Neutral Citation Number: [2023] EWHC 1165 (Ch)

Claim No. FL-2023-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)

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

Date: 12 May 2023

Before:

MR. JUSTICE MICHAEL GREEN

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Between:

FORTENOVA GRUPA D.D.
(AS A REPRESENTATIVE OF THE INTERESTS OF THE FORTENOVA GROUP COMPANIES, PURSUANT TO CPR 19.8)

Claimants

- and -

(1) LLC SHUSHARY HOLDING
(2) KROLL AGENCY SERVICES LIMITED
(3) KROLL TRUSTEE SERVICES LIMITED
(4) KROLL ISSUER SERVICES LIMITED
(5) MP 2019 PGU HOLDINGS LUX SARL (AS A REPRESENTATIVE OF THE INTERESTS OF THE HPS HOLDERS, PURSUANT TO CPR 19.8)
(6) BANQUE PICTET & CIE SA

Defendants

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MR. STEPHEN ROBINS KC and **MR. RYAN PERKINS** (instructed by **Akin Gump LLP**) appeared for the **Claimant.**
MS. CLARE SIBSON KC (instructed by **PCB Byrne**) appeared for the **First Defendant.**
MR. BRIAN KENNELLY KC (instructed by **Sidley Austin LLP**) appeared for the **Second, Third** and **Fourth Defendants.**
THE FIFTH DEFENDANT was not present and was not represented.
MR. EDWARD MEULI (instructed by **Morgan, Lewis & Bockius LLP**) appeared for the **Sixth Defendant.**

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APPROVED JUDGMENT

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MR. JUSTICE MICHAEL GREEN:

1. This is the expedited trial of a claim brought by Fortenova Grupa d.d., which I will call "the Company", under Part 8 of the CPR. The trial was expedited by order of Edwin Johnson J on 17th March 2023 for reasons that I will explain. The company is represented before me today by Mr. Stephen Robins KC, leading Mr. Ryan Perkins, and I have had the benefit of their very helpful skeleton argument supplemented by short oral submissions.

2. The first defendant to the claim is LLC Shushary Holding, which I will call "Shushary". It is a subsidiary of a Russian bank called VTB Bank PJSC ("VTB"). Because of the war in Ukraine, VTB and its subsidiaries (including Shushary) have been designated as being subject to sanctions under the various sanctions legislations in jurisdictions, including the UK, the US and the EU. As well as being highly relevant to the relief being sought, indeed it is the reason for the relief being sought, it has also meant that Shushary has had difficulty in instructing lawyers on its behalf.

3. On 5th April 2023, by one of its directors, a Mr. Egor Efimikov, Shushary applied to Zacaroli J to delay this trial, but that application was refused. I am pleased to say that Shushary has managed to obtain legal representation, both by solicitors and counsel. I assume this was through the extension of its general licence from OFSI (Office of Financial Sanctions Implementation) to allow it to pay legal fees in this jurisdiction. As a result, it has put in a witness statement from Ms. Elizaveta Suleymanova. Ms. Clare Sibson KC has appeared for it and she has made realistic and practical brief submissions on its behalf. That has also been of assistance to me.

4. The claim concerns loan notes with a face value, excluding interest, of approximately €400 million, which were issued by the Company and are held by Shushary. The notes are governed by English law and are subject to the exclusive jurisdiction of the English court. They are also secured over various assets owned by the Company and its associates. Because of a proposed refinancing, the Company wishes to redeem the notes held by Shushary before their maturity date in September 2023. The trouble is that because of the sanctions in place against VTB and Shushary, the sums required to redeem the notes cannot be paid to or for the benefit of Shushary. Accordingly, the Company is asking for an order that moneys be paid into court and it would then be for Shushary to apply for the moneys to be released from there, when and if sanctions are lifted. The Company also seeks a declaration that it is not liable for default interest on the notes because it has been unable to pay interest to Shushary in accordance with the Subscription Agreement while the sanctions have been in place.

5. The matter seems to me to be relatively straightforward as a way of dealing with the unfortunate situation in which the Company finds itself. It is not strenuously opposed by Shushary, recognising the difficult position that all parties are in as a result of the sanctions. Ms. Sibson has pointed to the fact that Shushary would obviously prefer payment to be made to a blocked account in its name within the EU, or indeed in rubles to a Russian account, but no suitable account or blocked account in the EU has been identified and the latter alternative of payment to Russia would clearly be unlawful and unacceptable. She does also tentatively, if I can put it that way, oppose the default interest declaration.

6. Before dealing with this in more detail, I should also mention the other parties. The second to fourth defendants are all members of the Kroll Group and are the administrative parties to the loan notes being the security agent, the payment agent and the calculation agent. They do not oppose the relief being granted in the terms sought so long as their rights to avoid breaching sanctions or the law are respected. Mr. Brian Kennelly KC has represented them before me today. The fifth defendant is the representative of the holders of the majority of the notes, that is 61.7% of them or approximately €651 million. I will call them "the HPS holders". The representation order is sought pursuant to CPR 19.8(1). The sixth defendant, Banque Pictet & Cie SA, holds the balance of 0.4% of the notes. It is represented before me today, as I understand it, by Mr. Meuli, but no submissions have been made on its behalf. Both the fifth and the sixth defendants were joined to these proceedings in order that they should be bound by the order.

7. I will give a short background to the claim and I should say that I have read the witness statements of Mr. Fabris Peruško and Mr. Richard Hornshaw, on behalf of the Company, and I have already referred to the witness statement of Ms. Suleymanova.

8. The Company is part of the Fortenova group of companies, which is a major food producer in Central and Southeastern Europe. It employs approximately 45,000 people and it is the largest grocery retailer in Croatia and Slovenia and the second largest grocery retailer in Serbia, Bosnia and Herzegovina and Montenegro. The group is the largest group of private companies in Croatia, accounting for the source of more than 3.5% of the Croatian national budget.

9. The Subscription Agreement by which the notes were issued was originally dated 29th August 2019, but it has been amended from time to time. The Company issued a total of €1.157 billion worth of senior secured floating rate notes. As I have said, the Subscription Agreement is governed by English law and it is subject to the exclusive jurisdiction of the English court. That is provided for in clauses 42 and 43 of the Subscription Agreement. The final contractual maturity date of the notes is 6th September 2023, pursuant to clause 6.1(a) of the Subscription Agreement.

10. Pursuant to clause 7.3(a) of the Subscription Agreement, the Company is entitled to redeem the notes voluntarily, in whole or in part, prior to the final contractual maturity date "at a price equal to 100% of their principal amount, together with interest accrued to such date, and any amount due, pursuant to clause 17.2 (the tranche A redemption fee) or 17.3 (the tranche C redemption fee)."

11. As I have said, as regards the current holders of the notes, Shushary holds nearly €400 million, which is approximately 37.9% of the notes. The HPS holders, represented by the fifth defendant, hold €651 odd million, which is 61.7% of the notes. The remaining €4.5 million (approximately 0.4%) is held by the sixth defendant.

12. Pursuant to clauses 2.3(b)-(d)(i) of the Payment Direction Letter dated 29th September 2021, the Company must pay any sums due in respect of the Shushary notes to certain bank accounts with VTB and VTB Bank Europe SE in the names of Shushary and VTB, and these I will call "the VTB accounts". In accordance with the terms of the Subscription Agreement, the Company and various other companies in the Fortenova Group granted security in respect of the notes including (1) pledges over the shares of certain of the company's subsidiaries; (2) intercompany receivables

pledges; (3) real estate pledges; (4) floating charges; (5) promissory notes; and (6) mortgages. That security is subject to the terms of the Subordination Agreement, dated 29th August 2019, and that too is governed by English law.

13. The Company wishes to conduct a refinancing exercise. In order to enable the refinancing of the notes, the Company wishes to exercise its contractual right to redeem the notes under clause 7.3(a) of the Subscription Agreement. During 2021 therefore, the Company began exploring options for refinancing the notes. Amongst other things, the Company contacted various banks to gauge interest in participating in the refinancing. In addition, the Company commenced discussions in September 2021 with each of the ratings agencies (S&P, Moody's and Fitch) to explore a rating of the Group to assist with accessing the bond markets.

14. In January 2022, the Company agreed with UniCredit and Erste Bank that they would act as lead banks with respect to a syndication proposal to refinance the existing notes in full. That proposal assumed that the providers of the refinancing would benefit from first-ranking security over certain of the Group assets. UniCredit and Erste Bank began working on a commercial term sheet and proposal with a view to approaching other interested lenders to participate in the refinancing. In February 2022, meetings were scheduled with Erste Bank to discuss progress on the syndication process and indicative commercial terms for the refinancing of the notes.

15. However, on 24th February 2022, Russia invaded Ukraine. In the light of this, the UK, the US and the EU imposed sanctions in respect of Russian individuals and entities. VTB were specifically designated as a target of such sanctions. As a result of the VTB sanctions, it became unlawful for the Company to make any payments to Shushary or VTB. As a result, the Company cannot presently redeem the Shushary notes despite being contractually entitled to do so.

16. Mr. Robins helpfully provided a summary of the applicable sanction regimes in his skeleton argument and it is as follows.

(a) UK sanctions. On 24th February 2022, pursuant to the Russia (Sanctions) (EU Exit) Regulations 2019, VTB became a designated entity and subject to an asset freeze under UK blocking sanctions, which extends to its subsidiaries, including Shushary. The UK sanctions prevent a UK person from, amongst other things, dealing with funds or economic resources owned, held or controlled by a UK designated person, which includes making funds or economic resources available to subsidiaries of a UK designated person.

(b) US sanctions. On 24th February 2022, pursuant to an Executive Order 14024, the US Government designated VTB and its subsidiaries as Specially Designated Nationals and Blocked Persons ("SDNs"). VTB Bank and Shushary became SDNs and subject to an asset freeze under US blocking sanctions given VTB's more than 50% ownership of these two entities. Executive Order 14024 prohibits, amongst other things, the making or receiving of any contribution or provision of funds, goods or services by, to, or for the benefit of an SDN.

(c) EU sanctions. On 8th April 2022, pursuant to Council Regulation EU 269/2014 of 17th March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, as

amended by Council Regulation 2022/580, VTB became a designated entity and subject to an asset freeze under EU blocking sanctions, which extends to its subsidiaries, including Shushary. The EU sanctions prevent, amongst other things, dealing with funds and economic resources belonging to, owned, held or controlled by an EU designated person, which includes making funds or economic resources available to subsidiaries of a UK designated person. Likewise, no funds or economic resources shall be made available directly or indirectly to, or for the benefit of, an EU designated person.

17. Further, on 3rd June 2022, the EU introduced Article 5m of Regulation EU 833/2014, as amended, which I will call "Article 5m", to prohibit the provision of trustee services and services to any similar legal arrangement by EU persons where a beneficiary or trustor includes any Russian nationals or natural persons residing in Russia, or legal persons, entities or bodies established in Russia, and any other persons referred to in Article 5m. This extends to all Russian nationals or persons residing in Russia and not just those subject to specific or blocking sanctions measures.

18. As Mr. Kennelly pointed out in his skeleton argument, it may be that a movement of frozen funds to another account that is similarly frozen, such as into court, would be permissible under the EU sanctions and could be effected without a licence, but reassurance may be needed in this respect from the respective authorities. Clearly, it is essential for the Company to comply with the sanctions legislation of the UK, the US and the EU.

19. The VTB sanctions caused the planned refinancing to become impossible. As I have already noted, one of the main practical consequences of the VTB sanctions for the Company is that it is unable to make payments under the Shushary notes to the VTB accounts. That is because payments to or making financial resources available to Shushary and VTB as SDNs or blocked entities would contravene the VTB sanctions. In practical terms the inability of the Company to make any payment to Shushary or VTB meant that the Company became unable to proceed with that refinancing.

20. The scheduled meetings with Erste Bank never occurred and the term sheet was never provided to the Company. This state of affairs is causing serious prejudice: first of all, because if the Company is unable to refinance the notes, it will be unable to repay them on their maturity date and it will also be unable to procure the release of the security. This would have serious consequences for the group, including the possibility of enforcement action by the third defendant, Kroll Trustee Services Limited, on the instructions of the HPS holders.

21. Secondly, the Company's statutory audit deadline is 30th June 2023. If the Company is unable to refinance the notes by that date, or at least have a binding commitment to refinance the notes by that date, the total principal amount of the notes will fall to be classified as a short term liability of the Company. This would result in a going concern qualification in the audit report which, as Mr. Peruško explained in his witness statement, could in turn result in the cancellation of the guaranteed financing lines and credit facilities as well as a change to the terms of supplier contracts requiring immediate payment for services and goods throughout the Fortenova group, which would have an adverse effect on its business given it is before the typical peak of its cash flow cycle in the summer.

22. Since February 2022 the Company has been exploring various other options which might enable it to finance the existing notes, including with local Croatian banks who were not willing to participate in negotiations until the Company had identified a means of redeeming the Shushary notes. More recently, the Company and HPS have been in discussions regarding terms to refinance the notes in full. Key economic terms have been agreed, however HPS has made it clear that any refinancing will be conditional on the court making an order permitting the Company to pay the principal and interest due on the Shushary notes into court to redeem the Shushary notes.

23. That is therefore the purpose of the claim, to enable the Shushary notes to be redeemed and for the security in Shushary's favour to be released so that the refinancing can proceed and the disastrous effects of a delay, such as qualified accounts, being avoided.

24. The Company brings the claim on its own behalf but also on behalf of the companies within the Fortenova group that have granted security for the notes, and it does so pursuant to CPR 19.8(1), and that seems to me to be a sensible way to have proceeded.

25. The urgency of the matter was recognised by both Edwin Johnson J in expediting the trial and Zacaroli J in refusing an adjournment. They were concerned there would be real prejudice to the Company if this was not resolved soon and certainly well before the accounting year end at the end of June.

26. It is important to recognise that the Company must comply with the sanctions legislation in the UK, the US and the EU. That is why it needs licences to pay the Shushary money into court and the court order itself is not sufficient protection for it and its advisers. That is because, first of all, in relation to the UK a number of relevant persons including but not limited to Kroll, many of the companies legal representatives and certain of the HPS holders are UK persons and must therefore obey any applicable UK sanctions legislation. Also, the notes themselves are governed by English law.

27. As regards the US, the OFAC (the Office of Foreign Assets Control) a licence is necessary to enable a number of US persons which also includes Kroll, the companies, some Company legal representatives and certain of the HPS holders to be involved in the implementation of the proposed refinancing transaction.

28. As for the EU, the need to comply with EU sanctions legislation is self-evident given that the group is based in the EU.

29. Therefore, the Company has sought certain licences from the sanctions authorities in the UK, the US and the EU. In particular, in April 2022 the Company applied for specific licences to enable the winding down of the group's relationship with Shushary from each of OFSI, OFAC, and the Ministry of Finance of the Republic of Croatia on behalf of the EU. On 21st June 2022, following the introduction of Article 5m, the second to fourth defendants and the Company requested the expedited issuance of a licence to authorise Kroll and any other person appointed by or pursuant to the instructions of the Company or the holders, as defined in the Subscription Agreement, to continue to act as trustee and security agent in respect of the notes

while the notes remain in issuance and to allow it to transfer those roles as necessary (that is called the 5m Licence).

30. To date the following licences have been issued: one, on 12th July 2022 the OFAC licence was issued and it expires on 31st July 2023; secondly, on 31st August 2022, the 5m Licence was issued; and thirdly, on 7th October the EU licence was issued. However, the EU licence expired two days later on 9th October 2022 along with other similar EU licences issued under Article 6 of Regulation 269/2014.

31. Given the expiry of the EU licence, the Company submitted a new licence application to the Croatian Ministry on 8th December 2022. Mr. Robins said in his skeleton argument that there is no reason why this licence should be refused to the extent that it is required at all. As was explained in paragraph 14.8 of Mr. Peruško's second witness statement, and Mr. Kennelly also referred to this in his skeleton argument, previous guidance by the EU Commission suggests that a change of the character of frozen funds may not be in breach of an asset freeze provided that the change does not enable the funds to be accessed or used by anyone and that the exchanged assets remained frozen while the relevant sanctions are in force.

32. On 19th December 2022, OFSI issued a pre-licence which authorises the relevant UK persons to take all steps necessary and desirable to wind down the relationship with Shushary, including relevantly the commencement of these proceedings without the issuance of a formal licence. This OFSI pre-licence does not authorise any payment, including the actual payment into the court funds office bank account, but instead requires the Company to revert to OFSI once it is ready to make the payment; which will be up to €500 million, including prepayment fees and interest, and to provide OFSI with the relevant bank account details, the exact amount of funds to be paid and answer any other questions OFSI may have.

33. In addition, on 28th March 2023 OFSI issued a new general licence which UK persons involved in the transactions should be able to rely upon to pay the Shushary moneys into court and which may render a specific licence issued further to the OFSI pre-licence unnecessary.

34. Mr. Robins submitted that the combination of the court order and the relevant licences will enable the Company to redeem the Shushary notes by paying the Shushary moneys into court.

35. In his skeleton argument Mr. Robins referred to a number of authorities as to the origins and nature of the redemption action, which is essentially the enforcement by a court of equity of a mortgagor's or chargor's rights to redeem their security. Those authorities emphasise that the policy of courts of equity is always to ensure that there is nothing to prevent redemption: there should be no clogs (as it is put) on the equity of redemption; there is a right to redeem even after the contractual time for redeeming has passed; and there is a right to relief from forfeiture.

36. There is no dispute as to these principles and they are clearly established. The court will fashion a remedy to ensure that a debtor is able to rid their property of encumbrances and that will include directing that security be released upon payment into court of the sums required to redeem (see, for instance, what the Master of the Rolls, Sir John Romilly said in *Lysaght v Westmacott* [1864] 33 B417; and, more

contemporaneously, Males J (as he then was) in *St. Vincent European General Partner Limited v Robinson* [2018] EWHC 1230 (Comm)).

37. In the present case, due to the VTB sanctions, it is not lawful for the Company to make payment to the VTB accounts in accordance with the terms of the Subscription Agreement and the Payment Direction Letter. As a result the Company is prevented from exercising its right to redeem the Shushary notes and is unable to obtain the release of the security. Accordingly, the Company is seeking an order permitting it to pay the Shushary moneys into court to redeem the Shushary notes in the event of the Company exercising its right of redemption under clause 7.3 of the Subscription Agreement. That seems to me to be a perfectly proper and sensible route for the Company to take in the circumstances in which it finds itself.

38. As already explained, there is urgency to this application, because it is most unlikely that sanctions will be lifted soon and, without the relief, the Company and the Fortenova Group face a real and increasing risk to their financial stability. The order provides for Shushary to have liberty to apply for the Shushary moneys held by the court and any interest accruing on the Shushary moneys in the court funds account to be paid to it or to such other person as it may nominate. Such application to be supported by evidence showing that such payment would be lawful and not in contravention of any applicable sanctions regime. This would enable Shushary to seek an order for the payment out of the Shushary moneys in the event of the sanctions being lifted.

39. Mr. Robins has also identified a potential issue in relation to the fact that some of the assets covered by the security are located abroad. It is clear that the Subscription Agreement and other transaction documents are governed by English law and the English courts. Flaux J (as he then was) dealt with this issue in *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2013] EWHC 3186 (Comm) in which a debt was created by a contract governed by English law but it was secured by a security assignment governed by Dubai law in relation to an asset situated in Dubai. Flaux J referred to the principle that:

> "An English law contract to mortgage or charge foreign land takes effect in England as an English mortgage or charge with all the rights and liabilities attached to such a mortgage or charge even if the foreign law does not recognise the equity of redemption or the validity of the security interest created."

40. It seems to me that the fact that the assets covered by the security are located overseas does not affect the Company's right to redeem and obtain a release of that security. The court remains entitled to direct that the relevant parties should take such steps as may be necessary to release the security.

41. That is not Shushary's objection. It accepts, as Ms. Sibson confirmed, that the Company has a right to redeem and, despite anxious consideration on Shushary's part as to whether there was jurisdiction to make such an order, as demonstrated by the authorities, Ms Sibson and her instructing solicitors concluded that there was indeed jurisdiction for this sort of order to be made and they could raise no proper objection to it in principle.

42. Ms. Suleymanova put forward, in her witness statement, various suggestions as to where the moneys could be paid. She was concerned that payment into court would be highly prejudicial to Shushary as OFSI might not respond quickly to a request to release those funds. As Mr. Robins pointed out, that is not a good reason for refusing to allow the Company to make a payment into court. The court must proceed on the basis that OFSI will carry out its functions in accordance with applicable UK legislation and UK public policy. That may mean that Shushary is unable to receive the funds for a lengthy period of time; for example, until after the resolution of the war in Ukraine. However, that is not a reason to refuse redemption. On the contrary, it is precisely why it is imperative for the court to permit it, otherwise the Company will be left in a state of paralysis due to the irredeemability of the security.

43. As to the alternative suggestions that Ms. Suleymanova made in her witness statement, Ms. Sibson realistically recognised that they are not viable under English law. It would appear to be highly unlikely that OFSI would allow Shushary or VTB to gain access to these funds by whatever means. If a suitably blocked account within the EU cannot be identified, there appears to be no alternative but for these moneys to be paid into court and that is what I propose to order.

44. Turning to default interest which concerns the amount that should be paid in, it will be necessary for the calculation agent to calculate how much is payable on the Shushary notes by way of principal and interest including default interest, if such is payable. Mr. Robins says that on the proper construction of the Subscription Agreement it is not payable. Alternatively, he submits that the default interest would be an unenforceable penalty in the circumstances.

45. Default interest is governed by clause 10.4 of the Subscription Agreement which states:

> "If an obligor fails to pay any amount payable by it under a finance document on its due date, interest shall accrue on the overdue amount from the due date up to the date of actual payment."

46. The construction argument is that the Company cannot be said to have failed to pay sums due to Shushary in circumstances where the Company (a) is willing to pay those sums to Shushary, but (b) is unable to do so as a result of international sanctions which prohibit the Company from paying those sums to Shushary.

47. Mr. Robins directed me to the familiar authorities on the modern approach to the construction of contracts, including: *Rainy Sky v Kookmin Bank* [2011] UKSC 50; *Re Sigma Finance Corp* [2009] UKSC 2; *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV* [2014] EWCA (Civ) 984; and *Arnold v Britton* [2015] AC 1619. I do not need to refer to those well-known principles which are clearly summarised, first of all, by Lord Neuberger in *Arnold v Britton* and Lord Clarke in *Rainy Sky*.

48. Mr. Robins submitted that the commercial purpose of a default interest clause is to identify the circumstances in which the note holders become exposed to a greater credit risk by reason of the obligors' default. In such circumstances the obligors are liable to pay interest at a higher rate than the rate than would otherwise apply. He

therefore said that a failure to pay within clause 10.4 is therefore a failure by the obligors in the nature of a default which reveals that the obligors pose a heightened credit risk. Such a failure to pay will not exist where the obligors have been unable to pay due to international sanctions. In the case of non-payment due to international sanctions, there has been no deterioration in the financial position of the obligors and no increase in the credit risk faced by the holders. Rather, it has become unlawful for the obligors to make payment to the sanctioned person and the obligors are therefore unable to do so.

49. However, that is not a change in circumstances which discloses a deterioration in the financial standing of the obligors so as to justify the imposition of a higher rate of interest. As a matter of contractual interpretation, therefore, it does not fall within the scope of the concept of failure to pay within clause 10.4 of the Subscription Agreement.

50. Mr. Robins put it another way, that the concept of a failure to pay within clause 10.4 presupposes that it is lawful for the obligors to pay the debt. If the debt cannot lawfully be paid, whilst it would be right to say that the obligors are not permitted to pay the debt, it would be inaccurate to say that they have failed to pay it. He referred to some old case law on bills of exchange and an inability to pay during wartime. Under section 57 of the Bills of Exchange Act 1884, the court has power to award interest where a debtor has failed to pay a bill of exchange. In a series of cases decided during wartime, the courts held that there is no failure to pay in circumstances where payment would be unlawful as a result of the creditor being an enemy alien. The reason in these cases is that a debtor cannot be said to be in default of an obligation if the performance of the obligation would be unlawful. Rather, for the period in which the performance would be unlawful, the obligation is suspended. Default will only occur if non-performance continues after the point in time in which performance has become legally possible.

51. The authorities he referred to were: *Hugh Stevenson and Sons Limited v Aktiengesellschaftfur Cartonnagen-Industrie*, [1918] A.C. 239, 256; *Biedermann v Allhausen & Co* [1921] 37 TLR 662, a decision of Darling J; and *NV Ledeboter and Van der Held's Textielhandel v Hibbert* [1947] KB 964, per Morris J. Those cases were effectively summarised in McGregor on Damages, 21st Edition, paragraph 30-022, which records that "*the act which would have constituted the breach of duty was the very thing which the defendant could not lawfully do. The defendant was therefore not in default*".

52. That does seem to me to be analogous to the situation that I have before me here. On 5th April 2023, Zacaroli J expressed the preliminary view that the Company had the better of the argument on this point and said that it would be "*a harsh construction*" to suggest that the Company was fixed with default interest when it was at all times willing and able to pay, but was prevented from doing so by sanctions.

53. I agree. In my view, the correct construction is that in these circumstances, the Company has not become liable to pay default interest.

54. Ms. Sibson referred to the Payment Direction Letter as indicating that the parties were not agreeing that in the event of sanctions being imposed, the Company might still be in breach. However, the Payment Direction Letter post-dated the Subscription

Agreement and cannot affect its construction. Furthermore, it does not purport to amend the Subscription Agreement in relation to the meaning or incidence of default interest.

55. Given my conclusion in relation to the construction of the Subscription Agreement, I do not need to consider Mr. Robins's further argument on penalties, which is only relevant if I had found against him that default interest was payable. I can simply say that I found his argument on that quite compelling also and it does actually add to the construction argument.

56. In conclusion, therefore, I will make the order in the terms sought and having gone through its contents with Mr. Robins, subject to one small amendment, it can be approved in that form. I would be grateful if a clean copy could be lodged with my clerk when available, which we will arrange to seal.

(This Judgment has been approved by Mr Justice Green.)

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