Neutral Citation Number: [2022] EWHC 2795 (Comm)

Case No: CL-2019-000281

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2022

Before :

MR JUSTICE FOXTON

- -

Between :

VTB COMMODITIES TRADING DAC (formerly VTB CAPITAL TRADING LIMITED)	**Claimant/ Arbitration Claimant**
- and -	
JSC ANTIPINSKY REFINERY	**Defendant/ Arbitration Respondent**
- and -	
PETRACO OIL COMPANY SA	**Intervener**

- -
- -

Lord Wolfson KC and **Andrew Leung** (instructed by **Mishcon de Reya LLP**) for the **Intervener**
The Claimant in person, represented with the permission of the court by **Nick Hutt**

Hearing dates: 28 October 2022 and 2 November 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 04 November 2022 at 14:00.

Mr Justice Foxton :

INTRODUCTION

1. The background to the applications before the court presents a study in procedural complexity. The applications themselves are:

   i) By Mr Hutt, the Chief Executive Officer of the Claimant (**VTB**) for permission to represent VTB at these hearings, the solicitors previously representing VTB having come off the record on 7 June 2022. This occurred because VTB is a sanctioned entity and no license has as yet been granted by the Office of Financial Sanctions Implementation (**OFSI**) to enable it to pay legal fees.

   ii) By the Intervener (**Petraco**) for security for the costs of the trial ordered by Sir William Blair (**the Cargo Trial**) to determine Petraco's application for an award of damages pursuant to the undertakings offered by VTB when obtaining injunctions from Mr Justice Waksman (on 29 April 2019) and Mr Justice Teare (30 April 2019).

   iii) By Petraco for an order that VTB be required to serve a response to a Request for Further Information served on 23 February 2022 (**the RFI**), in which Petraco seeks further information as to VTB's case on Russian law.

   iv) By VTB, albeit it has been unable to issue an application notice because of the sanctions in place, to adjourn the security for costs application, and for extensions of the directions which would have the effect of vacating the Cargo Trial, currently listed for 23 May 2023.

2. After the hearing on 28 October 2022, it became apparent that on that day, OFSI had issued a "General Licence under the Russia Regulations and the Belarus Regulations Int/2022/2252300" (**the General Licence**) in relation to the provision of legal services. That necessitated a further hearing at which submissions were made addressing the potential impact of the General Licence on the issues before the court.

PRELIMINARY RULINGS

3. I should deal with the first of those applications at the outset. I am satisfied on the material before me that VTB is not presently in a position to pay for legal representation in this jurisdiction, as a result of sanctions imposed by orders made pursuant to the Russia (Sanctions) (EU Exit) Regulations 2019 (**the 2019 Regulations**). As I have stated, the solicitors previously acting for VTB (PCB Byrne (**PCBB**)) have come off the record. The effect of the evidence before me is that neither that firm of solicitors nor counsel were willing to undertake this hearing without remuneration (assuming that the provision of legal services without remuneration would not contravene the 2019 Regulations). Nor can they be criticised for adopting that position.

4. In such circumstances, the court has a discretion to permit an appropriate person such as a director or an officer of the company to appear on its behalf pursuant to its inherent jurisdiction (and cf CPR 39.6 as to the position of an employee of the

company at trial). It is often not practicable for litigants in person to conduct complex commercial litigation. As *The Commercial Court Guide* 11th edition (2022) notes at [M.3]:

> "Although rule 39.6 allows a company or other corporation with the permission of the Court to be represented at trial by an employee, the complexity of most cases in the Commercial Court generally makes that unsuitable. Accordingly, permission is likely to be given only in unusual circumstances, and is likely to require, at a minimum, clear evidence that the company or other corporation reasonably could not have been legally represented and that the employee has both the ability and familiarity with the case to be able to assist the court and also unfettered and unqualified authority to represent and bind the company or other corporation in dealings with the other parties to the litigation or with the Court."

5. In this case, the matters which Mr Hutt wishes to raise on behalf of VTB concern issues of case management – which application should be determined at this hearing, what variations should be made to the directions for trial which have been given and the timing of the trial. I was satisfied that it was appropriate to give Mr Hutt permission to speak on VTB's behalf in relation to issues of that kind, and that it furthered the overriding objective of dealing with cases justly and at a proportionate cost to do so. In particular, I was satisfied that, as VTB's Chief Executive Officer, Mr Hutt has authority to act for VTB and is in a position to explain VTB's position on these issues. I was also satisfied that it would assist the court in resolving those issues if it heard submissions from VTB as well as from Petraco.

6. As I have mentioned, one consequence of the sanctions imposed on VTB is that it was unable to pay the fee necessary to issue an application notice. The exemptions from the requirement to pay fees do not provide for the position of a sanctioned party. This is becoming an increasingly common issue in the Commercial Court, while litigants wait for OFSI to determine their license applications. The matters which VTB wishes to raise through its draft application notice are all matters of case management, which it would be open to the court to raise of its own motion as part of the process of active case management. In these circumstances, I confirmed that VTB would be able to raise these issues at the hearing even though no application notice had been issued.

THE BACKGROUND

7. I am fortunate that the background to this case up until 2 July 2021 is set out in the judgment of Mrs Justice Cockerill of that date, *VTB Commodities Trading DAC v JSC Antipinsky Refinery*, *Petraco Oil Company, Sberbank of Russia and JSC Vo MachinoImport* [2021] EWHC 2021 (Comm) (**the Jurisdiction Judgment**). Nonetheless, for this judgment to make sense on a standalone basis, it is necessary to offer a brief summary of the events here.

The Injunctions

8. On 29 April 2019, VTB, obtained injunctive relief under s.44 Arbitration Act 1996 in respect of six LCIA arbitrations it had commenced against the Defendant, (**Antipinsky**) which operated an oil refinery in Russia, arising from contracts for the purchase by VTB of oil from Antipinsky. VTB obtained two orders under s.44:

i) A Worldwide Freezing Order against Antipinsky (**the WFO**).

ii) A mandatory injunction requiring Antipinsky to deliver a particular cargo of oil then on board the tanker Polar Rock (**the Polar Rock Cargo**), to VTB (**the Cargo Injunction**).

In the usual way, as a term of obtaining injunctive relief, VTB offered an undertaking in damages, in this case in the following terms:

> "If the Court later finds that this Order has caused loss to the Respondent or any other person(s), and decides that the Respondent or that or those other person(s) should be compensated for that loss, the Applicant and Joint Stock Company VTB Capital Holding will comply with any order the court may make".

9. Petraco is an oil trader who claims it was entitled to delivery of the Polar Rock Cargo. On 8 May 2019, it applied to intervene in these proceedings to vary the WFO (so that it did not apply to the Polar Rock Cargo) and discharge the Cargo Injunction, and for an order for the payment of damages pursuant to the undertaking. On 13 May 2019, VTB applied for an order permitting it to sell the Polar Rock Cargo and pay the proceeds into court by way of fortification of the injunctions.

10. These applications were scheduled to be determined at a hearing before Sir William Blair on 15 May 2019. It became clear that a key issue between VTB and Petraco was whether, at the time the Cargo Injunction was granted:

i) title in the Polar Rock Cargo remained with Antipinsky, such that VTB could injunct Antipinsky from delivering the cargo and Petraco had no legal right to delivery of the Polar Rock Cargo (and could not suffer loss by reason of any interference with such a right); or

ii) title in the Polar Rock Cargo had passed from Antipinsky to JSC Vo MachinoImport (**MachinoImport**) from whom Petraco said that it had purchased the cargo, such that VTB had no basis to injunct delivery of the Polar Rock Cargo and Petraco had a legal right to delivery of the cargo.

11. In the event, the parties were able to agree a way forward which Sir William approved (**the Blair Order**):

i) VTB was permitted to sell the Polar Rock Cargo.

ii) VTB was required to pay $30m into court to fortify the injunction (**the Secured Sums**).

iii) The issue between VTB and Petraco as to who had what rights in relation to the Polar Rock Cargo was to be tried on an expedited basis, with a three-day estimate (**the Cargo Trial**).

12. The Blair Order provided for:

> "The expedited trial of the rights and obligations of the Claimant, the Defendant and the Intervener in respect of the Polar Rock Cargo and/or the Secured Sums including any losses that Petraco may have sustained under the cross-

undertaking in damages and (for the avoidance of doubt) the Claimant's right to seek repayment of the monies paid into Court".

13. While this order referred to the rights of Antipinsky, as well as of VTB and Petraco, and to rights in respect of the Secured Sums, as well as the Polar Rock Cargo:

    i) Antipinsky has not itself advanced any claim to the Polar Rock Cargo or participated in the Cargo Trial. Antipinsky is in receivership.

    ii) Petraco has made it clear that it does not claim it ever acquired title to the Polar Rock Cargo, nor has it advanced a proprietary claim to the Secured Sums. Rather it claims it has a personal claim against VTB pursuant to the undertaking in damages for the loss it said the WFO and Cargo Injunctions caused it, and that it should be able to use the sums paid by VTB into court to fortify the injunctions for the purposes of satisfying that damages claim.

14. After that direction had been made, the Cargo Injunction, and the WFO so far as it concerned the Polar Rock Cargo, were set aside by an order of Phillips LJ on Antipinsky's application, supported by Petraco: *VTB Commodities Trading DAC v JSC Antipinsky Refinery and Petraco Oil Company SA* [2020] EWHC 72 (Comm). It was not necessary for the purposes of resolving that application for Phillips LJ to determine whether or not Antipinsky had passed title in the Polar Rock Cargo to MachinoImport. Even assuming in VTB's favour that Antipinsky was in a position to transfer to title in the Polar Rock Cargo to VTB, Phillips LJ held that VTB no realistic prospect of obtaining specific performance of Antipinsky's obligation to transfer the cargo (which was the substantive relief which the Cargo Injunction was granted to preserve) because the oil in question was a commodity, damages were an adequate remedy, and it would not be appropriate to place VTB in, in effect, the position of a secured creditor so far as Antipinsky was concerned (Antipinsky facing numerous claims and being in a precarious financial position).

15. That took the issue of setting the injunction aside off the table, but did not remove the need for the Cargo Trial to determine whether or not VTB was liable to Petraco, and in what amount, pursuant to the undertaking in damages.

The Cargo Trial

16. So far as the Cargo Trial is concerned, and pursuant to directions made in the Blair Order:

    i) On 21 May 2019, Petraco served its Particulars of Claim asserting its entitlement to damages under the undertaking. That asserted that title in the Polar Rock Cargo had passed from Antipinsky to MachinoImport, such that Antipinsky should not have been injuncted from delivering the cargo to Petraco and Petraco had suffered loss because the injunction had prevented it from exercising its contractual right to take delivery of the cargo.

    ii) VTB served a defence, but also a counterclaim. VTB denied that Petraco had ever had any contractual right to delivery of the cargo, on the basis that MachinoImport had not acquired or retained title. On that basis it denied that Petraco suffered loss. It also argued that, as a matter of discretion, the court

should refuse to award damages under the undertaking to Petraco. VTB's counterclaim advanced Russian law claims broadly based on alleged actionable interference by Petraco with VTB's contractual rights to delivery of oil from Antipinsky. That claim was not limited to interference with its right to the Polar Rock Cargo, but involved alleged interference with its rights to other cargos as well.

iii) Following the service of VTB's statement of case, and given the issues now in play, the Cargo Trial, which had been fixed for 29-31 July 2019, was adjourned.

17. On 31 July 2019, VTB applied to join additional parties as defendants to that counterclaim – Sberbank of Russia (**Sberbank**) and MachinoImport – and to serve those parties out of the jurisdiction. The question of whether it was entitled to do so turned on the proper characterisation of the roles of the parties in the Cargo Trial, and whether VTB had the status of a defendant. That was because it is a defendant, not a claimant, who is able under CPR Part 20 to join additional parties as defendants to a counterclaim, and then serve such parties out of the jurisdiction under the relatively broad provisions of Practice Direction 6B paragraph 3.1(4) ("a claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to that claim").

18. On 10 October 2019, Teare J gave VTB permission on a without notice application to serve the Part 20 Claims on Sberbank and MachinoImport out of the jurisdiction. Sberbank and MachinoImport applied to set the order for service out aside.

19. Those applications were heard by Cockerill J who set the order aside. Her primary basis for doing so was that VTB did not have the status of a defendant, and therefore there was no basis on which it could issue Part 20 Claims against new parties. Petraco relies heavily on Cockerill J's judgment when seeking an order for security for costs and it will be necessary to return to that judgment below.

20. On 8 October 2021, VTB served an amended Defence and Counterclaim. On 12 November 2021, Petraco served its Reply and Defence to Counterclaim. On 17 January 2022, VTB serves its Reply to Defence to Counterclaim.

21. Following discussion between the parties as to proposed directions, the Court provisionally agreed to hold a trial window of 2-23 May 2023 for the Cargo Trial, and a CMC was fixed for 14 March 2022. However, VTB failed to file its Section 2 DRD by 23 February 2022, and its CMIS by 4 March 2022. Nor did it reply to a Request for Further Information served by Petraco on 23 February 2022.

Sanctions

22. On 24 February, VTB Bank PJSC, of which VTB was the commodities branch, was placed on the United Kingdom government's sanctions list following the Russian Federation's invasion of Ukraine. VTB applied to adjourn the CMC, but in the event the CMC proceeded, and VTB was represented by a solicitor advocate from PCBB. At that hearing, Sir Nigel Teare gave directions for trial, including:

i) The provision of discovery by 27 July 2022.

ii) The exchange of witness statements by 14 October 2022.

23. Following that CMC, the trial was fixed for 2 May 2023, with an estimate of 3 weeks.

24. On 3 March 2022, PCBB applied to OFSI for a licence allowing VTB to pay past and future legal fees, but not adverse costs orders. That application was supplemented by further applications on 14 March and 27 April 2022. On 11 March 2022, Petraco's solicitors Mishcon de Reya LLP (**MdR**) wrote to PCBB asking for confirmation that VTB would be willing to provide security for costs, and seek a licence from OFSI to be in a position to do so.

25. A second CMC had been fixed to deal with outstanding case management matters. On 20 May 2022, Cockerill J rejected VTB's application to adjourn that hearing. At the CMC, Cockerill J made further orders, requiring VTB to provide Section 2 of its DRD and the outstanding answers required to complete the CMIS by 10 June 2022. Following that hearing, Petraco issued its applications for security for costs and for a response to the RFI which are to be determined at this hearing.

26. On 7 June 2022, I approved a consent order by which PCBB came off the record, given the evidence that VTB was not lawfully able to pay its fees.

27. On 10 June 2022, VTB prepared, but due to its inability to pay the issue fee was unable to issue, an application seeking to stay the proceedings until 1 October 2022 pending the outcome of the licence applications made to OFSI, and to adjourn the trial.

28. A further case management hearing took place on 22 July 2022, at which Cockerill J ordered that Petraco's applications for security for costs and in relation to the outstanding RFI be heard in October 2022, and varying the dates for VTB to provide Section 2 of the DRD and its responses to the CMIS to 5 October 2022. Procedural deadlines were varied, but all with a view to preserving the trial date.

29. On 5 October 2022, VTB issued the application for further directions and to vacate the hearing fixed for 20 May 2023 to which I have referred at [6] above.

THE GENERAL LICENCE

The structure of the General Licence

30. Paragraph 4 of the General Licence states:

> "Provided that one of the sets of conditions in either Part A or Part B of this licence are complied with in full any Person or Relevant Institution may:
>
> 4.1. Receive payments from a DP [a person designated under the 2019 Regulations];
>
> 4.2. Make payments (directly or indirectly) for or on behalf of a DP;
>
> 4.3. Make payments for the benefit of a DP;
>
> 4.4. Process payments which relate to a DP; and

4.5. Carry out any other act which is reasonably necessary to give effect to 4.1 - 4.4 above".

31. As the references to Parts A and B indicate, the General Licence falls into two parts. There are, however, certain features common to both parts:

i) Where the conditions of Part A or Part B are satisfied, they permit the payment of "professional legal fees", "Counsel's fees" and "Expenses".

ii) The term "Expenses" is defined as:

> "any fees or expenses associated with the provision of the Legal Services including (but not limited to):
> - fees for expert witnesses;
> - translation fees;
> - printing;
> - travel expenses;
> - subsistence expenses;
> - courier expenses;
> - legal searches;
> - court transcripts;
> - administrative fees necessary to provide legal services (i.e., Home Office fees); and
> - bank transaction fees,
>
> but excluding Counsel's fees."

iii) The General Licence does not refer to payments made to meet costs orders in favour of the other side or to comply with an order for security for costs.

iv) Payments under each of Part A and Part B are subject to an overall limit of £500,000 including VAT for the period from 28 October 2022 to 28 April 2023, and a separate limit for Expenses of 5% of the legal fees total or £25,000 including VAT, whichever is the lower (paragraphs 5 and 6 of Part A and paragraphs 4 and 5 of Part B).

v) Paragraph 7 of Part A and paragraph 6 of Part B provide:

> "If at any point either:
>
> 7.1. It is estimated that in any individual case the limits for the professional legal fees, Counsel's fees or Expenses set out above will be exceeded; or
>
> 7.2. In any individual case, the limits for the professional legal fees, Counsel's fees or Expenses set out above are in fact exceeded,
>
> this licence will not apply to any further payment of any nature in relation to the entirety of the Legal Services nor to any other act in relation to the provision of the Legal Services".

vi) The effect of this provision would appear to be that in an "individual case" in which it is anticipated the total of professional legal fees or counsel fees will exceed £500,000, or Expenses will exceed the Expenses limit, the General Licence will not apply at all (rather than simply not applying to any excess). The words "any further payment" appear to be directed to payments after the point when it is estimated that the limits will be exceeded.

vii) The application of the limits in cases in which the law firm or counsel undertake different, or separate but related, matters for the same client is unclear. The definition of Legal Services is "legal services provided to a DP, including legal advice and/or representation, whether provided in the UK or another jurisdiction, in relation to *any matter*", with the definition of Legal Services feeding through to various provisions in the General Licence. However, the limits are expressed to apply to "professional legal fees, together with any Counsel's fees … in total for the duration of the licence". Certainly, work done pursuant to a single letter of engagement would appear to attract a single £500,000 limit.

Part A of the General Licence

32. Part A concerns "legal services based on a prior obligation", namely an obligation owed prior to the date that the Designated Person or its owner or controller was designated under one of the relevant sanctions regimes.

33. While matters are not as clear as they might be, the application of Part A would appear to be determined by the date that the relevant engagement was entered into, rather than when the particular fee became payable:

i) Paragraph 3 provides that the payment must be "in relation to Legal Services which have been provided *or are being provided* to a DP …".

ii) Paragraph 4 requires that "the payment must be owed in *accordance with* an obligation which was entered into by the DP" prior to the designation date, language which is broad enough to cover ongoing services under a pre-designation mandate.

iii) Paragraph 7 of Part A, to which I have referred above, contemplates that fees which have yet to be incurred but which can presently be estimated can fall within Part A.

iv) The OFSI press release accompanying the General Licence (https://ofsi.blog.gov.uk/2022/10/28/legal-fees-general-licence/) describes Part A in the following terms:

> "For legal work which is carried out in satisfaction of a prior obligation (*for example where a law firm or barrister is engaged before the designation of the individual or entity*), there is a £500,000 (inc. VAT) cap on the amount that can be claimed over the duration of the licence. This amount reflects the potentially costly nature of legal work and therefore covers legitimate requests, while still maintaining the policy intent of a financial sanctions designation."

That supports the view that it is the date of engagement which is significant.

v) The reporting requirements require production to OFSI of "the relevant letter of engagement between the DP and the Legal Adviser, Law Firm or Counsel", presumably for the purpose of identifying the date of engagement.

vi) This interpretation is also supported by the fact that Part A (unlike Part B) does not specify limits for the hourly rate for solicitors or counsel, presumably on the basis that where the engagement is entered into before designation, the existing contractual hourly rates will apply.

34. However, where a DP instructs new solicitors or counsel after designation, the professional fees of the new firm or counsel would not appear to fall within Part A. In such cases, the fees will not be "owed in accordance with an obligation which was entered into by the DP prior to the date of the DP's designation". The operation of the limits in a case in which a new counsel is instructed by solicitors acting under a pre-designation engagement is unclear.

Part B

35. Part B applies to legal services not based on a prior obligation. It follows a similar structure to Part A, save that it also imposes limits on the hourly rates which can be charged by solicitors (dependent on their seniority and location) and counsel. There is no reference to brief fees, nor any explanation of how contingent fees are to be treated. The solicitors' rates are significantly higher than the Civil Justice Council guideline hourly rates.

36. Paragraph 9 provides that if the hourly rates charged at any point exceed these figures, "this licence will not apply to any further payment of any nature in relation to the entirety of the Legal Services nor to any other act in relation to the provision of Legal Services". Once again, the result of exceeding the figures in the General Licence would appear to be to take the entire legal matter outside the scope of the General Licence.

Can the limits of Part A and Part B be combined?

37. Where work is done under an existing retainer by the same law firm or counsel before and after the DP's designation, can these limits be combined?

38. The OFSI press release states:

> "Where applicable, these two caps can also be combined, meaning if work is undertaken for a designated person that involves fees for legal work carried out in satisfaction of a prior obligation (£500,000 limit) and work commenced post-designation (£500,000 limit), up to £1 million (inc. VAT) could be paid under the General Licence. For any fees above these caps, a specific licence must be sought."

39. That passage might be read as referring to work done under the same retainer before and after designation, or for the same client in respect of two different matters.

40. However, in my view, the better interpretation of the General Licence is that it does not allow "doubling up" of the limits in respect of work undertaken pursuant to the same engagement, before and after designation. As I have stated the terms of Part A appear to contemplate the limit applying to the combination of past and future fees, given the reference in paragraph 3 of Part A to "Legal Services which have been provided, or which are being provided …." Further, paragraph 5 suggests that the £500,000 Part A limit applies to amounts paid during the period of the licence, i.e. up to 28 May 2023 ("must not exceed £500,000 …. in total for the duration of this licence"), and hence applies to ongoing work.

SECURITY FOR COSTS

Petraco's Security for Costs Application

41. Petraco seeks security for all of its costs of the Cargo Trial, in an amount of 75% of its current estimate, some £4,142,061.07 from a total of £5,552,748.09. It seeks security pursuant to CPR 25.12(2)(c), on the basis that:

> "the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so".

42. The basis for that belief is as follows:

    i) If Petraco wins, it will seek an interim payment which VTB would be required to pay within 14 days.

    ii) As VTB's funds are frozen as a result of the sanctions, any application to obtain the funds necessary to meet the costs order would not be resolved for many months.

    iii) The General Licence does not apply to payments of the other side's costs.

    iv) As a result, VTB will not be in a position to make payment on the due date.

    v) A company which is unable to meet a costs liability when due, because of the illiquid nature of its asset base, meets the requirements of CPR 25.12(2)(c): *Chemistree Homecare Limited v Teva Pharmaceuticals Ltd* [2011] EWHC 2979 (Ch), [3] (Briggs J) and *Holyoake v Candy* [2016] 6 Costs LR 1157, [63] (Nugee J).

43. The order which Petraco seeks is noteworthy in a number of respects:

    i) As I have stated, it seeks the full costs of the Cargo Trial, in which Petraco seeks to make out its entitlement to damages pursuant to the undertaking given by VTB. The security for costs application does not in any way seek to distinguish between VTB's response to that claim, and its counterclaim, nor to address what additional costs (if any) or issues the latter introduces.

    ii) The order is for provision of security for costs in tranches, the first tranche payable within 14 days of VTB obtaining an OFSI license to make the payment. As Petraco explains, "under Petraco's proposed order, the obligation

to pay security will only be triggered if and when VTB has obtained appropriate licenses to make such payments". As a result, an application for security justified by reference to the time it will take for VTB to obtain a licence to pay any costs order is only to be provided once VTB has obtained a licence to provide the security. Petraco accepts that this will require a special licence application.

iii) The consequence of not providing the security for costs is not the staying and ultimately striking out of the Cargo Trial, something which would be of no benefit to Petraco, but that the "Claimant's Defence and Counterclaim be struck out in its entirety without further order". That would presumably leave Petraco to establish its entitlement to damages pursuant to the undertaking.

The status of VTB in the Cargo Trial

44. Petraco rightly recognises that an initial issue thrown up by its application is how VTB's role in the Cargo Trial is to be characterised for security for costs purposes. Petraco submits:

> "Only the defendant may apply for security for costs of the proceedings under CPR r 25.12. VTB has always been and remains the claimant: it went on the offensive by launching a claim against Antipinsky in order to obtain injunctive relief to shore up its position in relation to the Cargo, specifically against Petraco, a competing buyer who would otherwise have lifted the Cargo. Petraco is in substance the defendant as, in response to VTB's claim and in order to vindicate its rights, it has had to seek relief against VTB under the cross-undertaking in damages, given to and enforceable by the Court.
>
> The picture might be thought to be even more stark, because VTB has also launched a counterclaim against Petraco in respect of other cargoes".

45. In order to clear some ground, I am satisfied that the following matters are clear:

i) Petraco, in seeking to enforce the undertaking in damages offered by VTB as a condition of obtaining the WFO and Cargo Injunctions, is not in the position of a claimant, and cannot be required to give security for costs of the enforcement exercise. That is clear from *CT Bowring & Co v Corsi &* Partners [1994] BCC 713. Petraco is not a voluntary participant in this litigation, but someone who has intervened to protect its interests in the face of the impact of the injunctions which VTB obtained, and Petraco seeks to be restored to the *status quo ante* before the injunctions were granted, rather than to place itself in a better position as a result of engagement with the court process than it was in before any court order was made (Millett LJ in *CT Bowring* at pp.724 and 728-29).

ii) VTB, in pursuing a counterclaim for loss allegedly caused by unlawful interference with its contractual entitlement to receive cargoes, is, so far as that counterclaim is concerned, in the position of a claimant. I accept that, in principle and subject to other moderating factors, an order for security for costs could be made in relation to its pursuit of that counterclaim. However, as I have stated, that has not been the focus of Petraco's application.

46. Petraco needs to go further, and establish that it necessarily follows from the fact that it is not in the position of a claimant and cannot be required to give security for costs in respect of its invocation of the undertaking in damages, that VTB is, for all purposes including in answering that invocation, in the position of a claimant and can be ordered to provide security for the costs Petraco will incur in asserting and establishing its entitlement. Particularly in a case in which the enforcement of the undertaking remains the only live issue in the proceedings, that is far from a self-evident proposition, and Lord Wolfson KC accepted that no case had been found in which an order had been made requiring a claimant facing an attempt to enforce the undertaking in damages it had given to provide security for the costs of that hearing.

47. Petraco relied on the Jurisdiction Judgment, [138]-[157], which were "adopted in full". In particular reliance was placed on [144], where Cockerill J held:

> "This therefore is a starting point: to the extent that this is a claim under the undertaking in damages Petraco, not VTB, should be seen as being in the position of being the defendant; and by parity of reasoning VTB would be the claimant."

48. However, that observation was made in the context of a wholly different issue, whether VTB could invoke the wide powers of the counterclaiming defendant to join new parties to proceedings and to serve them out of the jurisdiction. I am satisfied that it does not answer the issue which arises at this hearing. Whatever the position might be in other contexts, I am not persuaded that merely because the intervener seeking to enforce the undertaking is not a claimant for security for costs purposes, it necessarily or always follows that the party seeking to resist payment under its undertaking has the status of a claimant for the purposes of an application to obtain security for costs of the undertaking proceedings.

49. In approaching this issue, I have found the sanction which Petraco seeks to impose for non-compliance with the order to provide security revealing. Ordinarily, the sanction for non-compliance with an order requiring security for costs to be provided is to halt, either on a temporary basis or for good, the claim which the party ordered to provide security is seeking to pursue. Where such a sanction cannot be imposed, because it is the person applying for security rather than the respondent to the application who is incentivised to pursue the proceedings, that is a strong sign that an order for security for costs is not appropriate.

50. The importance in distinguishing, in the security for costs context, between court proceedings which the applicant for security wishes to pursue, and those which the respondent wishes to pursue, is evident in the approach taken to applications for security for costs by counterclaiming defendants. In this context, the courts are reluctant to impose an order for security in respect of the claim when the respondent will incur those very costs in pursuing its counterclaim, and also mindful of the consequences of ordering security for the claim in such circumstances on the ability to conduct a fair trial of the counterclaim. In *BJ Crabtree (Insulation) Ltd v GPT Communications Systems* (1990) 59 BLR 43, Bingham LJ observed:

> "It is however necessary, as I think, to consider what the effect of an order for security in this case would be if security were not given. It would have the effect, as the defendants acknowledge, of preventing the plaintiffs pursuing their

> claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. It seems quite clear - and, indeed, was not I think in controversy - that in the course of defending the counterclaim all the same matters would be canvassed as would be canvassed if the plaintiffs were to pursue their claim, but on that basis they would defend the claim and advance their own in a somewhat hobbled manner, and would be conducting the litigation (to change the metaphor) with one hand tied behind their back. I have to say that that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation.
>
> Mr. Phillips for the defendants submits there would really be no problem because, if the defendants failed in their counterclaim and the plaintiffs' case contrary to the counterclaim effectively succeeded, then the stay could be lifted and the plaintiffs could be given judgment. But on that assumption one is bound to ask what would be the point of making the order at all except to give the defendants a tactical advantage in the litigation."

51. In this case, leaving aside any additional costs raised by VTB's counterclaim, if VTB is ordered to but fails to provide security, Petraco will still incur costs in proving its case, but the problems of "one-sided" litigation will be present in an acute form. This is because, as Lord Wolfson KC accepted, the normal sanction for security for costs of staying or striking out the respondent's claim (*Civil Procedure* [25.12.12]) is not available. The sanction sought – striking out VTB's defence and counterclaim – could have profound consequences on VTB's ability to resist the enforcement of the undertaking. The-then Edwin Johnson QC provides a useful summary of the relevant principles in *Times Travel v Pakistan International Airlines Group* [2019] EWHC 7322 (Ch), [55]:

> "(1) If there is a debarring order in place, its effect depends in the first instance upon its terms ..
>
> (2) Where an order debars a defendant from defending particular proceedings, this should mean what it says: At the trial of the relevant proceedings the defendant should not be permitted to participate in the normal way. That is to say by doing such things as adducing evidence, cross-examining witnesses on the other side, or making submissions.
>
> (3) The case law does appear to demonstrate the existence of a residual discretion or trial management power to permit a debarred defendant to take some part in the trial of the relevant proceedings. It seems to me that this discretion is a narrow one. In particular circumstances I can see that the exercise of this discretion might include the permitting of some limited submissions or the permitting of some cross-examination. More generally, it strikes me that a debarred defendant should normally be able to address the court on the form of order to be made after the substantive decision on the trial has been made, and in relation to the pointing out of any errors in the relevant judgment. It also strikes me, but I say this on a strictly provisional basis because it is not a matter I am deciding at this stage, that it does strike me that the debarred defendant ought to be able to address

the court on the question of the costs of the relevant proceedings. But I repeat that that is not a question which I am deciding in this judgment.

(4) The overriding principle however is that debarring orders should mean what they say. The debarred defendant should not normally be permitted to participate in the relevant trial in a way which undermines the debarring order, and permits the defendant to escape the effect of the debarring order. A debarring order is an important sanction available to the court in the exercise of its case management powers, and an important method of ensuring that the court's case management orders are respected. As such, defendants should not normally be allowed to escape from the consequences of a debarring order when the trial of the relevant proceedings takes place.

(5) Where a debarring order does have the effect of preventing a defendant from participating in a trial, the position does not then go by default. At the trial the claimant must still demonstrate to the satisfaction of the court that the claimant is entitled to the relief sought in the relevant proceedings.

(6) The striking out of the defence does not mean that the court cannot have any regard to that defence. It can still be considered by the court for the purposes of understanding the statements of case in the relevant proceedings as a whole. It also appears, by reference to what Sales J is recorded as saying in the second decision in *Thevarajah*, that looking at the defence for the purposes of understanding the claim can also, in an appropriate case, extend to hearing from counsel for the debarred defendant in order for counsel for the debarred defendant to provide assistance for the benefit of the court in understanding the nature and extent of the relevant claim."

52. These consequences are appropriate in cases where there has been a serious and deliberate breach of a court order, and the sanction is proportionate to the consequences of that breach. A highly relevant consideration is whether the breaches have impaired the other party's ability to have a fair trial: *Byers v Samba Financial Group* [2020] EWHC 853 (Ch), [121]-[132]. Even when a party commits contempt of court, it has been noted that it would be a "strong thing" for the court to refuse to hear a party when responding to an application or order made against it (*JSC BTA Bank v Ablyazov* [2012] EWCA Civ 639, [27]). However, this case concerns the important, but undoubtedly less fundamental, interest of a litigant in being able to enforce any costs order made in its favour at the end of the proceedings.

53. Against this background, and ignoring VTB's counterclaim, I am not persuaded in the circumstances of this case that the position of VTB in the only surviving aspect of the litigation (Petraco's attempt to enforce the undertaking) is sufficiently analogous to the bringing of a claim for an order for security for costs to be appropriate. Nor am I persuaded that the result is different merely because (as I accept) VTB had Petraco in its sights from the outset, in that the Cargo Injunction was intended to prevent Antipinsky delivering the Polar Rock Cargo to Petraco, and would inevitably impact on Petraco. That may mean there is little difference between the position of Antipinsky and that of Petraco, as Petraco submitted. However, if it was Antipinsky which was, in the present context, seeking security for costs in circumstances in

which its attempt to enforce the undertaking was the only issue left in the litigation, I would not be willing to make an order in the form sought in its favour either.

54. I should make it clear that nothing in this judgment is intended to suggest that a defendant facing a claim for substantive relief is not able to seek security for costs of the whole action, which might be in an appropriate case the costs of enforcing the undertaking in damages in a case where that forms one of the streams of ongoing or anticipated litigation activity. However, the sanction for non-compliance with such an order would be the staying and striking out of the claimant's claim. If the defendant then proceeded to enforce the undertaking, I am not persuaded that the effect of the claimant's non-compliance with the security for costs order would be that it would not be permitted to defend the application to enforce the injunction (any more than it would be denied the right resist the defendant's claims for assessment of its costs).

55. Nor am I seeking to preclude an application for the security for costs of VTB's counterclaim. As I indicated at [45(ii)] above, I am satisfied that this is a context in which security might well be ordered, and in which an appropriate sanction for its non-provision (staying or striking out the counterclaim) is available. However, any application for security for costs on that basis would need to engage with the specific issues which arise when the court is asked to order security for costs of a counterclaim while the claim continues, including as to the appropriate amount of security.

If an Order for Security is Appropriate as a Matter of Principle, Would an Order be Appropriate on the Circumstances of this Case?

56. I have already referred to the noteworthy feature of Petraco's application that it is the time which it will take to obtain a licence from OFSI which is said to provide the basis for seeking security, but the security is only to be provided once a licence to do so has been obtained. In addition, as Mr Hutt pointed out, on the current timetable any licence to provide the security might well only be granted relatively close to the trial date, by which time the costs will largely have been incurred. By way of a development of that point, as the obligation to provide security would only arise 14 days after receipt of the licence, any default in compliance may well occur close to or even during the trial.

57. However, the position may be less stark than the previous paragraph would suggest.

58. First, it might be the case that OFSI will only provide a licence to permit compliance with a court order, with the result that if an order for security is made now, a licence can be obtained, whereas if the first relevant order made is for the payment of costs after trial, the clock will only start running at that point. However, the evidence on this issue was exiguous, reflecting what appears to be a level of uncertainty as to the approach which OFSI is adopting. On the basis of the material before me:

    i) Regulation 66 of the 2019 Regulations permits the Treasury to grant general or particular licences, and can be of a definite or indefinite duration.

    ii) The General Guidance produced by OFSI identifies as one purpose for which a licence might be granted the payment of "fees for the provision of legal services", including legal fees and disbursements. It would appear that licences of this kind can be anticipatory in nature, the General Guidance providing:

> "You are strongly encouraged to apply for a licence in advance of providing substantive legal services in order for you to have certainty as to the fees that will be recoverable while the designated person remains listed"

and stating that the application should provide "an estimate of the anticipated fees".

iii) The legal fees exception extends to making a payment into court for security for the other side's costs, which is perceived as being different from paying security for damages into court. It would seem to follow that meeting the other side's costs in litigation is a licensable activity in itself. I am not, therefore, presently persuaded that VTB cannot apply for a license at this stage in anticipation of any future costs liability to Petraco, and would not be willing to order security for costs (were it otherwise appropriate to do so) without more information on this issue. I return to this issue at [76]-[80] below.

59. Second, in answer to Mr Hutt's timing point, Lord Wolfson KC submitted that now that VTB and this litigation is "on OFSI's radar", an application for a licence to comply with an order for security for costs might be dealt with more quickly than the licence applications made to date. That may, or may not, be correct, but if it is, it rather cuts across the assumption that I should use the time it is taking VTB to obtain a licence to pay its own lawyers as a yardstick for how long it would take to obtain a licence allowing an adverse costs order after trial to be complied with.

SHOULD THE CARGO TRIAL DATE BE MAINTAINED?

60. As I have stated, this trial is due to start on 2 May 2023. It is scheduled to last 3 weeks. It involves allegations of dishonesty against Petraco, and expert evidence of Russian law and market practice. Each side is claiming some $30m from the other. On any view, it is significant litigation.

61. As matters stand:

i) Disclosure is due by 1 November. Beyond ensuring that relevant documents are preserved, VTB has taken no steps to locate relevant documents.

ii) Witness statements are to be served by 9 December.

iii) Expert reports in both disciplines are to be served by 13 January 2023, with the Joint Memoranda by 3 February 2023.

iv) Supplemental witness statements are to be served by 10 February 2023.

v) The PTR is to take place by 24 March 2023.

62. Even for a legally represented litigant, that is a very demanding timetable. I am satisfied that the issues arising at the trial are not matters which the director of a Swiss commodities trader is realistically going to be able to advance on VTB's behalf. Lord Wolfson KC was able to identify, at best, a couple of weeks of "slack" in that timetable, and I think that is a realistic appraisal.

63. When the case was before Cockerill J on 22 July 2022, she observed at pages 33-34 of the transcript:

> "I think my own view is that looking at this case I know that the parties had in mind potentially moving it. It is just about conceivable, just about conceivable, that if licences are in place at October you could put in place a timetable to a May trial. It will be tight. There may well be a contested application at that point, if licences are in place, and I am not prejudging it because it may well depend on what the positions of the witnesses are, what the positions of the experts are and so forth. But it does not seem to me to be yet completely illogical to suppose that a trial could take place in May, if all goes well over summer, because also, to an extent, if it looks like things are moving, people may even without licences being in place be able to do some work, witnesses may be able to think about what they are going to say and so forth. I think we will keep it with the date in the diary, but you are going to have to jump in autumn one way or the other."

64. Lord Wolfson KC responded:

> "Yes, absolutely. By the 1st November, as I understand it, the parties will need to make their mind up, and if not, the court may make their mind up for them, so to speak."

65. At this hearing, for reasons I well understand given the three years and counting during which his clients have been waiting to pursue their claim to be "made whole", Lord Wolfson KC suggested that the decision about maintaining the trial date should be postponed once again, leaving open the possibility of OFSI granting a licence or Petraco persuading the court that the trial should proceed with VTB as litigants in person if no licence is granted. As I have indicated, I am satisfied that the latter option is wholly unrealistic, while the former would involve holding a three week-slot which would not be available to other litigants on an increasingly precarious basis, and would mean that any new trial date in the event of an adjournment would be fixed that much further into the future.

66. Drawing on what Hobhouse LJ would characterise as "knowledge of light entertainment" (*Denby v English and Scottish Maritime Insurance Co Ltd* [1998] CLC 870, 877), I am satisfied that at this hearing we have reached "make your mind up time".

67. I accept Lord Wolfson KC's submission that VTB has failed to take such steps as it is able to take to progress the position on disclosure, notwithstanding Cockerill J's clear warnings on 22 July. VTB's attitude appears to have been one in which it has thrown up its hands in despair, proclaiming how unfair everything is, rather than doing what it can with the resources it has to move matters along. Nonetheless, the following matters are clear on the evidence:

    i) The imposition of international sanctions following the Russian invasion of Ukraine has had devastating effects on VTB, reducing its headcount from over 80 personnel down to 19, all of whose contracts expire at the end of the year.

ii) Half of those 19 personnel are traders, with only one (relatively junior) Swiss lawyer, and for a prolonged period they had to work without pay.

iii) There has been a succession of crises to be managed: obtaining the ability to pay debts, replacing suppliers who refused to continue dealing with VTB, seeking to replace departing personnel and negotiating extensions to staff contracts. Mr Hutt said that, with a significantly reduced team, "we also have a number of issues that we need to deal with and firefight on a daily basis".

iv) While VTB is at fault in failing to recognise that progressing this litigation is one of the fires to be fought, I am not satisfied that a greater level of diligence by VTB would have fundamentally changed the position as it now subsists.

68. I accept that delay involves prejudice to Petraco. In addition to the disappointment of failed expectations and additional costs which any adjournment occasions a litigant, in this case the amount paid into court is in €s, but Petraco's claim is in US$. Due to the strengthening of the US$ against the €, there is now the € equivalent of US$26.8m in court, with Petraco claiming in excess of US$30m damages. Nonetheless, the presence of that fund in court leaves Petraco in a better position than many litigants faced with adjournments arising from the Russian invasion of Ukraine. In any event, in this case there is the very real risk that not acting now will involve greater delay in the longer term.

69. That leaves the effect of the General Licence. Petraco understandably contends that this is a "game changer", and that there is nothing to stop PCBB resuming work immediately. However, I am not persuaded that this is the case:

i) As I have explained above, the General Licence does not appear to apply to work on cases in which the current estimate of fees will exceed £500,000 between 28 October 2022 and 28 April 2023, a week before the trial would begin.

ii) PCBB has estimated its future costs at £3,900,000. Whatever detailed points might be made about the recoverability of that figure, PCBB's total costs for the Commercial Court trial would appear to be below the figure of in excess of £5m which Petraco are to spend. On any view, the level of costs required to bring this case to the eve of trial will be very substantially in excess of £500,000.

iii) The expenses limit of £25,000 would not seem anything like sufficient to cover an electronic disclosure platform provider, expert fees in Russian law and the oil market, application fees, printing, travel, couriers, searches and transcripts.

iv) The effect of these matters on my understanding of the General Licence is that PCBB will not be able to bring itself within the scope of the General Licence.

v) While Lord Wolfson KC floated the possibility that the General Licence may reduce the volume of work which OFSI faces, and increase the speed with which it can resolve applications for specific licences, that is wholly

speculative. It offers no sufficiently concrete reason to proceed on the basis that OFSI will resolve VTB's applications in time to hold the current trial date.

vi) That is particularly the case when the apparent complexities of VTB's position are taken into account. In a letter to OFSI of 1 November 2022, PCBB noted that counsel who acted in the case to date have stated that they will only act if all past costs are paid, and if PCBB hold a sufficient amount on account for future costs. OFSI's response to such a request is unknown. PCBB assert that VTB's use of its funds to pay legal fees would also require licences from the Swiss authorities (where VTB is incorporated) and Germany (where funds are held). A previous request to the Swiss authorities (SECO) took three months to resolve. There is no sensible basis for anticipating any imminent resolution of these issues.

70. Against this background, and subject to the condition at [78] below, I have reluctantly come to the conclusion that the trial needs to be adjourned. It should be re-fixed in November 2023. I have asked the Commercial Court registry to hold slots beginning on 13 and 20 November 2023, and would ask the parties to approach listing with a view to re-fixing the case without delay. The parties are also asked to submit revised directions to the court, once the trial has been fixed.

OUTSTANDING APPLICATIONS

71. That does not mean, however, that VTB can sit and do nothing unless and until an OFSI license is granted. There are matters which can and should be progressed.

The RFI

72. This RFI seeks some further information about the Russian law causes of action which VTB has pleaded in some detail, clearly with the benefit of significant Russian legal input. On the basis of exchanges between Mr Hutt and the Court, I am satisfied that the following order is appropriate:

i) VTB's inhouse lawyer should obtain the Russian law advice obtained by PCBB for the purpose of pleading the Russian law causes of action.

ii) On the basis of and with the benefit of that material, VTB is to use its best endeavours to answer the RFI.

iii) That "best endeavours" answer is to be served within 6 weeks.

73. I do not propose to make an "unless order" given my decision on the trial date. However, in the absence of a serious and evidenced attempt to engage with this order, an "unless order" will be very much on the table at any future hearing. Doing nothing and crying "foul" will not pass muster.

Section 2 of the DRD

74. The purpose of Section 2 of the DRD is to provide the court with information about the data held by each party, and how the parties propose to search it. There was no application before the Court in relation to the DRD. However, I can see no reason why VTB cannot take steps over the next 6 weeks:

i) to identify which VTB personnel worked on the Legacy Contracts and the October Contracts, were involved in the Moscow Meeting and the negotiations subsequent to that meeting including the Langham Meeting, the March Contracts and the April Contracts;

ii) to locate where the emails and electronic documents of those individuals are stored;

iii) to identify where documents relating to the arbitrations commenced by VTB are located;

and to report that information to Petraco's solicitors in a letter. If there is no evidenced attempt to engage seriously with these tasks, that is a matter to which the Court may have regard at any future hearing.

75. More generally, VTB need to understand that if no licence is granted, or there is delay in providing it with an order which would threaten the new trial date, then there is every likelihood of that hearing proceeding, whether VTB is able to instruct lawyers or not. VTB needs to prepare on the assumption that it may not be able to instruct lawyers, and that it needs to take the steps which will enable it to do the best it can in November 2023, however unsatisfactory that might be.

FURTHER APPLICATION TO OFSI

76. It has been necessary to adjourn this case in part because of the time required to obtain OFSI licenses. That has involved a significant disruption to the case, and I am keen to avoid any repetition, including in complying with any costs order made. As I have indicated at [58] above, it is not clear to me whether there is anything which would prevent VTB applying now on a contingent basis for a licence in respect of any future liability to pay Petraco's costs if the action proceeds.

77. CPR 3.1(m) permits me to make any order for the purpose of managing the case, and furthering the overriding objective. That requires me to ensure that:

i) "The parties are on an equal footing" (CPR 1.1(2)(a)). In this case, VTB will face no similar delay in obtaining an enforceable costs order if it prevails.

ii) Ensuring that the case is dealt with "expeditiously and fairly". That includes avoiding delay while steps are taken by a party to put itself into a position to comply with orders of the court.

78. By way of exercising those case management powers, and as a condition of the adjournment which I have granted at VTB's request, I am satisfied that it is appropriate now to order VTB to make a contingent application to OFSI for a licence in respect of any adverse costs liability in this case.

79. It is clear from the OFSI General Guidance that OFSI are keen to ensure that licences in respect of legal fees are reasonable and proportionate in amount. With that in mind, I have reviewed Petraco's costs estimate. I accept that, given the nature of the allegations which VTB has advanced, there is a realistic possibility of indemnity costs being awarded in this case if Petraco succeeds and VTB fails. However, as matters stand, even on an indemnity basis I think that it is unlikely that Petraco would recover

an interim payment at the level of costs for which it had sought security having regard to:

i) The hourly rates used, which exceed guideline rates.

ii) The involvement of three equity partners.

iii) The fact that the case has moved law firms twice (albeit on the second occasion the case moved with the team).

iv) The level of counsel fees - £1.5m in total.

v) The additional costs which will have been incurred through the use of four counsel, two of whom are now KCs.

80. However, it seems to me entirely realistic that Petraco would, if they succeed, obtain an interim payment of £2,500,000, on an indemnity basis. This part of my judgment should be drawn to OFSI's attention in the application.

81. To the extent that the decisions I have reached in this judgment require any further orders, the parties are asked to explain them in writing.