Neutral Citation Number: [2022] EWHC 659 (Comm)

Case No: CL-2020-000486

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2022

Before:

THE HON. MRS JUSTICE MOULDER

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Between:

(1) INTEGRAL PETROLEUM S.A. **(2) MR MURAT SEITNEPESOV** **(3) ETOILE ENERGY LTD** **(4) BEREC GROUP LTD** **(5) BROADEX TRADING LTD** **(6) AJAP TRADING LLP**	**Claimants**
- and -	
(1) BANK GPB INTERNATIONAL S.A.	**Applicant**
(2) IVAN DUN **(3) VADIM LINCHEVSKY** **(4) OLEG PREDTECHENSKY**	**Defendants**

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CHRISTOPHER HANCOCK QC AND ANGHARAD M PARRY (instructed by **THOMAS MILLER LAW**) for the **CLAIMANTS**
MICHAEL McLAREN QC AND GILLIAN HUGHES (instructed by **SHERRARDS SOLICITORS LLP**) for the **FIRST DEFENDANT**

Hearing dates: 28 February and 1 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MRS JUSTICE MOULDER

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00am on 24th March 2022.

Mrs Justice Moulder :

Introduction

1. This is the judgment on the application (the "Application") of the first defendant, Bank GPB International SA (the "Bank") for summary judgment against the Claimants on its counterclaim for sums totalling approximately $25 million.

Evidence

2. In support of the Application the court had the following witness statements:

   i) the second and third witness statements of Mr Alexander Zalivako, head of the Bank's legal department; and

   ii) the first witness statement of Mr Dmitry Derkatch, CEO and a chairman of the management board at the Bank.

3. Opposing the application the court has a witness statement from Mr Seitnepesov, the Second Claimant in these proceedings and also one of the directors and the majority shareholder of the First Claimant, Integral Petroleum SA ("Integral").

Sanctions

4. At the outset of the hearing counsel for the Bank addressed the court on the issue of sanctions. It was acknowledged that the Bank is a Luxembourg entity which is wholly owned by JSC Gazprombank, Moscow, which is owned by JSC Gazprom (para 5 of POC).

5. It was also accepted that Gazprombank is subject to sanctions which were originally imposed by the EU in 2014 and were given continuing effect in the UK after Brexit. However it was submitted that the existing sanctions do not prohibit the provision of legal services and as at the date of the hearing of the Application there was no asset freeze in place.

6. The court accepted the submission which was not opposed by the Claimants that the court should hear the Application as it was not affected by the current sanctions, but that should the Application be granted, any order for enforcement would have to be considered having regard to the position at the time.

Background

7. Integral's business at the relevant time included the purchase, through intermediate buyers (the 3rd to 6th claimants), and sale of commodities from production facilities in Turkmenistan.

8. In 2017 Integral entered into a commodity finance facility with the Bank to finance the purchase of commodities.

9. On 28 September 2017 Integral and the Bank concluded an Uncommitted Commodity Finance Facility (the "Facility Letter") for the maximum amount of US$35,000,000.

10. Integral's obligations under the Facility Letter were guaranteed by the second to sixth Claimants.

11. Integral also signed a Security Deed which granted the Bank certain security interests in the cargoes financed by the Bank and Integral's receivables in respect of those cargoes.

12. On 20 December 2018 the Facility Letter was amended and restated (as so amended and restated, the "Facility Agreement").

13. According to the evidence of Mr Seitnepesov:

    i) In the summer and autumn of 2019, Integral faced a number of issues with the producers in Turkmenistan and Integral experienced significant delays in respect of certain commodities.

    ii) Due to the delays, a large number of Integral's suppliers' purchase contracts from the Turkmen state producer entities expired before the cargoes could be loaded. The producers then charged penalties for the late lifting of the cargoes, despite the delays having been caused by them.

    iii) In view of all these delays, Integral was unable to repay the Bank's financing for cargoes sourced from the relevant Turkmen state entities (maturing in September and October 2019) on time.

14. It is common ground that prior to the alleged default by Integral on its payment obligations under the Facility Agreement that is the subject of the Bank's counterclaim in these proceedings, the terms of (some of) Integral's loans were extended on four occasions, on 3 July 2018, 14 December 2018, 30 April 2019 and 28 June 2019.

15. It is further accepted for the Bank (paragraph 20 of Zalivako 2) that in August 2019, at Integral's request, Integral and the Bank began to discuss the possibility of agreeing a restructuring of Integral's debt.

16. The court has before it evidence in the form of WhatsApp messages between Mr Derkatch and Mr Seitnepesov during August 2019, but it also appears to be accepted by the Bank (paragraph 8 of Mr Derkatch’s witness statement) that there were phone calls between the two men in August and September 2019.

17. From the contemporaneous emails it appears that in September 2019, the Bank provided an indicative draft term sheet to Integral which included a summary of the steps which would be involved in a restructuring process and the Bank's proposals as to the improvements to its security which it would require in exchange for agreeing a restructuring. In mid-October, those proposals were rejected by Integral.

18. It is the Bank's case (Zalivako 2 paragraph 16) that as at 29 October 2019, each of Integral's 32 loans under the Facility Letter had reached its maturity date and was therefore due for repayment by Integral.

19. However it is the Claimants' case that by 30 September 2019 an agreement had been reached on a repayment plan. Mr Seitnepesov's evidence is as follows:

> "28 I cannot recall the precise content of the above calls, but by 30 September 2019 we had agreed on the repayment plan, because the repayment plan has already been referred to on 30 September 2019. The general restructuring plan would be as follows:
>
> a. Integral would propose a payment schedule, which would provide for extended payment terms. The parties would discuss and agree this schedule. Integral would pay interest when it took it longer to repay the amounts advanced by GPB.
>
> b. The schedule would be such as to enable Integral, in its reasonable assessment, to take delivery of cargoes under current (i.e. non-expired) contracts, sell them and repay GPB. Alternatively, if it were not possible to repay GPB from those sources, enable Integral to make profit elsewhere (i.e. on transactions not financed by GPB) and repay GPB from those sources.
>
> c. There would then be the issue of the expired contracts, in respect of which GPB's financing was effectively blocked with producers. Here the parties envisaged that GPB could provide additional financing such that (i) Integral or its suppliers could conclude new contracts with producers (which required upfront payments); and (ii) funds blocked with the expired contract could then be transferred to those new contracts and utilised for the lifting of new cargoes.
>
> d. GPB's position was that it would not be able to provide any such additional financing until a formal restructuring were agreed by its credit committee in Moscow. Mr Derkatch also said that such a formal restructuring would later be needed to protect his own back, since GPB Luxembourg is effectively overseen and/or controlled by GPB Moscow. Hence the terms of the formal restructuring had to be negotiated and submitted to the credit committee in Moscow. This was, in my understanding, separate from our agreement on the extended payment terms." [Emphasis added]

20. The reference to a repayment plan being "*referred to on 30 September*" appears to be a reference to a WhatsApp message exchange with Mr Derkatch on 30 September 2019 in which Mr Seitnepesov said:

> "I'll tell you the payment plan in an hour"

Mr Derkatch responded:

> "Waiting today. Tomorrow morning we have to give the plan in Risks".

21. Mr Seitnepesov therefore draws a distinction between the agreement on the extended payment terms and the restructuring which involved the provision of additional finance.

22. Mr Derkatch's evidence is that the purpose of agreeing "interim repayment schedules" was merely for Integral to demonstrate its ability to repay its debt and was not an agreement on new terms for the repayment of the loans:

> "12. In order for GPB to agree a restructuring of Integral's overdue debt, Integral, among other important elements, needed to demonstrate its ability to repay its debt and therefore that it would be in a position to enter a restructuring if that could be agreed (as opposed to a debt enforcement process)…"
>
> 13. One way that GPB expected this ability to make repayment to be shown was by Integral making repayments in accordance with interim repayment schedules that were exchanged between the parties on various occasions. Integral was told of this expectation by me and by others at GPB. This is why, in my communications with Mr Seitnepesov, I referred to the repayment schedules in connection with payments GPB expected to receive from Integral. It was very clear to Integral that this was the purpose for it complying with the interim repayment schedules. It was also very clear to Integral that the repayment schedules did not constitute an agreement on new terms for the repayment of the loans." [Emphasis added]

23. It is not in dispute that further discussions took place in October and November 2019 about a possible restructuring. The court has before it evidence of a transcript of a telephone conversation that took place on 23 October 2019 and minutes of a meeting on 7 November 2019.

24. However it is Mr Zalivako's evidence that although there was an exchange of draft repayment plans, they were yet to be agreed, and would only have effect as extending the terms of Integral's loans, as part of any restructuring. Mr Zalivako relied in his witness statement on the transcript of the telephone conversation on 23 October 2019 to support his evidence in this regard:

> "29. Following Integral's 15 October counter proposals on the 20 September Term Sheet, on 23 October 2019 there was a telephone call between GPB and Integral, in which I, Mr Maklufi, Mr Fetisov, Mr Andrey Mazurin (Head of Risk) and Mr Derkatch (who joined at the middle of the call) (all of GPB) and Mr Seitnepesov and Mr Vatnik (of Integral) participated. The purpose of the call was to discuss the 20 September Term Sheet and Integral's 15 October counter-proposals…During the call, I made the following matters clear to Mr Seitnepesov:
>
> a Any restructuring proposal would need to be presented for the approval of various committees of GPB and GPB Moscow

> whose approval would be required in order to agree a restructuring…
>
> b As Integral was seeking a very significant additional term for the repayment of the outstanding loans (which would twice exceed the maximum repayment period set out in the Facility Letter), we could not submit a restructuring proposal for approval of the various committees of GPB and GPB Moscow without Integral agreeing to improve the security position of GPB…
>
> c The signing by Integral of a letter acknowledging the total outstanding sum due under the Facility Letter ("the Debt Acknowledgement Agreement") was a condition to GPB continuing restructuring discussions…
>
> 30. It was made clear to Mr Seitnepesov that no restructuring would be approved if Integral was not able to demonstrate its ability to follow new repayment terms and that, as of end October, Integral was not complying with the then current repayment schedule. Mr Derkatch said as follows "…as I've said you before, that restructuring can be discussed as an idea, in case the parties clearly fulfil their repayment obligations based on schedules. Constantly updated schedules are not a good thing here." [Emphasis added]

25. It is the Bank's case (paragraph 32 of Zalivako 2) that as of the date of the call on 23 October 2019, the Bank was at the very early stage of developing a restructuring proposal to be presented to its various committees with no agreement having been reached as to any of the many elements of any potential restructuring, including any extension to repayment terms; and that any restructuring proposal would need to be approved by the various committees of the Bank and GPB Moscow before any agreement could be reached.

26. It is clear from the minutes of the meeting of 7 November 2019 that one of the issues discussed at that meeting was an "Acknowledgment of Debt and Reservation of Rights" letter (the "Acknowledgement of Debt Letter"). In this regard the minutes of the meeting of 7 November 19 state:

> "Alexander Zalivako explained in detail the importance for the Bank to have a confirmation of the cooperativeness of IPSA by obtaining a signed letter of Acknowledgment of Debt and Reservation of Rights without any kind of additional conditions as per the e-mail received on 06-11-2019 from Gavriil Vatnik with MS in copy. After a detailed explanation of the meaning of the above document MS agreed to remove all conditions related to the letter of Acknowledgment of Debt and Reservation of Rights by sending the relevant e-mail confirmation. MS informed that he would receive the signatures of the Guarantors to this document as well as soon as practically feasible." [Emphasis added]

27. The Bank relies on this Acknowledgment of Debt Letter in support of its case that no agreement was reached with Integral to extend payments. The Bank submitted that Integral expressly acknowledged and agreed the total "outstanding" and "overdue" principal amount of its loans and that the maturity date had expired on or before 29 October 2019. The relevant provisions in the Acknowledgement of Debt Letter in this regard were as follows:

> "2.4 The Borrower agrees that the total principal amount of the Loans which was not repaid on their contractual Maturity Dates is equal to 24,662,178 US Dollars and 70 cents (the "Total Outstanding Principal Amount of the Loans") and such Total Outstanding Principal Amount of the Loans is overdue from the Borrower.
>
> 2.5 The Borrower requested that the Lender consider the restructuring of the Total Outstanding Principal Amount of the Loans. Following such request of the Borrower, the Borrower and the Lender have been discussing the possible solution which may permit the Borrower to ensure the full repayment of the Loans (the "Negotiations").
>
> 2.6 The Borrower acknowledges and agrees that in accordance with clause I (Non payment) of Schedule 11 (Events of Default) of the Facility Agreement, the failure of the Borrower to repay a Loan on its Maturity Date constitutes an Event of Default. Accordingly, an Event of Default is continuing as of the date of this Letter in respect of all Loans listed in the Schedule (Outstanding Indebtedness) above. [Emphasis added]

28. Mr Seitnepesov's evidence in his witness statement was that Mr Zalivako's evidence about the Acknowledgment of Debt Letter was not what he was told at the meeting on 7 November 2019 and that an agreement on extended payments terms was reached before (and after) that letter:

> "66 Mr Zalivako repeats that the signing of an Acknowledgment letter was a condition to continuing the negotiations. This is however not what was said at the 7 November 2019 meeting in Luxembourg. It may have been necessary for the Moscow credit committee (and according to Mr Zalivako was a mere formality) but, quite separately from that letter, agreements on extended payment terms were reached both before that letter and after it. [Emphasis added]"

29. Following that meeting it is Mr Zalivako's evidence (paragraph 40 of Zalivako 2) that there were ongoing discussions but the terms of any restructuring were never agreed:

> "Following the meeting on 7 November, there were detailed and on-going discussions between Integral and GPB on restructuring the debt under the Facility Letter. Suffice it to say that GPB never received all the information it was seeking from Integral, including confirmations that the assets financed by GPB

> remained available as security for GPB loans and as to how and within what time frames Integral would be able to restructure its contracts with the Turkmenistan Producers and start lifting commodities purchased with the loans of GPB. Therefore, GPB never got to the stage of being able to consider, let alone to agree, the terms of any restructuring agreement (e.g. those set out in Stage 2 of the 20 September Term Sheet)."

30. Mr Zalivako's evidence (paragraph 41 of Zalivako 2) is that:

> "Between 20 November 2019 and 11 March 2020, Integral and GPB exchanged various versions of repayment schedules on at least 8 occasions."

31. However, his evidence (paragraph 42 of Zalivako 2) is that these were merely to demonstrate Integral's capacity to repay and thus support the application for credit committee approval for the restructuring:

> "The draft repayment schedules that were exchanged between the parties were to be used as one element of Integral demonstrating this. If Integral were to make payments in accordance with the draft schedules while the due diligence was being carried out, this evidence would assist in showing Integral's ability to repay and would be provided in support of any application to the relevant committees of GPB and GPB Moscow for approval of a restructuring." [Emphasis added]

32. Discussions then continued through December to February 2020 and each party relies on statements made in correspondence during this period to support its case (as further considered below).

33. Mr Seitnepesov refers in his evidence to a call on 13 January 2020 (which was recorded by the Bank) as follows:

> "50. In relation to the agreed payment schedule, Mr Derkatch said this: *We agreed the schedule with you based on your own forecast of sales. We said, great*!"
>
> 51. He also insisted that Integral provide certain documents, as discussed above. To this I said: "*There is no deadline [for the documents] because nothing is (was) signed. It was just a conceptual arrangement*". To this Mr Derkatch responded: "*Yes, but in order to make this arrangement… Wait, this is the basis of our agreement. Not just a conceptual one but based on your own understanding*". When I referred to the "conceptual agreement" and "deadline" I believe that was in relation to the documents that GPB had asked Integral to provide, not to payments. We did not agree (not to my recollection) to any deadlines for provision of documents. I do not recall ever having challenged at that time Integral's obligation to make payments in accordance with the agreed payment schedules." [Emphasis added]

(It is not entirely clear whether in the above passages of his witness statement Mr Seitnepesov is in fact referring to a subsequent call on 5 February 2020 (as the extracts quoted and exhibited to his witness statement appear to refer to the transcript of the call on 5 February 2020).)

34. In relation to the call on 5 February 2020, Mr Zalivako does not appear to have been on the call and thus cannot properly give evidence as to what was said. However he comments on the transcript of the call in his witness statement. Amongst other observations on what was said, he said (at paragraph 46c):

> "Mr Seitnepesov acknowledged that the draft repayment schedules did not affect the parties' legal obligations but set out his understanding, consistently with what GPB had been saying to him, that payments by Integral in accordance with the draft repayment plans would improve the prospects of a restructuring taking place. In particular, Mr Seitnepesov said that:
>
> i. "In preparation for this restructuring process, we are doing certain actions. From our side, the most important thing we can do is to pay the money." (page 4 of the transcript).
>
> ii. "There is no deadline [for repayment of the loans] because nothing is signed. It was just a conceptual arrangement." (page 5 of the transcript)"

35. Mr Seitnepesov in his witness statement (at paragraph 75) responded that the comments relied on by Mr Zalivako were taken out of context:

> "As to paragraph 46, Mr Zalivako takes the 5 February 2020 call and the statements made during that call out of context. The discussion about the restructuring which "hasn't happened yet" is in relation to the formal restructuring which had to be approved by Moscow (according to Mr Zalivako). Later on the same page of the transcript, Mr Derkatch says that the agreement in relation to the extended schedule and documents was "an agreement" and "not just a conceptual one". I said there was no agreed deadline to provide the documents sought by GPB, but I did not object to providing them because GPB said it would help with obtaining approvals in Moscow. At the same time Integral was working to produce all the documents it could and do so as fast as possible."

36. Mr Derkatch deals in his evidence with the telephone call on 5 February 2020 with Mr Seitnepesov (and others):

> "When, on that call, I referred to schedules having been "agreed" with Integral, I was referring to an agreement in the limited sense of GPB and Integral "agreeing" that it was necessary for Integral to demonstrate that it could comply with the interim repayment schedules in order to improve the prospects of GPB agreeing to extend the terms of Integral's loans as part of a restructuring of

> Integral's debt. This is because evidence of such repayments would need to be provided in support of an application to the various committees of GPB and GPB Moscow for approval of any restructuring proposal. Unless GPB's collective management bodies were satisfied of Integral's ability to repay, they would not grant such approval and therefore no restructuring could take place. I made this comment in the context of Mr Seitnepesov saying that there was no deadline for payment by Integral because nothing had been signed and that a restructuring had not been agreed." [Emphasis added]

37. At the end of March 2020 the Bank raised concerns in relation to trades related to Gunvor (which do not affect the present Application). In correspondence in April and May 2020 Integral advanced the proposition that the Facility Agreement had been frustrated as a result of COVID. The Bank underlines the requests made by Integral in, for example, letters in March and April 2020 for relief from the payment of default interest.

Bank's counterclaim

38. The Bank's case is that it brings a counterclaim to recover:

    i) from Integral repayment of the unpaid principal and interest owing under the Facility Agreement; and

    ii) from the 2nd to 6th Claimants the amount of Integral's indebtedness pursuant to their respective guarantees,

    plus interest.

Claimants' defence to the counterclaim

39. The Claimants' defence to the counterclaim is that (in summary):

    i) they can set off against any sums awarded to the Bank the damages which they are claiming (the "Set Off argument");

    ii) the Bank is precluded from pursuing its counterclaim because of its own wrongdoing (the "Prevention Principle argument"); and

    iii) as at 29 October 2019 the Bank and Integral had already agreed to extend the maturity dates on Integral's loans with the result that Integral was not then in default of the Facility Agreement ("No Default argument").

Bank's case for summary judgment

40. The Bank submitted that none of these defences raised by the Claimants has a real prospect of success:

    i) any set off is precluded by the "no set off" clause contained in the Facility Agreement and the guarantees of the 3rd-6th Claimants;

ii) the Prevention Principle cannot bar the Bank from asserting its contractual entitlement to the sums payable by Integral;

iii) the Claimants have no realistic prospect of establishing the alleged oral agreement was reached as a matter of fact and in any event such agreement would not have been legally binding; and

iv) although Mr Seitnepesov's guarantee lacks a no set off clause, his claims are a limited answer to the application against him.

Principles of summary judgment

41. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if-
>
> (a) it considers that-
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

42. The principles were not in dispute: *Easyair v Opal* [2009] EWHC 339 (Ch) at [15]:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can

> reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

43. The burden of proof in this Application lies on the Bank.

44. The Bank relied on an additional authority in relation to the issue of Set-off: *AIS Pipework v Saxlund* [2017] EWHC 1523 (TCC) at [12]:

> "In my judgement, a defendant is not entitled to resist an application for summary judgement merely because it raises a set-off or counterclaim. The court must still enquire into the nature of such a set-off or counterclaim and consider whether the defendant has established that it has a reasonable prospect of successfully defending the claim or issue."

The "No Default argument"

45. The Bank's case is that as of 29 October 2019, each of 32 loans had reached its maturity date and was due for immediate repayment.

46. The Claimants' case (paragraph 20a of their skeleton) is that the Bank and Integral agreed on an extension of payment terms prior to 30 September 2019.

Bank's submissions as to the factual case

47. It was submitted for the Bank that there was no realistic prospect of the Claimants establishing that the alleged oral agreement was reached as matter of fact:

    i) there had been four previous variations in writing which the then guarantors had signed and for which an amendment fee had been paid and the Bank would not have departed from its previous practice in writing and charging a fee;

    ii) on 20 September 2019 by email the Bank sent to Integral an indicative restructuring term sheet which contemplated a 2-stage process: Stage 1 being execution of a reservation of rights acknowledgment; and Stage 2 an amendment and restatement of the facility with additional security; the email also included a proposed repayment schedule;

    iii) by 30 September 2019 (contrary to the evidence of Mr Seitnepesov) no oral agreement had been reached;

    iv) Integral responded on 15 October to the term sheet: the accompanying letter made no reference to any oral agreement having been reached; the email was accompanied by a revised payment schedule;

    v) there was a discussion between the parties on 23 October 2019 but the passages from the transcript do not evidence an agreement having been made; the Bank was just doing its best to get Integral to make payment under its existing obligations;

    vi) on 29 October 2019 the Bank sent the Acknowledgment of Debt Letter which was an important step in the discussion of the restructuring plan; Integral signed and sent back the Acknowledgment of Debt Letter on 7 November 2019; by that Letter Integral agreed that the principal was overdue and there was a continuing event of default;

    vii) after 7 November 2019, the correspondence should be read in the context that the Bank had already established that there were outstanding amounts and the Bank was trying to get Integral to show that it was "capable" of meeting its obligations on the proposals put forward for approval;

    viii) even if there was an oral agreement after 7 November 2019, the obligation to pay remained outstanding and overdue, there was no implication that the event of default had been cured or the amounts were no longer payable;

ix) Integral accepted that it remained in default: it paid default interest and made several requests for relief from default interest; there is reference in the correspondence to "outstanding debt" and "due"; and

x) when formal demands were made, Integral did not assert that there had been an oral agreement to extend terms but instead asserted that the Facility Agreement had been frustrated.

48. It was further submitted for the Bank that:

i) the alleged oral agreement to extend payment terms was inconsistent with the Claimants' pleaded case which drew no distinction between the agreement to restructure the debt and the agreement to extend payment terms; and

ii) the alleged agreement was inconsistent with Mr Seitnepesov's previous evidence filed in support of the Claimants' application for an anti-suit injunction.

Claimants' submissions as to the factual case

49. It was submitted for the Claimants that:

i) there is a conflict of evidence but the transcripts show that an extended repayment schedule was agreed between the Bank and Integral and this was a precursor to the broader restructuring;

ii) the oral discussions between Mr Seitnepesov and Mr Derkatch are key to understanding what transpired between the parties and both parties should be cross-examined on these oral discussions; Mr Zalivako was not party to these conversations and Mr Derkatch provided little evidence as to what was actually covered in the communications (including meetings);

iii) the transcripts are hard to follow and witnesses who have knowledge and understanding of what was under discussion would assist the court;

iv) there is an admitted conflict between the papered formal record and what emerges from the transcribed conversations and Mr Seitnepesov's evidence; on a summary judgment application the court should not accept that the Acknowledgement of Debt Letter outweighs all other evidence; the Application is made prior to disclosure and disclosure and cross-examination could lead the court to view the Acknowledgment of Debt Letter in a different light; and

v) the fact that the Bank relies on legal objections shows that the Bank perceive force in the Claimants' arguments.

Discussion of the factual case

50. The court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success; the burden lies on the Bank to show that it is not realistic.

51. Whilst as stated above, on a summary judgment application the court does not take the evidence in the witness statements at face value but considers whether the evidence is

contradicted by the contemporaneous documents, the court has to bear in mind that the court must not conduct a "mini-trial."

52. In relation to the key issue of whether an agreement was reached in September 2019, the court has conflicting evidence from the witnesses.

53. Mr Seitnepesov's evidence is referred to above.

54. Mr Derkatch in his witness statement said:

> "No final agreement on a repayment schedule was ever reached, with the parties exchanging various copies throughout the course of their restructuring negotiations."

55. Further, Mr Zalivako in his third witness statement says that:

> "… as Mr Derkatch says at paragraph 7 of his witness statement, he read my second witness statement and agreed with my evidence. In addition, Mr Derkatch has read Seitnepesov 1 and this statement in its final form. He has confirmed to me that: (i) he agrees with everything that I say in this statement and (ii) he maintains everything that he said in his first statement"

56. However, for the reasons discussed below, in my view the witness statements do not enable the court at this stage to resolve the issues of:

    i) what was said in the oral discussions which took place between Mr Derkatch and Mr Seitnepesov in August and September 2019; and

    ii) whether if an oral agreement was reached, any agreement to pay amounts was (as the Bank contends) merely for Integral to demonstrate its ability to repay its debt or whether (as Integral contends), there was an agreement to extend the dates for payment.

57. Although Mr Derkatch makes reference (paragraph 9 of his statement) to the WhatsApp messages exchanged with Mr Seitnepesov in October and November 2019 he did not deal with the WhatsApp messages exchanged in August and September 2019 (which were only exhibited by Mr Seitnepesov). Further, Mr Derkatch did not give any evidence as to what was said on the calls referred to in the WhatsApp messages for August and September 2019.

58. In paragraph 11 of his statement Mr Derkatch said:

> "From as early as the end of September 2019 (i.e. before an agreement to extend maturity dates was allegedly reached), I was messaging Mr Seitnepesov about Integral <u>making repayments in accordance with promises Integral had made</u>". [Emphasis added]

Mr Derkatch then exhibited a WhatsApp exchange on 30 September 2019 which read so far as material:

> "Derkatch: ...At the end of August, you promised to pay off 1 million by selling the stocks in Sangachal and 100 thousand from United Petroleum ...
>
> Derkatch: In September!!
>
> Derkatch: What prevents you from doing this
>
> Seitnepesov: in an hour I'll inform you about the payment plan
>
> Derkatch: I'm waiting today. Tomorrow the plan needs to be given into the Risks
>
> Seitnepesov: Hi! Stock in Sangachal - until 10.10,
>
> 100 thousand from United Petroleum to 15." [Emphasis added]

59. There is no further evidence which clearly explains the nature, context or background to the "*promises*" which Mr Derkatch referred to as having been made or the "*payment plan"* to be given to "Risks".

60. It is notable in my view that although Mr Zalivako accepted in his witness statement of 8 June 2021 that discussions concerning the possible restructuring began in August 2019, he gave no evidence concerning the content of those discussions and Mr Derkatch, who was the person having the discussions with Mr Seitnepesov and thus best placed to give evidence for the Bank, in his witness statement of 8 June 2021, exhibited only WhatsApp messages from September and October 2019 and it was left to Mr Seitnepesov in his witness statement to disclose the relevant WhatsApp messages from August 2019.

61. It was submitted for the Bank that given that the WhatsApp messages from August 2019 are before the court, there is nothing to suggest that there is any further disclosure to be made in this regard. However that is to ignore the fact that the WhatsApp messages were only part of the discussions and it is clear that there were phone calls between Mr Derkatch and Mr Seitnepesov which are referred to only fleetingly by Mr Derkatch in his evidence and not described in any detail. Paragraph 8 of his statement reads as follows (so far as relevant);

> "Between August 2019 and March 2020, I was in contact via WhatsApp and by phone with Mr Seitnepesov to discuss issues relating to GPB's efforts to progress restructuring discussions with Integral. I was also copied into emails between GPB and Integral on matters relating to restructuring discussions."

62. By contrast it is the evidence of Mr Seitnepesov that:

> "I cannot recall the precise content of the above calls, but by 30 September 2019 we had agreed on the repayment plan, because the repayment plan has already been referred to on 30 September 2019"

63. Further Mr Derkatch makes no reference in his evidence to meetings in August 2019. However the evidence of the WhatsApp messages suggests that meetings are likely to have taken place: in a message on 26 August 2019 from Mr Derkatch he referred to a "plan" and proposed a meeting:

> "we got the plan, we need clarifications/details. Rustam and I plan to be in Geneva tomorrow or the day after tomorrow. I need a meeting with you. Can you do it?"

Another message on 19 August 2019 referred to a meeting as having been fixed for 20 August 2019.

64. The court cannot at this juncture and without evidence as to the contents of the phone calls and meetings resolve the conflicting accounts in the witness statements. The court on a summary judgment application can take into account that at trial it can reasonably be expected that evidence will be available about the content of the telephone calls and any meetings. At trial the court will need to assess the credibility of the witnesses: Mr Derkatch will doubtless be cross-examined on why in his witness statement (paragraph 9) he made no reference to the WhatsApp messages in August and provided no detail of the calls and meetings in August:

> "I exhibit at [DD1/2-19] a copy of all WhatsApp messages that Mr Seitnepesov and I exchanged during October – November 2019 and an English translation of those messages. I confirm that I have reviewed this translation and I consider it is accurate. Aside from the above communication and the emails between other individuals at GPB and persons at Integral (into which I was copied), there were no other electronic or written communications between me and Mr Seitnepesov."

65. Mr Seitnepesov is likely to be cross-examined on his previous evidence in support of the anti-suit injunction and the alleged inconsistency (as referred to below). But, as discussed below, in my view the credibility of these witnesses are matters for trial which cannot be resolved now.

66. As to the second issue, namely whether if there was an oral agreement such an agreement was only to demonstrate Integral's ability to pay its debts, there are subsequent references in the evidence such as the WhatsApp messages which tend to suggest that an agreed schedule was in existence but on which oral evidence would be needed to provide context and assist the court to resolve the issue of why such payments were then being made by Integral. For example, on 17 October 2019 Mr Derkatch wrote:

> "Restructuring is discussed <u>only if IPSA meets the repayment schedule.</u>" [Emphasis added]

On 5 December 2019 Mr Derkatch wrote:

> "it is important that Integral <u>follow the schedule</u>. As I remember there is a repayment of 1.1 million in December…". [Emphasis added]

67. In support of its overall case that the Claimants' factual case has no realistic prospect of success, the Bank relies on the documentary evidence of:

    i) the previous agreements;

    ii) the correspondence and the term sheet; and

    iii) the Acknowledgment of Debt Letter.

68. As to the previous agreements, it is of some weight that there were previously formal written agreements and a fee was paid. However the evidence of Mr Seitnepesov is that:

> "59. In paragraphs 13-19 of his statement, Mr Zalivako suggests that GPB always acted formally and any extensions to repayment terms had to go via a complex formal process. This is simply not how business is conducted in Russia (as to which I am advised by my legal team that expert evidence could be adduced at the appropriate stage). The way it is conducted is on the basis of informal agreements / trust between the responsible individuals. Documents can be adjusted later if and when required…
>
> 60 I have referred above to a number of oral discussions between Mr Derkatch and myself, and also to conference calls between Integral and GPB/GPB Moscow from which it is clear that agreements were reached without formal documents. Payment schedules were agreed. Mr Derkatch regularly chased Integral to ensure that it complied with the agreed schedules…". [Emphasis added]

69. Whilst the Bank disputes this evidence, the weight to be given to the existence and the formality of the previous agreements is difficult to assess at this stage given the matters raised in the evidence of Mr Seitnepesov and the absence of evidence about the oral discussions.

70. As to the correspondence and the term sheet, I accept that, when on 15 October 2019 Integral responded to the term sheet sent by the Bank, rejecting the payment schedule proposed by the Bank and putting forward its own term sheet there is nothing stated in that email (or the accompanying letter) to suggest that there had been any agreement reached on a repayment plan. I also note that Integral's letter dated 8 October 2019 (sent with its email of 15 October 2019) referred to the two stages contemplated by the Bank in its term sheet, and that the first stage contemplated by the term sheet was not the agreement of payment schedules but the execution of the Acknowledgement of Debt Letter, the due diligence of the existing assets of the Borrower financed by the Lender and the signing of the term sheet. It was only the second stage which included the amendment and restatement of the existing Facility Agreement and contemplated a new repayment schedule.

71. However I also note the references above which suggest that there was an agreed schedule. I also take into account the submission for Integral that previous payment extensions had not needed to be approved by Moscow and thus there was no obstacle to the extension of payment terms having been agreed as a first step, as the Claimants

assert, and as a precondition of making the application to Moscow for the restructuring which would have included new money being made available and not just the extension of payment dates for the existing indebtedness. Viewed against the evidence currently before the court, that is a plausible explanation which cannot be dismissed as fanciful at this stage.

72. The Bank submitted that the transcript of the telephone conversation on 23 October 2019 (referred to above) only amounted to evidence that the Bank was trying to get Integral to make payment under its existing obligations and does not evidence any agreed payment plan. However that is far from clear on the face of the transcript and without the benefit of oral evidence from witnesses as to what is being referred to. From what is a lengthy discussion I note the following passages which are relevant to the issue:

> "ANDREY [Mazurin, Head of the Risk Management Department]: Murat, the thing is that if we take this Schedule to the Credit Committee, and then later the schedule won't be adhered to, we will run out of arguments. We need a realistic schedule.
>
> MURAT [Seitnepesov]: Yes, I understand. Let's do the following. Since this topic has taken already too long - we were planning for August, and it's been two months since then already. We are in different circumstances now, and the schedule needs to be updated, of course. I am in long-distance business trips until Monday, and it is quite inconvenient to manage all these things from here - it's always something missing here, either internet connection, or telephone, or something else. Therefore, probably, next week Tuesday or Wednesday we will run an internal session to discuss the update. In the meantime, Gavriil will work on drafting the new schedule, and we will deliver a new schedule, having taken into account all current realities, and not the ones that existed in August. Surely, there will be certain slip-offs in terms of deadlines, and I think that you should take the new updated schedule to the Credit Committee to be approved, and we will make every effort to adhere to it…
>
> RUSTAM: Do you think they'll arrive this month?
>
> MURAT: Well, we are expecting. Something will definitely arrive. The question is how much.
>
> DMITRY [Derkatch]: This is exactly the question here, Murat, because we rely on the Integral's statement - on your personal statements, which are not fulfilled later on. We are also unable to assess what the reasons of such unfulfillment are. I mean, why this happens - is it due to delayed shipments? What's the matter?
>
> MURAT: Yes, yes, the delay in shipments.

> DMITRY: It is only natural that this complicates our negotiations a lot, because as I've said you before, that restructuring can be discussed as an idea, in case the parties clearly fulfil their repayment obligations based on schedules. Constantly updated schedules are not a good thing here…"
>
> DMITRY: Yes, but back in August we were also saying that you will be making repayments until the end of October. At least, 3.5-4 million. Isn't it so Murat? And yet the only settlement we have received was for Riegel. And not even the complete one.
>
> RUSTAM: Just a half of it.
>
> RUSTAM: So, in order for us to…
>
> MURAT: Well, then, if you can't…
>
> DMITRY: For us to be able to apply for Committee's approval for additional funding, we need to receive a settlement payment under the existing agreements.
>
> MURAT: Ok, then, let's… I mean… let's do it in two steps. Let's restructure it for now and apply for settlement when everything will be back to normal.
>
> DMITRY: What do you mean 'for settlement'?
>
> MURAT: Oh my! I meant to apply for new funds when everything is back to normal with the settlement.
>
> ANDREY: But what is the source? In regard to the old contracts?
>
> MURAT: What source? What do you mean?
>
> DMITRY: The question is where will the money come from under the old contracts? Because there [indiscernible] delays everywhere…" [Emphasis added]

73. Integral's case is that a payment schedule was agreed but then had to be updated and these further schedules were agreed.

74. I note Mr Seitnepesov's evidence (paragraph 67 of his witness statement) in relation to what he says was the background and context of the call on 23 October 2019, namely that there was already an agreement and Mr Derkatch was chasing Integral to comply with that agreement:

> "In paragraph 32 Mr Zalivako speculates on things about which he claims I should have been aware as at 23 October 2019. He says there was no agreement on any extended payments terms - this is wrong as discussed above. There was already an agreement by then and Mr Derkatch was chasing that I comply with that agreement. Mr Zalivako says that I do not mention any

> agreement to Mr Derkatch on the call - but Mr Derkatch himself mentions payments "under the existing agreements". Mr Zalivako says that an approval from GBP Moscow would have to be sought to affect the restructuring - this is true in respect of the envisaged formal restructuring (not the extended schedules agreed between Mr Derkatch and myself) and in order to obtain additional funding from GPB - this is what Mr Zalivako said, but I repeat my prior comments to the effect that GPB could, was and is supposed to act independently…" [Emphasis added]

75. As to the fact that there were several payment schedules, Mr Seitnepesov's evidence was (paragraph 71 of his witness statement):

> "In paragraph 41 Mr Zalivako says that 8 versions of the payment schedules in total were exchanged between the parties, but no agreement on a repayment schedule was reached. Again, this is incorrect. The payment schedules had to be updated for the reasons discussed above. However each relevant schedule was agreed, except for the latest ones proposed by Integral following GPB's attacks on Integral. Mr Derkatch chased me for payments under those schedules (which he called "existing agreements"), he then confirmed (and was happy) that the schedules have been fulfilled for 2019 and the beginning of 2020."

76. The transcript of these discussions is not inconsistent with Integral's case. It cannot be said that it clearly supports the Bank's case or that it leads to a finding that the Claimants' case is fanciful.

77. The Bank relies on the Acknowledgment of Debt Letter as evidence that Integral agreed that the principal was overdue and there was a continuing event of default.

78. However as set out above, the evidence of Mr Seitnepesov (at paragraph 66 of his witness statement) was that agreements on extended payment terms were reached before that letter.

79. In assessing the significance of the Acknowledgment of Debt Letter, the court has, in addition to the witness evidence, the minutes of the meeting of 7 November 2019, and has regard to the passage set out above concerning the explanation given by Mr Zalivako to Mr Seitnepesov in the course of that meeting.

80. The court cannot resolve on this Application and without further evidence as to what was "explained" to Integral at that meeting, the significance of the Acknowledgment of Debt Letter to the issue of the alleged prior agreement. I also note that the Claimants also assert that there was an actionable misrepresentation made to Mr Seitnepesov and in reliance on that misrepresentation he signed the letter.

81. Although therefore the Acknowledgement of Debt Letter on its face appears to support the Bank's case, the court takes into account the evidence that can reasonably be expected to be available at trial, namely oral evidence and cross-examination of the witnesses who were present at the meeting on 7 November 2019. Without that evidence,

the court cannot rely on the contents of the Acknowledgement of Debt Letter in order to reach a conclusion at this interim juncture that the Claimants' case on an oral agreement has no real prospect of success.

82. I also note for completeness the following passage in the minutes of the meeting of 7 November 2019:

> "It was agreed that a working group of GPBL shall visit the office of IPSA on 19-21 November 2019 to discuss in detail the current status of each transaction financed by GPBL. As a result of this visit a detailed action plan shall be elaborated in a written form, allowing GPBL to formalize forbearance measures in according with the applicable regulatory requirements." [Emphasis added]

83. In his oral submissions counsel for the Bank submitted that a reference to the Claimants establishing "*forbearance*" was different from the evidence of Mr Seitnepesov's evidence which alleged that there was an agreement as to specific dates and that "*forbearance*" would not have affected the underlying rights which the Bank had been "*careful to preserve at all times*".

84. I note that in the minutes of 7 November the term "*forbearance*" was used but without the benefit of oral evidence and cross-examination of those who were present at the meeting, it is impossible for the court to determine what the reference to "*forbearance measures*" in those minutes was intended to convey.

85. Whilst the Bank's case is that it did not agree to an extension of the debt, the issue of whether in fact the Bank did in fact preserve its underlying rights is an issue which has to be resolved and in my view, for the reasons set out above, is one which needs to be resolved at trial.

86. It was also submitted for the Bank in oral submissions that it was "*wholly unrealistic*" for the restructuring to be preceded by the rescheduling of loans. It was submitted that it was never envisaged by the Bank that the rescheduling of loans would be followed by restructuring.

87. However it is clear on the evidence (such as the transcript of the call on 23 October 2019) that the restructuring would involve additional finance whereas the rescheduling of loans did not, and the evidence before the court is that in the past such rescheduling had occurred without the need for credit approval from Moscow. Whilst the term sheet contemplated 2 stages, the second stage involving the restatement of the Facility Agreement, in my view, it is not fanciful for the Claimants to assert that an agreement was reached as to an extension of payments prior to any restructuring being agreed: this is the evidence of Mr Seitnepesov (referred to above) and I have set out above the passages of the transcript of the call on 23 October 2019 which in my view appear to be consistent with that evidence.

88. As to the other matters relied on by the Bank in support of its case, the fact that default interest was paid does not establish that the Claimants' case is unrealistic since interest would have been payable even if an agreement had been reached to extend the dates for payment. Similarly the references in correspondence to debt being "outstanding" does

not establish whether the dates for payment were extended: there is no dispute that monies were outstanding.

89. Other references in correspondence which were not legal documents but were part of ongoing discussions to monies being "due" and to "default interest" are of little if any significance in my view as to whether any agreement to extend the date for payment had been reached in September 2019.

90. It was submitted for the Bank that the case now advanced by Integral is contrary to its pleaded case which drew no distinction between the agreement to restructure the debt and the agreement to extend payment terms. The Bank relies on paragraph 12 the Particulars of Claim:

> "…In 2019 there were delays at the producing facilities in Turkmenistan, as a result of which Integral was late in repaying GPB's financing. GPB and Integral orally agreed to restructure the debt / extend payment terms, but then GPB demanded that it put its own director on Integral's board who would have veto powers over all of Integral's decisions and be copied on all of Integral's correspondence with its relevant counterparties. GPB also demanded that Integral sign an acknowledgment of debt prior to any restructuring being agreed. Upon being promised a restructuring later, Integral signed the acknowledgment." [Emphasis added]

91. However I note that at paragraphs 26 and 27 of the Particulars of Claim the Claimants plead that:

> "26. Integral was not in a position to repay some of the financing provided by GPB maturing in September 2019 and onwards. In the spring/summer of 2019 there were delays/stoppages at the Turkmen production facilities as a result of which Integral did not receive the cargoes financed under the Facility from the Turkmen state entities on time.
>
> 27. Since this was not an issue of Integral's creditworthiness, but merely one of operational delays beyond Integral's control, the parties entered into negotiations with a view to agreeing a restructuring and extending the repayment terms. As at September-October 2019, when the delays started, the total amount of financing provided by GPB to Integral wasUS$24,662,178.70. A general agreement was reached between Mr Derkatch (CEO and Chairman of the board of GPB) and Mr Seitnepesov to the effect that Integral's payment terms would be extended and GPB would provide financing for Integral's other trades and would otherwise facilitate Integral's business." [Emphasis added]

92. In the Defence, the Bank responded to these paragraphs:

> "30. …The allegation of a "general agreement" between Mr. Derkatch and Mr. Seitnepesov is vague, not understood and too unparticularised for GPB to plead fully in response, but in any event denied. After 20 June 2019, GPB never concluded any agreement with Integral for any extension to the maturity dates of Integral's loans."

93. In the Reply the Claimants pleaded in response to paragraph 30:

> "22. …Over a series of conversations up to and during October to November 2019, Mr Derkatch on behalf of GPB and Mr Seitnepesov orally agreed that mutually acceptable terms for restructuring would be agreed if Mr Seitnepesov signed the Acknowledgment Letter. These terms included that: (i) there would be an extension of term to repay over 18 months, and (ii) thus Integral would not be in default as of October/November 2019. After the Acknowledgement Letter was signed, the repayment schedule that had been exchanged between Integral and GPB was confirmed, and for that very reason, Integral started making payments to GPB."

94. I also note paragraph 16 of the Defence:

> "…However, as set out at paragraphs 35.2, 36 and 39.2 below, no agreement with GPB was concluded in connection with the restructuring of the repayment of Integral's debt."

95. The Claimants responded in the Reply:

> "…
>
> 12.2. It is admitted that Integral made payments to GPB after 7 November 2019. These were made in accordance with the oral agreement reached between Mr Seitnepesov and Mr Derkatch, and also in accordance with ongoing communications between Mr Derkatch and Mr Seitnepesov as to when payments could be made.
>
> 12.3. It is denied that no agreement was concluded in connected with the debt restructuring. An agreement was reached between Mr Seitnepesov and Mr Derkatch. This is corroborated by: (i) WhatsApp correspondence where the individuals discussed monthly payments between Integral and GPB, and (ii) the fact that between November 2019 and April 2020, Integral repaid to GPB a total of USD 3,244,010.06. These payments were not made randomly." [Emphasis added]

96. This was then followed by an RFI from the Bank on 1 March 2021. Question 7 sought further information in relation to paragraph 12 of the Particulars of Claim ("GPB and Integral orally agreed to restructure the debt/extend payment terms…") and paragraph

16 ("… GPB's prior agreement to extended payment terms with Integral"). The Claimants' response was as follows:

> "Over a series of conversations up to and during October to November 2019, Mr Derkatch on behalf of GPB and Mr Seitnepesov orally agreed that mutually acceptable terms for restructuring would be agreed if Mr Seitnepesov signed the Acknowledgment Letter…" [Emphasis added]

97. Integral relies on the next response in the RFI:

> "The oral agreement was reached over time before Mr Seitnepesov signed the Acknowledgement Letter and is confirmed by WhatsApp correspondence between Mr Derkatch and Mr Seitnepesov (provided in the Claimants' Initial Disclosure List of Documents), and by repayment schedules and restructuring proposals that were exchanged between GPB and Integral on 20 September 2019 and 15 October 2019 and around the time when the Acknowledgement Letter was signed. …" [Emphasis added]

98. In my view the Claimants' pleadings do not draw the clear distinction which is now advanced in the evidence and the submissions on this Application between the alleged oral agreement reached to extend the payment terms and the restructuring to involve additional finance. However I am not persuaded that the Defendant does not understand the case which it has to meet or that any lack of clarity in the pleadings would amount to a sound basis for finding that the defence to the counterclaim has no real prospect of success: *Mischon de Reya LLP v RJI Middle East Limited* [2020] EWHC 1670 (QB) at [53]- [58].

99. The Bank also relies on the alleged inconsistency of the Claimants' case with the evidence previously given by Mr Seitnepesov in his First Affidavit dated 28 July 2020:

> "27. During this meeting [on 7 November] Mr Derkatch and Mr Predtechensky insisted that the Acknowledgment was a mere formality and that they needed the document in order to run the official request for restructuring past their colleagues in Moscow and extend the payment terms. They said that it was important for them to know that the borrower (i.e. Integral) is cooperative and is not refusing to repay GPB. Subject to that, they would be happy to offer extended payment terms.
>
> 28. If payment terms were extended than Integral would no longer be in default and, on the basis of GPB's assurances, I agreed the acknowledgment and provided a personal guarantee for amounts covered in the acknowledgment on 7 November 2019.
>
> 29. I proposed that a solution could have been for the amounts financed by GPB to be repaid within approximately 24 months, regardless of the delays with the contracts financed by GPB. This

> could be achieved even if we only paid GPB from the profits we made on transactions not financed by GPB.
>
> 30. Mr Derkatch, CEO of GPB, said they were fine with this solution in general, and while it was being finalised Integral should keep paying what it could. He also said that GPB would be satisfied with an 18-months extension (instead of the 24 months I proposed initially)."

100. If this matter is allowed to proceed to trial the court will in due course be likely to hear evidence from Mr Seitnepesov and he is likely to be cross-examined on the alleged inconsistency. I am not persuaded that the credibility of Mr Seitnepesov can or should be assessed at this stage. I note the conclusion of Birss J in *Corma v Hegler Plastik* [2013] EWHC 2820 (Pat) at [40]:

> "I must say, if I take the Professor's reports at face value, I believe they can be read in the manner proposed by Mr Silverleaf. Indeed, I am not at all sure that Professor Oswald's explanation in his fifth report really faces up to the true scope of his evidence in the third and fourth reports. However, what I am sure about is that I cannot say on this application, on the summary basis and without having heard the Professor in the witness box, that his evidence lacks all credibility. No matter how much I may doubt that the Professor has faced up to the problems with his evidence I am quite satisfied that it would not be right for me to rule on a summary application that his evidence is so doubtful as to lack all credibility. For that reason I will not accede to the defendants' application."

101. Although Birss J was dealing with expert evidence the principle seems to me to apply equally to a witness of fact and even if I were wrong on that, in the circumstances of this case in my view the matter is not so clear cut as to enable me to form a definitive assessment of the credibility of Mr Seitnepesov.

Conclusion on factual case

102. The Bank submitted that the "*dearth of documents*" is a "*telling point*". In my view it is clear that in August and September 2019 there were oral discussions by phone and it is likely there were discussions in person. What is lacking at this stage, and can reasonably be expected to be before the court at trial, is oral evidence from the witnesses as to what was said on those calls and at those meetings. The key documents relied on for the Bank are the term sheet and the Acknowledgment of Debt Letter. However as discussed above, what is necessary in order to form a view on those documents and what can reasonably be expected to be available at trial is evidence from witnesses present on the relevant calls and meetings in October and November 2019 to explain the context of those documents, by reference to the transcripts of the phone calls and the minutes of the meeting on 7 November 2019.

103. It was submitted for the Bank that since the fourth variation extended the maturity to early September 2019 there was no need for any discussions until after it was apparent

that Integral was in default. That submission appears to be at odds with the evidence of Mr Zalivako that:

> "In August 2019, at Integral's request, Integral and GPB began to discuss the possibility of agreeing a restructuring of Integral's debt..."

104. It was submitted for the Bank that there cannot be a triable issue when the witness does not say what the terms of the agreement were and there are no documents to support them. I have addressed the issue of the "*dearth of documents*" above. Insofar as the terms of the agreement are concerned, the Claimants rely on the payment schedules and the WhatsApp messages. Insofar as the pleaded case is unclear, the correct course would be for the pleadings to be amended if necessary. However the triable issue is clear: the Claimants' case is that Integral and the Bank had agreed on a repayment plan by the end of September 2019 and agreed to extend the maturity dates of the loans.

105. It was submitted for the Bank that it was "implausible" that the Bank would extend loans so that Integral was no longer in default in the light of the previous formalities of involving the guarantors and paying an amendment fee. Whilst the Bank's contention as to what was "plausible" is a possible conclusion, the test for the court to apply is whether the Bank has established that the Claimants' case has no real prospect of success. In my view for the reasons discussed above, the Bank has not discharged that burden in relation to the factual case.

Would any agreement have been legally binding?

106. I turn now to consider the legal issues advanced by the Bank to the effect that any agreement as alleged by the Claimants would not have had binding force.

107. It was submitted for the Bank that the Claimants have no real prospect of establishing that their alleged agreement fulfilled the requirements for a binding variation:

i) Clause 20.1 of the Facility Agreement prevented oral variations and there was no written agreement: the only schedules prior to 7 November 2019 were rejected by the claimant on 15 October 2019; further it would not be enough for the amendment to be "evidenced" in writing.

ii) There was no (good) consideration.

iii) There was no intention to enter into a binding agreement.

"No oral variation" clause

108. Clause 20.1 of the Facility Agreement provides that:

> "any term of the Finance Documents may be amended or waived with the agreement of the Borrower and Lender in writing."

109. It was submitted for the Claimants that the wording of Clause 20.1 is not mandatory and there is no express wording prohibiting oral modification or oral variation.

110. As the Claimants accept (paragraph 49 of their skeleton) this is a matter of construction. The Bank submitted that the language means that amendments must be in writing, otherwise the words "*in writing*" have no meaning. The Claimants submitted that "*an equally plausible construction*" of Clause 20.1 is that amendments or waivers are permitted with agreement.

111. I accept the submission for the Bank that the court should strive to give meaning to the words "*in writing*". Although the clause does not use the word "*shall*", to interpret the clause as meaning that amendments or waivers are permitted by agreement but that writing is not necessary would be to give no meaning to the words "*in writing*". The Facility Agreement is not an informal document and there is no reason to infer that the parties did not intend to give meaning to the words "*in writing*".

112. However, in my view the language is ambiguous as to whether the words "*in writing*" require the amendment to be effected in a written document or whether it is sufficient for it to be evidenced in writing. In accordance with the well-established principles of construction the court has to weigh the natural meaning of the language against the factual context and commercial common sense. As to the factual context, the Bank relies on the fact that the term sheet provided a two-stage process with agreements to be in writing whilst the evidence of Mr. Seitnepesov is that in the past oral agreements were reached which have thereafter been reduced to writing. The court cannot resolve the weight to be given to this evidence without oral evidence and cross examination. Further part of the factual context which the court can expect to be available at trial is evidence as to the oral discussions in August and September 2019, as referred to above.

113. The issue of construction is a mixed question of fact and law and in my view the court cannot be satisfied that it has before it all the evidence necessary for the proper determination of the question of construction of Clause 20.1 at this interim stage.

114. The Claimants submitted that even if amendments were required to be made "in writing" the repayment schedules were provided in Excel format and Mr Seitnepesov contends that the agreements were recorded/mentioned in WhatsApp conversations between Mr Seitnepesov and Mr Derkatch. At paragraph 79 of his witness statement Mr Seitnepesov said:

> "As to paragraph 57(a), I do not agree that the extended payment schedules were not in writing. They were in excel spreadsheets. The oral agreements between me and Mr Derkatch are recorded/mentioned in GPB's own telephone transcripts and in WhatsApp chats"

115. On the evidence currently before the court, the only payment schedule at the relevant time appears to be the schedule which was sent by the Bank with its term sheet on 20 September and this was rejected when Integral responded on 15 October with its counter schedule.

116. However as referred to above, there are references in the transcripts and minutes which would suggest that an agreement had been reached by reference to an agreed schedule.

117. In reaching a conclusion on a summary judgment application the court must take into account not only the evidence actually placed before it but also the evidence that can

reasonably be expected to be available at trial. Although the WhatsApp conversations at the relevant time are already before the court (as are the telephone transcripts referred to by Mr Seitnepesov) this Application is brought before disclosure (other than Initial Disclosure) has taken place.

118. The Claimants also advanced an alternative case in this regard that the Bank would be estopped from denying the existence of an agreement to extend payment terms. It was submitted for the Claimants that the Bank represented by words that the variation to payment terms was valid even if informally agreed.

119. The following extract from the transcript of the telephone call in February 2020 supports that submission:

> "DMITRY: …-It's not just a schedule. We agreed the schedule with you based on your own forecast of sales. We said, great! But, firstly, the schedule must be fulfilled. Let's speak frankly, as of January we have the main body of the loan, even if these 520 thousand. They have not been repaid, and the regulator and auditor are very formal organizations. They say there is a deadline. On January 31st the amount was not received, we believe that the entire plan is invalid. And the borrower can refuse to fulfil this plan.
>
> MURAT: There is no deadline because nothing is (was) signed. It was just a conceptual Arrangement
>
> …
>
> DMITRY: And, listen, this is the first part in creating this plan. We said A and B. Where are the other letters of the alphabet then? So where? We have clearly agreed that firstly, you, despite the fact that we have not yet signed an approved restructuring, are carrying out this plan. We have no other plan. Firstly, we show this plan to the regulator and the auditor. Secondly, we said that the maximum offloading at the plant should be obtained. For all plants…" [Emphasis added]

120. The Claimants relied on *Rock Advertising Ltd v MWB Business Exchange Centres* Ltd [2018] UKSC 24 at [16]:

> "16. The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of

> estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd v International Glass Engineering In Gl En SpA [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker)." [Emphasis added]"

121. The Bank submitted that the reference by Mr Derkatch in the passage relied upon by the Claimants (above) to "*carrying out this plan*" was not the same as an extension of the existing obligations and an agreement that they were no longer in default. The Bank submitted that there was an agreement as to how to discharge the existing obligations but that this did not alter the fact that Integral was already in default and the debts were already due. It was submitted that the background to any oral representations relied upon by the Claimants was the fact that the term sheet provided a two-stage process with agreements to be in writing.

122. It is clear that the parties contemplated that if the two stages being discussed (including the restructuring) were agreed, ultimately there would be an amendment and restatement of the Facility Agreement. However the Claimants rely on the past conduct, and it was submitted for Integral that, if in the past agreements have been reached, as Mr. Seitnepesov says was the case, which have thereafter been reduced to writing and which were treated as binding prior to being reduced to writing, there would then be a legitimate expectation on the part of Mr. Seitnepesov that the agreement would be binding, notwithstanding the fact that there was not at the time of the agreement a written version.

123. It seems to me that this alternative case cannot be determined on a summary judgment application and requires full evidence before the court can reach a finding as to what representations (if any) were made and the context for such representations. In my view there is a realistic prospect of the Claimants establishing that there was a representation by the Bank that the amendment to the Facility Agreement was valid notwithstanding its informality.

124. For the reasons discussed above, I am not persuaded that the Bank has established that the Claimants have no real prospect of defending the counterclaim by reason of a failure to comply with Clause 20.1.

No consideration

125. It was submitted for the Bank that the Claimants need to establish that the alleged extension was in exchange for an "*additional legal benefit*" to the Bank: *Foakes v Beer*

(1884) 9 App Cas 605; *Re Selectmove* [1995] 1 WLR 474; *Rock Advertising* at [18]. It was submitted that even if consideration was provided in the form of reference letters and documents relating to an Integral judgment, these were discussed only in December 2019 (after the alleged agreement in October 2019) and would in any event be insufficient to amount to good consideration.

126. The claimants refer to the conflict between the position adopted by the Court in *Foakes v Beer* and *Re Selectmove* and that of the Court of Appeal in *Williams v Roffey Brothers* [1991]1 QB 1. The Claimants also notes that Lord Sumption in *Rock Advertising* said that *Foakes v Beer* was "*probably ripe for re-examination*":

> "18. That makes it unnecessary to deal with consideration. It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991]1 QB 1 the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in Foakes v Beer (1884) 9 App Cas 605: see, in particular, p 622, per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in In re Selectmove Ltd [1995] 1 WLR 474, and declined to follow Williams v Roffey Bros &Nicholls (Contractors) Ltd. The reality is that any decision on this point is likely to involve a re-examination of the decision in Foakes v Beer. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum." [Emphasis added]

127. Whilst the point may in due course be the subject of higher judicial consideration, for the purposes of this Application, I proceed on the basis that "*an expectation of commercial advantage*" is not good consideration.

128. It was submitted for the Claimants that even on this basis the nature of consideration provided is not a matter apt for summary determination but requires a fuller review of the evidence. Mr Seitnepesov does not set out what consideration was provided although he does state in his evidence in the context of describing the general restructuring plan:

> "Integral would pay interest when it took it longer to repay the amounts advanced by GPB."

129. Counsel for the Claimants also noted the references to payment of default interest set out in Mr Zalivako's evidence (referred to in the Bank's skeleton):

> "During the entire period from 1 October 2019 through to 31 March 2020, Integral paid default interest of USD 817,371.15 on the basis of what was contractually due and outstanding under the Facility Letter" (Zalivako 2-45g)

130. Whilst I note the authorities that where a summary judgment application gives rise to a short point of law the court should grasp the nettle and decide it, this is only in the circumstances where the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument. On a summary judgment application the burden lies on the applicant to show that there is no realistic prospect of the claim succeeding.

131. I am not satisfied that the court has before it all the evidence necessary for a proper determination of the issue of consideration and there are reasonable grounds for believing that a fuller investigation into the facts and circumstances of the case with the benefit of oral evidence and cross-examination would enable the court to determine whether in fact good consideration was provided for the alleged agreement.

No intention for binding variation

132. It was submitted for the Bank that the Claimants have to show that the parties intended the new agreement to take effect as a binding variation of the original contract and the test is an objective one: *RTS Flexible Systems v Molkerei* [2010] UKSC 14 at [45]:

> "it depends not upon their subjective state of mind but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."

133. The Bank relied on the background of the previous extensions in writing, the contemporaneous documents which, the Bank submitted, made it clear there would be no extension before all the terms of restructuring had been agreed and the subsequent conduct being the payment of default interest, the changes to repayment schedules, the failure to adhere to repayment schedules and no mention of the alleged agreement in subsequent correspondence.

134. It was submitted for the Claimants that the background facts can only be ascertained with disclosure and full witness evidence. In particular it was submitted that the evidence establishes that repayment plans were agreed and amended without the formal steps being completed. Further, Mr Seitnepesov’s understanding was that the overall restructuring and additional financing required formalities but this followed on from compliance by Integral of the agreed amended repayment terms.

135. In my view this is a matter which can only be resolved once the court has all the evidence before it including, as discussed above, evidence as to the conversations that took place orally in August and September 2019, and thus a clear understanding of the

context against which an objective consideration can take place. I note that in light of the evidence of the transcripts of the later calls, the Bank was obliged to submit that references to an agreement in the later exchanges have to be understood in the context of the Acknowledgment of Debt Letter and that it was "*plausible*" that the payment schedule had been agreed without altering the fact that the borrowing was outstanding and would remain overdue. This submission can only be resolved once the court has all the evidence before it.

136. For these reasons I find that the Bank has not established that there is no real prospect that the Claimants can establish their defence to the counterclaim on the basis that there was no intention to create legal relations.

Conclusion on legal issues

137. In my view the Bank has not established that the Claimants have no real prospect of succeeding on their defence to the counterclaim by reason of the legal issues discussed above.

Conclusion on summary judgment application

138. For the reasons set out above the Application is dismissed. In light of my conclusion on the issues discussed above, it is not necessary for me to consider the alternative defences raised as to Set Off and the Prevention Principle.