do so and requesting an extension of time to file a defence in the email of 19 February 2024 that I have quoted above, amounted to a submission at common law to the jurisdiction of this Court, which cannot now be withdrawn.
73. If that is wrong, then Top Oil accepts that it would require relief from sanction to bring its jurisdiction application late and it accepts that its default is serious and significant. As to the reason for default, Mr Ijezie submits that Top Oil dealt with Penningtons through their lawyer in Nigeria who did not explain the requirement to file any challenge within 28 days. The basis of this appears to be paragraph 41 of the third witness statement of Chief Etiebet which states that Penningtons dealt with the Nigerian lawyer and that Chief Etiebet was not made aware of the need to file an application within 14 days. In the absence of more detailed evidence, any supporting documents or a comprehensive waiver of privilege, I am not prepared to accept that this is a “good reason” within the second stage of the Denton inquiry. Jurisdiction is an area where it is especially important that parties act promptly so that they and the court know where they stand. In all the circumstances of this case, I would not grant relief from sanction.

74. Even if that decision were wrong, since these proceedings are for the breach of a jurisdiction agreement in favour of this Court that I have found to the standard of a high probability to bind Top Oil, I would have no hesitation in rejecting Top Oil's application either to challenge jurisdiction or to stay the proceedings on the ground that England is not the most appropriate forum.
75. The final issue is whether there are strong reasons to refuse the anti-suit relief that I have otherwise found to be justified on contractual grounds. There are not. I reject the submission for Top Oil that any lack of promptness by Augusta in applying for anti-suit relief amounts to culpable "delay" or could come near to being a strong reason to refuse such relief, when set against the exclusive jurisdiction agreement which I have found, for present purposes, to be established. The principles to which I have had regard in reaching this judgment are those that are set out by reference to earlier authority in my judgment in Aon UK Ltd v Lamia Corporation SRL and others [2022] EWHC 3323 (Comm) at paragraphs 134 to 139.

### **Conclusion**

76. For these reasons, I will allow Augusta's application for interim anti-suit relief and dismiss Top Oil's application to challenge jurisdiction. Unless there are matters of which I am not aware, I will award the costs of both applications to Augusta on the standard basis and deal on paper with any question of summary assessment or interim payment and with any issues that may arise on the form of order to be made, including the date for Top Oil to file its Defence.