APPROVED **[2023] IEHC 514**

THE HIGH COURT

Record No.: 2023/3 MCA

IN THE MATTER OF AN INTENDED ARBITRATION

AND IN THE MATTER OF THE ARBITRATION ACT 2010

BETWEEN:

FIRST MODULAR GAS SYSTEMS LIMITED

Applicant

-and-

CITIBANK EUROPE PLC, ENNOVATE CONSULTANTS INCORPORATED, BOSAI ENERGY TECHNOLOGY CORPORATION and ACCESS BANK PLC

Respondents

JUDGMENT of Mr Justice Rory Mulcahy delivered on 5 September 2023

Introduction

1. On 7 January 2023, the Applicant ("**First Modular**") sought and obtained on an *ex parte* basis an Order pursuant to Order 56, Rule 3(a) and or 3(h) of the Rules of the Superior Courts for an interim measure of protection under Articles 9 and/or 17J of the Model Law, in this case, an injunction in aid of an intended arbitration. The Order restrained the first Respondent ("**Citibank**") from making any payment on foot of a

letter of credit, bearing the number ALC2021C02347C ("**the Letter of Credit**") to the benefit of the third Respondent ("**Bosai**").

2. The Order gave First Modular liberty to issue and serve an originating notice of motion and notice of motion seeking interlocutory relief, both of which were duly served on the Respondents. First Modular seeks, in effect, a continuation of the injunction pending the determination of the arbitration proceedings. The Respondents seek to have the injunction discharged. The second and third Respondents also issued a motion on 27 February 2023 seeking to set aside the Orders made by the Court on 7 January 2023. The parties were all agreed that the three motions raised identical issues and could be dealt with together.

3. The underlying dispute to this application is striking in a number of respects. It involves a dispute between Nigerian, Canadian and Chinese companies regarding the performance of a contract in Nigeria to design and manufacture a gas processing plant. This application seeks to restrain an Irish registered company, Citibank, as an interim measure in aid of an arbitration in Nigeria to which Citibank is not, and could never be, a party. And it involves a claim for payment by Bosai for goods purportedly dispatched by Bosai from China to Nigeria which First Modular claims were never ordered or, in the alternative, were never dispatched at all. Put otherwise, First Modular claims that Bosai's request for payment on foot of the Letter of Credit is a sham.

4. The parties have filed a number of affidavits and, notwithstanding, the claim by First Modular that Bosai has perpetrated a fraud by claiming payment on the Letter of Credit, much of the factual background is not in dispute. Having regard to the interlocutory nature of this application, its resolution turns on two issues. The first is whether the injunction sought falls within the jurisdiction of this Court pursuant to Order 56 of the Rules of the Superior Courts and the Model Law at all, *i.e.* can it properly be characterised as an interim measure in aid of arbitration? If not, then the injunction must be discharged. If the application does fall within the parameters of Order 56, then the second issue to be determined is whether the Applicant has met the very high threshold required to restrain payment on foot of a letter of credit.

Factual Background

5. The parties' affidavits have laid out in detail the factual background to this application. It is necessary for the purpose of this judgment to provide only a summary of that background.

6. In June 2021, First Modular, a Nigerian company, and the second Respondent ("**Ennovate**"), a Canadian company, agreed Heads of Terms for the design and manufacture of a gas processing plant in Anambra State, Nigeria. Those parties executed a main contract ("**the EPC contract**") on 8 February 2022.

7. The third Respondent ("**Bosai**") was retained by Ennovate as a subcontractor to manufacture components for the plant. On 5 October 2021, Bosai issued a pro forma invoice to First Modular for "ONE COMPLETE New Bosai Natural Gas Processing Plant" ("**the Pro Forma Invoice**"). The delivery term was described as CFR, meaning 'Cost and Freight'. In general terms, this meant that the purchaser was liable for the goods while they were in transit. The Pro Forma Invoice included a list of 31 accessories for the gas plant, which included, at Item 15, 11 CNG (compressed natural gas) storage skids. The total price was USD$4,717,415 and the method of payment was a confirmed letter of credit.

8. On 17 February 2022, the fourth Respondent ("**Access Bank**") issued a letter of credit with Citibank as the confirming bank and Bosai as the beneficiary. The Letter of Credit was amended 12 times between March and November 2022 to increase the value of the credit.

9. Although the contract documents were executed on 8 February 2022, it is not disputed that there were further discussions and negotiations between the parties thereafter. Ennovate and Bosai claim that First Modular instructed them to get whatever equipment they could for the gas plant "off-the-shelf" as a matter of urgency having regard to the falling value of the Naira, the currency of Nigeria. This is not expressly denied by First Modular in its affidavits. On foot of those instructions, Bosai claims that it issued a purchase order for certain long lead items, including 11 CNG storage cylinders, on 1 March 2022.

10. In May 2022, First Modular wrote to Ennovate and Bosai asking them to stay any action on procurement and/or equipment production until they had resolved an issue with the feedgas owner. In June 2022, all three parties met in order to discuss a new project location. There were further video meetings between the parties throughout the summer of 2022.

11. On 8 September 2022, Mr Dipo Lawore of First Modular called Mr James He of Bosai to tell him that First Modular was cancelling the project. Mr Lawore called Mr Khalid Saleh of Ennovate the following day to tell him that the project was being cancelled and that Ennovate was free to arbitrate in Nigeria. On 12 September 2022, First Modular requested, through Access Bank, the cancellation of the Letter of Credit. That request was refused by Bosai.

12. Ennovate sent emails to First Modular on 12 September, 26 September and 27 September 2022 with no reply. The emails made clear that, as no formal instruction had been received, Ennovate was still working under the terms of the EPC contract. The reference to the absence of a formal instruction reflects the fact that the EPC contract requires that any notice of termination be furnished in writing.

13. On 1 October 2022, Bosai issued an invoice for 11 CNG storage cylinders forming a partial shipment of "one complete new Bosai natural processing plant". I pause to note that the absence of a reference to "gas" in this invoice is one of the bases of First Modular's complaint about the claim for payment. Mr He of Bosai avers that Bosai's procurement manager oversaw these goods being loaded onto trailers at the company's plant in China for transport to the port at Qingdao. A bill of lading was issued for the goods by a freight company, Astline International Transport Limited ("**Astline**") on 11 October 2022 which states that the goods were laden on board the ocean vessel, *Koto Satria* on 10 October 2022, with a port of discharge, Apapa Seaport, Lagos, Nigeria.

14. On 13 October 2022, Bosai submitted a claim pursuant to the Letter of Credit. The claim was initially rejected by Citibank on the basis that the claim was not worded as per the terms of the letter of Credit. Revised documentation was submitted on 7 November 2022. On 11 November 2022 Citibank confirmed the revised documents complied with the Letter of Credit.

15. On 14 November 2022, First Modular, through Access Bank, noted further discrepancies with the claim. Ultimately, Citibank rejected the claims that the documents submitted did not comply with the terms of the Letter of Credit. Payment, therefore, fell to be made under the Letter of Credit on 9 January 2023.

16. On 1 December 2022, First Modular served a Notice of Dispute on Ennovate and Bosai. On 7 December 2022, First Modular obtained an Order from the High Court in Nigeria restraining the parties to the Letter of Credit from acting on it pending the determination of an intended arbitration between First Modular, Ennovate and Bosai. The Order was served on Citibank on 23 December 2022. On 29 December 2022, Citibank advised that it did not consider that the Nigerian Court Order was binding upon it. First Modular was advised on 4 January 2023 that payment would be made on foot of the Letter of Credit on 9 January 2023.

17. On 7 January 2023, First Modular, in apparent acceptance that the Nigerian Court Order was not binding upon Citibank, sought and obtained the interim Order referred to above, restraining payment on foot of the Letter of Credit.

The CNG Cylinders

18. The Bill of Lading, referred to above, describes the goods purportedly dispatched, 11 CNG Cylinders, as being laden on the ship the *Koto Satria*. It is not disputed that neither Bosai nor Ennovate advised First Modular in advance that the goods were being dispatched; First Modular only became aware of the dispatch when it was notified of the claim being made on the Letter of Credit. It is alleged by First Modular that this was in breach of Bosai and Ennovate's obligations. The failure to notify is explained by those parties by the fact that, as it is put, First Modular had "ghosted" them at that stage *i.e.* First Modular had ignored any communications post-dating the date on which First Modular had purported to cancel the contract. First Modular argue that Bosai's reliance on the terms of transport being CFR necessitates First Modular being informed that the goods are being dispatched.

19. It appears that the *Koto Satria* arrived in Apapa Port on either 19 or 21 November 2022. It departed Apapa Port on 22 November 2022. First Modular appointed clearing agents,

Gatbrix Premium Impex Limited ("**Gatbrix**") to handle the clearance of the shipment on 28 November 2022 and wrote to the Nigerian Customs Service about the status of the shipment on 30 November 2022.

20. On 2 December 2022, First Modular sent a letter, through DHL, to Astline at the address contained on the Bill of Lading, but were advised by DHL that the address was incorrect. Gatbrix advised First Modular on 5 January 2023 that it could not locate the shipment. On 19 January 2023, the Nigerian Customs Service replied to First Modular's letter of 30 November confirming that the *Koto Satria* arrived on 19 November 2022 but that the Bill of Lading "was not found on the rotation number".

21. As at the date of the hearing of this application, the consignment had not been located.

The Arbitration Proceedings

22. First Modular sent a Notice of Dispute to Ennovate and Bosai on 1 December 2022. The Particulars of Dispute alleged the following:

> *Ennovate and Bosai are in breach of the provisions of the EPCM contract, the letter of credit terms, and the pro forma invoice terms by failing to satisfy the agreed conditions precedent prior to the shipment of the gas plant.*

23. This claim was particularised at items (a) to (d) of the Notice. Item (a) alleged that there had been a failure to present an advance payment guarantee to First Modular and Item (b) alleged that as negotiations on project costs and other specifics of the project were ongoing at the time of the purported shipment of the gas plant, the conditions necessary to proceed to the shipment phase had yet to crystallise.

24. Item (c) purported to identify discrepancies between the requested gas plant and the shipped gas plant. In particular, as noted above, the description of the shipped gas plant omitted the word "gas". In addition the accessories listed in the Pro Forma Invoice included CNG storage skids but the shipped goods were CNG storage cylinders. The notice asserted that these were completely different. Under this heading First Modular also complained about the partial shipment of the plant stating that it was the contemplation of the parties that the gas plant would be shipped as a whole. It was

accepted however that the Letter of Credit made provision for the partial shipment of the gas plant.

25. Item (d) was described as fraudulent packaging and shipment of the gas plant and equipment. However, save for an argument based on the purported prior cancellation of the contract, the 'fraud' alleged consisted of Bosai claiming that it complied with the terms of the Letter of Credit notwithstanding the alleged discrepancies described at Item (c).

26. Ennovate replied to this Notice on its own behalf and on behalf of Bosai by letter dated 29 December 2022. The letter set out the position maintained by both parties on affidavit, that they had repeatedly been requested to procure parts "off the shelf" to the greatest degree possible which they had done in good faith. The letter denied that there was any obligation to furnish an advance payment guarantee in circumstances where payment was sought on foot of the Letter of Credit rather than the EPC Contract. It dismissed the claims regarding discrepancies between the Letter of Credit and the Pro Forma Invoice as being "so categorically ridiculous" a response was not required, save to remind First Modular of its repeated assurances that partial shipment was allowed. No separate response to Item (d) was contained in the letter. The letter referred to costs incurred by Ennovate and Bosai which they would seek to recover. The letter stated that "*all associated documentation and proof of POs/payments will be provided during arbitration*."

27. On 27 February 2023, First Modular served a formal notice of arbitration pursuant to Article 19 of the EPC Contract. The Notice stated, at Clause 8, that First Modular would apply to join Bosai, being the relevant party to the EPC Contract the subject of the arbitral proceedings.

28. The Notice of Arbitration repeated the allegations contained in the Notice of Dispute. However, it also concluded an allegation that the goods had not been shipped at all. At Clause 5, iii.a of the Particulars of Dispute that have arisen from the EPC Contract, it is alleged:

> *The foregoing findings by the claimant raises serious doubts on the genuineness of the bill of lading presented by Bosai and by extension the credibility of the*

purported shipment of the equipment by Bosai. Indeed, the claimant believes that the entire shipment claim by Bosai was contrived by Bosai in collusion with the respondent for the sole purpose of defrauding the claimant.

29. Ennovate accepts that it is bound by the arbitration clause in the EPC Contract, but argues that it has not been properly invoked. Bosai is emphatic that it is not bound by the arbitration clause; that it has not sought payment under the EPC Contract, but rather under the Letter of Credit. As it puts it in its written submissions, the very purpose of the Letter of Credit was to ensure an autonomous, entirely independent basis upon which it would be paid irrespective of any dispute under the EPC Contract.

30. As appears from the notice of arbitration, the parties to the arbitration are First Modular and Ennovate. However, the parties which First Modular seeks to restrain in this application are Citibank and Bosai; Bosai from claiming on foot of the Letter of Credit, Citibank from paying out on foot of any claim. In those circumstances, the first issue to address is whether this court has any jurisdiction at all to grant or continue the injunction sought.

Injunctions in aid of arbitration

31. By section 6 of the Arbitration Act 2010 ("**the 2010 Act**"), the State adopted the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments as adopted by that Commission at its thirty-ninth session on 7 July 2006) ("**the Model Law**") into the law of the State.

32. Section 9 of the Arbitration Act 2010 confers functions on the High Court in relation to the Model Law, in particular:

> (1) The High Court is—
>
> (b) the relevant court for the purposes of Article 9, and

(c) the court of competent jurisdiction for the purposes of Articles 17H, 17I, 17J, 27, 35 and 36.

33. Section 10 of the Arbitration Act 2010 provides:

> (1) Subject to *subsection (2)*, the High Court shall have the same powers in relation to Articles 9 and 27 as it has in any other action or matter before the Court.

34. Article 9 of the Model Law states:

> *It is not incompatible with an arbitration agreement for a party to request before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."*

35. Article 17 of the Model Law provides:

> 1. *Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.*
> 2. *An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:*
>
> *(a) Maintain or restore the status quo pending determination of the dispute;*
>
> *(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*
>
> *(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
>
> *(d) Preserve evidence that may be relevant and material to the resolution of the dispute.*

36. Article 17J provides:

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

37. Order 56, Rule 3 of the Rules of the Superior Courts provides that:

> *(1) Subject to sub-rules (2) and (3), any application or request to the Court for any of the following orders or reliefs by any party to a reference under an arbitration agreement in relation to an arbitration, or by any person in relation to an intended arbitration, may be made by originating notice of motion:*
>
> > *(h) to issue any interim measure in relation to arbitration proceedings in accordance with Article 17J of the Model Law.*

38. Taken together, these provisions empower a Court to grant the same type of interim or interlocutory measures in aid of arbitration as it could in Court proceedings, or as an arbitrator could in arbitration proceedings. In **Osmond Ireland On Farm Business v McFarland [2010] IEHC 295**, the High Court (Laffoy J) made clear that the power to grant interim measures pursuant to Article 17 included the power to grant an interlocutory injunction.

39. A Court's power or an arbitrator's power to grant an injunction will generally be directed towards the parties to proceedings, although, of course, there are circumstances in which third parties can be bound by the terms of such an injunction, *e.g.* in the case of a *mareva* injunction.

40. In this application, the injunction is sought against Citibank and, *inter alia*, Bosai to restrain payment on the Letter of Credit. Although Ennovate is named as a Respondent, there is no action of Ennovate which the injunction seeks to restrain. Access Bank is only named as it is the intermediary bank through which Citibank provided the Letter of Credit.

41. First Modular has no claim in any arbitration against Citibank. Nor does it assert a free-standing entitlement to seek an injunction against Citibank in aid of an arbitration to which Citibank is not a party. Rather, it asserts that it intends to join Bosai to the arbitration proceedings which have been commenced against Ennovate. Although the claim does not directly relate to the Letter of Credit, First Modular asserts that its intended claim against Bosai is sufficient to entitle it to invoke the jurisdiction of this Court under Article 17 of the Model Law. However, as noted above, Bosai denies that it is a party to any arbitration agreement with First Modular. It is in those unusual circumstances, therefore, that the question arises as to whether this Court's jurisdiction is engaged at all.

Is the injunction sought an interim measure within the meaning of Article 17?

42. In order for an injunction to be granted pursuant to Article 17, it must be an injunction directed to a party to arbitration proceedings or intended arbitration proceedings.

43. The arbitration agreement pursuant to which First Modular has initiated a claim against Ennovate is contained at Articles 20.2 and 20.3 of the EPC Contract:

> *20.2 If any dispute or difference shall arise between the parties in connection with or arising out of the way Contract or the Works, the parties shall immediately meet to attempt to settle the dispute amicably before the commencement of arbitration. If the parties have not resolved the dispute amicably within 56 (or such longer period as the parties may agree) days of the first notice pursuant to this sub-clause 20.2 the dispute and/or pursuant to subclause 20.3. The fact that the dispute may be pending shall not delay progress of the works only the contractor or the employer from their duties under the contract.*
>
> *20.3 Unless amicably settled in accordance with clause 20.2, any dispute arising from or in connection with this contract shall be finally settled by international arbitration. The arbitral award shall be final and binding between the parties except where there is misconduct on the part of the arbitrator on the*

face of the award. The dispute is deemed to have been declared upon the service by one party on the other party written notice to that effect.

44. Clause 1 of the EPC Contract defines the parties to be First Modular, as employer, and Ennovate, as contractor. The Contract was executed by those two parties. However, First Modular argues that its dispute with Bosai is captured by the arbitration agreement. In support of this proposition, it cites the fact that the EPC Contract includes a payment schedule which includes the terms of payment to Bosai "outside LC terms". It points to the fact that Ennovate is liable under the EPC Contract for any loss or damage to First Modular caused by its sub-contractors, including Bosai. It asserts that since Bosai has sought to exercise the substantive benefit conferred on it under the EPC Contract, it is bound by the arbitration clause, or is estopped from denying that it is so bound.

45. First Modular argues that the arbitration agreement is governed by Nigerian law and that the question of whether Bosai can be joined as a party to the arbitration will ultimately be determined by the arbitrator in Nigeria in accordance with Nigerian law. It argues that in order to obtain interlocutory relief from this Court, it is only necessary to establish that it has an arguable case that Bosai is bound by the arbitration agreement. It was accepted by counsel for First Modular in oral submissions that if Bosai was ultimately *not* joined to the arbitration, then the Respondents might have a strong case for discharging the injunction in the event that it had been granted.

46. I find it difficult to accept that the Applicant only has to establish an arguable case that Bosai is bound by the arbitration agreement. For this Court to grant an Order pursuant to Article 17, it must be satisfied that it has jurisdiction to do so. That jurisdiction is contingent on there being an arbitration or an intended arbitration to which the Order relates. In circumstances where the intended arbitration on which First Modular relies to invoke the jurisdiction of the Court is an intended arbitration against Bosai, it seems to me that the Court must be satisfied that there is such an intended arbitration.

47. This view is reinforced when the analogous jurisdiction to stay proceedings pending arbitration pursuant to Article 8 of the Model Law is considered. The obligation to stay court proceedings will only arise if there is, in fact, an arbitration agreement to which

the parties are bound. There had been some divergence in the authorities on the question of the test to be applied in determining whether to stay proceedings pursuant to Article 8, *i.e.* in determining the question of whether the dispute the subject of the proceedings is the subject of an arbitration agreement, but any such divergence seems to have been resolved. In **Barnmore Demolition and Civil Engineering Ltd and Alandale Logistics Ltd and Others [2010] IEHC 544**, the High Court (Feeney J) expressed the view that the question of whether the dispute between the parties was the subject of an arbitration agreement required "full judicial consideration". In **P. Elliott & Co. Ltd v FCC Elliot Construction Limited [2012] IEHC 361**, however, the High Court (MacEochaidh J) considered the test to be applied in determining whether to stay proceedings and expressed agreement with the approach taken in a Canadian case:

> *49. The Supreme Court of British Colombia gave a decision called Pacific Erosion Control Systems Ltd. v. Western Quality Seeds [2003] BASK 1743, in which the defendant applied for a stay of proceedings in favour of arbitration pursuant to s. 8 of the (Canadian) International Commercial Arbitration Act, and pursuant to the inherent jurisdiction of the court (s. 8 of the Canadian International Commercial Arbitration Act provides for stays on proceedings where a court has referred disputes to arbitration pursuant to Article 8 of the Model Law). The learned trial judge referred to the decision of Hinkson J. in the Court of Appeal in Gulf Canada Resources Ltd. v. Arochen International Ltd. [1992] BCJ 500, which, in admirably clear terms, formulated a test for whether a stay of proceedings should be ordered, as follows:*
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> > "The test formulated is that a stay of proceedings should be ordered where: (i) it is arguable that the subject dispute falls within the terms of the arbitration agreement; and (ii) where it is arguable that a party to the legal proceedings is a party to the arbitration agreement. "
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> *My view is that this is the correct test."*

48. As noted in **The Lisheen Mine v Mullock and Sons (Shipbrokers) Limited [2015] IEHC 50**, the decision in **Barnmore** is not referenced in **P. Elliot**. In **The Lisheen**

Mine, having carried out a careful review of the authorities and the academic literature, the High Court (Cregan J) concluded:

> *"135. Having considered all the above I am of the view that the more appropriate approach for a court to follow is to give full judicial consideration to the issue as to whether there is an arbitration agreement between the parties. I say this for the following reasons:*
>
> *1. Firstly it seems to me to be unsatisfactory that a court having heard the matter fully argued before it, should only consider on a prima facie basis whether an arbitration agreement exists. If it were to do so, then it would be leaving open the essential question of whether there is an arbitration agreement between the parties on a final and conclusive basis. A finding that an arbitration agreement exists on a prima facie basis means that the issue may have to be re-argued before the arbitrator as to whether an arbitration clause exists on a conclusive basis. It is unsatisfactory for the court, for the arbitrator and indeed for the parties themselves. This is entirely wasteful of costs.*
>
> *2. Secondly, if the court only conducts the analysis to a prima facie review level, and it leaves the matter open to the arbitrator, and if the arbitrator decides, that there is or is not an arbitration agreement then that decision itself is open to challenge by way of appeal on a point of law. This means that the courts could be faced with a prospect of having to decide the issue again. It also means that in a worse case scenario the parties might have to fight the issue on no less than three separate occasions. This cannot be in the interests of proper case management.*
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> *3. Thirdly the question of whether there is an arbitration agreement is a question of law which is best decided by a court. The courts in this (and other) jurisdictions are well used to considering whether on the basis of the affidavit evidence before the court there is a valid and concluded contract in existence between parties. Moreover if there are disputed facts on affidavit then oral evidence can be heard before a court to resolve such conflicts of facts.*"

49. In **K & J Townmore Construction Limited v Kildare and Wicklow Education and Training Board [2019] IEHC 666**, the High Court (Barniville J, as he then was) described the position that "full consideration" was required of whether there was an arbitration agreement in being as being "well established". I agree with the views expressed in **Barnmore**, **The Lisheen Mine** and **K & J Townmore**. In determining whether to stay proceedings pursuant to Article 8, a Court must be satisfied as to its jurisdiction to do so and must, therefore, be satisfied that the dispute the subject of the proceedings is the subject of an arbitration agreement, not merely that there is a *prima facie* or arguable case that this is so. By analogy, it seems to me, this Court has jurisdiction to make an Order pursuant to Article 17, only where it is satisfied that the Order sought relates to a dispute which is the subject of an intended arbitration, *i.e.* in this case, that Bosai is bound by the arbitration agreement.

50. However, in circumstances where Bosai's primary argument was that the Applicant had not met the threshold of even a *prima facie* case that Bosai was bound by the arbitration agreement, I propose first to consider whether the Applicant has met the arguability threshold for the purpose of invoking the jurisdiction under Article 17.

51. It does not seem to me that the Applicant has made out that it has a *prima facie* or arguable case that Bosai is bound by the arbitration agreement in the EPC Contract, consequently it has not met the lower threshold it argues for, let alone satisfied the Court that the relief sought falls within the jurisdiction under Article 17. As noted by the Applicant, the question of whether Bosai is bound by the arbitration clause will be determined in accordance with Nigerian law. But the Applicant has adduced *no evidence at all* to suggest that, as a matter of Nigerian law, Bosai are bound by the arbitration clause. In circumstances where Bosai disputes that it is so bound, there is therefore no basis upon which this Court could be satisfied that First Modular had met the threshold of even an arguable case.

52. The most that the Applicant asserts is that, as a matter of Irish law, there is authority for the proposition that an arbitration agreement can apply to a third party where there is sufficient connection between that third party and the parties to the arbitration agreement and therefore it is arguable that Bosai is bound by the arbitration clause in

the EPC Contract. However, the authorities relied on do not support First Modular's proposition that Bosai is bound to arbitrate.

53. Both cases relied on, **P. Elliott** and **Maguire v Motor Services Ltd [2017] IEHC 532**, involved parties seeking to invoke the benefit of an arbitration agreement to which entities with which they had a connection were a party. Both decisions envisage the possibility that this could be done, but in neither case did the Court conclude that the party seeking to do so was entitled to invoke the arbitration agreement. In **Maguire**, the Court (Barrett J) held that a husband could not invoke an arbitration agreement to which his wife was a party notwithstanding the similarity in the disputes in which they were involved. In **P. Elliot**, MacEochaidh J quoted from an English decision (at para. 45):

> *"In the City of London v. Sancheti [2008] EWCA Civ. 1283, [2008] All ER (D) (204), Laurence Collins L.J., having held that it was necessary for an applicant for a stay to be a party to the arbitration agreement said:*
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> > "30. Nor is it sufficient for there to be a mere connection between the claimant and another person who is bound by the arbitration agreement. For Mr. Sancheti, reliance was placed upon a case in which a subsidiary of a party to an arbitration agreement was entitled to a stay because of an arbitration agreement with its parent company. In RusselUclaf v. G.D. Searle & Co. Ltd. [1978] I Lloyd's Rep. 225, 23I-232, Graham J held (in relation to the stay provisions of s. I of the Arbitration Act 1975) that a wholly owned subsidiary company could claim to be a party to an arbitration where the arbitration agreement was between the parent company and a third party on the basis that the parent and subsidiary were 'so closely related' that it could be said that the subsidiary was 'claiming through or under' the parent . ..
> >
> > 34. Russel-Uclaf v. G.D. Searle & Co. Ltd. was a case in which the subsidiary was seeking a stay of court proceedings brought against it and claiming the benefit of an arbitration agreement to which it was not a party. Here, Mr. Sancheti seeks a stay of proceedings brought against him by the Corporation of London and thereby seeks to impose upon the

> corporation the burden of an arbitration agreement to which it is not a party. But even without such a distinction, I do not consider that Russel Uclaf v. G.D. Searle & Co. Ltd. assists Mr. Sancheti. In my judgment, it was wrongly decided on this point and should not be followed. A stay under s. 9 can only be obtained against a party to an arbitration agreement or a person claiming through or under such a party and a mere legal or commercial connection is not sufficient."
>
> *46. The logic of the Sancheti decision and the criticism of the Russel-Uclaf decision are persuasive. Thus in so far as the defendant claims that Irish law permits a party to claim the benefit of an arbitration clause 'through or under' another, I would adopt the approach of Collins LJ and look for more than a bare commercial or legal connection between two entities."*

54. In that case, the Court concluded that the Defendant had not even met the arguability threshold necessary to obtain a stay.

55. There is nothing, in my view, in the relations between First Modular and Bosai, whether by reference to the Pro Forma Invoice, the Letter of Credit or the EPC Contract which suggests an agreement between the parties that the arbitration clause would bind Bosai in relation to any dispute it had with First Modular, still less a dispute about the Letter of Credit. In the absence of evidence that pursuant to Nigerian law Bosai is so bound, in my view, the Applicant has failed to discharge the onus necessary for invoking the jurisdiction of this Court under Article 17.

56. In the course of the *ex parte* application for the interim Order, the Applicant relied on the letter of 29 December 2022 described above, from Ennovate and Bosai, as evidencing that Bosai had indicated an intention to participate in an arbitration. In particular, reliance was placed on the references to separate claims that Ennovate and Bosai would have against First Modular and the letter's statement that "*all associated documentation and proof of POs/payments will be provided during arbitration*." First Modular now relies on the same letter to argue that Bosai is estopped from denying that it is bound by the arbitration agreement.

57. Ennovate and, in particular, Bosai have criticised the Applicant's characterisation of this letter in the course of the *ex parte* application. In written submissions, it was argued that the Applicant's assertion that the letter appeared "to commit both parties to engagement in the arbitral process" amounted to material non-disclosure. In my view, the complaint is overstated. Although, in light of the affidavits filed by Bosai and a detailed examination of all the documents, it is clear that the letter does not commit Bosai to an arbitral process, on a fair reading of the letter, the Applicant was entitled to argue that it provided evidence in support of the Applicant's contention that there were arbitration proceedings pending between it and Bosai. In circumstances where the letter itself was opened to the Court during the *ex parte* application, there can be no question of non-disclosure.

58. However, in the context of this interlocutory application, it does not seem to me that the letter could be said to "commit" Bosai to arbitration, still less that it could ground an estoppel preventing Bosai denying an arbitration agreement which does not appear to exist. No authority has been identified for the creation of an arbitration agreement by estoppel. There is some authority for the proposition that a party can be estopped from relying on an arbitration agreement, but only in "clear" cases. In **Furey v Lurgan-ville Construction Co. Ltd. [2012] 4 IR 655**, the Supreme Court (Clarke J, as he then was) posited the following high threshold (at pp. 667-8):

> *"I agree that it is possible that a party, otherwise entitled to rely on an arbitration clause, may, by conduct, create an estoppel which prevents that party from being able to continue to place reliance on an entitlement to have the matter referred to arbitration. It follows that it is possible, in theory, that there may be cases where, although no step (within the meaning of s.5 of the 1980 Act) has been taken in the proceedings by a defendant, nonetheless the defendant has, by conduct, become estopped from relying on an arbitration clause. However, it seems to me that counsel for Lurgan-ville was correct when she argued that it is necessary in those circumstances that there be a clear unequivocal promise or representation to the effect that the arbitration clause would not be relied on and also that the plaintiff had acted on the basis of that representation."*

59. Even if there is the converse possibility to that identified by the Supreme Court – that a party can be estopped by representation from denying that it was bound to arbitrate – there is nothing approaching the type of clear, unequivocal statement in this case which could give rise to an estoppel.

60. In the circumstances, the injunction sought is not, in my view an interim measure within the meaning of Article 17 since there is no underlying arbitration or obligation to enter arbitration between the parties to whom the injunction is directed.

61. In light of that conclusion, it is not strictly necessary to consider whether First Modular had met the threshold for the grant of an injunction. However, lest I am incorrect about the scope of this Court's jurisdiction, I propose for completeness to consider whether, in the event that this was an injunction which fell within the Court's jurisdiction under Article 17 of the Model Law, this would be an appropriate case to grant the injunction.

Letters of Credit

62. Before considering whether this would have been an appropriate case for an injunction but for my conclusion on the first issue, it is necessary to examine the nature of a letter of credit. This was addressed by the High Court (Butler J) in **Construgomes and Anor v Dragados Ireland Ltd and Ors [2021] IEHC 79**:

> *"[O]n demand bonds of this nature are widely used in a number of economic sectors, including construction, as a form of cash guarantee which facilitates a range of contractual relationships. The courts have recognised that placing any impediment on payment of foot of such bond is potentially disruptive of these contractual relationships which are essential to international commerce. This is described in a passage of the judgment of Sir John Donaldson M.R. in* Bolivinter Oil SA v. Chase Manhattan [*1984] 1 All ER 351 which was cited with approval by Laffoy J. in* Fraser v. Great Gas Petroleum (Ireland) Ltd *[2012] IEHC 523:-*
>
> > "The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee,

> the customer is seeking to take advantage of this unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined."

Similar views were expressed by Keane J. in Hibernia Meats Ltd v. Ministere de L'Agriculture (Unreported, Keane J., 16th February, 1984) relying on statements of Kerr J. in R.D. Harbottle (Mercantile) Ltd v. National Westminster Bank [1978] QB 146. Having refused an interlocutory injunction, Keane J. commented:-

> "One can readily understand the frustration which the sellers may now feel, since under the terms of the contract it may be necessary for them to pursue whatever remedy is open to them in the Algerian courts. It must be said, however, on the other side of the coin, that business firms who enter into contracts of this nature requiring the provision of unconditional guarantees by banks take the risk that they may have no remedy against their overseas customers other than an action in the foreign tribunal; and no remedy at all against the bank because of the unconditional nature of the guarantee."

63. Having regard to the nature of letters of credit, the Courts have made clear that the circumstances in which a Court may intervene to restrain payment on foot of such a bond are limited. In **Construgomes**, Butler J, having examined the relevant authorities, made clear that the *only* ground upon which an injunction could be granted was in the case of fraud:

> *"27. It seems to me, on the basis of this case law that the legal test applicable to the granting of an injunction to restrain payment on foot of a letter of credit or on demand bond is well settled in Irish law. The initial criteria normally*

applicable to an interlocutory injunction, namely, whether there is a fair question to be tried, is not the appropriate test as that would undoubtedly lead to the grant of an injunction in many instances in circumstances which would undermine the fundamental character of the bond which has been freely entered into between the parties as part of the terms of the contract between them. Instead, a higher test of "seriously arguable" applies. The courts have also expanded upon what is meant by "seriously arguable" and the judgments both in this jurisdiction and in the neighbouring jurisdiction have made it clear that in the particular context this is actually a very high threshold. As the only ground upon which such an injunction might be granted has been identified as fraud, the case law indicates that the fraud relied on must be clear, obvious or established."

64. The Court also addressed the difficulty in meeting a threshold of clear, obvious or established fraud in the context of an interlocutory application:

> *"As it can be difficult if not impossible for one party to prove the state of knowledge of the other, it necessarily follows that it must be possible to establish fraud by inference. However, the threshold where interlocutory relief is sought to restrain payment in circumstances such as these, is not merely that there be a seriously arguable inference, but it must be seriously arguable that the only realistic inference to be drawn is one of fraud. In my view, the latter is a more stringent test than the former."*

65. The Applicant advances arguments regarding the particular wording of the Letter of Credit in this case to the effect that it is 'less' unconditional than the type of letter of credit to which the case law analysed in **Construgomes** was addressed. It is also suggested, somewhat tentatively, that by reference to the threshold for the grant of interim measures set out in Article 17A of the Model Law, the threshold for the grant of an interim measure in this case should simply be an arguable case. Neither argument is well made in my view and to have obtained a remedy here, it would, in my view, have been necessary for the Applicant to meet the threshold for relief identified in **Construgomes.**

Injunction to restrain a letter of credit

66. In considering whether this would be an appropriate case to grant an injunction, it is first necessary to establish the threshold applicable. In the ordinary course, an application for an injunction would be determined by reference to ordinary **Campus Oil v The Minister for Industry (No. 2) [1983] IR 88** principles, as refined in the recent decision of **Merck, Sharp & Dohme v Clonmel Healthcare [2019] IEHC 65, [2020] 2 IR 1**. However, as set out above, if the application is to restrain the operation of a letter of credit, a far higher threshold is required to be met: it is necessary for the applicant to show that it is seriously arguable that the only reasonable inference is that the attempt to secure payment on foot of the letter of credit is fraudulent. Fraudulent in this case means that the party claiming payment has no honest belief that it is entitled to such payment.

67. The Applicant contends that the lower threshold applies because, in effect, the particular terms of the Letter of Credit at issue here meant that Citibank's obligations were more extensive than required by a 'normal' letter of credit. In particular, the Applicant contends that the Letter of Credit is not autonomous and is not independent of the underlying transaction. It argues that Citibank was under an obligation to determine whether the goods supplied were the same as the goods described in the Pro Forma Invoice.

68. The basis for the Applicant's argument is that the Field 45A of the Letter of Credit describes the goods the subject of the Letter by reference to the Pro Forma Invoice dated 5 October 2021.

69. As noted above, the Pro Forma Invoice contained a schedule listing the 31 accessories forming part of the Gas Processing Plant. As a consequence, First Modular argues that Citibank could not have been satisfied that the terms of the Letter of Credit had been met without, in addition to examining whether the conditions for payment set out in the Letter of Credit had been met, also examining whether what was being shipped matched the description in the Pro Forma Invoice.

70. The parties are agreed that the Letter of Credit is subject to the application of the Uniform Customs and Practice for Documentary Credits (**"UCP 600"**) which are a set

of uniform rules governing the use of letters of credit. The Applicant acknowledges that the rules expressly *discourage* incorporating references to contractual documents in letters of credit, but argue that, since that hasn't occurred here, the Pro Forma Invoice has been incorporated into the Letter of Credit and therefore the question of whether there has been compliance with the terms of the Letter of Credit requires some consideration of whether there has been compliance with the terms of the contract.

71. The Applicant's argument is based, in my view, on a selective reading of UCP 600, and in particular, Articles 4 and 5 thereof:

> *Article 4*
>
> *Credits v Contracts*
>
> *a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate, or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary. A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.*
> *b. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like.*
>
> *Article 5*
>
> *Documents v. Goods, Services or Performance*
>
> *Banks deal with documents and not with goods, services or performance to which the documents may relate.*

72. The Applicant relies on Article 4b, but Article 4b must be read in light of Article 4a. Even if contractual documents are referenced in a letter of credit, the letter of credit remains autonomous from that contract; a bank is no way concerned with the contract. The stipulation in Article 4b discouraging references to contractual documents in a letter of credit is clearly intended to ensure clarity by avoiding precisely the type of misplaced argument being advanced by the Applicant in this case. In circumstances where it is agreed that the Letter of Credit is subject to UCP 600, it is subject to the stipulation in Article 4a that inclusion of a reference to the Pro Forma Invoice in Field 45A does not affect the Bank's obligation.

73. For those reasons, there is nothing in the terms of the Letter of Credit which alters its fundamental nature, as a guarantee that funds are available and will be paid if the beneficiary provides the documentation specified in the Letter.

74. Nor can I see any merit in the Applicant's argument that, since this is an injunction sought in aid of an international arbitration, a lower threshold should apply than if this were an application to restrain reliance on a letter of credit in domestic proceedings. Article 17A of the Model Law does lay down minimum thresholds for the grant of interim measures, but it does not preclude the application of different standards depending on the nature of the interim measure sought. The threshold for the grant of an injunction to restrain payment on foot of a letter of credit is derived from case law and reflects the nature of letters of credit, the very purpose of which is to facilitate trade and, in particular, international trade. It would be entirely illogical, in my view, to apply a standard which undermines the utility of letters of credit in facilitating international trade simply because the relief was being sought in the context of an international arbitration.

75. I am satisfied, therefore, that the appropriate threshold for the grant of an injunction in this case is that identified in **Construgomes**: a seriously arguable case that the only reasonable inference that the claim for payment on foot of the letter of credit is fraudulent.

Is the claim made on the Letter of Credit a clear and obvious fraud?

76. One unusual feature of this application is that the most compelling evidence in favour of fraud has only become apparent since the granting of the *ex parte* Order, or at least subsequent to Citibank rejecting First Modular's objections to the claim: the goods for which payment has been claimed cannot, according to First Modular, be located.

77. There was some debate at the hearing of the application as to whether the Court should assess the question of whether the claim is fraudulent based on the information available to Citibank at the time it confirmed that payment would be made on the Letter of Credit or based on the information available to the Court at the hearing of the application. In circumstances where this Court is concerned with whether to grant an injunction in aid of arbitration proceedings which are pending, it seems to me that there is no justification for confining the inquiry to matters pre-dating the initial application to the Court. In those circumstances, it is not necessary to consider whether Citibank was on notice of the fraud such that it should have refused payment under the Letter of Credit. What matters is whether, in light of the evidence now before this Court, the only reasonable inference is fraud.

78. In considering whether the only reasonable inference which can be drawn *now* is that Bosai's claim on the Letter of Credit is fraudulent (or that it is seriously arguable that that is so), there are factors other than the 'missing' cargo which I consider have a particular relevance.

79. The first is that, other than the issues arising from the shipment of the CNG cylinders and the claim on the Letter of Credit, First Modular has not identified any basis for criticising Bosai or impugning its behaviour. First Modular was clearly happy to execute the EPC Contract in the knowledge, indeed on the basis, that Bosai would be the sub-contractor providing the actual gas plant to be constructed by Ennovate in Nigeria. Moreover, First Modular was prepared to provide a Letter of Credit for the benefit of Bosai, effectively guaranteeing it payment for performance of its sub-contractual obligations. First Modular was clearly of the view that Bosai and Ennovate were capable of performing their contractual and sub-contractual obligations. Nothing has been identified by First Modular in the course of this application to suggest that Bosai is anything other than what it purports to be. In this regard, Mr He, in his affidavit on behalf of Bosai, describes Bosai as a Chinese company that provides engineering

and installation of liquified natural gas plants. He avers that it has conducted engineering and installation works on numerous gas plants in the Asia-Pacific region, with a number of global accreditations and ISO accreditations. He says that he has been the CEO since 2018 and oversees teams of engineers and technicians.

80. No other allegations had been made of any breaches of Bosai's obligations prior to the issues arising with this shipment and no other breaches are identified in the Notice of Arbitration. The direction to stay procurement in May 2022 and the purported cancellation of the contract in September 2022 appear to have been referable to difficulties which First Modular was experiencing with third parties, not with Ennovate or Bosai.

81. First Modular purported to cancel the EPC Contract in September 2022, but do not appear to have done so in accordance with the terms of that contract. It then proceeded to ignore communications from Ennovate. It also unilaterally sought to cancel the Letter of Credit.

82. None of this suggests that Bosai is a company which was likely to engage in the type of fraudulent behaviour that First Modular alleges here.

83. The first action of Bosai identified by First Modular which might give rise to some criticism is its failure to provide advance notice of the shipping of the goods. This was, it is alleged, in breach of the terms of shipment agreed in the Letter of Credit, CFR Incoterms 2010. Bosai argues that any failure by it in this regard must be seen in the context of First Modular "ghosting" Ennovate and Bosai following its verbal cancellation of the EPC Contract. Although there may be some merit in First Modular's arguments that Bosai's has not complied with Incoterms 2010 by failing to give prior notification of the shipment, this falls far short of giving rise to an inference of fraud.

84. The Notice of Dispute dated 1 December 2022 refers to a number of issues regarding the shipment in respect of which payment was claimed, and this included an allegation of fraud. But the fraud alleged is that Bosai knowingly dispatched goods which it knew were not in compliance with what was detailed in the Pro Forma Invoice. But that fact is disputed. Moreover, Bosai and Ennovate have both sworn affidavits averring to the fact that First Modular had requested them to procure off the shelf parts as quickly as

they could and that Bosai had procured the CNG cylinders on foot of that instruction. First Modular has not denied giving such an instruction. It says that CNG cylinders and CNG skids are not the same thing, and exhibits photographs of both, but no engineering evidence is adduced to explain that CNG cylinders are not an accessory to a CNG gas plant. It appears that Citibank took expert advice when addressing the complaint that the goods did not meet the description in the Letter of Credit and were satisfied that CNG cylinders could be regarded as an accessory to a CNG gas plant. To the extent that there is some dispute regarding whether what was purportedly shipped met with the description of the goods ordered, that does not give rise, in my view, to a necessary inference of fraud.

85. In the circumstances, based on the allegation of fraud made at the time of the Notice of Dispute, there is no basis for arguing that the only reasonable inference is that there has been a clear and obvious fraud. The more difficult question is whether the apparent failure of delivery of the goods changes the inference which must be drawn. In my view, it does not.

86. Bosai has sworn affidavits to the effect that it procured the goods as long lead items on foot of First Modular's instructions. It has averred that the goods were loaded on trucks at its factory and sent for shipment. Strictly speaking this latter averment is hearsay evidence, but admissible on an interlocutory application. Ennovate and Bosai have both sworn affidavits entirely consistent with each other regarding their engagement with First Modular. Ennovate has supported Bosai in its defence of the allegation of fraud. First Modular has made clear that, for the purpose of this application, and notwithstanding the allegation contained in the Notice of Arbitration quoted at paragraph 28 above, no allegation of fraud is made against Ennovate. There is, of course, evidence – the Bill of Lading – that the goods were shipped. Bosai provided all the necessary documentation to persuade Citibank to make the payment requested on the Letter of Credit.

87. Although First Modular avers that it has not located the goods and there is documentary evidence – the correspondence from DHL and the Nigerian Customs Service – which could be consistent with the alleged fraud, it does not seem to me that the only reasonable inference which can be drawn is that Bosai made a claim on foot of the

Letter of Credit without sending any goods at all. There is nothing in the history of its conduct with First Modular which would suggest the likelihood of so audacious a fraud, nor is it consistent with making a claim in respect of goods not listed in the list of accessories in the Pro Forma Invoice: if nothing is being sent at all, and the Bill of Lading is only a pretence, why create an unnecessary obstacle by 'pretending' to send anything other than goods which precisely correspond with the Pro Forma Invoice? There are potentially innocent explanations for the failed delivery of the CNG cylinders. It is not necessary to speculate on what those might be, but one obvious possible explanation is that the goods were mistakenly unloaded somewhere other than Apapa Port. In light of the controversy on affidavit and the clear averments on behalf of Bosai, fully supported by Ennovate, as Laffoy J put the matter in **Fraser v Great Gas Petroleum (Ireland) Ltd [2012] IEHC 523**, *"it is not possible to infer that [the Respondents] could not honestly believe at this point in time in the validity [of the] demand."* To conclude otherwise would require me to reject the sworn evidence of Mr He, and also that of Mr Saleh, as lies. That would be wholly inappropriate on an interlocutory application conducted on affidavit only.

88. In the circumstances, I am not satisfied that the Applicant has met the necessary threshold for seeking injunctive relief and would, therefore, have refused the injunction on this ground even had the Court's jurisdiction pursuant to Article 17 of the Model Law been properly engaged. In **Construgomes**, the Court determined that it was not necessary to consider the question of the balance of convenience having concluded that there was no clear case of fraud such as to justify the grant of an injunction. The Court noted that there was a divergence between the Irish and English case law on the approach to the balance of convenience in these types of cases and that a resolution of any such differences should await a case in which they would be determinative. Other than noting that the Applicant has not set out any basis here for arguing that damages are not an adequate remedy other than an asserted difficulty in recovering damages from a Chinese company, I respectfully adopt the same approach here.

Conclusion

89. In light of the above, I propose making an Order refusing the Applicant's application for an interlocutory Order and vacating the interim Order previously made. My

provisional view is that the Respondents, having been successful in their opposition to the injunction, are entitled to their costs as against the Applicant in the Applicant's motions.

90. It does not seem necessary to make any Order on foot of the second and third Respondent's motion, and I propose to make no Order on that motion.

91. Should any party wish to contend for a different form of Order than that proposed, that party should file written submissions in the Central Office of the High Court within three weeks days of today's date. A copy of the written submissions should be sent to the other parties and to the Registrar. The other parties will then have a further two weeks within which to file written submissions in reply. I will list the matter for the purpose of making final Orders at 10.30 am on 13 October 2023.