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IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
OF ENGLAND AND WALES  
COMMERCIAL COURT (QBD)  
**[2020] EWHC 3689 (Comm)**



Nos. CL-2020-000544  
CL-2020-000594  
CL-2020-000696  
CL-2020-000725

Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Tuesday, 22 December 2020

Before:

HIS HONOUR JUDGE PELLING QC  
(Sitting as a Judge of the High Court)

B E T W E E N :

TENACITY MARINE INC.

Claimant

- and -

NOC SWISS LLC

Defendant

\_\_\_\_\_

COUNSEL appeared on behalf of the Claimants.

MR PAPADOPOULOS appeared on behalf of the Defendant.

\_\_\_\_\_

**J U D G M E N T**  
(via Microsoft Teams)

(Transcript prepared without the aid of documentation)

JUDGE PELLING QC:

- 1 This is the hearing of an application by the defendant (“GP”) for an order discharging mandatory orders giving effect to letters of indemnity issued by it, either to obtain the release of hydrocarbon cargos in lieu of the production by it of original bills of lading or in order to obtain payment for hydrocarbon products it was selling but in respect of which it could not produce an original bill of lading.
- 2 In each and every case, it appears that GP had financed the purchase of the cargos concerned using trade finance provided by a small number of different lenders. In each case, the original bill of lading was apparently in the custody of the trade finance lender concerned as security for the payment of its outlay on the basis that the bills of lading would be released when the cargo was either sold by GP and the proceeds of sale credited to its account with the relevant lender, or the proceeds of sale of cargo being sold by GP purchased by it with trade finance support was credited to GP’s account with the relevant trade finance lender.
- 3 In each case, the cargo was discharged, or the purchase price paid, against a letter of indemnity from GP. In fact, the proceeds of sale in each case were directed by GP to be credited to a bank account other than that of the relevant trade finance lender. This meant that the relevant trade finance lender could not recover its outlay and resulted in claims being made against the ship owners for wrongful delivery with either threats of arrest of the ships concerned or, in some cases, actual arrest. When claims for security pursuant to GP’s letter of indemnity were made, it was not forthcoming.
- 4 Each letter of indemnity is expressly governed by English law and is subject to an exclusive jurisdiction provision in favour of the Courts of England and Wales. Proceedings to enforce the letters of indemnity were commenced by the ship owners or disponent owners applying for mandatory orders, giving effect to the letters of indemnity. In all cases, orders were granted subject to the right of GP to apply to vary or discharge those orders. It is the application to discharge those orders that is the subject of this hearing.
- 5 GP contends that the orders could be discharged because:
  - (a) GP is hopelessly insolvent, both technically and commercially;
  - (b) it is, in consequence, impossible for it to comply with the orders, and wrong in law that it should be made the subject of an order requiring it to perform its obligations, breach of which is punishable as a contempt when it is impossible for it to comply; and
  - (c) it is asserted that it would be contrary to the laws of the United Arab Emirates (the relevant local law) for the company to comply with the order, and those who are charged with its management, apparently currently Mr Roderick John Sutton, who has been appointed by GP with the support of some of its funders as its chief restructuring officer, would be exposed to the risk of criminal prosecution if he or they attempted to comply with the orders of this court.
- 6 GP is a company formed in accordance with the laws of the UAE and the Emirate of Sharjah. GP trades principally from facilities in Fujairah, another constituent Emirate within the UAE. It is common ground that the applicable insolvency law is that of the UAE.

It is also common ground that UAE corporate insolvency law has only one relevant response to corporate insolvency, which is liquidation. Although Mr Sutton's evidence is that GP is hopelessly insolvent, it has not been placed in liquidation, as would normally be the only appropriate response for an insolvent company, but continues to trade with the support of some of its major lender creditors including at least some of the trade finance banks that funded the transactions that are at the heart of these proceedings and which initiated the claims against the claimants leading to these proceedings.

- 7 The claimant in each case maintains that GP's conduct was fraudulent for the reasons outlined already. That appears to be likely on the material currently available and is not apparently disputed but is immaterial to the issues I have to determine since GP accepts that if it is unable to make good its case that compliance with the orders it seeks to discharge is financially or legally impossible, the orders must remain in place.
- 8 I record that Mr Sutton had not been appointed at the time when either funds were diverted from the relevant trade finance lenders or when the letters of indemnity were issued. There is no suggestion by anyone that he is responsible for or was in any way involved in these events.
- 9 Finally, I record that the directors of GP at the time when the LOIs were issued currently remain directors of GP. Mr Sutton maintains that they have not been removed for three reasons. First, they are supporting and cooperating with Mr Sutton, secondly, there are practical difficulties in taking the necessary steps to remove them related to the pandemic and, thirdly, given the financial state of the company, it has been difficult to find anyone willing to become a director in their place. I am doubtful whether the pandemic could have played any real role in preventing the removal of the directors if otherwise it had been intended that they should be removed, but I accept that their continued support of the process apparently being conducted by Mr Sutton will be of value, and I also accept that it would be difficult to find replacement directors of a company in the financial condition Mr Sutton says GP is in. It is unlikely that the equivalent of the Articles of Association of GP will permit it to operate without any directors, but I make no finding as to that since there is no evidence to that effect in these proceedings. It is also noteworthy that substantial contributions to the estate of the company are anticipated by Mr Sutton from those who are beneficially interested in GP who are or are repented by the directors.
- 10 Mr Sutton maintains that the current directors, although in office, have no control over the affairs of the company. That may be so, given the restructuring is being carried out with the support of at least some of GP's major trade finance creditors whose interests are not obviously aligned with those of GP's directors and shareholders. However there is no evidence on this point other than Mr Sutton's assertions and, for that reason, I cannot safely make any findings as to the role of GP's directors and shareholders and the current management of GP in the restructuring process apparently being carried on by Mr Sutton, and do not do so.
- 11 Before turning to the issues to be determined, I should say something about the commercial context in which this dispute arises. It frequently happens that original bills of lading are not available for presentation to the ship's master or the ship's agent at the disport. This is so for a variety of reasons, including the fact that cargos, and particularly hydrocarbon cargos, are frequently sold afloat, often multiple times, and that the original bill of lading takes time to pass down the chain to the entity ultimately entitled to receive the cargo, and because the trade is funded, as these ones were, with the original bill of lading being held as security by trade finance houses funding the venture. It is frequently the case that

charterparties oblige owners to accept letters of indemnity in lieu of bills of lading for these reasons. In consequence, it is critical to the efficiency of the shipping trade generally and to the hydrocarbon shipping trade in particular, that ship owners and disponent owners can safely rely on letters of indemnity when accepting discharge instructions. That said, all ship owners know, or ought to know because P&I clubs and others have been warning them for many years, that an unsecured letter of indemnity is only as good as the creditworthiness of the profferer of the letter of indemnity, and that the only way of eliminating this credit risk entirely is by insisting either that the letter of indemnity be secured or by insisting on the production of the original bills of lading as the only basis on which discharge instructions will be accepted. However, neither course is possible if the owner is obliged to accept a letter of indemnity by the terms of its charterparty and in any event insisting on the production of an original bill of lading is likely to result in delay and cost, which demurrage may only partially mitigate. These points are relevant to the approach a court should take to discharge applications of the sort now before me. I will explain why when considering the applicable principles of law later in this judgment.

### The Primary Claims

- 12 In this section of the judgment, I summarise the basis of each of the claimant's claims against GP. I do so in summary form because, ultimately, the detailed facts of each dispute are not material to the determination of this dispute.

### OCM Singapore Njord Holdings Hardrada, Pte. Ltd and Torm A/S v. GP (CL-2020-544) ("The TORM Claim")

- 13 The first claimant is the owner of the MT TORM HARDRADA. The second claimant time-chartered the vessel from the first claimant and, on 8 May 2020, entered into a voyage charter with GP. Pursuant to the voyage charter, TORM HARDRADA loaded 14,533 metric tonnes-odd of Jet A-1 fuel at Yanbu on 20 May 2020. The master signed a bill of lading in triplicate which was consigned to Natixis France, the bank financing the acquisition of the cargo by GP.
- 14 On 6 June 2020, GP instructed the vessel to proceed to Fujairah in the UAE, and there discharge the cargo at the receiver's terminal. The disponent owner complied with these instructions in consideration of the receipt from GP of a letter of indemnity that was subject to English law and to the exclusive jurisdiction of the English courts. The voyage charterparty contained a provision requiring the owners to release the cargo against a letter of indemnity in the preferred wording of the owner's P&I club. The cargo was discharged pursuant to the express letter of indemnity provided in accordance with these provisions. Thereafter, Natixis claimed to hold the original bills of lading, that the discharge was without its authority and demanded either delivery of the cargo or its value, together with interest and costs. Natixis's solicitors threatened the arrest of the TORM HARDRADA. The claimant's solicitor called on GP to put up security pursuant to the express letters of indemnity provided by GP as the price of obtaining discharge of the cargo but the requested security was not provided.
- 15 On 21 August 2020, the claimants applied on notice for a mandatory order requiring GP to give effect to the letter of indemnity, which was granted on 24 August 2020. Ultimately, the application to discharge now before me was made on 6 November 2020. GP has not complied, either wholly or in part, with the letter of indemnity.

Aramco Trading (Fujairah) v GP (CL-2020-696)  
(“The ATF Claim”)

- 16 On 18 June 2020, GP, as seller, agreed to sell to ATF, and ATF agreed to buy, two parcels of 20,000 metric tonnes of fuel oil FOB. ATF was required to pay for the fuel, the subject of these proceedings, against the presentation of various categories of documents, including the original bills of lading issued or endorsed to the buyer. The sale contract provided that if the documents were not available, GP was to proffer, and ATF would accept, a letter of indemnity from GP in the prescribed form.
- 17 ATF voyage-chartered the MT KRONVIKEN on 3 July 2020 to carry the fuel oil to its intended destination. The vessel had been time-chartered to the disponent owner. Under the terms of the contract of sale, title to and risk in the cargo passed to ATF, and ATF was entitled to the original bills of lading from GP on loading but, instead, it received, as I have said, letters of indemnity, by which GP agreed to indemnify ATF in respect of any loss caused by the bills of lading not being supplied. In turn, ATF had to give a letter of indemnity to the disponent owner in order to obtain discharge of the cargo since ATF did not have the original bills of lading. There is an issue as to whether the chain of letters of indemnity was broken by reason of a different Aramco entity being named in each of the letters of indemnity to which I have referred, but that is not material for present purposes.
- 18 The cargo was discharged on 13 July 2020, and on 20 August 2020, Banque Cantonale de Genève commenced proceedings in Singapore and arrested the vessel on the basis that the bank was the owner of the cargo loaded aboard the vessel and discharged on the instructions of ATF against its letter of indemnity. The bank’s claim is based on the fact that it had funded the purchase of the cargo by GP, which GP had then sold to ATF, and was the holder of the original bills of lading and so was the owner of the cargo, notwithstanding its purported sale by GP to ATF.
- 19 Following the arrest, claims followed down the line of indemnities from head to disponent owner and then to ATF. ATF invoked its letter of indemnity from GP on 31 August 2020. GP failed to provide security as it was obliged to and ATF then intervened in the Singapore proceedings and provided the security necessary to obtain release of the vessel. ATF claims to be indemnified in respect of that outlay by GP under its letter of indemnity.
- 20 This claim was commenced on 22 October 2020 and, on 29 October 2020, I ordered GP to provide the necessary security needed to obtain the release of the vessel to replace the security provided by ATF. By an application notice dated 6 November 2020, GP applied to discharge that order on the basis that it is impossible to provide the required security, either financially or legally.

V8 Pool Inc. v GP (CL-2020-725)  
(“The V8 Claim”)

- 21 This claim is concerned with the MT PACIFIC A.DORODCHI. The claimant time-chartered the vessel. The chain of charters above the claimant is complex, and the detail does not matter for present purposes. On 23 January 2020, the claimant in these proceedings (V8) voyage-chartered the vessel to GP which was then loaded with 98,000 metric tonnes of very low sulphur fuel oil in Rotterdam. Eleven original bills of lading were issued, and the vessel left Rotterdam on 19 February 2020. On 8 March 2020, GP instructed V8 that the disport would be Fujairah, and on 13 March 2020, GP ordered V8 to discharge the cargo against its letter of indemnity. Discharge then followed in two tranches shortly thereafter.

- 22 On 15 October 2020, the vessel was arrested at the suit of Natixis France in proceedings commenced in Antwerp on the basis that Natixis was the lawful holder of five of the original bills of lading pursuant to which the cargo had been carried because it financed the purchase of the cargo by GP and had yet to be paid.
- 23 Following claims down a chain of letters of indemnity from the head owner to V8, V8 made demand under its letter of indemnity from GP that it (that is GP) provide security for the release of the vessel. A mandatory order requiring GP to provide security was granted on 9 November 2020 and GP now seeks to set that order aside on the grounds already indicated. All the letters of indemnity, the subject of these proceedings, made English law the applicable law and granted either exclusive or non-exclusive jurisdiction to the courts of England and Wales.

#### The Application to Discharge - Applicable Principles

- 24 There was no material dispute as to most of the principles applicable to the application to discharge. In summary:
- (a) An obligation to indemnity under a maritime letter of indemnity is amenable to enforcement by mandatory order because damages are generally not an adequate remedy - see Trafigura Maritime Logistica Pte Ltd v Clear Lake Shipping Pte Ltd [2020] EWHC 726 per Henshaw J [26 to 32] and the authorities cited by Henshaw J at [31];
  - (b) However, as with any application for a mandatory order, a court will not order or continue to order a party to do that which it is impossible for it to do - see South Bucks District Council v Porter [2003] 2 AC 558, per Lord Bingham at [32] and Udall v Capri Lighting Ltd [1988] QB 902 [915];
  - (c) The burden of proving that compliance with a mandatory order that is either being sought or has been made would be or is impossible rests squarely on the party asserting its impossibility and nothing short of impossibility will do;
  - (d) The standard a party asserting impossibility must satisfy is the ordinary civil standard of the balance of probabilities;
  - (e) In deciding whether a party to a maritime letter of indemnity has established financial impossibility, it is necessary for a court to bear in mind that:
    - (i) All the factual material relevant to such a claim is in the possession of the party asserting financial impossibility and that, in the context of an interlocutory application for a mandatory order or to discharge a mandatory order, the only material that the party seeking or seeking to uphold a mandatory order will gain access to is either that which is in the public domain or that which the party asserting impossibility chooses to disclose;
    - (ii) Given the importance of maritime letters of indemnity to the particular transactions giving rise to these claims and the integrity of the letter of indemnity process to the shipping trade in general, the evidence proffered by a party asserting financial impossibility must be both full and frank and must clearly establish, on the balance of probability, that it is financially impossible for the party asserting financial

impossibility to comply with its undertakings contained in its letter of indemnity - see Tenacity Marine Inc. v NOC Swiss LLC [2020] EWHC 2557 (Comm) per Foxton J at [11 and 13];

- (iii) Mere assertions by a party claiming financial impossibility are unlikely ever to be a sufficient basis on which to conclude that compliance would be financially impossible. In a case such as this, as in cases where companies resist orders to give security for costs, a court must judge the availability of funds by reference to the underlying realities of a company's financial position - see Goldtrail Travel Ltd v Onur Air [2017] UKSC 57; [2017] 1 WLR 3014, per Lord Wilson at [23];
- (iv) Subject to these points, it is for a party asserting that it is financially impossible for it to comply with its obligations under a maritime letter of indemnity to establish, on the balance of probabilities, that the necessary funds would not be made available to it either by its shareholders or by some other closely associated person by analogy with the principles applicable to security for costs and similar applications - see Goldtrail Travel Ltd (Ibid.) at [23];
- (f) In answering the question that a court must answer in the circumstances of an application such as this, a court does not take refutation at face value, but considers the possible availability of willing sources of funding by reference to the underlying realities of the financial position of the party asserting impecuniosity and its relationship with its backers (see Goldtrail Travel Ltd (Ibid.) at [24].

25 There is a dispute of principle concerning how far a court should go in asking whether the party asserting impecuniosity has established that the relevant funds would not be made available to it by a third party. All the claimants contend that, upon a proper analysis, GP has not satisfied the test set out in Goldtrail Travel Ltd (Ibid.) because it has not approached its existing funders to see whether or not they would be prepared to provide support for the company in complying with its obligations under its letters of indemnity. This question arises because, as Mr Sutton puts it in para.79 of his third witness statement:

“... GP is continuing to trade with the support of its lenders because the lenders perceive it to be in their collective best interest. However, as explained above, there is no conflict or divergence between the interests of the lenders and of the other creditors as both the lenders and creditors will make a significantly greater recovery if the business of the company is restructured and sold as a going concern as compared to a liquidation.”

Later in the same witness statement, Mr Sutton adds, in relation to the suggestion that GP should be placed in liquidation under the supervision of the UAE courts:

“108. In terms of maximising recovery for creditors, there are significant disadvantages to a liquidation. The main disadvantages are the high legal and other professional fees, the long and uncertain duration of the process, the appointment of a state liquidator who may not have the resources or expertise to maximise recovery and the sale of assets in a distressed state. The inability to sell the business as a going concern would also mean the loss of a significant number of jobs.

“109. Under a liquidation, there is the possibility that the court may decide to try to implement a restructuring plan. That would be done if the

court believed that there was a possibility that the company would be profitable again within a reasonable period. Considering the financial state of GP, there is, at the very least, a high risk that a UAE court would consider that a restructuring plan is not appropriate and, therefore, if GP found itself in a court process, it is very likely that the company would be placed in liquidation. Therefore, the insolvency processes under UAE law are either unavailable or detrimental to GP and its creditors. The creditors recognise this, which is the reason why they have not put the company into a court process by petitioning the UAE court.”

This leads all the claimants to submit that the defendant has failed to discharge the burden that rests upon it because Mr Sutton has failed to ask the relevant funders whether they would be prepared to provide the necessary security sought under the letters of indemnity. In this connection, the only evidence from Mr Sutton on this issue is to be found at para.60 of his third witness statement where he states:

“Considering the banks have not been prepared to provide GP with any trade finance ... I do not believe that there is any prospect of banks being prepared to lend GP any of the sums claimed as security or, of course, the total, which is in excess of \$50 million.”

The sums in issue in these proceedings are less than \$50 million in fact, and the issue which arises is not one concerned with the provision of trade finance either. It is submitted on behalf of GP however, that the possibility of third-party funding does not and cannot extend to the possibility of one group of creditors funding an insolvent company in order that thereby another set of creditors will receive preferential treatment. All the claimants maintain, on the other hand, that, where a company is being kept out of an insolvency process and is continuing to trade with the support of a group of creditors, it is entirely legitimate to ask those creditors for further support. I return to this issue when considering the submissions about the role of funders later in this judgment.

#### The position of the company aside from potential third-party support

- 26 The evidence as to GP’s current financial position is contained in Mr Sutton’s third witness statement. His evidence on critical issues in that statement is different from, or at least purports to fill what he maintains are unintentional lacunae in his earlier statements, in particular in relation to the realisable assets available to GP.
- 27 It is necessary to start by saying something about Mr Sutton’s role. In an earlier judgment given by me in a claim by Tenacity Marine Inc. in similar circumstances to those giving rise to the claims currently before me, I analysed Mr Sutton’s role on the material then available to me in these terms:

“33. Although it is said that Mr Sutton is fully independent and under a duty to act in the interests of creditors as a whole, that does not appear strictly to be true. His revised appointment letter dated 17 August 2020 defines ‘Lenders’ by reference to an apparently closed list of creditors, being principally banks and other financial institutions (see the second paragraph on page 1 of that document). Clauses 3.1 and 3.2 of the document require



Mr Sutton to act in the best interests of the lenders as defined, not creditors as a whole ...

“35. In those circumstances, I consider that Mr Sutton’s evidence fails adequately to explain why at least some security cannot be provided, even if not all of it. As Mr Sutton says in paragraph 18, he owes GP’s funders a duty of confidentiality and duties of care and to act in their best interests. That duty of confidentiality may mean that issues such as those I have referred to cannot or have not been disclosed. Mr Sutton’s statement makes clear that what is going on is an attempted restructuring that has been negotiated between GP and its ‘financial stakeholders’, that is the lenders referred to in Mr Sutton’s letter of appointment, and he confirms at paragraph 19 that he reports to and owes his duties to those financial stakeholders. There is no necessary alignment of interests between those financial stakeholders and those in the position of NOC; nor can I safely rely upon reading between the lines of a statement such as that of Mr Sutton to give the duties to which Mr Sutton owes to a limited class of creditors. Importantly, the company is apparently continuing to trade. If that is so, it can only be continuing to trade with the support of its lenders, and its lenders will presumably be supporting the company in its continued trading activities because they perceive it to be in their collective best interests to do so.”

Mr Sutton addresses this point at paras.76 to 78 in his third witness statement in these terms:

- “76. My letter of engagement refers to ‘Lenders’ as any and all banks, financial institutions, commodity houses or similar creditors owed money from the company. The reason why we confirmed in the letter that the CRO owed his duties to lenders was to affirm this point in response to requests received at the time from lenders. I am happy to do the same for trade creditors, but we have not received any requests from other groups of creditors to be provided with or amend the letter of engagement. However, I confirm that I am acting in the interests of all creditors, whether they fall within the definition of ‘lenders’ or not.
- (a) Firstly, under international best practice, in the event of conflict, the overriding duty of a director or executive officer such as a CRO of an insolvent company is owed to its creditors. I do not believe the position is clear under UAE law, but I confirm I am acting in accordance with international best practice.
  - (b) Secondly, the interests of all the creditors are aligned because all the creditors will make significantly greater recovery if a liquidation is avoided. Under the restructuring or sale of the business, the recovery will follow the order of priority dictated by the level of security. Therefore, there is no conflict of interest between the lenders as defined in the letter of engagement and other creditors, including the claimants.
- “78. The order of priority under a contractual restructuring and sale of the business will be as follows:
- (a) Funds realised from assets specifically pledged will be paid to creditors who hold security over those assets.

- (b) Preferential liabilities such as judicial charges, unpaid wages and amount dues to government bodies.
- (c) Any surplus of funds realised from inventory and trade receivables after deduction of the costs and expenditure incurred in maintaining the business and assets will be paid to lenders who have the benefit of *pari passu* charges over these assets.
- (d) The surplus from (a) along with all other unsecured realisations will be paid to unsecured creditors on a *pari passu* basis ...”

In relation to the confidentiality point, at para.80 of his third statement, Mr Sutton says that the duty of confidentiality that he owes to lenders is not an impediment to him disclosing the full position to the court.

- 28 The claimants continue to submit that Mr Sutton is neither a director nor officer of the company but performs a role pursuant to a contract with some but not all of GP’s creditors or, at any event, contractually owes duties exclusively to those creditors, even though nominally appointed by the company. In my judgment, the letter of engagement speaks for itself. It is addressed to the directors, who were the directors in control of the company at the time when the events giving rise to these claims occurred. Clause 3.1 provides that the “... *CRO has a continuing obligation to act in the best interests of the Lenders in performing ...*” the task Mr Sutton undertook to perform. “*Lenders*” is a defined term, as is indicated by its capitalised initial letter L, and is defined as meaning “... *any and all banks, financial institutions, commodity houses or similar creditors owed money by ...*” GP or its subsidiaries.
- 29 The scope of work to be undertaken by Mr Sutton is set out in cl.2.1 of the letter of instruction and is in these terms:
- “2. Scope of Work
- “2.1 As set out within the CRO’s Appointment Notification Letter, the CRO is required to perform the following principal workstreams amongst others:
- “The agreed scope:
- (a) Manage the various businesses in a way that maximises their potential and there is a minimum of cash leakages.
  - (b) Work with the new board and other advisors on the development of a strategy for restructuring of the company.
  - (c) Review the group’s cashflow forecast and financial position, including an analysis of the group’s receivables and payables.
  - (d) Perform an operational and financial review of the group’s business and affairs.
  - (e) Considering the formulation of rolling short, medium and long term business plans, budgets and cashflow forecasts.
  - (f) Considering restructuring options for the group and compare outcome to liquidation scenarios.
  - (g) Reconstituting the boards of directors of the subsidiaries for the purpose of facilitating the restructuring process.
  - (h) Assisting with forbearance and debt restructuring negotiations with lenders.
  - (i) Where required, assisting with the negotiation of out of court settlements with lenders and other creditors.

- (j) Unfettered and independent reporting to lenders and other creditors on an ongoing basis in relation to the progress of the restructuring process and the CRO's findings (copies of these reports will be provided to management for factual accuracy checking).
- (k) Review and analysis of assets and liabilities recorded in the financial accounts and comparing this to the actual position of the existence of assets and liabilities ...”

Pausing to note that Mr Sutton undertakes expressly to manage the business of GP in a way that minimises cash leakages, it is noteworthy that there is nothing anywhere within the scope of work that sets out any of the matters he mentions in either para.77(a) or para.78 of his third statement. The letter of engagement provides for Mr Sutton to receive a success fee of 1.25 per cent of the gross sale proceeds generated by any of GP's assets that are agreed to be sold pursuant to the restructuring process.

- 30 All of this leads me to accept the claimants' submission that I should treat Mr Sutton's evidence with rather more circumspection than might be shown to the evidence of a court-appointed liquidator or a UK Insolvency Act appointed administrator. Although he could have done so, Mr Sutton has not offered any undertaking to carry out his appointment in the terms set out in paras.77(a) or 78, or 80, of his statement. As things stand, either his statement is wrong or the letter of engagement does not reflect the true nature of what he has undertaken to do, or what he has undertaken to do has been varied since the letter of engagement was written. In any event, the explanation is unsatisfactory, does not meet the point made in my earlier judgment and is a factor I take into account in assessing the fullness and frankness of Mr Sutton's evidence and whether it demonstrates, on the balance of probabilities, that it is impossible for GP to comply with the existing mandatory orders.
- 31 In this context, I should mention two other points. First, this is the third opportunity Mr Sutton has had to establish impossibility. Secondly, in the course of his submissions, GP's counsel told me that the third statement had been prepared to answer specific points identified in earlier judgments as being reasons why GP had failed at that stage to establish impossibility. In my judgment, that is not a satisfactory approach, at any rate unless it can be shown that, in the result, Mr Sutton has now fully and frankly exposed GP's financial position so as to demonstrate, on the balance of probabilities, that it is financially impossible for GP to comply with the orders that have been made.

#### Financial impossibility and GP's position

- 32 The most up to date balance sheet provided by Mr Sutton is for the period down to 31 October 2020 and therefore shows the position as at that date. It has not been updated, even though Mr Sutton has filed a further witness statement dated 6 November 2020 and to which the balance sheet was attached.
- 33 The balance sheet suggests that all its unrecovered trade receivables and remaining unrealised trade inventory are “*encumbered*”, even though those assets have been included as an asset of the company at their full value. It suggests that the company has a deficit of liabilities over assets of in excess of US\$646 million. On that basis, the company is plainly technically, or balance sheet, insolvent. The “*current liabilities*” are said to be \$1,045.57 million. This figure includes bank borrowings, borrowings from lenders that those described in Mr Sutton's letter of appointment as “Lenders” are not attempting to collect. If that figure is omitted, the total of current liabilities reduces to \$203.81 million against current assets of \$194.13 million. It is questionable whether such a reduction is appropriate for balance sheet purposes since the

bank debt has not been waived in whole or in part, but it is appropriate for the purposes of considering the current ability of the company to meet its liabilities with the continuing support of its lenders. The resulting current deficit, having made these adjustments, is only a deficit, ignoring bank lending, if the deduction of “*doubtful debts*” of 17.9 million is correct. If it is not, then the company is marginally in surplus on current assets and liabilities by about \$8 million.

- 34 This analysis demonstrates how GP is able to continue trading with the support of its lenders even if, as Mr Sutton says, that support consists of the lenders not seeking to collect the debts due to them. Although the claimant criticises these figures as historic, because they show the position at 31 October 2020, I consider that criticism to be mistaken since all that the realisation of realisable and inventory will change is the creation of cash in lieu of receivables and inventory, and thus the balance sheet would be only inaccurate in terms of cash available, which, as I have said, would depend on the collections made and inventories sold.
- 35 The more critical point, however, is whether or not the receivables or inventory are charged as alleged or not. As to that, it is unexplained why receivables and inventory appear in the balance sheet as assets of the company if they are charged either specifically by way of assignment to particular banks or otherwise subject to what are described in these proceedings as “*pari passu* charges”. No attempt has been made to explain whether the word “*encumbered*” refers to specific charges or to the *pari passu* charges either. The document does not in fact disclose GP’s current cash holdings.
- 36 I now turn to the receivables in more detail. In para.26 of Mr Sutton’s third statement, he states that US\$675 million of receivables are not collectable. That adjustment has, however, been taken into account in striking the receivable figure that appears in the balance sheet referred to earlier. The non-collectable figure has not been verified (see para.27 of Mr Sutton’s third statement) and some or all of it may yet be collected by the methods he there identifies. The degree of any success of these collection policies is not reflected in the balance sheet because no value seems to have been attributed in the balance sheet to the possibility of any collections of any part of these supposedly uncollectable receivables.
- 37 In para.30 of his statement, Mr Sutton states that his intention is to secure an orderly sale of GP’s business and assets. As a matter of probability, that means that value will attach to assets. The assets will include uncollected receivables. He does not say that the company will be placed in liquidation following such a disposal. Presumably, therefore, the intention is that the company will revert to the control of its shareholders and directors once its business and assets have been sold. Normally, at any rate in England, I would expect a company to be placed in liquidation or dissolved by being struck off the register following such disposals by an administrator but, as I say, Mr Sutton does not suggest that that is the approach that it is intended should be adopted in this case.
- 38 Mr Sutton states, at para.41 of his third statement, that receivables fall into two groups: those which had been assigned to a lender or lenders, and those subject to what is called in these proceedings a “*pari passu* charge”. He states that the inventory held by GP also divides into these two categories. He states, at para.42, that all receivables and inventory have been pledged to lenders. If this is so, as I have already said, it is not clear what is to be sold as a part of the restructuring process or how the sale can benefit anyone other than the secured creditors. No value is attributed to the goodwill of GP in the balance sheet referred to earlier and, in the circumstances, it is difficult to see what goodwill might credibly be offered for sale.

- 39 In previous statements filed in these proceedings, Mr Sutton has said that GP has unpledged receivables and stock in trade or inventory. He now maintains that those elements not specifically assigned are subject to the *pari passu* charges referred to earlier whilst, at the same time however, stating that realisation of the receivables and inventory is “... *essential to keeping the company trading as a going concern* ...”. As I recorded in my *Tenacity* judgment, Mr Sutton’s evidence at that stage was that there was a balance of current assets over current liabilities of about \$156 million.
- 40 In para.86 of his third statement, Mr Sutton addresses this point by, in effect, moving the bank debt to current liabilities from non-current liabilities, where it had been placed, presumably, to reflect the fact that, by agreement with the lenders, the lenders were not currently seeking repayment or enforcing any *pari passu* or other charges over receivables collected in order to reduce the indebtedness to the banks concerned. Such a movement of funder lending from non-current to current liabilities may eliminate the current surplus I referred to in my *Tenacity* judgment, at least on paper, but, in practical terms, it is immaterial, as long as GP continues to operate with the support of its lenders in not collecting what is otherwise due and, thus, this change does not reflect anything other than a change of treatment on paper of the funder’s debt.
- 41 In paras.88 to 89 of his third statement, Mr Sutton states that:
- (a) On 31 July 2020, GP was owed US\$317.9 million.
  - (b) Since that date, US\$117 million-odd has been collected, leaving therefore approximately \$200 million-odd outstanding.
  - (c) After taking account of fixed charges on specific receivables, the sum actually received by GP in respect of its realisations to date has been about \$10.7 million, which was used “... *to pay salaries and other operational expenses in order to keep the company trading as a going concern*”.

This suggests about 9 per cent of the outstanding \$200 million-odd would be received by GP; that is about \$18 million. These outstanding receivables are expected to be collected by the end of January. This application of the \$10.7 million demonstrates that the *pari passu* charges are either not currently enforceable because the company is not in liquidation or are not being enforced as a result of the lender’s decision to continue to support GP as a going concern. The difficulty with this evidence is that none of it fits with the balance sheet as at 31 October 2020 referred to earlier. It refers to “*net trade receivables*” of \$82.21 million being an asset of the company. That sum is substantially in excess of the sum referred to by Mr Sutton in his statement as likely to be recovered by the company net of the various specific charges. This difference is not explained.

- 42 To further confuse the picture, Mr Sutton then states, at paras.96 to 98 of his statement that:

“96. I confirm all of GP’s future and present monies, properties, rights and claims in relation to all finance and inventories, receivables, accounts and contracts are pledged and assigned to the respective lending banks that financed the transactions.

“97. I had previously thought that there was some stock in trade and there were some trade receivables that were not charged to creditors. This

is because there is an amount of approximately \$45 million of trade receivables, including doubtful, and approximately \$5.6 million of stock that does not relate to transactions specifically financed by lenders.

“98. However, I now confirm that all of GP’s present and future receivables and stock are subject to *pari passu* charges under UAE law and granted under various finance agreements.

“99. Therefore, I confirm that GP has no unencumbered assets that can be utilised to provide security.”

This is inconsistent not merely with what appears in the balance sheet but, more importantly, what appears in para.89 of Mr Sutton’s third statement.

43 It is now necessary that I say a little more about *pari passu* charges. These instruments are a UAE law concept (see the third statement of Mr Sutton at para.98). They are defined by Mr Brown (GP’s UAE law expert) at para.28 of his initial opinion in these terms:

“A *pari passu* charge created by contract is one where a secured creditor is on an equal footing with all those secured creditors holding a *pari passu* charge over the same asset, i.e. tanks or oil on GP’s example. For example, if GP, as borrower, creates a security interest over its asset on a *pari passu* basis in favour of B and C, then B and C are secured creditors holding a *pari passu* charge and will be treated equally. A *pari passu* charge is created by a borrower pursuant to a contract.”

Mr Brown describes what he maintains as the effect of these charges at paras.29 to 31 of his initial opinion in these terms:

“29. If receivables and stock in trade are subject to a *pari passu* charge and the company attempts to sell those assets for the purpose of providing security under LLIs, then this would be clearly contrary to the rights of the chargees, even if this were under an English court order.

“30. It is in the nature of such a charge that it allows for ordinary trading to take place, otherwise it becomes self-defeating commercially. This is qualitatively different from using an asset to provide security to a third party and, therefore, using that asset for the benefit of a third-party creditor rather than the charge holder, but the issue is a matter of contractual interpretation.

“31. Stock can be sold to keep the company trading providing that this is carried out in accordance with the provisions of the relevant charge.”

44 The claimants jointly instructed Dr Hassan Arab as its expert witness. He maintains that if such a charge is to take effect, it must be registered (see footnote 7 in his report). Mr Brown rejects this point on two grounds, being: (a) the law requiring registration requires implementing regulations before it can take effect and none have been promulgated; but (b) in any event, registration is irrelevant between charger and chargee. As Mr Brown puts it:

“This is a matter of contract. Using the charged asset to pay the security would be a breach of contract and the charge.”

- 45 In a context such as the present application, without an opportunity for hearing the experts give oral evidence at which the various concepts can be tested and explored, it is difficult to resolve issues such as this satisfactorily. For present purposes, however, I leave the registration issue to one side. I accept that it is likely that registration will be immaterial to the contractual position of a charger and chargee; however the key point that remains is whether, and if so to what extent, any of the realisables are the subject of *pari passu* charges and the extent to which *pari passu* charges are either enforceable as a matter of law and when and in what circumstances; or are not being enforced as a result of a decision taken by the relevant lenders.
- 46 Viewing this evidence as a whole, there is a fundamental inconsistency and a lack of any detail to support the key assertions in paras.96 to 99 of Mr Sutton’s third statement. It is difficult to see how the 31 October balance sheet can be correct if these paragraphs are correct, and it is difficult to see how GP can continue to trade other than on the basis that either the *pari passu* charges are not currently enforceable or are not being enforced by the chargees as part of their support of GP. In light of Mr Brown’s evidence that “... *It is in the nature of such a charge that it allows for ordinary trading to take place, otherwise it becomes self-defeating commercially* ...” it is at least possible that these charges operate as a floating charge and therefore do not take effect unless and until crystallised. No attempt has been made to explain how otherwise the *pari passu* charges could have the effect attributed to them by Mr Brown. If that is correct, no attempt has been made to explain when or in what circumstances such charges would take effect or over what assets. It is possibly that they crystallise only on the charger becoming the subject of an insolvency process according to the laws of the UAE. However, this has not been discussed in the evidence and I can take it no further in the context of an application of this sort. What is clear, however, is that either the *pari passu* charges are not currently enforceable or are not being enforced by decision of the chargees.
- 47 In summary, therefore, the evidence does not satisfactorily explain what part of the receivables and stock in trade has been charged so as to require payment to a chargee on realisation and what is not. Plainly, however, the only source of income that GP has comes from the collection of its realisables and the sale of its inventory. The extent to which either are subject to *pari passu* charges is entirely unclear on the evidence and if and to the extent either are subject to such charges, it has not precluded GP from using funds apparently subject to the charges to meet the expenditure that Mr Sutton and his staff approve for payment. This can only be because any such charges are not enforceable, as I have said, because the company continues to trade as a going concern, or because they are not being enforced by the lenders concerned. It may be that the lenders are only permitting current, rather than historical, debts to be met, however there is no evidence that this is so and, in particular, no evidence from any of the lenders to this effect. Rather than being full and frank, the position in relation to the *pari passu* charge and its impact on the availability of receivables and inventory when realised is obscure.
- 48 It is noteworthy that Mr Sutton placed no reliance on these instruments at any earlier stage in these proceedings. GP’s case is that these charges make it legally impossible, as a matter of UAE law, for GP to use assets, the subject of such charges, to meet its liabilities under the letters of indemnity. I am not persuaded that this is so. If that was so, it is entirely unclear how the realisation and the proceeds of sale of the stock in trade could be used to meet other expenses being incurred as the company continues to operate. As Mr Brown says, to require

charges to have that effect would be self-defeating. However, he identifies no principled basis for distinguishing between current liabilities incurred for current operations and such liabilities that relate to past transactions. It may be, as I have said, that such charges operate as a floating charge that crystallise only at a point where the company enters liquidation or perhaps where the chargee chooses to crystallise the charge concerned. It may be that non-enforcement is part of the lenders' support of GP. However, none of this is explained. It was for GP to prove that these charges precluded using receivables, or part of the proceeds of receivables realised and/or the proceeds of the sale of stock to meet its liabilities to the claimant, and it has failed to do so.

- 49 It was suggested by GP that to force GP to use its assets, the subject of *pari passu* charges, would expose Mr Sutton to criminal charges in the UAE. I do not accept that that has been made out, either because the charges do not crystallise until the company enters liquidation or, at any rate, a chargee causes them to be triggered or crystallised, or because the lenders more generally are permitting the company to continue trading without regard to the charges. The only party damaged by this conduct would be the chargees, and they can prevent such damage either by enforcing the charges or commencing liquidation proceedings. They have not done so, and as I will explain later, it is close to commercially inconceivable that they will.
- 50 Against that, payments pursuant to the letters of indemnity are sums falling due in the ordinary course of business, as long as GP continues to trade. If it enters liquidation, the position will be different, but it has not and it is improbable that it will, at any rate in the near future. As matters stand, I accept that the sums resulting from the collection of realisable and stock in trade may not be sufficient to meet all of the liabilities that arise under the letter of indemnity, but the extent to which that is so is unclear on the evidence. If it had been GP's case that some, but not all, of the sums which are being claimed could be met from realisable and/or the sale of stock in trade, then it was for GP to say so. The only thing that can be said with confidence is that GP is technically insolvent, as I have said, but continues to trade by collecting receivables and realising its stock in trade and is doing so notwithstanding any apparent impediment created by the *pari passu* charges.
- 51 As things stand therefore, 9 per cent of the receivables collected to date (in excess of \$10 million) has been used to enable the company to continue trading, with approaching double that to be collected by the end of January on Mr Sutton's own evidence. In that context, Mr Sutton's evidence as to GP's available cash historically does not assist and, in any event, is not current.

#### Funding available to GP from third-party sources

- 52 It is now necessary to consider the possibility of third-party funding. The focus of all the claimants' submissions has been on the suggestion that funds will be made available to GP by institutional lenders who will be the principal (and possibly the only) beneficiaries of the restructuring exercise being conducted by Mr Sutton and who are currently supporting it as Mr Sutton has described. Mr Sutton's evidence is that:
- (a) His duty of confidence to the lenders does not preclude him from disclosing the full position to the court (see the third statement of Mr Sutton at para.80).
  - (b) The company continues to trade only because of the support of those lenders.
  - (c) There is a substantial benefit to the lenders in permitting the company to continue trading. In this regard, Mr Sutton estimates a return to all creditors, irrespective of class,



of between 34 and 47 per cent, using the methods currently being applied, as opposed to 9 per cent in the liquidation, giving a benefit spread for the lenders as defined in his letter of engagement of at least 25 per cent over liquidation but, in reality, more since they are, at least in substantial part, secured creditors and therefore, on the order of priority identified by him, will be paid before all unsecured creditors.

(d) The lenders, as defined in Mr Sutton's letter of engagement, are owed in excess of US\$1.1 billion (see the third statement of Mr Sutton at paras.57 and 86).

(e) In consequence, the benefit to the lenders of the process Mr Sutton is engaged in over liquidation quantifies at between \$300 million and \$400 million.

53 As is obvious, this is a powerful potential incentive for the lender to support the company in relation to the claimants' entitlement under the letter of indemnity, which aggregate at about \$30 million.

54 There is no evidence from Mr Sutton as to whether this issue has been discussed by him with the, or any of, the lenders. His only evidence on this issue is at para.60, where he expressed his belief that there was no prospect of the lenders being prepared to lend the sums needed to meet the claimants' claims. Given what he says concerning the effect of his duty of confidence, the only inference I can draw from this is that he has not approached the lenders on this issue at all. The only alternative is that he has approached them but has chosen not to explain their reaction, but that would be contrary to the evidence he has given concerning the effect of his duty of confidence and would be a failure to give full and frank evidence on the impossibility issue.

55 As I indicated much earlier in this judgment, two issues arise:

(a) whether it is legitimate for the claimants to submit that creditors in the position of the lenders are sufficiently closely connected persons to whom a company in GP's position can be expected to seek support; and

(b) whether, in fact, the lenders would be willing to provide such support had they been approached.

56 So far as the first of these issues is concerned, the focus of GP's submissions was that it was not legitimate for the claimants to expect it to approach the lenders because any support would result in one creditor being treated more favourably than another, or another class of creditors, because it would enable the claimants to make a full recovery whilst leaving the lenders to make a partial recovery, further reduced by the amount of their outlay, and leaving other unsecured creditors without any, or with a reduced or partial recovery.

57 There are a number of reasons why, in my judgment, this is misconceived as a basis of challenge. First, it ignores the fact that the lenders are very largely secured creditors, whereas the claimant is an unsecured creditor. That being so, the restructuring process is likely to benefit the lenders, with little or any benefit, or a much lower benefit, for unsecured creditors. The secured creditors owe no relevant duties to the unsecured creditors, their interests being exclusively in collecting as much as possible of the debt that is secured. Secondly, GP is not in insolvent liquidation, which is when the issue of preferences become relevant. The company is, as I have said on a number of occasions in the course of this judgment, continuing to trade with the support of the lenders, who have an obvious commercial interest in providing that support, being the enhanced recovery to which I referred just a moment ago.

Third, that being so, there is no legal or other impediment on the company asking the lenders to provide such support; rather, the facts and matters to which GP refer under this head of the argument are issues which may be material to a decision by the lenders whether to provide support (although given the apparent commercial imperatives it is unlikely to carry much weight), but do not demonstrate that GP is precluded or excused from approaching them to see whether such support would be forthcoming.

- 58 As to the question whether the lenders would be prepared to provide support, that is something that has not been addressed in the evidence, since Mr Sutton has, I conclude, not asked the lenders whether they are prepared to provide the necessary support, and further, that there is, in consequence of that, no evidence from any of the lenders on this issue. Notwithstanding that, GP submits that it is overwhelmingly inherently unlikely that the lenders will provide such support and, thus, it is submitted I can safely conclude that it is impossible for GP to honour its obligations under the letters of indemnity. GP argues that this is so because:
- (a) The lenders would not permit the claimants to jump the queue of other unsecured creditors.
  - (b) The basis of the restructure is that all creditors will be treated in the same way.
  - (c) Paying will open the floodgates of demands from other unsecured creditors seeking to benefit, and if they are refused, then it may cause one or more of them to seek GP's liquidation.
  - (d) It is wrong to make an order against GP on the assumption that the lenders (or some of them) would be prepared to provide funding.
- 59 There are a number of reasons why these factors, either when taken alone or in combination, do not demonstrate that it is inherently improbable that the lenders, or some of them, will provide support. First, all of these points ignore the very strong commercial interests that the lenders have in making sure that Mr Sutton's plan is completed. The factors identified by GP, or some of them, might result in the refusal of the lenders to provide the necessary support, but the commercial considerations that arise may cause them, or some of them, to take a different view. Unless and until they are asked, the evidence as to what position they might, or some of them, might adopt is a matter of speculation alone.
- 60 In any event, it is not the basis of the scheme that all creditors will be treated similarly. The order of priority that will be adopted is that identified in para.78 of Mr Sutton's third statement. There is nothing wrong with that approach other than that there is no mention of it in Mr Sutton's letter of engagement, but it means that, to the extent that the lenders are secured, they will be preferred over unsecured creditors and so are likely to benefit much more from the scheme than unsecured creditors, and possibly to the exclusion of unsecured creditors altogether if there is not enough to repay all the sums secured. Again, there is nothing inherently wrong in that. It follows fairly closely the order of priority in which a winding up or creditor's voluntary liquidation would be carried into effect as a matter of English law, but it does mean that there is a powerful commercial interest for the lenders in making sure the scheme is completed as planned.
- 61 GP's submission that it is wrong to make or maintain an order on the assumption that the lenders will fund compliance misses the point that, on this application, the onus rested squarely on GP to prove that no such funds would be made available to it, but Mr Sutton

chose not to ask the lenders whether that was so. In those circumstances, GP has manifestly failed to prove that the lenders would not provide the funds if asked.

- 62 Finally, GP maintains that the lenders would be bound to refuse to provide the necessary support because it would lead other unsecured creditors to make similar claims. This takes matters no further. Aside from the point that this is ultimately one of commercial judgment, the scheme has always been vulnerable to such an approach and is as vulnerable to such an approach being adopted by one of the claimants if they fail, as it is by such action being taken by another unsecured creditor if they succeed. All creditors are likely to be motivated by self-interest. As things currently stand, it is difficult to see how any unsecured creditor would be better off by initiating a liquidation or indeed how any unsecured creditor can expect to recover anything if there is to be a shortfall in respect of the secured claims.
- 63 In summary, therefore, I consider that GP has failed to prove financial impossibility.

### Legal Impossibility

- 64 Aside from the issue concerning the *pari passu* charges that I have considered already, two issues arise under this head, being: (a) whether the provision of security by the defendant under the letter of indemnity would be an unlawful preference as a matter of UAE law; and (b) whether the provision of such security would expose Mr Sutton to criminal liability in the UAE.
- 65 Before turning to those points in detail, I make two general points. First, to my mind it is at least questionable whether legal impossibility, according to the laws of the UAE, would be a relevant consideration in deciding whether to make a mandatory order in respect of a contract subject to English law where the parties have agreed that the exclusive jurisdiction or non-exclusive jurisdiction for the determination of the disputes would be England. However, that point has not been developed in the course of the argument and I leave that to one side.
- 66 Both experts are agreed that UAE Federal Law No.9 of 2016 (the Bankruptcy Law) is the relevant local law code. Mr Brown's evidence is that if GP is made subject to an order requiring its liquidation, then Art.168 applies and any reviewable transaction occurring two years prior to the date of the commencement of the bankruptcy application is capable of being set aside by the UAE court. The claimants submit this point does not arise because either security will be provided by or on behalf of GP by the lenders for some or all of the reasons already considered and/or because they are confident that GP's business can be sold, or the payments will not be made and the company will be placed in liquidation. I do not accept that analysis summarises all the possible permutations. It is foreseeable that security will be provided but a sale does not happen and following the collection of receivables and the sale of its remaining stock and the payment of the secured creditors, there will be an insolvent husk left which may have to be placed in liquidation. It is also foreseeable that if GP's business is sold, the company at that point will be placed in liquidation rather than being returned to the control of its shareholders and current directors, although as I have said earlier, Mr Sutton has not suggested at any stage that that is the likely outcome.
- 67 The transaction which Mr Brown focuses on in relation to Art.168 is any disposition "... *in which the obligations of the debtor significantly exceed the obligations of the counterparty ...*". Mr Brown maintains that "... *the UAE court may view the provision of security under the court order in isolation from the underlying contractual obligation arising out of the LOI ...*". It is only if this very narrow view is adopted that this point is even arguable. As a matter of first impression, that approach appears an improbable one. Article 168 is concerned with

the disposition of assets either at no consideration or at an undervalue, not with complying with a contractual undertaking entered into at arm's length in the ordinary course of business as the price of obtaining the release of a cargo which could otherwise have been obtained only by the provision of original bills of lading. Mr Brown himself rates the chances of a UAE court adopting such a narrow approach as less than 50 per cent. In my judgment, it is very significantly less than that. Indeed, I accept Dr Arab's evidence on this provision, at para.27 of his first report, and conclude that there is no realistic prospect of a UAE court adopting this very narrow approach to Art.168(1) of the Bankruptcy Law.

68 Mr Brown then turns to Art.168(2), which he maintains would be engaged if security was provided by GP pursuant to the letters of indemnity. Article 168(2) provides:

“The court may rule not to enforce any disposition which is not listed in paragraph 1 of this Article if the disposition is detrimental to the creditors and the counterparty to the contract was aware, or should have been aware, at the time of the disposition that the debtor has ceased payment of the debtor's debts or was in a state of over-indebtedness.”

Mr Brown says that it is hard to evaluate how likely it is that a UAE court would set aside security provided by GP pursuant to its letter of indemnity. As Dr Arab accepts in para.29 of his report, Art.168(2) is concerned with dispositions that are detrimental at the time when the disposition occurs. However, the disposition is reviewable only if it is made at a time when the counterparty is or should have been aware that the debtor had ceased payment of the “debtor's debts” or “was in a state of over-indebtedness”. I reject, as mistaken, Dr Arab's conclusion that the time at which the relevant knowledge is to be tested is the date of the underlying contract rather than the date of a disposition, because that is inconsistent with what is reviewable, which is the disposition, not the contract pursuant to which the disposition is made.

69 Turning next to the first alternative concerning “*debtor's debts*”, Dr Arab states that this phrase is defined in the UAE Bankruptcy Law as being debts payable by a debtor at the date the court issues an order to commence proceedings under Chapters 3 or 4 of the Bankruptcy Law. No such proceedings have been commenced against GP. This does not appear to be in dispute and therefore, as it seems to me, there is no realistic basis upon which this alternative route could be said to give rise to a reversible disposition if the obligation to provide security were honoured.

70 However, that leaves the alternative, namely that, at the date of the disposition, the receiving party was or ought to have been aware that the paying party was in a state of “*over-indebtedness*”. What that phrase means is unclear. As Dr Arab states in para.34 of his report, it probably means actual or constructive knowledge by the receiving party that the paying party was insolvent. As I have said, Mr Sutton's third witness statement establishes that GP is technically insolvent. To that extent at least, therefore, this requirement will be satisfied in respect of any security provided by GP after the date when Mr Sutton's statement became known to any of the various claimants. However, whether any payment could be set aside ultimately depends on whether Art.170 would provide a defence to a claim that the transaction should be reversed. Article 170 provides:

“The court may rule to dismiss a claim for the non-enforceability of the disposition filed on the basis of Article 168 of this law if it finds that the debtor made the disposition in good faith for the purposes of carrying out the debtor's business, and that when the debtor made such a disposition,

there were reasons which led the debtor to believe that the disposition might benefit the debtor's business.”

I accept Mr Brown's evidence that the provision of security does not easily fall within this provision since it is difficult to see how a payment to an unsecured creditor with no continuing business dealings could benefit GP's business other than perhaps by avoiding liquidation, which is likely to be viewed as circular.

- 71 All of that said, none of this renders the provision of security unlawful. It means merely that the transaction can be reversed by order of the UAE court directed to the relevant receiving party as and when an application is made in the context of a liquidation for the reversal of that transaction - see Art.169 of the Bankruptcy Law. As things stand at present, no bankruptcy proceedings have been commenced, so the jurisdiction conferred on the UAE courts has not yet been and may never be engaged. That a transaction may, at some subsequent date, be unwound does not render the transaction one that it is legally impossible for GP to enter into at this stage. I conclude, therefore, that GP has failed to prove legal impossibility by reference to Art.168 of the bankruptcy code as it has failed to prove legal impossibility by reference to the existence of the *pari passu* charges for the reasons identified earlier.
- 72 The final issue I have to consider is whether any payment would expose Mr Sutton or GP's directors to criminal prosecution. Mr Brown considers that such a payment would expose each of the directors and Mr Sutton to criminal liability by operation of Art.201(4) of the Bankruptcy Law. This provides, insofar as material, as follows:
- “The members of the board of directors, the managers and the liquidators of the company declared in bankruptcy at final judgment shall be punished by imprisonment of not more than two years if they commit any of the following acts ...
- “(iv) pay the debt of a creditor after cessation of payments to cause damage to the other creditors or accept securities or special benefits for a creditor which are more favourable than for the other creditors, even if the same was with the intention of concluding protective composition or restructuring.”
- 73 Pausing only to note that before this clause can be engaged, there first has to be a liquidation or at least the commencement of bankruptcy proceedings leading to the liquidation of the company and that is not presently the position, the phrase, “*after the cessation of payments*” means when the debtor fails to pay its debts when due - see Art.1 of the Bankruptcy Law). Dr Arab's opinion is that this definition cannot be satisfied in the circumstances of this case because Mr Sutton has said, at para.79 of his statement, that GP is continuing to trade with the support of its lenders. Dr Arab says that, in these circumstances, no criminal liability could attach to the directors or Mr Sutton, much less if security were provided by a third party on its behalf.
- 74 There is disagreement between the parties as to whether non-payment of a particular liability (in this case to provide security pursuant to the letter of indemnity) constitutes a failure by GP to pay its debts when due but, as it seems to me, that is not the relevant question. Dr Arab maintains that a merely isolated failure would not be enough to constitute a cessation of payments when all other debts are being paid as they fall due, whereas Mr Brown maintains

that if a particular debt has not been paid, but is due, then that is good enough for these purposes.

- 75 Pausing there, I consider this to be beside the point because the question that arises is whether it would be unlawful to pay or to meet the obligations imposed by the letters of indemnity at this stage in GP's existence, not whether the failure to provide security constitutes a failure by the company to pay, constituting a cessation of payments. In any event, in my judgment, it is probable that a UAE court would approach this issue much as an English court would approach the question, that is by asking whether, in this context, at the point the relevant payment was made, the company was able to pay its debts as they fell due, looked at as a whole. Since GP is apparently paying its debts as they fall due, the payment of security at this time would not be at a time when GP was unable to pay its debts as they fell due. It is true to say that in English law, the failure to pay a single debt that is due and not disputed is evidence from which it can be inferred that a company can no longer pay its debts as they fall due (see, by way of example, *Re Taylor's Industrial Flooring Ltd* [1990] BCC 44). However, that is not the point here since, on the hypothesis under consideration, the security would have been paid at a time when GP was meeting its debts as they fell due.
- 76 In any event, as is set out in para.56.3 of AFD's submissions, it is unlikely that GP would incur any criminal liability, or rather its directors or the CRO would incur any criminal liability, because it is difficult to identify any harm caused to creditors generally. It is not suggested, other than perhaps by reference to some of the receivables referred to earlier in this judgment, that these liabilities can be met other than with the support of a third party. Any support by a third party would, by definition, eliminate any risk of harm, particularly if the payments were made directly by the third party concerned.

### Conclusions

- 77 I am not satisfied that GP has proved that it is financially impossible to make the payments sought. I am satisfied that GP is technically insolvent, but I am equally satisfied that it continues to trade on a going concern basis with the support of its lenders. Aside from the unsatisfactory evidence in relation to receivables and the realisation of inventories and what part of the sum collected from these activities accrue for the benefit of the company as opposed to specific chargees, the real point remains that identified in GP's own skeleton at para.16(a): has GP proved that the funds required will not be made available to it by a third party? It has not because, on its own evidence, it has not apparently asked the group with the most interest in maintaining GP as a going concern, namely the lenders as defined in Mr Sutton's letter of appointment, for whom the benefit of the restructuring process is principally being carried out.
- 78 As to legal impossibility and putting to one side the point I mentioned earlier concerning the materiality of legal impossibility according to a system of law other than that of England and Wales, I am not satisfied that it has been proved, and there is no evidence to suggest that a payment made now of the sums due to the claimants under the letters of indemnity is unlawful according to the laws of the UAE as long as GP is continuing to meet its liabilities as they fall due, albeit with the support of its lenders, and no criminal liability would arise either for the reasons I have given. In those circumstances, the application is dismissed.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Official Court Reporters and Audio Transcribers  
5 New Street Square, London, EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
civil@opus2.digital*

**This transcript has been approved by the Judge**