



Neutral Citation Number: [2024] EWHC 147 (Comm)

Case No: CL-2019-000281

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30/01/2024

Before :

MR JUSTICE FOXTON

Between :

ABFA Commodities Trading Limited
(formerly VTB Commodities Trading Limited)
(formerly VTB Commodities Trading DAC)

Claimant

- and -

PETRACO OIL COMPANY SA

Intervener

Yash Kulkarni KC and Andrew Leung (instructed by Mishcon de Reya LLP) for the
Intervener
Alan Gourgey KC, Bobby Friedman and John Grocott-Barrett (instructed by PCB Byrne
LLP) for the Claimant

Hearing dates: 20-23, 27-30 November 2023, 4, 6 and 7 December 2023
Draft Judgment Circulated: 18 January 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

The Honourable Mr Justice Foxton:

INTRODUCTION

1. These proceedings first came before the court on 15 May 2019 when the Claimant (who I shall refer to in this judgment as **“VTB Commodities”**, its name at the time of the underlying events) applied for injunctions under s.44 of the Arbitration Act 1996 against its contractual counterparty, JSC Antipinsky Refinery (**“Antipinsky”**): a worldwide freezing order, and a mandatory injunction requiring Antipinsky to deliver a cargo of 60,608.95 mt of High Sulphur Vacuum Gasoil (**“VGO”**) then on board a floating storage facility called the **“POLAR ROCK”** (**“the Disputed Parcel”**) to VTB Commodities (**“the Cargo Injunction”**). The injunctions were granted by Mr Justice Waksman on 29 April 2019.
2. The nature of the proceedings has evolved significantly in the intervening four years, an evolution which can be traced through reported judgments of this court ([2019] EWHC 3292 (Comm), [2020] EWHC 72 (Comm) and [2021] EWHC 1758 (Comm)), but in brief:
 - i) On 8 May 2019, Petraco Oil Company SA (**“Petraco”**) applied to intervene in the action, contending that it was entitled to delivery of the Disputed Parcel, which application to intervene was granted, and it also sought an inquiry as to damages pursuant to the undertaking in damages offered by VTB Commodities as a condition for obtaining the injunctions (**“the Undertaking”**), alleging that the Cargo Injunction should not have been granted and that the injunction had caused Petraco loss.
 - ii) On 15 May 2019, on the return date for the injunctions, Sir William Blair ordered VTB Commodities to pay US\$30m into court by way of fortification of the Undertaking; ordered the sale of the Disputed Parcel, with the proceeds to be paid into court; and directed an expedited trial of the rights and obligations of VTB Commodities, Antipinsky and Petraco in respect of the Disputed Parcel.
 - iii) On 12 December 2019, Phillips LJ discharged the Cargo Injunction granted in respect of the Disputed Parcel, on the basis that it amounted to an impermissible interim mandatory order for specific performance of an obligation to deliver unascertained goods.
 - iv) On 30 December 2019, Antipinsky was declared insolvent, and it has not played any active part in the proceedings since then.
 - v) VTB Commodities served a Part 20 claim in response to Petraco’s claim under the Undertaking, seeking damages by reference to Russian law from Petraco in relation to the Disputed Parcel and two other cargoes of VGO which were delivered to Petraco (**“the Other Cargoes”**). VTB Commodities’ attempt to bring similar claims against other entities failed on jurisdictional grounds.
 - vi) Sanctions imposed following the Russian invasion of Ukraine left VTB Commodities without legal representation for lengthy periods and necessitated a second adjournment of the trial from May to November 2023. VTB Commodities’

legal team are to be commended on the manner in which they have overcome the considerable difficulties they have faced, and put themselves in a position to advance a formidable case at trial.

3. In strictly chronological terms, the issues which arise are as follows.
4. First, is Petraco liable to VTB Commodities in damages for the tort of abuse of rights under Articles 10 and 1064 of the Russian Civil Code (“**the RCC**”) for contracting to acquire the Other Cargoes and/or the Disputed Parcel and if so, in what amount? That depends:
 - i) on Petraco’s state of mind when acquiring the right to the Other Cargoes and the Disputed Parcel;
 - ii) the content of Russian law; and
 - iii) the causation and quantification of any loss;but raises no issue as to whether and when property in the Other Cargoes or the Disputed Parcel passed to Petraco.
5. Second, should the court award Petraco damages pursuant to the Undertaking in respect of the Disputed Parcel and, if so, in what amount? That raises the following issues:
 - i) Both parties have been content to proceed on the basis that Petraco can only claim under the Undertaking in damages if Petraco would have acquired title to the Disputed Parcel but for the Cargo Injunction requiring Antipinsky to deliver the Disputed Parcel to VTB Commodities. While there was a late attempt by Petraco to depart from that shared assumption at the end of closing submissions, I was satisfied that it would not be fair to permit it to do so at that stage.
 - ii) The resolution of this issue requires the court to determine the following questions:
 - a) Did JSC VO MachinoImport (“**MachinoImport**”) – the Russian company from whom Petraco claims to have acquired the Disputed Parcel – acquire title to the Disputed Parcel from Antipinsky? VTB Commodities contends that it did not because Antipinsky and MachinoImport acted contrary to Articles 10 and 168(2) of the RCC by contracting for the sale and purchase of cargo knowing or being reckless as to the fact that delivery under that contract would necessarily have the effect that Antipinsky would breach its contractual obligations to VTB Commodities. Petraco denies that the Article 10 claim arises in law or is made out on the facts, but contends that even if it does, MachinoImport nonetheless acquired title to the Disputed Parcel.
 - b) By way of a fall-back argument, VTB Commodities initially contended that the contracts between Antipinsky and MachinoImport were a sham, MachinoImport’s true role being to act as Antipinsky’s agent, such that Petraco has to show it acquired property in the Disputed Parcel from

Antipinsky. That argument (sensibly in my view) was not pursued by the end of closing.

- c) If MachinoImport did acquire title to the Disputed Parcel from Antipinsky, would Petraco have acquired title to the Disputed Parcel from MachinoImport? This raises the same issue as to Article 10 of the RCC, albeit on this occasion as between MachinoImport and Petraco.
 - d) If MachinoImport did not acquire title to the Disputed Parcel from Antipinsky, would Petraco nonetheless have acquired title to the Disputed Parcel if MachinoImport had delivered the Disputed Parcel to it, as a good faith purchaser?
- iii) If Petraco would, by one means or another, have acquired title to the Disputed Parcel, should the court nonetheless refuse to make an award in Petraco's favour pursuant to the Undertaking?
 - iv) If an award is to be made in Petraco's favour pursuant to the Undertaking, in what amount should it be made?

THE EVIDENCE

Factual witness evidence

- 6. Petraco called four witnesses who work for Petraco and had contemporaneous involvement in the events:
 - i) Ms Ingeborg Srenger, a director and the CEO of Petraco, whose father founded the company and who has worked for Petraco for over 40 years;
 - ii) Mr Enrico Morello, a VGO trader who has worked for Petraco since 2014,
 - iii) Mr Josip Vukman, who is the head of Petraco's representative office in Moscow; and
 - iv) Mr David South, a senior crude oil trader with Petraco (whose role in events was limited).
- 7. The broad thrust of Ms Srenger, Mr Morello and Mr Vukman's evidence was that they were confident that Petraco's contractual counterparty, MachinoImport, would be able to supply the VGO which Petraco had contracted to purchase; they did not have cause to consider the issue of whether Antipinsky had the capacity to supply the product; they had no knowledge that VTB Commodities had contractual rights to cargo of such a nature that it would have taken all or substantially all of the capacity of the Antipinsky refinery's production to meet them; and that they did not and had no reason to believe that delivery of VGO under its contracts would obstruct performance of VTB Commodities' contracts. The statements also offered explanations for a number of communications which might, on one reading, have suggested the contrary.

8. For reasons I explain below, the evidence given by Ms Srenger and Mr Morello as to their dealings in relation to Antipinsky VGO was materially incomplete, with evidence as to important events only being offered (and then on an incomplete and inaccurate basis) once disclosure alerted VTB Commodities to them. Their evidence involved a conscious and concerted attempt to downplay their contemporaneous knowledge and understanding of VTB Commodities' entitlements and the impact which deliveries to Petraco would have on satisfaction of those entitlements. Mr Vukman's statement contained a number of assertions which he was not in a position to support, and in cross-examination he professed to have little, if any, recollection of many of the contemporaneous events. Save where undisputed or corroborated by contemporaneous documents or the inherent probabilities, I am unable to place weight on the evidence of any of these witnesses. I make further detailed findings on the evidence of Ms Srenger and Mr Morello below.
9. I do not make the same criticism of Mr South, who had a more marginal role in events. He found himself in a difficult position: he was a close personal friend of the key VTB Commodities trader, Mr Mohsin ("Moh") Kabir, but as an employee of Petraco, he must have felt under some pressure to support the "party line". In the main, he navigated those tensions honestly and adroitly. An attempt was made to use Mr South as a vehicle to introduce opinion evidence as to what would and would not have been known about Antipinsky's refinery. However, it was not open to Petraco to adduce opinion evidence on this topic other than through the expert witness they were given permission to call, and, in any event, Mr South was at pains to make it clear that he did not have any involvement in the VGO side of Petraco's business and that in relation to his role in crude oil trading, he did not follow the Russian market.
10. VTB Commodities called two witnesses – Mr Graham Cane, who was an Executive Director at the relevant time, and Mr Deepak Rastogi, who was Head of Commodities Structuring. They had only a marginal involvement in the events. Their evidence was given honestly but was of limited assistance. Once again, I was not willing to place reliance on the opinion evidence which VTB Commodities sought to introduce through Mr Cane's evidence. Not only was there no permission to rely upon such evidence, but Mr Cane had no experience as a VGO trader and was principally concerned with chartering matters.
11. In addition, both parties relied upon evidence which had been adduced in the course of the injunction proceedings in 2019, from witnesses who were not called to give oral evidence. In determining what weight to give to that evidence, I have had regard to the factors identified in *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm), [82]- [86]. Clearly, all other things being equal, such evidence is entitled to less weight than evidence tested by cross-examination, but where the court is able to test the evidence by reference to the contemporaneous documents and inherent probabilities, it is not without value.
12. Petraco seeks to rely upon three witness statements from Mr Andrey Ivanov, the Deputy Director General of MachinoImport, from whom Petraco claims it acquired the Other Cargoes and the Disputed Parcel. This evidence was principally addressed to establishing Petraco's chain of title and it does not address the key meetings of December 2018 and January 2019 (see [49] and [60] below). Its language is carefully phrased (as Mr Kabir pointed out in his second witness statement of 13 May 2019). Having signed contracts of sale with Petraco, it was inevitably in MachinoImport's interest to seek to uphold the

validity of those contracts and its role generally. I do not draw an adverse inference from Petraco's failure to call Mr Ivanov. He does not work for Petraco, is based outside the jurisdiction, and, MachinoImport having successfully resisted VTB Commodities' attempt to join them to the proceedings, it would scarcely be surprising that Mr Ivanov did not participate voluntarily. However, I am satisfied the statement must be approached with considerable caution. I have sought to test the evidence against the contemporaneous documents and the inherent probabilities, and I have only felt able to place very limited reliance on this evidence where it is not corroborated by one or other of these factors.

13. VTB Commodities seeks to rely on the interlocutory witness statements of Mr Mohsin Kabir, a VGO trader who was involved in the relevant trades with Antipinsky, and Mr Maxim Alenov, VTB Commodities' Managing Director and Head of Physical Crude Oil and Refined Products Trading. Once again, I do not draw any adverse inference from VTB Commodities' failure to call these individuals. The sanctions which followed the Russian invasion of Ukraine have destroyed VTB Commodities' business, reduced its headcount from over 80 personnel down to 18, and neither individual works there anymore, or is located within the jurisdiction. I have made appropriate allowances for the fact that the evidence has not been tested in cross-examination, and, once again, have sought to test it by reference to the contemporaneous documents and the inherent probabilities.

Expert evidence

14. I heard evidence from two Russian law experts: Mr Maxim Kulkov, managing partner at KK&P Trial Lawyers and former head of the Russian dispute resolution practice at Freshfields Bruckhaus Deringer LLP, called by Petraco, and Professor Mikhail Schwarz, acting head of the Department of Civil Procedure at St Petersburg State University, called by VTB Commodities. Both experts were appropriately qualified, and sought to assist the court on what are, in the main, genuinely difficult issues of Russian law on which the underlying materials offer something for everyone. Reflecting the particular focus of their legal experience, Professor Schwarz placed greater emphasis on arguments of legal principle, Mr Kulkov on the practical application of legal norms by the Russian courts. Both perspectives were valuable and informative. In both cases I have sought to test the evidence by reference to the Russian legal sources placed before the court, its inherent plausibility and the extent to which it coheres with the principles and structures of Russian private law.
15. I also heard evidence from two experts on the VGO market, covering issues of the availability of information in that market as to the production capacity of the Antipinsky refinery and what contracts had been concluded, and also issues going to pricing and quantum.
16. Mr Heilpern, called by Petraco, had been performing a teaching and consulting role since 2009, having stopped trading physical products in 2005. As a result, he had less recent experience of the realities of the marketplace. Mr Heilpern was a fluent and engaging witness, but I formed the impression that his views were a better guide to what *could* happen in the VGO market, rather than what was likely to be the case. This was particularly true of his evidence as to the monthly production of Antipinsky VGO (as the market would understand that term) of 240,000 mt/month. This was far in excess of any

figure adopted by market participants or reported contemporaneously, and exhibited a distinctly Panglossian outlook so far as Petraco's case was concerned. The suggestions of production far in excess of the crude pipeline capacity or of VGO being brought in by Antipinsky to meet its sale commitments were similarly unrealistic. The tendency of Mr Heilpern's evidence to cleave to the outer reaches of the possible led to some late and rather speculative evidence on his part as to the pricing of the cargoes which Petraco had contracted to acquire, which did not survive forensic scrutiny in impromptu cross-examination by Mr Friedman.

17. Mr Beckett, called by VTB Commodities, had been an active market participant more recently (becoming a consultant in 2020), although I accept a significant part of his professional experience had a different geographical focus, and that he would have had rather less experience of VGO trading in this market than the individuals who undertook the trading in issue in this case. For that reason, I have found the reaction of those traders as recorded in contemporaneous documentation most informative. While the terms in which Mr Beckett expressed his opinions were pitched a little high on some occasions, his evidence was, in its overall effect, grounded in the realities of the marketplace, rather than a more theoretical enquiry, and more informative as a result.

THE FACTS

18. The approach to be taken to making findings of fact in this case – the significance of the seriousness of certain of the allegations, the legitimate limits on drawing inferences from admitted or proved facts, the comparative weight to be accorded to witness evidence and documentary evidence and the proper approach to circumstantial evidence – were not in dispute between the parties. I have had regard to the various authorities cited by both parties addressing these issues, but I have not lengthened what is already a substantial judgment by formally reciting them.

Introduction

19. The claims in this action concern VGO, a relatively simple petroleum product obtained by refining crude oil, from which more sophisticated refineries can then produce gasoline and diesel. In the Russian market, VGO is sometimes referred to as Distillate of Gas Condensate (“**DGC**”) which appears to have a different status for Russian customs purposes. In particular, the claims concern VGO produced by Antipinsky, a refinery located in the Tyumen Region in eastern Russia. At the relevant time, Antipinsky formed part of the New Stream group of companies, which was ultimately owned by Mr Dmitry Mazurov. The New Stream group included a number of companies which feature in the case: ANPZ Produkt Liability Co (“**ANPZ**”) and two Swiss commodities traders: AF Energy SA (“**AF Energy**”) and Edima SA (“**Edima**”).
20. Antipinsky is Russia's largest stand-alone oil processing plant. It generally processes Urals Crude shipped by pipeline to the refinery, refining it into VGO. However, it lacks the hydrocracker necessary to turn VGO into diesel or gasoline. As a result, VGO produced by Antipinsky is shipped in railcars to the Baltic for export by sea, principally from Murmansk. In addition to Antipinsky, the New Stream group operated two other refineries: the Mariisky or Mari-El refinery (which also produced VGO), and the Afipsky refinery, which produced gasoil.

21. VTB Commodities was, between 2017 and 2019, a subsidiary of PJSC VTB Bank, a major Russian bank, which operated from a branch in Zug, and which, by 2019, had developed a significant oil trading business.
22. Petraco is part of a group of companies founded in Milan in 1972 and is a long-established oil trader.
23. MachinoImport is a Russian company established in 1933. Its role in these proceedings is the subject of significant dispute, but I am satisfied that it is a significant as well as a long-established commercial concern.

The early history

24. On 28 December 2017, VTB Commodities entered into a contract with Edima to acquire VGO or DGC (“**the First Legacy Offtake Contract**”), and an accompanying Prepayment Facility Agreement (“**the First Legacy Prepayment Facility Agreement**”) by which VTB Commodities advanced funds to Edima by way of advance payment for that VGO.
25. The First Legacy Offtake Contract provided that it was entered into in connection with the First Legacy Prepayment Facility Agreement and was to operate as follows:
 - i) Edima was to deliver and VTB Commodities to accept delivery of the monthly commodities set out in Schedule 1, +/- 10% in Edima’s option. Schedule 1 provided for deliveries of 6 shipments of 33,000 mt (i.e. a total of 198,000 mt) in each of March, April and June 2018, and 5 shipments of 33,000 mt in May 2018 (i.e. a total of 165,000 mt).
 - ii) Deliveries were to be made FOB Murmansk or Baltic Sea port, with title passing at the carrying vessel’s flange.
 - iii) Edima was to notify VTB Commodities before each scheduled month of delivery of the quantity and quality of product to be delivered that month, with VTB Commodities being entitled to notify Edima if it did not want to take delivery of DGC, in which case Edima could deliver DGC to a third-party purchaser, and still satisfy its delivery obligation.
 - iv) Edima’s obligation to deliver product and VTB Commodities’ obligation to accept it were subject to VTB Commodities having made an advance under the First Legacy Prepayment Facility Agreement “in respect of such scheduled month of delivery”.
 - v) VTB Commodities were to make an advance payment “in respect of the Commodity to be delivered to it under this Contract” in accordance with the First Legacy Prepayment Facility Agreement.
 - vi) For each month in which deliveries “are required to be made under this Contract and until the final discharge in full or all ... amounts owing ... under the Prepayment Facility Agreement”, the amount of each invoice payable “shall be

applied ... in or towards discharge of the amounts owing ... in accordance with the Prepayment Facility Agreement”.

26. The following features of the First Legacy Offtake Contract should be noted:
- i) The contract was not concluded with Antipinsky, but with a trading company within the New Stream group, which would have to source the product.
 - ii) The contract did not require delivery of VGO or DGC produced by the Antipinsky refinery, although no doubt that was what the parties contemplated.
 - iii) The contract (which was governed by English law) was not a contract of sale, but a contract for sale (*Benjamin’s Sale of Goods* (11th), [1-025]-[1-026]).
27. By the First Legacy Prepayment Facility Agreement, VTB Commodities had the discretion to make a Euro prepayment advance available to Edima for an amount up to €232,500,000, to be applied “to make advance payments for purchase of crude oil and its transportation, for transportation of refined products and customs duty payments, for capital expenditures, for a loan to ANPZ in the amount of EUR 7.5 million to be used by ANPZ for payment of amounts owing under the Put Option Agreement and for payment of the Additional Risk Fee”.
28. At this point, it is convenient to address an argument raised by Petraco in relation to all of the offtake contracts to which VTB Commodities was a party, which (so far as this particular issue is concerned) were in materially identical terms. Petraco contended that, properly construed, the offtake agreements provided the seller with two alternative means of performing its primary obligations – *either* delivering cargoes of VGO *or* repaying the sums advanced together with the contractual rate of interest. If correct, I accept that this would have very significant implications for the Russian law tort claims which VTB Commodities advances. I am satisfied that there is nothing in this point:
- i) Clause 4 of each of the Offtake Contracts contains a mandatory supply obligation (“the Seller shall sell and supply, and the Buyer shall accept and pay for, a total quantity of Commodity per month specified ... in Schedule 1”). This was not expressed as an option.
 - ii) Clause 5.3 (which should have been numbered 5.4) provided “the Seller shall have no right to cancel, replace or repurchase any Deliveries [defined as the shipments in Schedule 1] unless it has received prior written consent from the Buyer”. Once again, this is inconsistent with Edima or Antipinsky (as appropriate) having an option to “deliver or repay”).
 - iii) Clause 6.1(a) of the Prepayment Facility Agreements in the Legacy Contracts (see [31] below) provides “the Seller must repay the aggregate outstanding Advances in instalments by repaying a Repayment Instalment on each Repayment Date if and to the extent that such repayment obligation has not otherwise been discharged in accordance with this agreement”. However, the existence of this right on VTB Commodities’ part to recover the prepayment, to the extent not otherwise

discharged, as a debt does not preclude a claim for loss of bargain damages for breach of the obligation to supply VGO.

- iv) Clause 6.1(a) of the non-Legacy Prepayment Agreements contained an obligation to reimburse by delivery (“the Seller must reimburse the Prepayment by delivering Commodity”).
 - v) Petraco’s alternative construction is thoroughly uncommercial. It would mean that VTB Commodities could never sell a cargo on without undertaking a significant risk because it had no legal right to delivery, merely to delivery or repayment. It would also mean that, if by the scheduled delivery date, the market had moved in VTB Commodities’ favour, with the market value of the cargo exceeding the amount of the prepayment and accumulated interest, the seller could retain the cargo, repay the prepayment and interest, and reap the benefit of the market rise itself. That is so improbable a result that only the clearest wording could achieve it (*The Antaios* [1985] AC 191, 201).
 - vi) A contract for the supply of goods, which the Offtake Contracts were, which gave the buyer no right to shipment, only to repayment, would not provide the legal rights ordinarily incident to such a contract. Clear words would be required to achieve this (under the principle in *Modern Engineering v Gilbert Nash (Northern) Ltd* [1974] AC 689).
29. Reverting to the operation of the offtake and prepayment agreements, Edima drew down from the facility by issuing Utilisation Requests, which were required to specify a repayment date no later than the earlier of 6 months after utilisation or the Final Discharge Date (the earlier of 6 months from the month in which the last Advance was made or 5 January 2019). The First Legacy Prepayment Facility Agreement further provided:
- i) Edima had to repay the aggregate outstanding advances by repaying a Repayment Instalment (i.e. the amount of each previous advance) on each Repayment Date (the date specified in the Utilisation Request) “to the extent that such repayment obligation has not otherwise been discharged in accordance with this Agreement”.
 - ii) Subject to Edima’s overriding obligation to repay the advances by the Final Discharge Date, it was agreed that, in respect of each Scheduled Delivery Month, the amount of the Repayment Instalments falling due the following month would be deducted from amounts invoiced under the First Legacy Offtake Contract.
 - iii) Edima had an overriding obligation to repay all amounts due on or before the Final Discharge Date.
 - iv) The advances carried interest at 8.5% per year.
30. Antipinsky entered into a Deed of Guarantee with Edima, by which it guaranteed the performance of Edima’s obligations under the Finance Documents (which included the First Legacy Offtake Contract and the First Legacy Prepayment Facility Agreement).

31. On 1 June 2018, VTB Commodities entered into a further Offtake Contract and Prepayment Facility Agreement with Edima (“**the Second Legacy Offtake Contract**” and “**the Second Prepayment Facility Agreement**” and together with the First Legacy Offtake Contract and the First Prepayment Facility Agreement, “**the Legacy Contracts**”). This provided for scheduled deliveries in July 2018 (2 shipments of 33,000 mt each) and August 2018 (3 shipments of 33,000 mt each), with the maximum amount of the Prepayment Facility being €60,000,000.
32. VTB Commodities had invited Petraco to tender for VGO cargoes produced by Antipinsky on a regular basis during 2018 – tenders were received on 2 March, 23 May and 28 August, with tenders sought for up to five cargoes per month. Petraco was, therefore, aware that VTB Commodities had a significant and ongoing contractual relationship as a pre-financer and off-taker of Antipinsky VGO production in 2018.

The transactions in October 2018

33. On 10 October 2018, Mr South sent Ms Srenger and Mr Morello an email with information about the progress of works at the Antipinsky and Afipsky refineries, referring to “big changes on VGO”. The email provides an informative illustration of the manner in which intelligence circulated in the market, and within Petraco, in relation to VGO production at Antipinsky.
34. On 11 October 2018, Mr Quigley of AF Energy contacted Petraco asking them to bid for a cargo of DGC (Russian origin) to be shipped from Murmansk in January, bids being sought on both a prepayment and LC basis (i.e. payment on tender of documents under a letter of credit). The email stated:

“Note that due to the agreements we have with passthrough financing entities it is import[ant] that all commercial discussions are conducted directly with AF Energy SA. For any non-prepayment bids I will speak to the various financing partners that we have to determine how they may be able to prepay on behalf of the company bidding and notify the bidder accordingly”.

35. The tender was for DGC to be sold by MachinoImport or any entity designated by them, 30,000 mt +/- 10% in seller’s option, FOB Murmansk in a window of 5 to 13 January 2019. Prepayment was to be 90% of the price, to be paid not later than 15 October 2018, at an interest rate to be agreed.
36. VTB Commodities’ and Petraco’s VGO traders, Mr Kabir and Mr Morello, were in regular contact by instant messenger, and on 11 October Mr Morello initiated a conversation, in which he raised the current state of the VGO market. Mr Morello asked “what’s up with newstream and afipka?”, to which Mr Kabir replied:

“nothing good. They are being quite difficult with us. We are discussing renewal of 2019. We want to maintain terms. Naturally they want cheaper interest so they have issued a tender to show us they do not need us. But its only one cargo and very few people can do 6 months financing like us [i.e. prepay 6 months in advance of delivery]. Most can only do 60-90 [days] prefinance so let’s see”.

37. Mr Morello replied “you are talking about antipinsky, right?” (demonstrating what I am satisfied was an established understanding on his part that VTB Commodities purchased significant quantities of VGO from Antipinsky in 2018, under an arrangement it was looking to renew for 2019), to which Mr Kabir replied that he was. I accept that Mr Morello would have understood that the renewal for 2019 had yet to be achieved. However, Mr Kabir’s communications proceeded on the basis that Mr Morello knew what transaction he was talking about and proceeded to discuss it in some detail, and I am satisfied that this was indeed the case. There was then some discussion of the financial difficulties Antipinsky were facing, and then Mr Morello said “also the seller is MachinoImport” (which was clearly a reference to the one cargo tender of which Mr Morello was clearly aware). Mr Kabir replied that this was “so funny” and Mr Morello responded “it looks more like someone wants to get paid)))”. There was clearly a shared understanding as to the significance of MachinoImport’s involvement, albeit it remains unclear quite what it was. To similar effect, a later internal VTB Commodities’ email of 6 February 2019 stated, “as you know [MachinoImport] has a role to play that nobody else can”, and asking “do you see additional value in having Edima on top of [MachinoImport]”. All of these communications proceeded on the basis that MachinoImport was or would be a contracting party.
38. Petraco bid for the tender at 09.59 on 12 October 2018, and at 14.17 AF Energy confirmed that the bid was acceptable on the basis that the seller would be AF Energy (and not MachinoImport). It is apparent that Mr Morello opposed the proposed change in seller, and that remained Petraco’s position, even when Mr Quigley pushed back. That suggests that the involvement of MachinoImport in the sale chain was seen as carrying some form of business benefit. The recap with MachinoImport was confirmed – and the commercial deal was done – at 13.33 on 12 October 2018. The recap email was circulated within Petraco, including to Eeva Karhula who performed a back-office function including counterparty due diligence. She raised various questions about the chain of sale and purchase (and whether MachinoImport were buying directly from the refinery) and KYC issues, noting “I understand we have some sort of relationship with Machinoimport but have not found any trading history”. Mr Morello replied “MachinoImport is an old state-owned company ... Inga [Srenger] knows it well”.
39. Also on 12 October 2018, Mr Evseev of AF Energy sent Ms Karhula a draft contract which was the subject of exchanges that afternoon, and Mr Evseev sent Ms Karhula an invoice from MachinoImport for the advance payment in the sum of US\$14,960,430. There were further exchanges on the subject of the contract on Monday 15 October 2018. This included an issue raised by Petraco who wanted MachinoImport to provide a delivery undertaking. Once again, Petraco stood its ground in the face of AF Energy’s push back on this request, with AF Energy agreeing to the request early in the morning on 16 October 2018. The contract was concluded when the prepayment was made by Petraco on 16 October 2018. However, the formal contract for the sale of 30-33,000mt from MachinoImport to Petraco was signed on 18 October 2018 and dated 12 October 2018. It provided for a 90% advance payment at an interest rate of one month USD LIBOR plus 3.6% (“**the Petraco October 2018 Contract**”).
40. On 19 October 2018, VTB Commodities entered into a further Offtake Contract (“**the VTB October 2018 Offtake Contract**”), on this occasion with Antipinsky rather than

with Edima. This provided for the sale of six cargoes of 33,000 mt – two in January 2019 and four in February 2019, and an associated Prepayment Facility (“**the VTB October 2018 Prepayment Facility**”). The VTB October 2018 Prepayment Facility provided for an advance up to €302,500,000. Utilisation requests were submitted and accepted under the VTB October 2018 Prepayment Facility and Offtake Contract. By the end of November 2018, these had had the effect of scheduling deliveries to the end of March 2019, with two shipments in January 2019, six in February 2019 and six in March 2019.

41. There were a number of relevant events on 22 November 2018:

- i) Mr Morello contacted Mr Kabir to ask if he had seen any delays in VGO cargoes from Murmansk, to be told there had been “huge delays” which had put deliveries to VTB Commodities back by 15-20 days, and that this was the result of production being down as Antipinsky had run out of credit to source crude. Mr Kabir explained that the deliveries VTB Commodities had been expecting in November and December had been postponed such that VTB Commodities were “sold out til Jan”. I am satisfied that Mr Morello’s curiosity as to the state of the VGO market coming out of Murmansk stemmed from the Petraco October 2018 Contract, and that this reflected a general interest on his part in the shipment of VGO cargoes from Murmansk. Later in the exchanges, Mr Kabir said “I didn’t tell you our exposure. It’s big m8 but at least we have the Russian leverage” to which Mr Morello replied, “I didn’t ask and I don’t want to know?? But agreed ... Luckily you have some Russian leverage!”
- ii) Mr Morello would have appreciated from these exchanges that VTB Commodities had contracted for a number of cargoes of VGO emanating from Antipinsky which were outstanding. However, it is to read too much into Mr Kabir’s statement on 22 November 2018 that VTB Commodities’ exposure was “big” that its 2018 arrangements had already been renewed for 2019, still less for how many months and how many cargoes. The comment might equally have been a reference to a large number of outstanding cargoes under the existing arrangement. Further, VTB Commodities’ submissions over-played Mr Morello’s “I didn’t ask and I don’t want to know??” comment, which I am satisfied was a light-hearted comment made before the key events of December 2018, which brought the issue of VTB Commodities’ VGO entitlements into much sharper focus for Petraco.
- iii) Mr Quigley contacted Mr Morello seeking to push back on the delivery date for the January 2019 cargo under the Petraco October 2018 Contract to later in the month. Mr Morello informed him the cargo had been committed to a purchaser (which was not in fact the case), leading Mr Quigley to ask if the cargo could be bought back, saying “we” had to move the delivery or return the prepayment. Mr Morello asked if a bank would confirm the reimbursement, Mr Quigley replying “we may be able to get something from VTB”. In context, I am satisfied that this was and was understood to be a reference to VTB Commodities or a bank acting for them. VTB Commodities was owned by and received financing from VTB Bank, and Mr Morello was aware that VTB Commodities had a real need for VGO from Murmansk and that there was insufficient production to supply both VTB Commodities and Petraco within the same delivery window. The exchange is

inconsistent with there being any understanding on Mr Quigley or Mr Morello's parts that alternative VGO cargoes could readily be acquired on the open market.

- iv) Mr Morello forwarded both instant messenger conversations to Ms Srenger.
- v) Mr Morello appears to have checked the information provided by Mr Kabir as to problems at Antipinsky within Petraco. An internal WhatsApp group message to Mr Morello on 22 November 2018 reported that a forwarder in Murmansk had seen no decrease in the regular Antipinsky shipment of 200,000 mt of VGO per month, there having been "delays two months ago, but today everything stabilized". That 200,000 mt figure was, as Mr Morello came close to accepting in cross-examination, a combined figure for VGO exports from both Antipinsky and Mariiskiy from Murmansk. It would have made no sense for the forwarder to report only on VGO produced by one refinery when the products of both refineries were referred to in the market as Antipinsky VGO.

Antipinsky's financial difficulties become apparent

- 42. By late November 2018, production at the New Stream Group's refineries had run into difficulty because the group lacked the funds necessary to purchase crude oil feedstock. This led to a reduction in capacity utilisation at the Antipinsky refinery to 66% in November 2018. At this point, Antipinsky's largest creditor, Sberbank, was owed approximately US\$2.6 billion and the refinery had total debts of US\$4 billion.
- 43. In late November 2018, Edima and VTB Commodities held discussions which culminated in a re-negotiation of the terms of the Legacy Contracts. By the end of December 2018, the effect of those negotiations (which continued for some time) was broadly as follows:
 - i) A reduction was to be made in the number of deliveries scheduled to be made in November 2018 (to two) and December 2018 (to eight, and then seven).
 - ii) Two cargoes of 33,000 mt were to be shipped in January 2019, six in February 2019 and six in March 2019 (the March 2019 figure being increased to eight cargoes on 27 December 2018).
- 44. On 4 December 2018, VTB Commodities spotted that no delivery was scheduled for the 7-11 January 2019 loading slot, and they informed Edima, "OK so you are placing the Petraco cargo on 07-11 January dates. VTB insist this [is] deferred". Edima responded that the issue was "under discussion".
- 45. By December 2018, Antipinsky's financial difficulties were such that Sberbank had taken control of various aspects of its operations. On 3 December 2018, Petraco were invited by the New Stream group to a meeting as one of "a group of offtakers of Antipinsky and Afipsky refineries' products", the meeting to take place in Moscow on 4 December 2018. Ms Srenger and Mr Vukman attended the meeting. Petraco's VGO exposure was clearly one of the major reasons why Ms Srenger and Mr Vukman attended this meeting (and for that reason, it was the only reason Ms Srenger gave in her first witness statement on 7 May 2019), although I accept it was not Petraco's only concern. Ms Srenger's attempt to distance herself from her earlier evidence which she said was "not accurate" was

unpersuasive. There was no representative of VTB Commodities at the meeting, although Mr Kabir had got wind of the meeting in advance and raised it with Mr South.

46. At the 4 December 2018 meeting, the attendees received a presentation from Alvarez & Marsal CIS LLP (“**Alvarez & Marsal**”), who had taken over the financial management of the refineries at the behest of Sberbank (the operational management of the refineries also being placed under independent management). The refinery’s financial and production difficulties were outlined (including the fact that production had only been at 66% in November), and the attendees were told that Sberbank was willing to provide financial support, but that co-financing was required by traders who would be expected to maintain their existing levels of funding until a restructuring plan was agreed with each trader. The meeting notes record that:

“The Bank expected the traders to express their willingness in the rolling over of prepayments by email ... until 6pm Moscow time, December 4th. The traders who agree to maintain the prepayments at the current level will have priority in receiving the cargos. Bilateral negotiations with each particular trader to be held within 2 weeks.”

Mr Kabir, in his 13 May 2019 statement, commented on evidence Ms Srenger had given in her 7 May 2019 statement that, at the meeting, Sberbank indicated “purchaser would still have to continue to pre-finance their trades to receive their cargoes”. Mr Kabir stated that he had spoken to a number of other traders who attended the meeting who had broadly confirmed that evidence, and that “Antipinsky/Sberbank suggested that unless purchasers made forward payments, they (the companies) would only be repaid with significant delays”.

47. On 5 December 2018, VTB Commodities spoke to New Stream, and were told that production had ceased at Antipinsky because crude oil stock had not been purchased for December (in the event production appears to have resumed around Christmas time). VTB Commodities were also told that Sberbank had asked off-takers to roll their prepayments and that most were agreeing.
48. On 7 December 2018, Alvarez & Marsal sent out an email reporting that all scheduled deliveries would be suspended until 15 March 2019. On 12 December 2018, Mr Morello asked the internal “Dirty Products” WhatsApp group “do you know how many cargoes of antipinsky vgo used to be exported per month? / 6 per month, no?” That statement was consistent with the information Mr Morello had received on 22 November that there were normally 200,000 mt of Antipinsky VGO available for shipment per month (assuming around 30,000-35,000 mt shipments).
49. Understandably, this statement about a suspension of deliveries caused alarm at Petraco. It led to the involvement of Petraco’s CFO, Mr Baron. He made contact with Mr Gorbachev of New Stream wanting to “clarify the statement by Alvarez & Marsal that all deliveries be suspended until March 15”, and explained in an email of 9 December 2018 that suspending product deliveries until 15 March 2019 would cause Petraco huge financial and commercial damage. A call was arranged between Petraco and representatives of New Stream on 13 December 2018 and a meeting took place in Moscow on 17 December 2018 (attended by Ms Srenger and Mr Vukman). Subsequent

emails involving Petraco suggests that over the period from 13 to 24 December 2018, an arrangement was reached which included at least the following elements:

- i) for the cargo which was the subject of the Petraco October 2018 Contract to be loaded on 10-11 January 2019; and
- ii) for the supply of a rolling 30,000 mt cargo by MachinoImport to Petraco (with the amount of Petraco's original prepayment being rolled even where it exceeded the value of the shipment), with the next shipment in February 2019.

This was clearly a major coup for Petraco.

50. It is clear that at this time, Petraco were monitoring VGO loading at Murmansk, Mr South reporting to Ms Srenger on 17 December 2018 that "customs were paid Friday VTB cargo is under loading".
51. On 25 December 2018, Ms Srenger had an unseasonal WhatsApp exchange with Mr Morello, in which Ms Srenger asked him to "tell what the price is for Antipinsky vgo in 2019". Mr Morello replied "All of 2019? But how many cargoes?", to which Ms Srenger replied:

"4 per month those that VTB had and Happy Christmas to you too."

52. This message featured extensively in the cross-examination of Ms Srenger and Mr Morello. Ms Srenger's evidence was that she was "referring to the fact that I had understood from Ms Vdovichenko at Machino that the previous year (2018) VTB had purchased around four cargoes per month from the refinery". Mr Morello's evidence was that he "understood from her message that in the previous year VTB had around four cargoes per month, and these may have been available going forward in 2019." As to this:
 - i) I am unable to accept that Ms Srenger was referring to VTB Commodities solely in a historical context: on that basis, the reference to VTB Commodities having purchased cargoes in 2018 would have been wholly superfluous and irrelevant to the request made to Mr Morello to carry out pricing.
 - ii) Nor, however, does the message itself establish knowledge of Petraco's part that VTB Commodities had as yet contractually signed up to receive 2019 cargoes from Antipinsky, and at what level of deliveries per month.
 - iii) I accept that the gist of the message, as intended by Ms Srenger and understood by Mr Morello, is that those cargoes which VTB were seeking to obtain delivery of in 2019 might be available to Petraco. I deal with Petraco's understanding as to VTB Commodities' legal rights at the key dates, namely the dates of Addenda No 1, 2 and 4, below.
 - iv) The message suggests, at least at this point, some greater ambition on Petraco's part as to the volume of Antipinsky VGO it would lift in 2019. It is important to recall that there was never any point when Petraco came close to lifting four cargoes per month: it lifted one in January 2019 (under the Petraco October 2018 Contract), one

in February 2019 (“**the Second Petraco Cargo**”), two in March 2019 (under Addenda Nos 1 and 2), with two more scheduled for lifting in May 2019 (under Addendum No 4) - six over five months.

53. On or around 28 December 2018, a preliminary specification was agreed for the sale of 56,404.008 mt of Antipinsky VGO from ANPZ to MachinoImport for delivery in February 2019. I address the position as between Antipinsky and MachinoImport below.

Events in January 2019

54. Against that background, on or around 8 January 2019, VTB Commodities reached out to Petraco through Mr South to arrange a meeting during International Petroleum week in London, saying “obviously lots to discuss around Afipsky and Antipinsky and maybe some common ground to be found also”.
55. There is a contract bearing this date, entitled an Expedition Agreement, by which Antipinsky appointed MachinoImport as its forwarding agent for sales of VGO. Once again, I address the significance of the Expedition Agreement below.
56. On 9 January 2019, MachinoImport told Petraco that the next cargo (into which the existing prepayment would be “rolled over” after the cargo under the Petraco October 2018 Contract was lifted) was planned with a window of 8-13 February 2019.
57. An Argus report of 11 January 2019 stated:

“Crude deliveries to Antipinsky and to the New Stream-operated 120,000 b/d Afipsky refinery resumed after the firm’s main lender, Sberbank, opened new credit lines in mid-December. In addition, state-controlled bank VTB agreed a \$300m export financing deal with the refinery until late 2019, market participants say. New Stream also owns the 32,000 b/d Mari-el refinery.”

Mr Morello agreed that he would “try to read” such reports “as much as possible”. It is not clear on the material before me whether he read and absorbed this reference, and in any event it does not identify the products which were being financed or the monthly volume of offtake. Had Mr Morello read the report, I have no doubt that he would have understood the reference to “state-controlled bank VTB” to be to a pre-payment facility from VTB Bank’s wholly-owned trading subsidiary, VTB Commodities, with the benefit of VTB Bank’s financial backing. I reject the evidence of Ms Srenger and Mr Morello that they would not have understood this to be a reference to a VTB Commodities facility of some kind.

58. On 12 January 2019, Petraco lifted the cargo in performance of the Petraco October 2018 Contract, on the vessel “HAFNIA BERING”. VTB Commodities were monitoring shipments of VGO from Murmansk, and complained to Edima about a cargo being loaded to a third party on those dates, stating “please confirm you are minimizing that cargo to minimal operational tolerance. We have argued many times before that we should be given priority so please at least confirm that cargo is being minimized”.

59. On or around 14 or 15 January 2019, Petraco signed the contract into which they had agreed to “roll over” the previous funding. The contract (“**the Second Petraco Contract**”) took the form of an addendum to the Petraco October 2018 Contract and provided for shipment of 33,000 mt between 4 and 9 February 2019. The Second Petraco Contract is not the subject of any claim. It provided for a 90% advance payment on which interest would run at LIBOR plus 3.6%. The pre-payment was made at some point in late January 2019.
60. Over the period from the end of December 2018 to January 2019, VTB Commodities and Antipinsky were negotiating a further offtake contract and prepayment agreement, which would restate the obligations arising under the First and Second Legacy Contracts and the VTB October 2018 Offtake Contract and the associated prepayment agreements, and cancel some of the outstanding obligations:
- i) On 15 January 2019, VTB Commodities had a meeting with Sberbank, MachinoImport, Alvarez & Marsal and New Stream. At that meeting, VTB Commodities were given to understand that they would receive cargoes shipped in the following windows: 1-3, 8-11, 15-19 and 23-27 February 2019 and 3-7 March 2019. It is the evidence of Mr Kabir (in his 9 May 2019 witness statement) that it was at this meeting that he first became aware that MachinoImport featured in the chain of sales from Antipinsky culminating in the Legacy Contracts between VTB Commodities and Edima. It is also his evidence that at the meeting, MachinoImport were made aware of the volumes of VGO to which VTB Commodities were entitled under the Legacy Contracts and the VTB October 2018 Offtake Contract in the period to the end of March 2019.
 - ii) I accept that evidence, which was not challenged in the third witness statement of Mr Ivanov of MachinoImport served on 14 May 2019. Mr Kabir’s evidence is also consistent with the emails sent after the meeting: an email sent by Mr Alenov of VTB Commodities makes it clear that VTB Commodities had been asked, but refused, to vary their contractual terms including for pre-paid cargoes. It is clear that MachinoImport had sought to obtain such a renegotiation by suggesting other buyers were offering a lower interest rate of LIBOR plus 3%, but Mr Alenov had refused to accept this. It is clear, therefore, that the terms of the contracts with VTB Commodities and VTB Commodities’ entitlements were discussed.
 - iii) VTB Commodities had a conference call with Sberbank on 21 January 2019 in which VTB Commodities were asked to roll their credit exposures as other third party off-takers were doing, with VTB Commodities indicating its readiness to do so in return for a delivery schedule of five shipments in January 2019, four in February 2019, six in March 2019, five in April 2019 and four in May 2019.
 - iv) VTB Commodities noted that Petraco had been mentioned in the Material Safety Data Sheet produced in relation to one cargo to be loaded, and asked Edima to tell them “the status/level of involvement of that named company” (on 21 January 2019), to be told “there is no connection between this company name and deliveries contracted by Edima/VTB”.

- v) On 22 January 2019, Mr Kabir sent an internal email stating that he had had tentative discussions with Petraco about Petraco participating as a sub-participant in the VTB Commodities facility, with Petraco expressing interest and asking for indicative terms. I am satisfied that this contact was with Mr Morello. Given the “tentative” nature of the discussions, Mr Kabir’s statement after the call that he only wanted to “initiate dialogue”, and the fact that indicative terms had yet to be put forward, I am unable to conclude that information was communicated to Mr Morello at this stage as to what contractual rights VTB Commodities had obtained as to 2019 deliveries. However, I reject Ms Srenger’s evidence that there was no such proposal, and Petraco’s submission that Mr Kabir’s internal email “misstates the position”.
 - vi) On 23 January 2019, VTB Commodities had learned from the market that Petraco was looking to charter a vessel to lift a 7-8 February 2019 cargo, and they complained to Sberbank and Antipinsky, asking “why is Sberbank/ANPZ prioritising loadings to a small trading firm in Lugano instead of the firm that has been proactively working with them to develop longer terms solutions to their financial issues.” Mr Poliansky of VTB Commodities spoke to MachinoImport, who informed VTB Commodities that they were planning to deliver the 7-8 February 2019 cargo to Petraco “because they need the money to pay taxes.” VTB Commodities sought to insist on delivery of the 8-11 February 2019 cargo to them. In a further conversation, MachinoImport stated that they wanted to “squeeze in one extra cargo” between 10 and 12 February 2019 for Petraco.
 - vii) On 24 January 2019, there was a meeting between VTB Commodities and representatives of Sberbank in which the delivery schedule to VTB Commodities was agreed, with a further delivery in January 2019, four in February 2019 (but with the second shipment pushed back from 8-11 February 2019 to 11-12 February 2019), and a March delivery between 3-7 March 2019, with the remaining March deliveries to be confirmed by 31 January 2019.
 - viii) The final version of this offtake agreement (“**the 2019 VTB Addendum**”) was signed on or about 30/31 January 2019 and provided for four shipments each in February and March 2019, five in April 2019 and four in May 2019, and the cancellation of a number of the earlier shipments (two in January 2019, two in February 2019 and two in March 2019).
 - ix) On 1 February 2019, Mr Kabir for VTB Commodities sent Sberbank a letter asserting VTB Commodities’ right to an additional two March deliveries “under the EDIMA-CRUDEX facility” and stating “we will not accept ANY THIRD PARTY sales without fully servicing the obligations under our financing facilities first”.
 - x) Ms Frolova of Sberbank replied stating “from the bank’s side we confirm that we are aware of 6 cargoes to be delivered to VTB: 4 under the direct contract and 2 under the Crudex facility.”
61. There are a number of documents dated at around this time (late January 2019 or early February 2019) involving MachinoImport. As between Antipinsky and MachinoImport:

- i) There is a document dated 27 January 2019 for the supply of 2.16m mt of VGO from Antipinsky to MachinoImport (equivalent to 12 months of deliveries of 180,000 mt/month), but which does not contain delivery dates or a price. VTB Commodities contend that this document was entered into no earlier than 22 February 2019.
- ii) There is a document dated 28 February 2019, referring to a 2016 contract between Antipinsky and MachinoImport, for the supply of 56,404 mt of VGO in February 2019, and which also refers to a “preliminary specification No 22-pr dated December 28 2018”, although the latter document is not available. I was shown a document bearing the date of 24 March 2016, by which ANPZ entered into a contract to sell just over 2 million mt of VGO produced by the Antipinsky refinery to MachinoImport in the period up to 31 March 2017, which contract would automatically renew for the following calendar year. The contract is in general terms, providing for the number, timing and price of sales to be defined in subsequent documents.
- iii) There are documents dated of 14 and 28 February 2019 and 29 and 31 March 2019 called “Specifications” signed by Antipinsky and MachinoImport referring to a contract dated 27 January 2019. These provided for delivery of various quantities of VGO in February, March and April 2019. In particular:
 - a) A document dated 31 March 2019, in its final form, records supply of 29,067 mt of VGO by Antipinsky to MachinoImport in March 2019 (“**Specification 2F**”).
 - b) A document dated 29 March 2019 records Antipinsky’s agreement to supply 46,000 mt of VGO to MachinoImport in April 2019 (“**Specification 3P**”).
- iv) I have already referred to the document dated 8 January 2019, providing for MachinoImport to act as “forwarder” for Antipinsky, to ship goods from Murmansk railway station to the POLAR ROCK, and to load it onto tankers.

I return to these documents, and their significance, when addressing Addendum No 4 at [104]-[109] below.

62. As to the position as between MachinoImport and Petraco, on or around 4 February 2019, MachinoImport and Petraco signed two contracts (both dated 25 January 2019).
 - i) The first (“**the 2019 MachinoImport Contract**”) provided for the transfer of VGO, in quantities and at a price to be the subject of separate addenda, in lots of 30,000 mt.
 - ii) The second, described as Addendum No 1 to the 2019 MachinoImport Contract (“**Addendum No 1**”), provided for delivery of 30,000 mt in “March/April 2019”. This cargo was loaded onto the “HAFNIA RAINIER” on 14 March 2019. This is the first of the Other Cargoes.

The position at the date of Addendum No 1

63. When considering Petraco's knowledge at the date of Addendum No 1, Petraco placed considerable emphasis on what the production capacity of the refinery could reasonably have been understood to be at that time (and what it said it understood the production capacity to be). This issue was the subject of expert evidence:
- i) Both experts accepted that "the refinery is reported to have a nameplate capacity of 180,000 barrels per day ... and a vacuum distillation capacity of 90,000 barrels per day which could theoretically produce ... about 246,000 mt per month". This is of the order of seven to eight cargoes per month.
 - ii) However, the experts agreed that if the only VGO being produced was from crude oil coming in to Antipinsky through the crude line, the capacity was a theoretical maximum of 187,500 mt per month. On the evidence, I find that the capacity of the crude oil line was a widely publicised figure, which would have been known to Petraco (for example it featured in contemporaneous market reports received by Petraco in November 2018), and was the basis of a general understanding in the market of capacity, when the refinery was running smoothly, of the order of 180,000 mt per month. Petraco points to the possibility of additional crude oil or straight-run fuel oil being brought in by railcar, but given the known financial difficulties of Antipinsky from December 2018 onwards, I do not accept anyone would have thought this a realistic prospect in the period under consideration (or that Petraco did so think).
 - iii) It was Mr Beckett's evidence that the 187,500 mt/month figure assumes that the Vacuum Distillation Unit is running at maximum capacity, and a figure of 160,000 mt on the basis of 90% capacity is more realistic. I accept that a figure somewhat below 187,500 mt is appropriate when looking at sustainable production – I accept Mr Beckett's evidence that a refinery is unlikely to be able to run at 100% capacity on a continuous basis, and evidence as to actual levels of production which was available at this trial suggest reliable monthly production of VGO was usually of the order of 160,000-175,000 mt/month. A figure somewhat below 180,000 mt/month is also supported by the Oxford Institute for Energy Studies Report published in April 2019, itself sourced from contemporary market reports from 2018 produced by Argus which were widely available to those active in the market.
 - iv) There are then two further issues – the impact of the financial difficulties on Antipinsky's ability to achieve that ordinary level of production in 2019, and whether an allowance should be made for production of VGO from another refinery in the same ownership as Antipinsky at Mariisky (the Mari-El refinery), which was also described in the market as Antipinsky VGO (as Mr Morello confirmed in his witness statement) and sold through Murmansk.
 - v) As to the former, it is clear that Antipinsky's financial difficulties inhibited its ability to ensure uninterrupted production, leading to well-publicised interruptions to production in 2018 (including a 10-day stoppage in December 2018 of which Mr Morello and Ms Srenger were aware) and a considerable backlog. This would have served to lower traders' expectations of the volume of production. So far as the second is concerned, I accept VGO production from the Mari-El refinery when operating efficiently was of the order of 30,000 mt/month. However, the Mari-El

refinery was subject to the same financial pressures as Antipinsky, being in the same ultimate ownership. It too had experienced a well-publicised interruption in production in December 2018. Funding full production at Antipinsky would take priority over production from Mari-El, for reasons of efficient operation.

- vi) Even allowing for Mari-El production, I am satisfied that a trader in the VGO market would regard a figure of no more than 200,000 mt/month as a reliable figure for what the market would regard as Antipinsky-origin VGO (i.e. produced at the Antipinsky and Mariisky refineries) available for export from Murmansk in ordinary market conditions (and that it would have been expected that all exports would be made from Murmansk). Expectations for production in the early part of 2019 would have been lower because of the financial difficulties experienced at both refineries, and it would have been known in the market that there was a substantial backlog of undelivered Antipinsky VGO from 2018. As I explain below, it is clear that Mr Morello and Ms Srenger (unsurprisingly as active participants in the VGO market) had a similar understanding at the relevant time.
 - vii) Mr Heilpern's evidence that "optimisation" could have increased total production to 240,000-250,000 mt/month was unrealistic – this was not a level which Antipinsky and Mariisky had come close to in better times, and no trader would have regarded that as a credible figure in late 2018 and the first half of 2019.
64. Petraco also placed considerable weight on the identity of its seller – MachinoImport – suggesting that it had sufficient confidence in MachinoImport to make good on its promises that Petraco did not have cause to dwell on Antipinsky's position. As to this:
- i) While I accept that there had been some trading history between Petraco and MachinoImport, both before and through the Petraco October 2018 Contract, it had been limited, and before October 2018, involved a completely different product and was undertaken many years before (with the possible exception of some "tiny" and "rare" pipeline deals of which no details could be given).
 - ii) I am satisfied that the evidence of Petraco's witnesses on this issue – on which Ms Srenger, Mr Morello and Mr Vukman all sang enthusiastically from the same hymn sheet – was wholly overblown. Mr Vukman was particularly enthusiastic, describing MachinoImport as "one of our top partners", although it turned out he had no knowledge of such prior dealings as there had been.
 - iii) The Petraco witnesses knew that any VGO they acquired from MachinoImport would come from Antipinsky/Mariisky and that, whatever MachinoImport was bringing "to the party", it was not able to access additional quantities of VGO. It was also clear that MachinoImport and Antipinsky were working very closely together.
 - iv) In short, the Petraco personnel involved in the transactions in issue knew that delivery of any promised quantities of VGO would be dependent on what was happening at the two refineries, and they approached the transactions accordingly. Their evidence that Petraco was not interested in what was happening at the

refineries because they were buying from MachinoImport did not reflect their contemporaneous outlook, but was a litigation construct.

65. I am satisfied that Petraco's knowledge at the time it entered into Addendum No 1 was as follows:

- i) They understood that ordinarily, the production of what the market would regard as Antipinsky VGO – which included Mariisky VGO – was about 200,000 mt per month, or enough for six cargoes a month, that being the internal report obtained within Petraco on 22 November 2018, the view expressed by Mr Morello on 12 December 2018, the number of cargoes which VTB Commodities had informed Petraco of back in 24 January 2018 and the general understanding of market material. This was information known to any trader operating regularly in the market – as Petraco was.
- ii) I am satisfied that Petraco appreciated that there would be no significant VGO in storage at Antipinsky – that would be inconsistent with the information Petraco obtained as to production delays and cashflow shortages at Antipinsky (before and at the 4 December 2018 meeting, and in Petraco's subsequent interactions with Antipinsky/Sberbank). Both experts agreed that it was unlikely that Antipinsky stored uncommitted VGO for resale, and that a reasonable trader would have appreciated this.
- iii) I am not persuaded that Petraco thought that there was any serious prospect of Antipinsky buying in VGO produced elsewhere (as suggested by Mr Heilpern). That was inconsistent with their parlous financial position, and it would not have made sense for Antipinsky to source VGO for the purposes of selling it to Petraco under a contract which, even if it is unclear that it was below market rate (see [66] below) was certainly not above it. Further the approach made to Petraco for a “buy back” for VTB Commodities' benefit of the cargo to be supplied under the Petraco October 2018 Contract, and the resultant conversations, were inconsistent with any of the participants understanding that there was a market for VGO ex-Murmansk from other sources.
- iv) Petraco (including Ms Srenger and Mr Morello) understood that there was a significant backlog of undelivered cargoes scheduled to go to VTB Commodities in earlier months – they were aware of financial difficulties at Antipinsky which had caused an interruption in production “two months ago” as referred to in the internal WhatsApp group message of 22 November 2018, of delays in shipment of cargo from Mr Kabir on 22 November 2018 and of the extent of interrupted disruption from the 4 December 2018 meeting. I am satisfied that Mr Morello was receiving regular reports of cargoes lifted from Murmansk in the form of Howe Robinson tracker reports. There are two copies of these reports in the trial bundles which were sent to Mr Morello – these are dated 11 February 2019 and 12 April 2019, in the same format, describe themselves as “latest Murmansk tracker” and make it clear previous versions had been sent (“with updates since last sent in red”). The 11 February 2019 tracker shows an update removing a “failed” 10/11 January lifting. I am satisfied that Mr Morello would have been aware from a previous

version that liftings were down for November 2018, December 2018 and January 2019, and were anticipated to remain lower in February 2019.

- v) Petraco knew that if Antipinsky were to give priority to delivering cargoes outstanding from previous months, it would not have a cargo to deliver to Petraco within the delivery window for Addendum No 1, such that this delivery would be delayed. This followed from its knowledge from the 22 November 2018 call as to the extent to which deliveries to VTB Commodities had “backed up”, and from the line taken by Sberbank at the 4 December 2018 meeting which expressly promised priority for those who “rolled pre-payments” now, and implicitly postponing deliveries to those who did not. It necessarily follows that it knew that if it received a February cargo, this would involve one of VTB Commodities’ delayed cargoes being further delayed.
 - vi) Petraco must have realised that VTB Commodities either had, or was in the course of, extending to 2019 its offtake rights in relation to Antipinsky VGO, given the offer of participation in a sub-facility on or around 22 January 2019. However, I am unable to conclude that it knew the extent or duration of VTB Commodities’ entitlements at that stage.
 - vii) Those conclusions are reinforced by the extraordinary sensitivity which Petraco showed in relation to its December 2018 interactions with New Stream/Sberbank/Antipinsky, which involved a concerted attempt to conceal these interactions from the court: see [249] below.
 - viii) However, if regard is had only to offtake obligations for February 2019, as opposed to outstanding cargoes from prior months, I am not persuaded that Petraco knew (as opposed to being aware of a very real risk) that the shipment of one cargo to Petraco would be sufficient to prevent performance of the obligations to VTB Commodities. It is VTB Commodities’ case that it was only entitled to four cargoes *qua February 2019 cargoes* (with six cargoes overdue from November and December 2018); Ms Srenger had referred to VTB Commodities having an entitlement to four cargoes per month on Christmas day, and VTB Commodities had sought tenders for up to five cargoes per month in the quarterly tenders in 2018.
66. In support of its contention that Petraco entered into Addendum No 1 knowing or being reckless as to the fact that performance of Addendum No 1 would lead to a breach of the contracts to which VTB Commodities was party, VTB Commodities contended that the price which Petraco paid for the Addendum No 1 cargo was below the market price. The experts were unable to agree on whether this was the case. The principal reason for that difficulty is that the date when the Addendum No 1 cargo was loaded was some time after the date of Addendum No 1 itself, the date when the loading days became known is not clear, there is no forward curve of VGO prices, and February 2019 was a particularly difficult month for which to determine market prices because of the limited reference points available. In these circumstances, I am unable to conclude that the price for the Addendum No 1 cargo was below market. However, it is not the case, as Petraco assert, that Mr Vukman believed that Petraco had paid more than a market rate for the cargo. That submission rests on an email Mr Vukman sent on 24 December 2018 saying “Based on today’s price, we have overpaid MachinoImport for 4.5mln”. However, that email was

sent in the context of Petraco's agreement with MachinoImport to roll over the pre-financing from one shipment to the next, and the point which Mr Vukman was making was that the amount rolled over was US\$4.5m greater than the price of the next cargo.

Events after Addendum No 1

67. On 7 February 2019, Mr Kabir sent Mr Morello a tender inviting Petraco to bid for one to three cargoes of VGO which VTB Commodities intended to load from Antipinsky in March 2019 (these being the indicative terms he had indicated would be sent to Petraco following the tentative discussions referred to on 22 January 2019). Mr Morello, aware of Petraco's arrangements to obtain VGO from Antipinsky through MachinoImport, dissembled, saying only:

“Many thanks for your VGO offer. We are not in a position to bid as aggressively for March cargoes. However, we hope to be more competitive in the future!”

The implication of this email was not that Petraco did not need cargo because they already had a March delivery fixed (the actual position) but that Petraco were not in a position to offer a competitive price (which was false). When Mr Kabir asked him “where do you see the FOB Murmansk market now?”, Mr Morello forwarded the email and his suggested response to Ms Srenger before replying with a price range, a reflection of the sensitivity of Petraco's position vis-à-vis VTB Commodities in relation to Antipinsky VGO.

68. By 9 February 2019, the Second Petraco Cargo had been loaded onto the MT SILENT, the payment then being “rolled over” by way of a pre-payment under Addendum No 1 on 11 February 2019.
69. On 11 February 2019, Mr Morello was sent an updated tracker of VGO loadings from Murmansk “with updates since last sent in red”. This showed three cargoes lifted in January 2019 and two lifted and two more scheduled for lifting in February 2019, and overall that, in the aftermath of the difficulties which had culminated in the December 2018 interactions, production of Antipinsky VGO was down from the normal monthly output.
70. On 12 February 2019, Edima wrote to VTB Commodities explaining that they had contracted with MachinoImport to fulfil their contracts with VTB Commodities but that MachinoImport had failed to meet their obligations, exposing Edima to a significant loss and leading it to file for judicial protection. There followed a series of exchanges (including by telephone) between VTB Commodities and their counterparties (including Sberbank).
71. On 15 February 2019, Ms Gorchilina of MachinoImport wrote to VTB Commodities giving windows for the lifting of five (not six) cargoes of VGO in the period from 4 March to 1 April 2019. Mr Alenov responded that VTB Commodities were expecting six cargoes. Ms Gorchilina replied stating “the possibility of the sixth shipment is not confirmed by the terminal.” This was a dissembling response, because the issue with the sixth shipment was not the attitude of the loading terminal (the POLAR ROCK) but the commitment to Petraco.

72. On 25 February 2019, VTB Commodities and Antipinsky signed Addendum No 1 to the VTB October 2018 Offtake Contract providing for deliveries of 148,000 mt of VGO over five lots in March 2019.
73. On 26 February 2019, a meeting took place between VTB Commodities and Petraco over breakfast at International Petroleum week. There was evidence as to this meeting at the trial from Ms Srenger, Mr Morello, Mr Vukman and Mr South, and in the witness statements served in 2019 from Mr Kabir and Mr Alenov of VTB Commodities.
74. I am going to begin with the account given in 2019 by Mr Alenov and Mr Kabir. Mr Alenov did not mention the meeting in the witness statement filed for the “without notice” application, something for which he was later criticised by Petraco. However, a detailed account was given by Mr Kabir in his statement of 9 May 2019. His evidence was as follows:
- i) The meeting had been arranged to seek co-operation following the issues which had arisen over the January and February 2019 deliveries.
 - ii) He informed Petraco that VTB had renewed their contract with Antipinsky and agreed to provide a rolling EURO 200m facility on a 120-day pre-pay basis.
 - iii) He asked Petraco whether they had any exposure and were pre-financing Antipinsky, to be told Petraco had been repaid their exposure.
 - iv) He said that VTB Commodities were willing to include Petraco as a sub-participant in their facility, and that they were seeking to arrange a larger EURO 400-500m facility covering a range of products. Ms Srenger asked if Petraco would be able to offtake VGO, and was told that VTB Commodities’ preference was to retain control of VGO if possible, but they were willing to work collaboratively. Ms Srenger said she would think about this.
 - v) In a statement which had been served just before Mr Kabir’s statement on 7 May 2019, Ms Srenger had referred to the meeting in very brief terms, criticising Mr Alenov of VTB Commodities for not mentioning it, and saying that at the meeting that Mr Alenov had offered to work together on pre-financing the export of VGO. Mr Kabir responded to that account in his witness statement of 13 May 2019, repeating his earlier account. Ms Srenger served a further witness statement on 9 July 2019 in which she criticised VTB Commodities’ failure to refer to the Langham meeting in the without notice injunction application. However, her statement did not challenge Mr Kabir’s account of the meeting.
 - vi) Mr Kabir served a further statement on 3 October 2019 repeating his earlier account.
75. On 7 June 2019 VTB Commodities served their Points of Defence and Counterclaim. This pleaded a lengthy section addressing the Langham meeting which reflected Mr Kabir’s evidence. Petraco’s reply was not, in the event, served until November 2021. While broadly consistent with Petraco’s case as to the meeting now, it did admit that Ms Srenger had been asked about Petraco’s exposure to Antipinsky, and that she confirmed it had been repaid.

76. So far as the evidence at trial is concerned:

- i) Ms Srenger said that VTB Commodities had said that they were organising a facility for Antipinsky, and asked Petraco to participate with a US\$100m contribution. In her witness statement, she said that VTB Commodities had asked what Petraco's exposure was to Antipinsky, and that she made it clear Petraco would not comment, although at trial she could not recall the question or her answer. However, in the Amended Reply filed in November 2021, supported by a statement of truth from Ms Srenger, Petraco had accepted that the question had been asked, and she had stated that Petraco had been repaid their exposure to Antipinsky. When shown this passage in cross-examination, Ms Srenger accepted that this was not correct, that Petraco had a US\$12.5m exposure – she said to MachinoImport, not Antipinsky – at the time of the meeting, accepting she had “withheld the truth”. She said that VTB Commodities had not stated how much they had prepaid Antipinsky and that VTB Commodities' proposal was very vague.
- ii) Mr Morello's evidence was similarly vague, stating that VTB Commodities had stated they were looking for a partner to help them with their financing arrangements in relation to Antipinsky, but that nothing formal was proposed. In cross-examination, he suggested for the first time that he had arrived late for the meeting, and professed to recall very little about it. I am unable to place any reliance on that evidence, which would have featured in Mr Morello's witness statement if he had a genuine recollection to that effect.
- iii) Mr Vukman's statement said that he recalled mention of VTB Commodities financing the refinery, but not much more than that, and, understandably, he was not asked about the meeting.
- iv) In carefully phrased evidence, Mr South referred to a suggestion by VTB Commodities that the two traders work together, but said he did not recollect the conversation in any detail, and had no recollection of Ms Srenger being asked if Petraco had any exposure to VTB Commodities, nor did he deny that this has happened.

77. I have concluded that Mr Kabir's account of the Langham meeting is broadly accurate:

- i) There was clearly tension in the run-up to the February meeting about the delivery of the cargoes to Petraco, as reflected in the “buy-back” attempt of November 2018, VTB Commodities' 4 December 2018 and 12 January 2019 emails to Edima, and the 21 and 23 January 2019 and 1 February 2019 communications from VTB Commodities relating to deliveries to Petraco. VTB Commodities' email of 8 January 2019 – suggesting there was “obviously lots to discuss around Afipsky and Antipinsky and maybe some common ground to be found also” – suggests that the competing positions regarding Antipinsky would be on the agenda.
- ii) By the date of the meeting, VTB Commodities had agreed to the 2019 VTB Addendum providing for four shipments in February and March 2019, five in April and four in May, and their entitlement to an additional two March shipments under the Legacy Contracts had been acknowledged.

- iii) In advance of the meeting, Mr Kabir had made a detailed offer to Petraco to bid for one to three VGO cargoes for March 2019. There is no reason why he should have been as vague as Petraco suggest at the meeting.
 - iv) Ms Srenger's account in her 2023 witness statement was clearly inaccurate in denying that she was asked about or had confirmed that Petraco's exposure to Antipinsky had been repaid. She effectively accepted that she had withheld the truth from VTB Commodities at the meeting, but was unable to explain why her 2023 statement had offered a different version of events. That reinforces my clear impression that Ms Srenger was willing to make untruthful statements if she believed this would advance Petraco's interests.
 - v) Mr Kabir's account was given when he would not have known whether Petraco had any notes or reports of the meeting (Petraco claims they do not), and when he was aware that Ms Srenger, Ms Morello and possibly others could challenge an untruthful account, and do so "en banc". By contrast, I regard Ms Srenger's failure in 2019 to challenge Mr Kabir's account of the February 2019 meeting, particularly in circumstances in which Petraco were asking the court to find that VTB Commodities had breached its duty of full and frank disclosure by failing to inform the court of the meeting, as significant.
78. I am also satisfied that Ms Srenger and Mr Morello believed what they had been told at the Langham meeting. Given their knowledge of VTB Commodities' 2018 arrangements, which had allowed VTB Commodities to offer Petraco the opportunity to bid for up to five cargoes of VGO per month; their knowledge of the VTB Commodities' negotiations to renew those arrangements for 2019, and the sub-participation proposal offered by VTB Commodities to Petraco on 22 January 2019, the information Mr Kabir passed on at the meeting made commercial sense. There is no contemporary record of anyone at Petraco expressing scepticism as to the position.
79. On 5 March 2019, VTB Commodities heard rumours of another operator seeking to charter a vessel to lift VGO from Murmansk around 18-20 March 2019 (a delivery window VTB Commodities had not been offered). Mr Alenov raised this issue with Antipinsky and MachinoImport asking for confirmation that "there are no third parties sales". On 6 March 2019, MachinoImport said that they had received instructions to deliver cargo to another buyer on 10-11 and 15-16 March 2019, and that "the issue of setting up VTB tankers is not in our competence and is decided between Sberbank and VTB". As MachinoImport were the contracting party for the various sales to Petraco, this response was lacking in candour.
80. Mr Kabir raised the issue of the 15-16 March 2019 delivery window with Mr Morello in a message exchange beginning at 10.27 am Zug time on 6 March 2019, saying he could see Petraco looking for a cargo on those dates which had already been sold to VTB Commodities. A draft of a proposed contract between MachinoImport for the delivery of 30,000 mt VGO in March 2019 was sent to Mr Morello at 10.31 am. Mr Morello forwarded the messages from Mr Kabir to Ms Srenger at 10.33 am. I am satisfied that Mr Morello and Ms Srenger discussed what line to take in response before Mr Morello replied saying he had been on the phone (an excuse which received rather more attention in VTB Commodities' submissions than it merited) and, more significantly, "we have

different dates”. That last response was untrue – Mr Morello must have known that the dates were sufficiently close that they were talking about the same cargo. I have concluded that Ms Srenger and Mr Morello agreed that Mr Morello would seek to mislead Mr Kabir.

81. Mr Kabir said that “even so, Sberbank and Antipinsky committed all March cargoes to VTB”, and asked various questions. Mr Morello did not reply, but once again forwarded Mr Kabir’s messages to Ms Srenger. The conversation continued, with Mr Kabir sharing details of VTB Commodities’ planned March liftings and pushing for Petraco’s dates. Mr Morello suggested – again disingenuously – that “production has increased.” Mr Kabir rejected this suggestion saying it was clear that Antipinsky had “sold you the same dates as us”. Mr Morello forwarded these exchanges to Ms Srenger who forwarded them to Petraco’s Moscow office.
82. I am satisfied that both Mr Morello and Ms Srenger were aware that the broad complaint being made by Mr Kabir was true – Antipinsky had committed to deliver a cargo to VTB Commodities in the March 16-18 window (with the result that performance of the contract with MachinoImport which Petraco was in the course of concluding would prevent performance of VTB Commodities’ contract). Ms Srenger’s evidence that she thought Mr Kabir was lying was untrue.
83. VTB Commodities also attempted to contact Sberbank about this issue, but without success, leading Mr Kabir to note on 6 March 2019 “both Petraco and Sber now ignoring my calls”. However, it would appear that VTB Commodities were told by Sberbank later that day that Petraco were being given a March cargo. On 7 March 2019, VTB Commodities sent a letter of complaint to Antipinsky and Sberbank, alleging a breach of contract by Antipinsky, and a potential claim against Petraco.
84. At 13.21 on 6 March 2019, MachinoImport confirmed to Petraco “the possibility of supplying the tanker shipment of approximately 35,000 mt from March 11-13 and from March 16-17 about 30,000 tons” (words which are not consistent with a deal already having been done over the telephone prior to that point). At 13.51, MachinoImport and Petraco finalised the further contract for delivery of 30,000 mt of VGO, which was described as Addendum No 2 to the 2019 MachinoImport Contract (“**Addendum No 2**”). At 11.56 on 7 March 2019, Mr Bottini of Petraco gave instructions for the prepayment under Addendum No 2 to be made. While I accept that discussions for this fourth cargo had been underway between Petraco and MachinoImport prior to 6 March 2019, I am satisfied that the legal commitment to Addendum No 2 was made after the exchanges between Mr Kabir and Mr Morello referred to at [80] and [81] above. MachinoImport invoiced Petraco for the prepayment on 7 March 2019. When contacted by Mr Kabir later that day, Mr Morello dissembled again, claiming falsely that he had had a “messy day” with “tender and quality problems unfortunately”.

The position at the date of Addendum No 2

85. As at the date it entered into Addendum No 2, I am satisfied that Petraco knew that performance of that contract, and delivery of a cargo to Petraco in March 2019, would necessarily involve not simply further delay to an already outstanding cargo so far as VTB Commodities was concerned, but also delivery of cargo in a delivery window in which

Antipinsky had contracted to deliver a cargo to VTB Commodities, such that delivery to Petraco would prevent delivery to VTB Commodities during that window.

86. I am satisfied that Petraco's knowledge at the time they entered into Addendum No 2 was as follows:
- i) For the reasons I have given in relation to Addendum No 1, I am satisfied that Petraco did not believe that more than six March 2019 deliveries of Antipinsky VGO could be made in ordinary conditions, and that there was a substantial backlog of deliveries to VTB Commodities which had yet to be clear.
 - ii) I am also satisfied that Petraco knew from the Murmansk trackers and general market information that production of what the market would regard as Antipinsky VGO was not achieving even six cargoes per month in 2019.
 - iii) Petraco (through Ms Srenger and Mr Morello) were also aware that VTB Commodities had reached an agreement in relation to Antipinsky cargo to be loaded in March 2019, with the offer to Petraco to tender for 1-3 March 2019 cargoes on 7 February 2019 and from the statements to that effect which I accept were made to Petraco at the 26 February 2019 meeting to the effect that VTB Commodities had renewed a US\$200m 120-day rolling facility, which would be sufficient to cover more than six cargoes in March 2019.
 - iv) The dissembling response (after careful internal consideration) to VTB Commodities' 7 February 2019 offer, Petraco's decision falsely to deny at the Langham meeting that they had outstanding exposure to Antipinsky, and the false or evasive evidence given by Ms Srenger and Mr Morello at this trial about the Langham meeting subsequently all suggest an awareness on their (and thus Petraco's) part that Petraco had embarked upon a course which would interfere with deliveries in compliance with VTB Commodities' offtake agreements and that Petraco acquired information at the Langham meeting which had contributed to that understanding. In their written opening and closing submissions, Petraco submitted that the evidence of the February meeting "in truth provides a litmus test of how weak ABFA's case is". As I have, without hesitation, preferred VTB Commodities' account of the meeting, and concluded that the evidence of Ms Srenger and Mr Morello was untruthful, the litmus test points the other way.
 - v) Mr Kabir expressly told Mr Morello that the delivery window offered to Petraco had been promised to VTB Commodities on 6 March 2019. After careful internal consideration, Mr Morello gave an evasive response suggesting that the delivery window was different and that "production has increased." That response evidences an awareness on Mr Morello and Ms Srenger's part that what Mr Kabir was saying was true. Nonetheless, Petraco proceeded to close the deal with MachinoImport, the clash with VTB Commodities' delivery notwithstanding. They did so with knowledge of what the consequences of performance under Addendum No 2 would be.
87. Finally, I accept that the terms of Addendum No 2 were favourable to Petraco when compared with prevailing market conditions. It is noteworthy that the price paid had not

moved since Addendum No 1 even though the market had moved in MachinoImport's favour, and the time period between prepayment and shipment was much shorter. This was common ground between the experts. In addition to the price discount, the wording of Addendum No 2 had a more favourable delivery window clause from Petraco's perspective than Addendum No 1. However, I have not placed reliance on this conclusion when determining what Petraco's state of mind was: there is better evidence which is less susceptible to conflicting rationalisations. Nonetheless, this fact makes Mr Heilpern's suggestion that Antipinsky might have bought in VGO to fulfil its commitments to VTB Commodities even more unrealistic. Finally, Mr Morello claimed that Petraco had not made a significant profit on the Addendum No 2 cargo because Petraco had to put the cargo into storage. This evidence was untrue. Petraco sold the cargo at a \$0.05 premium to Equinor three days before the cargo was lifted (although Equinor did put the cargo into storage).

The run-up to and conclusion of the March and April Offtake Contract

88. On 7 March 2019, VTB Commodities sent a "Letter of Demand" to Antipinsky and Sberbank complaining about the sale of VGO to Petraco, and a "Notice of Default" and "Reservation of Rights".
89. On the same date, a pre-payment for the Addendum No 1 cargo was made by Petraco.
90. On 8 March 2019, Mr Kabir contacted Mr Morello again, to tell him that VTB Commodities were loading a cargo on 10-11 March 2019 on the ALKIVIADIS and on 15-16 March 2019 on the MINERVA LEO, which he noted was on "same/similar dates as the HAFNIA RAINIER and a Scorpio vessel chartered by Petraco". On 11 March 2019, Mr Kabir asked Mr Morello to call him about Petraco's 11-12 and 15-16 March 2019 liftings, stating that VTB Commodities were keen to buy the cargoes back if they had not been on-sold by Petraco, even at the cost of covering the vessel cancellation costs. Mr Morello did not respond substantively that day. However, they did speak the following day (as is apparent from an email from Mr Alenov of VTB Commodities to Sberbank), with Mr Morello stating that Petraco's position was that they were free to sell as they thought fit, refusing to sell on an FOB basis and asking for a price which VTB Commodities thought too high.
91. On 12 March 2019, Mr Alenov contacted Sberbank to suggest Petraco should sell the 10-11 March cargo FOB to VTB Commodities and cancel their vessel, delivering the cargo onto the ALKIVIDIAS, with VTB Commodities buying the 15-16 March cargo from Petraco on a CFR basis, loading it onto the Scorpio vessel which Petraco had chartered (the STI ROTHERHITHE). An email of 12 March 2019 suggests that Sberbank had informed Petraco via MachinoImport that Petraco should sell the cargo to VTB Commodities. Once again, there was no suggestion by anyone that buying VGO elsewhere or delivering it from storage would provide a solution to this conflict.
92. On 13 March 2019, MachinoImport informed VTB Commodities that they would be receiving only three further cargoes in March.
93. On 13-14 March 2019, the Addendum No 1 cargo was loaded onto the HAFNIA RAINIER – the first of the Other Cargoes.

94. Negotiations continued between Edima, Antipinsky, Sberbank and VTB Commodities concerning the failure to deliver cargoes in accordance with the prior agreements, as a result of which:
- i) By a letter sent on or about 14 March 2019, VTB Commodities agreed to waive Events of Default under earlier contracts subject to the making of certain payments (which were made on 19 March 2019).
 - ii) On 15 March 2019, Antipinsky entered into Addendum No 2 to the VTB October 2018 Offtake Contract which confirmed five cargoes of 33,000 mt (+/- 10%) were scheduled for delivery in each of March and April 2019, and six for May 2019.
 - iii) On 15 March 2019, VTB Commodities entered into a further offtake contract with Antipinsky (“**the VTB March 2019 Offtake Contract**”) and a further prepayment agreement (“**the VTB March 2019 Prepayment Contract**”) for the amount of €200m with an interest rate of 8%. Later addenda to the offtake contract of 15, 19, 22 and 25 March 2019 provided for six shipments in June 2019 and five in July 2019.
 - iv) On 15 March 2019, VTB Commodities entered into a Settlement Deed with Edima and Antipinsky which quantified the outstanding amount due to VTB Commodities at €18,268,334 and provided for one final delivery to be made by no later than 21 March 2019 by way of partial satisfaction of that indebtedness, otherwise releasing the liabilities under the Legacy Contracts.
95. On 16 March 2019, Petraco took delivery of the Addendum No 2 cargo on the STI ROTHERHITHE. This is the second of the Other Cargoes.
96. On 18 March 2019, VTB Commodities asked MachinoImport for the April delivery windows. When the dates came forward the following day, after allowing for the cancellation letter, they were for five cargoes, including a delayed “March” shipment. VTB Commodities asked if the refinery had produced less, or cargo had been sold to a third party, to be told “sale to the ‘third party’ is not provided” and that the volume of April shipments was “still being specified” with a sixth lot being added “when we receive confirmation from ANPZ”. MachinoImport did not reveal that it was a “third party” itself purchasing VGO from Antipinsky for on sale to Petraco.
97. On the same date MachinoImport gave VTB Commodities April 2019 delivery windows for:
- i) 3-4 April (a delayed March “double” cargo);
 - ii) 10-11 April (a delayed March cargo);
 - iii) 23-24 April (a double cargo); and
 - iv) 25-30 April (later revised to 27-28 April).
98. In late March 2019, MachinoImport and Antipinsky entered into Specifications 2F and 3P, which I have referred to at [61(iii)] above.

99. On or about 7 April 2019, VTB Commodities and Antipinsky entered into further offtake and prepayment contracts (“**the VTB April 2019 Offtake Contract**” and “**the VTB April 2019 Prepayment Contract**”) in the sum of €100m with an interest rate of 6.5%. A Utilisation Request made under these contracts on 8 April 2019 provided for three shipments in June 2019 and four in July 2019.
100. On 10 April 2019, Mr Morello contacted Mr Vukman asking “Do you know if there will be another machin[o] vgo?” to be told “in April 100% No”. Mr Morello said “beginning of May” to which Mr Vukman replied “she [Ms Srenger] doesn’t know”.
101. By 12 April 2019, MachinoImport and Petraco were discussing the terms of a further sale. I am satisfied that an agreement for delivery of two lots of 30,000 mt VGO with delivery in May-June 2019 had been agreed by 16 April 2019, because the prepayment was made on this date (“**Addendum No 4**”).
102. Also on 16 April 2019, VTB Commodities had nominated the MT STONE with a laycan of 27-28 April 2019, to be told by MachinoImport that “due to a shortage of cargo at the terminal” they were proposing to put delivery back to 4-5 May 2019.

The position at the date of Addendum No 4

103. When considering Addendum No 4, which concerns the Disputed Parcel, I am concerned not only with Petraco’s state of mind, but also the separate question as to the contractual position between Antipinsky and MachinoImport, and MachinoImport and Petraco.
104. As I have stated, in closing VTB Commodities did not pursue their case that the contract between Antipinsky and MachinoImport was a sham, and that MachinoImport were not acting as buyer and seller. In any event, I am satisfied that MachinoImport were acting as a buyer and seller of cargo so far as the Disputed Parcel is concerned, and that the agreements between them were intended to create legal consequences:
 - i) The involvement of MachinoImport in a supply chain of Antipinsky VGO was far from unprecedented: it was the seller under the Petraco October 2018 Contract and featured in the supply chain which fed the Legacy Contracts, and there was talk of MachinoImport being included in the direct supply chain through which VTB Commodities were to acquire Antipinsky VGO, although VTB Commodities objected to this course.
 - ii) Petraco had insisted on MachinoImport being the seller in the Petraco October 2018 Contract and that they should provide a delivery undertaking, in the face of resistance, and had ultimately prevailed. It clearly understood MachinoImport to be acting as seller and saw advantages in this, and Mr Kabir also clearly perceived advantages in MachinoImport’s involvement, albeit he was did not explain in clear terms what they were (see [37]-[38]).
 - iii) Contemporary commentary – including Alvarez & Marsal’s report cited at [105] below – support the view that these were genuine contracts.

105. I accept that there is uncertainty as to the effective date of the documents which record Antipinsky's sales to MachinoImport. VTB Commodities challenges the date of the 27 January 2019 contract for the supply of 2.16m mt of VGO by Antipinsky to MachinoImport, suggesting that the document cannot have been effective any earlier than 22 February 2019. This is because a report produced by Alvarez & Marsal on that date records "the agreement with [MachinoImport] is approved but not signed. Money should be received today". In the event, the payment from MachinoImport to Antipinsky occurred on 25 February 2019.
106. On the basis of the evidence before me, I am not persuaded that the document dated 27 January 2019 on its own imposed an effective delivery obligation on Antipinsky nor an effective right on MachinoImport to delivery:
- i) The evidence of Mr Kabir was that the document did not contain sufficient terms to create a workable contract of sale, and the evidence of Mr Ivanov was to similar effect, it being his position that it was only the subsequent "Specifications" which did this.
 - ii) That was also Petraco's case in closing, Petraco submitting that the document dated 27 January 2019 "was a framework contract and the headline quantity was not something which would be delivered by default or without more. What was required for each purchase was an addendum or specification for a specific quantity."
 - iii) In these circumstances, it does not particularly matter when the document dated 27 January 2019 was actually finalised. I am satisfied it had been finalised by the end of February 2019.
107. I accept that there was a 28 December 2018 preliminary specification for a sale of VGO from Antipinsky to MachinoImport (which may have been concluded within the framework of the rolling 2016 agreement between Antipinsky and MachinoImport referred to at [61(ii)]), although in the event Antipinsky failed to deliver the quantity of cargo which it covered, and it appears to have been superseded by later documents. There are further specifications providing for delivery of various quantities of VGO in February, March and April 2019.
108. The Specifications which are relevant to the Disputed Parcel are Specification 2F and Specification 3P. I accept that these evidence genuine sale contracts, albeit between two companies who were closely co-operating in the sale and shipment of Antipinsky VGO across a broad front at this point. The Specifications provided for title to VGO to pass on delivery onto rail tank cars at the railway station near the Antipinsky refinery (clause 3.3 of the document dated 27 January 2019).
109. In relation to both, I am satisfied that Antipinsky and MachinoImport were aware when they committed themselves to the contracts evidenced by Specifications 2F and 3P that the effect of Antipinsky delivering the quantities covered by those specifications to MachinoImport (with the anticipated on-delivery of cargoes to Petraco) would be that Antipinsky could not deliver the number of cargoes it had contracted to deliver to VTB Commodities in accordance with the monthly schedule.

110. Antipinsky's position is relatively straightforward, and was not really challenged:

- i) They must have been aware of the quantity they were producing, the number of cargoes they had contracted to deliver to VTB Commodities and the delivery windows they had committed to, and the quantities they had agreed to sell to MachinoImport and the delivery windows of those cargoes.
- ii) On that basis, they were clearly aware that performance of the contracts to sell VGO to MachinoImport with a view to its on-sale to Petraco would necessarily delay deliveries to VTB Commodities until after the promised delivery periods.
- iii) The reality is that, in the face of the financial difficulties which they encountered at the end of 2018, those responsible for the management of Antipinsky decided on a strategy which involved selling more VGO than they were producing, with delivery windows which could not all be met, and which would inevitably involve prioritising delivery to some purchasers and delaying delivery to others. Indeed, evidence filed with the court on behalf of the post-bankruptcy Antipinsky management in July 2019 observed that "Antipinsky's current management does not know why its former management agreed to supply VTB with 8 cargoes per month when it only had the capacity to produce 6 cargoes per month". The answer is almost certainly the same motivation which led Antipinsky to promise six or more cargoes per month to VTB Commodities, and then contract to sell cargoes to Petraco in March, April and a double cargo in May-June 2019 – the desire to maximise incoming cashflow in the face of ongoing financial difficulties.

111. So far as MachinoImport is concerned:

- i) MachinoImport were clearly closely involved in co-ordinating the shipments of VGO from Antipinsky from December 2018 onwards, and implementing the prepayment "rollover" scheme which Antipinsky's management had demanded in and after the 4 December 2018 meeting.
- ii) I have accepted Mr Kabir's evidence as to the events at the meeting which VTB Commodities and MachinoImport attended on 15 January 2019, at which VTB Commodities' offtake entitlements were summarised (see [60(i)]). It is clear from MachinoImport's attempts to challenge the interest rate payable under the VTB Commodities offtake agreement (as recorded in Mr Alenov's email sent after the meeting) that MachinoImport were very familiar with VTB Commodities' contractual arrangements.
- iii) It is also clear that MachinoImport were closely involved in the attempts to manage the conflicting demands of the two contracts. Its role as "freight forwarder" under the 8 January 2019 contract so far as deliveries to VTB Commodities are concerned, and as a buyer and seller in relation to VGO to be sold to Petraco, meant that they had full visibility of the commitments being made for Antipinsky VGO, and the fact that they could not all be performed as scheduled. In this regard, I accept that the document dated 8 January 2019, providing for MachinoImport to act as "forwarder" for Antipinsky, to ship goods from Murmansk railway station to the POLAR ROCK, and to load it onto tankers, reflected a genuine role so far as the

shipment of cargo destined for VTB Commodities is concerned, albeit I remain uncertain as to the date on which this arrangement took effect.

- iv) The extent of MachinoImport's knowledge can be seen from them telling VTB Commodities on 23 January 2019 of the "one extra cargo" to be squeezed in; their notification to VTB Commodities on 15 February 2019 that there would only be five March cargoes for them, and the dissembling response for the lack of a sixth cargo; their interaction with VTB Commodities on 5 March 2019 and 13-14 March 2019; and in relation to April 2019 deliveries on 19 March 2019 and 16 April 2019.
- v) Specification 2F for the supply of 29,067 mt of VGO in March 2019, evidences a commitment concluded at a time in which MachinoImport would have known that Antipinsky had contracted to deliver six cargoes to VTB Commodities that month, being the maximum production even in stable conditions. Specification 3P for the delivery of 46,000 mt of VGO in April 2019 was entered into at a time when MachinoImport knew that Antipinsky had failed to deliver three March 2019 cargoes to VTB Commodities, and had a contractual obligation to deliver five April 2019 cargoes.
- vi) MachinoImport's failure to acknowledge emails from VTB Commodities from 18 April 2019, with emails "bouncing back" from that date reflects the fact that it simply had no answer to VTB Commodities' protests.
- vii) The overall effect of this evidence leaves me in no doubt that MachinoImport had the same level of knowledge as Antipinsky so far as the implications of their purchases from Antipinsky on deliveries to VTB Commodities are concerned.

112. I address the legal consequences of those findings as a matter of Russian law below. However, there is an anterior issue raised by VTB Commodities that even if the various contracts between Antipinsky and MachinoImport are valid, Petraco has not shown that there was sufficient VGO in the POLAR ROCK at the relevant date which MachinoImport was entitled to cause to deliver to Petraco, as opposed to VGO loaded onto the POLAR ROCK by MachinoImport in their capacity as freight forwarder for Antipinsky (which they did not have the legal right to transfer to Petraco).

113. This aspect of VTB Commodities' case raised a factually rather dense and relatively under-developed issue. While the material is not easy to digest, I am ultimately satisfied from the Certificate of Resources Availability Spreadsheet which Mr Ivanov of MachinoImport placed before the court in 2019 that, after the deliveries under Addendum Nos 1 and 2, there were 15,028.589 mt of VGO on board the POLAR ROCK in which title had been transferred from Antipinsky to MachinoImport at the time the Disputed Parcel was scheduled for loading. I also accept that Universal Transfer Acts, also produced by Mr Ivanov, show that title in a further 45,465.891 mt of VGO passed from Antipinsky to MachinoImport under Specification 3P. A Certificate of Resource Availability prepared by JSC ABC Cargo Service, a logistics company which managed inventory on the POLAR ROCK, and dated 2 May 2019, summarises the deliveries of cargo made by Antipinsky and by MachinoImport to the POLAR ROCK, the quantities loaded onto vessels from each of those amounts, and identifies a balance on the POLAR ROCK at that date of 85,675.838 mt, of which 60,608.905 mt was "MachinoImport

cargo” and 25,068.833 mt was “Antipinsky cargo”. There is also a certificate from the Master of the POLAR ROCK confirming that, as at 2 May 2019, 60,608.905 mt belonging to MachinoImport was onboard, and there is a customer “Goods declaration” by MachinoImport in relation to the Addendum No 4 sale to Petraco for 65,400 mt of VGO on which customs fees had been paid, and which authorised the release of the goods. Finally, there is evidence of a payment from MachinoImport into Antipinsky’s bank account of 17 April 2019 described as a payment under a contract dated 27 January 2019 “for the supply of VGO”. While the figures do not tally perfectly, they strongly suggest MachinoImport had title in sufficient cargo on the POLAR ROCK to deliver the Disputed Parcel to Petraco.

114. Indeed, there was an element of unreality in this aspect of VTB Commodities’ case. It alleged that Antipinsky had engaged in a scheme to sell cargo to MachinoImport (knowing it would be on-sold to Petraco), knowing that by doing so, they would not be able to fulfil their obligation to make scheduled monthly deliveries to VTB Commodities as a result. I have broadly accepted that case on the facts and, at least on Antipinsky’s part, the evidence filed by its General Director Mr Andriasov in 2019 accepted that the refinery had sold cargo to MachinoImport to address their financial difficulties and enable them to continue operating until they received a tax refund (although the purported justifications which Mr Andriasov offered for taking that course are strongly disputed). Against that background, the suggestion that, notwithstanding the fact that Antipinsky and MachinoImport entered into contracts for the sale and transfer of sufficient VGO to discharge the MachinoImport-Petraco Contracts, and that MachinoImport were on the point of delivering the Disputed Parcel to Petraco when the Cargo Injunction was granted, Antipinsky had not in fact transferred sufficient VGO to MachinoImport to perform those contracts is highly improbable.
115. Finally, there is the question of Petraco’s state of mind at the date of Addendum No 4. Once again I am satisfied that Ms Srenger and Mr Morello were aware that if this double cargo was delivered in May/June 2019, VTB Commodities would not receive the quantities it was scheduled to receive under its offtake agreements with Antipinsky:
- i) For reasons I have set out at [63] and [65] above, I am satisfied that Ms Srenger and Mr Morello knew that the normal level of production of what the market would recognise as Antipinsky VGO was six cargoes per month, and that there was no realistic prospect of additional quantities being delivered using crude oil delivered by rail cars or by Antipinsky buying VGO for resale.
 - ii) I have already explained my reasons for concluding that Ms Srenger and Mr Morello were aware when Petraco entered into Addendum No 2 that Antipinsky had promised to make a VGO delivery to VTB Commodities in the same window, and that both contracts could not be performed according to the contractual schedule. It would have been clear from the 8 March 2019 contact from Mr Kabir that this state of affairs was continuing. Had there been any doubt, the instructions from Sberbank via MachinoImport to Petraco to sell the 10-11 March 2019 cargo to VTB Commodities provided yet further confirmation that Antipinsky were selling cargo to MachinoImport which would be the source of supplies to Petraco having promised deliveries in the same period to VTB Commodities.

- iii) It must have been particularly obvious to Ms Srenger and Mr Morello that delivery to Petraco of a “double cargo” of Antipinsky VGO would mean that the quantities scheduled for delivery to VTB Commodities over the same period could not all be made within the contractual window.
- iv) As I explain below, when Mr Kabir contacted Mr Morello via electronic message on 17 April 2019 referring to the cargoes VTB Commodities were scheduled to have delivered in May, and to enquire as to Petraco’s position, he did not get a response, nor did anyone express any surprise within Petraco. I am unable to accept Mr Morello’s suggestion that he responded by telephone. I am satisfied that he did not respond because he was aware that Addendum No 4 had cut across VTB Commodities’ scheduled deliveries, and Ms Srenger was similarly aware, which is why she told Mr Morello not to message Mr Kabir.

116. Once again, VTB Commodities pointed to what they contended was the below market price at which Addendum No 4 was agreed. The same price was paid as under Addendum No 1, even though market conditions had moved since then in a way which made the price more favourable. The prepayment period was, once again, much shorter than for Addendum No 1. It was common ground that Petraco obtained a price at a discount to the prevailing market rate, and I accept that the contractual terms relating to fixing the delivery window made this a more favourable transaction for them than Addendum No 1. I have not found it necessary to place reliance on this factor, although, once again, it makes any suggestion that Antipinsky might have bought in VGO to fulfil its commitments to VTB Commodities even more unrealistic.

The events leading to the injunctions

- 117. The message which MachinoImport had sent to VTB Commodities on 16 April 2019 ([102]) led VTB Commodities to send letters reserving their rights to Antipinsky and Sberbank.
- 118. As I have mentioned, on 17 April 2019, Mr Kabir contacted Mr Morello saying that VTB Commodities “have 5 cargoes” scheduled for delivery in May 2019, and asking if Petraco had any because VTB Commodities wanted to conduct any on-sales on a realistic basis with the benefit of the full picture. Mr Morello did not reply, but forwarded the message to Ms Srenger who replied “Pdm” – “please don’t message”. I am satisfied that Ms Strenger was instructing Mr Morello not to respond to Mr Kabir, which message Mr Morello understood because he did not reply, and I reject the evidence of both of them that this was meant, or understood, as a request for Mr Morello not to message Ms Srenger because she was busy. Given that message, it is highly unlikely that Mr Morello replied to Mr Kabir by telephone, as he claims, and Mr Kabir’s message the next day saying “OK I assume 2 then” – i.e. in absence of a reply he was making an assumption – is inconsistent with such a conversation having taken place. Further Mr Kabir’s evidence in 2019 – which was not challenged at that time, albeit Mr Morello did not file a statement then – was that he “received no reply to this enquiry”.
- 119. Mr Kabir contacted Antipinsky, asking “where are the missing two cargoes? Have you sold any oil to any third party loading out of Murmansk other than VTB?”, but, once again, received no response.

120. On 24 April 2019, Petraco chartered two vessels – the MT ESTHER and the MT LOUIE – to lift the Disputed Parcel (each vessel to load 30,000 mt). On 25 April 2019, Petraco contracted to sell 30,000-33,000 mt of VGO (Antipinsky origin) to Totsa Total Trading SA, CIF Rotterdam for delivery 8-18 May 2019.
121. On 29 April 2019, VTB Commodities issued Notices of Default under the VTB October 2018, March 2019 and April 2019 Offtake and Prepayment Contracts and accelerated the amounts due, claiming a total amount due of €197,115,077.15. On the same date, they sought and obtained the Cargo Injunction requiring Antipinsky to deliver the Disputed Parcel to VTB Commodities and a worldwide freezing order against Antipinsky from Mr Justice Waksman.
122. On 8 May 2019, Petraco applied to intervene in the proceedings to discharge the Cargo Injunction, and on 13 May 2019, VTB Commodities applied for an order permitting them to sell the Disputed Parcel and pay the proceeds into court. On 15 May 2019, Sir William Blair made an order permitting the Disputed Parcel to be sold, and ordered a trial as to the competing claims to the Disputed Parcel.
123. On 20 May 2019, Antipinsky filed for bankruptcy in the Arbitrazh Court of Tyumen District.
124. On 20 January 2020, Phillips LJ discharged the Cargo Injunction.

THE APPLICABLE PRINCIPLES OF RUSSIAN LAW

125. The issues of Russian law which arise in this case are complex and difficult, and I approach the determination of them with some trepidation. I have sought to follow the guidance given as to the approach to be taken in ascertaining the content of foreign law as summarised in a number of recent judgments (including by Mr Justice Calver in *Suppipat v Narongdej* [2023] EWHC 1988 (Comm), [908]). I have also paid careful attention to the decision of the Court of Appeal in *Banca Intesa Sanpaolo SpA v Comune de Venezia* [2023] EWCA Civ 1482, and I have sought to keep the guidance given by the Court of Appeal in that case firmly in mind at all times.
126. In the circumstances, it may be appropriate for me to say a little more about the manner in which I have sought to approach the task of ascertaining the content of Russian law as relevant to these proceedings in this judgment:
 - i) The expert reports, in the usual manner, set out the statements of the content and effect of Russian law which the court was asked to accept, with extensive reference to statutory provisions, court decisions, textbook extracts and academic commentary which were said to support the expert's view. Cross-examination involved taking the experts to some of those materials, with a view to showing that the materials cited by the expert did not support the propositions asserted, or that other materials supported a different conclusion. The closing submissions similarly involved a close analysis of the legal materials, and this judgment also engages closely with the materials which the experts placed before the court and from which they asserted the content of Russian law could be ascertained.

- ii) I have at all times understood the question that I am seeking to answer as being “how would the highest Russian court resolve the issues in a case in which they arose directly for decision?” Decisions of lower courts can never be determinative of the answer to that question, but they form part of the corpus of material relied upon by the experts and available to assist the court. Faced with conflicting evidence from credible and qualified experts, I have sought to test that evidence by considering which answer “best fits” with the provisions and structure of the RCC, and the principles which the RCC embodies, as interpreted and applied by the Russian courts (with appropriate weighting for the relative seniority of the court decisions) and assisted by doctrinal analysis of the RCC and of those court decisions.

Article 10 of the RCC

The key provisions

127. Article 10 of the RCC, headed “Limits to the exercise of civil-law rights”, provides:

- “(1) It is not allowed to exercise civil-law rights exclusively intending to cause harm to another person, to evade the law for unlawful purposes, as well as other [intentionally/knowingly] bad-faith exercise of civil-law rights (abuse of rights).
- (4) If the abuse of right has resulted in a violation of another person’s right, that person is entitled to claim compensation for the damages claimed.
- (5) The good faith of the parties to civil-law relations and the reasonableness of their actions are presumed.”

The square bracketed section in Article 10(1) reflects a disputed translation, but one which I am not persuaded is ultimately significant. I have used the word “conscious” to embrace both. Article 10 was amended in 2013.

128. Article 1 of the RCC contains the following provisions added in 2013:

- “(3) Participants in civil-law relations must act in good faith in establishing, exercising and protecting civil-law rights and in discharging civil-law obligations.
- (4) No one should benefit from his or her illegal or bad-faith conduct.”

It is common ground between the experts that the principle of good faith was well-established in Russian law before 2013, and that “there is no simple and clear test to determine whether a person is acting in good faith, and that the good faith doctrine is a legal concept that courts apply on a case-to-case basis based on the circumstances.”

129. In conjunction with Article 168 (which is described by the experts as a “reference” article – one which does not have a free-standing effect but operates in conjunction with other articles), an abuse of rights under Article 10 which takes the form of concluding a

transaction can entail the invalidity of that transaction, where both parties to the transaction are parties to the abuse.

130. As I have said, the experts agree that good faith in the RCC is a legal concept which the courts apply on a case-by-case basis. In the context of Article 1, the Russian Supreme Court sitting in Plenary Session on 23 June 2015 stated, “when estimating the Parties’ actions as conscientious (fair) or unconscientious (unfair) one shall proceed from the behaviour expected from any participant in civil [commerce] taking into account the rights and lawful interests of the other parties assisting it including in the receipt of necessary information.”
131. The issues which arise between the Russian law experts with regard to Article 10 are as follows:
- i) Is intentional or conscious conduct which falls short of the requirements of good faith as set out in Article 1 and the cases which expand upon that concept sufficient to constitute conscious bad faith for Article 10 purposes?
 - ii) If not, what types of conduct will constitute conscious bad faith for Article 10 purposes?
 - iii) Can there be conscious bad faith for Article 10 purposes in circumstances in which it is not the predominant intention or purpose of the party or parties accused of acting in bad faith to harm the claimant?

The approach to Article 10

132. In approaching the interpretation of Article 10, I accept that it is a provision which is to be applied with care and consideration, because it provides an inhibition or limitation on rights expressly granted or recognised by Russian law. That is particularly the case when the doctrine is relied upon as a basis on which transactions are said to be invalid, because of the obvious potential impact of findings of invalidity on the certainty of commercial dealings.
133. The need for a cautious approach to the application of Article 10 is confirmed by a number of Russian commentators: for example, Sklovskiy KI, *Ownership in Civil Law* (2010) (albeit before the 2013 reforms to Article 10); Vitryanskiy VV, *Reform of Russian Civil Law: Interim Results* (2018) and Karapetov AG, *Transactions, Representation, Limitation Period: Article-by-Article Commentary to Articles 153-208 of the Russian Civil Code* (2017). That caution is particularly important when Article 10 is relied upon to invalidate a transaction concluded through the exercise of the right to contract. Karapetov observes:

“The need for caution in applying Article 10 of the Civil Code to justify invalidity

At the same time, as in any case of applying Article 10 of the Russian Civil Code, a restriction on one’s formal right (in this case in the form of invalidation of a transaction) is possible only in the most extreme cases, in a situation of obvious and deliberate abuse of right, when a transaction, although not violating any specific

imperative prescriptions of the law, nevertheless affirms a result of obviously bad faith conduct. The application of Article 10 of the Russian Civil Code in conjunction with the provisions of Article 168 of the Russian Civil Code should not be a basis of annulling any incomprehensible or unusual transaction which does not fit into any patterns or typified schemes, but the reaction of the legal order to extreme and absolutely obvious manifestations of bad faith, when imperative rules or [legal grounds] of invalidity prove insufficient and the underlying legal sense sharply rebels against the transaction”.

134. It is also clear that judicial decisions play a particularly important role in determining the sphere of application of Article 10: see for example Sklovskiy KI, *Ownership in Civil Law* (2010) who notes that the concept of abuse of right “becomes a fact only as a result of a judicial decision, in which judicial discretion plays a major role”, and EA Sukhanov, *Civil Law of Obligations Vol 1* (2019) noting that “the notion of abuse of right is given concrete content by the courts”.
135. I am not persuaded by Professor Schwarz’s opinion that the concept of good faith, in the full width it is given in Article 1, also defines the parameters of bad faith in Article 10, such that a person who exercises a legal right knowing that they are deviating from standard behaviour or failing to take into account the interests of others of which they are or ought to be aware commits an abuse of rights:
- i) Such an approach would give Article 10 a very wide scope indeed, and give it an effect which it has not achieved in Russian court decisions directly applying Article 10 to date. While I accept it is possible to find court decisions which refer to both Article 1 and Article 10 when discussing the concept of good faith (including the Plenum Decision of 23 June 2015 on which Professor Schwarz placed considerable reliance), this reflects a general tendency in the Russian cases to refer to a very large number of provisions of the RCC. I am not persuaded that referring to Articles 1 and 10 in the context of the same discussion amounts to a formal recognition of the legal equivalence of the two provisions. The principal focus of the Plenum Decision was not Article 10 but Article 1. I prefer Mr Kulkov’s evidence on the relationship of Article 1 and Article 10.
 - ii) There is extensive academic commentary to which the experts have referred which supports the view that Article 10 has a narrower focus. Thus Sklovskiy KI, *Application of Law and the Principle of Good Faith* (2018) contrasts the wider principle of good faith in Article 1, and “cases of bad faith behaviour, which is characterised by intention aimed at harming another person ... described in Article 10(1)” which involves “the subjective negative attitude of the offender to interests of the victim”. V Kostko, *Bad Faith Behaviour, Abuse of Law and Unlawful Acts: What is the Essence and Correlation of the Constructs?* (2018) states that “it is necessary to distinguish between bad faith behaviour and abuse of rights as its special type”, and suggests that Article 10 is concerned with using “lawful behaviour to achieve unlawful ends” (i.e. a focus on unlawful *purpose*). S Kim, *Significance of Guilt and Unlawfulness in the Mechanism of Functioning of Imputation in Civil Law* (2022) noted that “the concept of bad faith gravitates towards acts with a vicious, anti-lawful purpose, which makes it similar to the category of intent.” KV Nam, in *The Principle of Good Faith: Development,*

System, Problems of Theory and Practice (2022) stated “it is necessary to distinguish between the abuse of the right in a broad sense or by virtue of the principle of good faith ... and abuse of right under Article 10 ...”

- iii) Cases on which Professor Schwarz relies also emphasise the purpose of the party accused of abuse of rights: for example, the Supreme Court decision of 3 February 2015 in *Zinoviev v Renaissance Insurance Group* described an abuse of right as “exercising the legal right in contradistinction with its purpose”. While it is fair to say that wider language is also used when explaining the concept of an abuse of rights, the context of the case – consumer protection – is very different from the present. The same theme of exercising a right for a purpose other than that for which it is intended appears in a case referred to by Mr Kulkov, the judgment of the Commercial Court of the Far Eastern Circuit of 30 October 2017 in *Tekhtsentr Lux v Dubrovina*, which observes that Article 10 is concerned with “the exercise of the right solely with the intention to cause harm to another person or with the intention to realise other unlawful interest, not coinciding with the usual economic (financial) interest of transactions of this kind” and requiring evidence “that the parties had intended to realise any unlawful purpose”.

136. Nor am I persuaded by Petraco’s argument – not wholly endorsed by Mr Kulkov - that in practical terms, there can *only* be an abuse of rights for Article 10 purposes where the right is exercised with the predominant purpose of causing harm to another, or to evade a legal prohibition for unlawful purposes. The language of Article 10(1) identifies three types of abuse of rights – where the right is exercised “intending to cause harm to another person” (category 1), “to evade the law for unlawful purposes” (category 2) and “conscious bad faith exercise of civil law rights” (category 3). While the purpose of causing harm to someone is the most obvious “unlawful purpose” when exercising a right, it is clearly not the only unlawful purpose.

137. However, I accept that the first category – acting with the purpose of causing harm to another, referred to as “chicane” or “chicanery” in the Russian legal lexicon – is the dominant concept of abuse of rights, and that statements of the doctrine in case law very frequently define abuse as acting with such an intention: for example *Oleksis v Aleksandrov* Commercial Court of the Moscow Circuit 7 July 2020; *Lesnaya v Gerkon* Commercial Court of the Uralskiy Circuit 14 December 2020; *MRSK Urala v Krasouralsk* Commercial Court of the Ural Circuit 13 September 2017; *Victoria Development v Paradigma* Commercial Court of the Moscow Circuit 26 April 2023; *Kornev v AKB Limited Liability Company*, Commercial Court of the Povolzhskiy Circuit, 3 March 2023 and *Nepota v Zarya-Techservice* Commercial Court of the Central Circuit, 16 June 2023. To similar effect, writing in 2018, Sklovskiy KI in *Application of Law and the Principle of Good Faith* referred to “cases of bad faith, which is characterised by intention aimed at harming another person ... described in Article 10(1)”.

138. My review of the cases and commentary discussed by the experts suggests that the third category is likely to be a narrow and rare residuary category of abuse of rights, rather than the broad and overarching doctrine which it would constitute on Professor Schwarz’s analysis. Indeed, I was not referred to any Russian case in which an Article 10 abuse was expressly and clearly found to be established on the basis of category 3 alone. In these circumstances, and keeping in mind the approach I have referred to at [132]-[133] above,

I am satisfied that an incremental approach would be adopted by the Russian Supreme Court in applying the third category, by reference to established instances of abuse of rights.

139. In this case, VTB Commodities does not allege that MachinoImport or Petraco acted with the predominant intent or purpose of causing them harm, and no such allegation could realistically be made. Petraco was clearly motivated by the desire to make a commercial profit for itself. Nor can it be said that the purpose for which MachinoImport or Petraco exercised their right to contract was something other than the usual purpose for which the right of contracting is exercised or contracts of sale concluded: to make a profit from acquiring goods at one price, and selling them for a greater price. I have been unable to discern any unlawful purpose in the decision to contract.
140. However, to the extent that I have set out above, I am satisfied that at various points Petraco entered into contracts with MachinoImport to acquire Antipinsky VGO in the knowledge that if they received what they were contracting to receive when they had contracted to receive it, VTB Commodities would not receive what they had contracted to receive when VTB Commodities had contracted to receive it. It is that conduct which VTB Commodities contends amounts to the intentional bad faith conduct and gives rise to an Article 10 abuse of rights in this case. In Professor Schwarz’s view, where the conclusion of a contract interferes with the performance of an earlier contract, that is automatically an act of bad faith.
141. As Mr Kulkov noted, the Russian law relating to the position where the conduct of one party interferes with the performance of a contract between two other parties is “not well-developed”:
- i) There are decisions which (unsurprisingly) suggest that a mere adverse impact on the performance of a contract will not constitute an abuse of rights absent an intent to injure. For example, the judgment of the Commercial Court of the Uralskiy Circuit of 14 December 2020 in *Lesnaya v Gerkon* concerned a case in which L refused to allow access to shared space in an apartment block to permit G to install equipment necessary to provide a contracted service to various other residents. The court held that that it was necessary to establish “knowingly bad faith exercise of rights” which it equated as showing that “his sole purpose was to cause harm to another person (absence of other good faith purposes).”
 - ii) There are decisions in which a contract of sale was entered into which is alleged adversely to impact the enforcement of a civil right – usually a debt or a civil judgment – against the seller, in which the courts stress the need to establish that the purpose of the transaction was to harm the creditor: *Oleksis v Aleksandrov* ([137]), *Tekhstentr Lux v Dubrovina* ([135]). This is also the character of the examples given by Karapetov AG in *Transactions, Representation, Limitation Period: Article-by-Article Commentary to Articles 153-208 of the Russian Civil Code* (2017): a collusive sale or a mock gift to avoid enforcement.
142. Professor Schwarz relied heavily on the Russian law relating to a “double sale”, where the owner of identified goods sells the same goods to two different people under successive contracts of sale. As to this:

- i) Article 398 of the RCC addresses the “consequences of failure to fulfil an obligation to transfer an individually defined thing”. It provides that the creditor has the right to demand the transfer of the thing unless the thing has already been transferred to a third party, in which case the creditor is confined to a remedy in damages. Before any transfer has taken place, the creditor who first contracted to acquire the individually defined thing is entitled to the transfer, the other creditor being confined to a claim in damages.
- ii) The Commercial Court of Moscow Circuit in a decision of 15 November 2022 addressed a claim brought by the Ministry of Defence relating to the “double sale” of certain residential apartments. The court noted that “the existence of two or more obligations owed by a debtor to different creditors to transfer an individually defined thing does not invalidate any of these obligations or transactions on which they are based, but only gives one of the creditors a preferential right to claim fulfilment of the obligation. Other creditors whose obligations are thereby rendered unenforceable, are then entitled to claim compensation for the damages caused by the unfulfilled obligation”.

143. What of the position where the second creditor is aware of the existence of the first contract at the time it contracts to buy the individually defined thing?

- i) I was not shown any Russian legal materials which clearly established that this is ipso facto an Article 10 abuse of right, with the result that the second contract is void, as Professor Schwarz contended. On its face, that strikes me as a challenging proposition because it would mean that the second contract would be void even if, by the time for performance, the seller had managed to negotiate its way out of the first contract.
- ii) The cases of “double sale” in the court decisions put in evidence generally identified the need for the second sale to have an unlawful purpose, rather than simply an adverse consequence (see for example the Judgments of the Commercial Court of the Povolzhskiy Circuit of 5 November 2015 and 13 September 2016; the decision of the Russian Supreme Court in *Sergeevich*, 28 May 2019, referring to the need to “prove that the defendants made deals with *the aim of letting the debtor evade fulfilling his obligations*” (emphasis added); and the decision of the Russian Supreme Court in *Kravstov v Rimeca* 2 July 2018 (referring to the fact that “the main purpose of the subsequent transaction was not to raise funds for completion of construction, but to deprive the first participant of collateral in the interests of the developer” and the parties’ conduct was “aimed at circumventing the provisions of the Law on Joint Participation in Construction”).
- iii) By way of an alleged exception, I was referred to a decision of the Russian Supreme Court of 27 March 2018 in *Kalimullina v United Trade and Procurement Company* in which proceedings were brought to invalidate a sale contract for an apartment which had been “double sold”, with possession having passed to the first purchaser, but title being registered by the second purchaser. The Russian Supreme Court remitted the case, stating that the lower court:

“should have established *if the residential unit had previously been handed to such a creditor for actual possession in fulfilment of the identical obligation*, and the creditor whose right to the disputed thing was registered knew about this obligation while entering into the obligation related to this thing” (emphasis added).

The italicised words are potentially significant, because the effect of Article 398 is to attach significance to the date of transfer of the “double sold” property when determining priority. There is no clear statement that mere knowledge without more is sufficient for an Article 10 claim, even in the case of identified goods. This is equally true of the other Russian Supreme Court case relied upon by Professor Schwarz, *Metal Profile Company v Partnerstvo LLC* 28 July 2016, in which, once again, the earlier purchaser had obtained possession, but the later purchaser registered title. The court referred to Article 398 in upholding the claims of the buyer in possession.

144. Academic writing appears to be split on this issue:

- i) Bevzenko RS, in “An Essay on the Theory of Title Security” (2021) discusses the position where the owner of a thing who has agreed to sell it to one person then sells it to another who offers a bigger price “knowing there was a first buyer”. He expressed the view that “it is unlikely that a dispute between the first and second purchaser will be resolved by the court in favour of the first purchaser (perhaps if the second purchaser offered the bigger price in order to annoy, impair the interests of the first purchaser, but such behaviour in business practice is rather an exception, due to its irrationality)”. He suggests “there is simply an obligation the consequence of which is an obligation to compensate for damages”.
- ii) An alternative view is offered by Karapetov AG, in *General Provisions of Civil Law: Article-by-Article Commentary to Articles 1-16.1 of the RCC* (2018). He suggests that “our concept of justice makes it difficult to accept as good faith the behaviour of an intervener who knows for certain that the property disposed of him has already been promised to another person and that such alienation will inevitably result in an infringement of that person’s rights” because “the whole idea of good faith is that a participant in legal relations must, in certain situations, refrain from exercising his rights, considering the interests of his partner as well as those of third parties”. However, he notes that “the issue continues to be a matter of controversy.” I accept this commentary provides support for Professor Schwarz’s analysis. However, Professor Karapetov also notes that there are contrary views:

“It has sometimes been argued that a transaction with a bad faith intervenor can only be avoided if the intervenor has a demonstrated intent to harm the creditor’s interests, i.e. when the intervenor’s entry into the transaction was predetermined not by its own economic interest (even if in cynical disregard of the counterparty’s creditor’s rights that suffer as a result of the transaction) but by a desire to harm the creditor ... In other words there is a view that a cynical disregard for the relative rights of the creditors of a potential counterparty does not constitute an abuse of the freedom of contract if the intervener was pursuing his own vested interest rather than having an intent to cause harm”.

145. Finally, I accept that Mr Kulkov derives some support for his position from the treatment in the RCC of the position where a contract contains a “no assignment” clause, and a party takes an assignment notwithstanding their knowledge of the clause. Article 388(3) of the RCC provides that such an assignment is valid as a general rule, unless the assignment was undertaken for the purpose of harming the debtor (Supreme Court Plenum Resolution No 54, 21 December 2017, para. 17). While Professor Schwarz is right to say that there is an express provision in the RCC that the assignment is valid in these circumstances, such that something more than mere knowledge would be required to invalidate it, the Plenum Decision would suggest that no legal wrong (and hence damages claim) occurs in these circumstances, a state of affairs which it is not easy to reconcile with the suggestion that entering into a contract knowing it will place the other party in breach of a contractual obligation is ipso facto an abuse of rights for Article 10 purposes. A commentary on the decision, by Baibak VV, Ilyin AV, Karapetov AG, Pavlov AA and Sarbash SV, published in 2018 treats the decision as providing insight on the general use of Articles 10 and 168 to invalidate transactions, and suggests that the Russian Supreme Court expressly limited invalidation to cases of intent to harm.
146. The overall effect of this material is, in my view, supportive of the evidence of Mr Kulkov that Russian law has yet to embrace a principle that entering into an agreement to buy specific goods with the knowledge of an earlier inconsistent contract is, without more, an abuse of rights which invalidates the second transaction, albeit it is possible that Russian law is moving to develop in that direction.
147. The “double sale” of an “individually defined thing” raises the conflict of contractual rights in a particularly acute sense, because there are rival claims to delivery to the same specific item, and because transfer of ownership of that item to one purchaser necessarily and for all time precludes its delivery to the other. Although at times Professor Schwarz appeared to address this issue on the assumption that this case involved a “double sale” (see e.g. Day 7 page 79), this involved a considerable over-simplification as compared with that concept under Russian law:
- i) The various offtake contracts did not give VTB Commodities a right to “individually defined things” from either Edima or Antipinsky.
 - ii) The ordinary commercial consequence of failure to deliver the requisite volume of cargo in a particular month was delayed delivery, not non-delivery.
 - iii) At least for part of the cargo for the part of the period, VTB Commodities’ contractual rights were principally against Edima (albeit with a guarantee from Antipinsky), whereas MachinoImport’s contract was with Antipinsky, and Petraco’s contract was always with MachinoImport.
148. This case, therefore, presents a weaker case for invalidating the second contract than the “double sale” example. While Professor Schwarz suggested that it would be an abuse of right for a merchant, who knew another merchant had agreed to deliver a quantity of wheat in two months’ time, to buy up wheat for the purposes of making a profit, knowing that to do so would prevent the other merchant from meeting its delivery obligations when the time came, I was not referred to any Russian law material which supported this position. This suggests to me that Professor Schwarz’s analysis goes considerably further

than Russian courts have been willing to recognise to date. The fact that it is only identified goods which are addressed in the RCC and the legal literature in this context is not without significance, suggesting that Russian law recognises a real distinction between the two scenarios. In this regard, the views of Professor Sukhanov in *Russian Civil Law: In 2 Volumes: General Part* (2nd edition, 2011) are significant:

“Things defined by general characteristics are legally substitutable. Therefore failure to perform an obligation to deliver them (e.g. due to destruction or other loss of a particular batch of goods) generally enables the right holder to claim the same number of similar things, but excludes the possibility of claiming the same (specific) things in kind. For instance, a metal manufacturer undertook to sell 10 tonnes of nickel to a buyer, whereby the ownership of the metal in the contract was transferred to the buyer upon payment for the goods. However, after receiving the payment in the seller’s account, he sold all the metal he made, amounting to more than 100 tonnes, to another buyer. In such a situation, the original buyer may claim either the same quantity of metal from a newly manufactured batch or compensation for damages, but may not insist that 10 tonnes of nickel be withdrawn from the lot that was sold to another buyer.”

149. I would, in any event, have been unable to accept Professor Schwarz’s evidence that a party who enters into a contract who is aware of a significant risk that performance of that contract will interfere with performance of another contract involving other parties commits an abuse of rights under Article 10. In markets for limited volumes of commodities or where advance contracts are entered into, that must always be a very real possibility, and if this was the effect of Russian law, there ought to be a clear statement to this effect in the Russian legal sources.

Does VTB Commodities have standing to challenge the validity of the Antipinsky-MachinoImport and MachinoImport-Petraco contracts?

150. For the purpose of resisting Petraco’s claim under the Undertaking, VTB Commodities invites the court to hold that the contracts between Antipinsky and MachinoImport, and between MachinoImport and Petraco, so far as they concern Addendum No 4, are invalid. This raises an issue as to whether it is open to VTB Commodities to invite the court to make such a determination when it is not party to the contracts in question. The parties proceeded on the basis that this raised an issue of Russian law and was a necessary ingredient in VTB Commodities’ Russian law claims.
151. It is common ground between the experts that VTB Commodities must show that it has a “legitimate interest” in seeking such a declaration before it will be granted, but the issue of what constitutes a legitimate interest is in dispute. That raises another difficult question of Russian law, to which the legal materials explored at the trial offered no definitive answer.
152. This issue requires consideration of Articles 166 and 168 of the RCC. Article 166(3) provides (with the numbering interpolated for ease of reference):

“[1] A party to a transaction and, in cases prescribed by statute, another person may claim the consequences of a void transaction.

[2] A claim to invalidate a void transaction, irrespective of applying the consequences of its invalidity, may be granted if the person making such a claim has a legally protected interest in the invalidation of that transaction.”

153. Article 168(2) provides:

“A transaction that violates the requirements of a statute or another legal act and thereby infringes on public interests or the rights and legally protected interests of third parties shall be void, unless it follows from the statute that such transaction is avoidable or other consequences of the violation not related to the invalidity of the transaction must be applied.”

154. In this context, Mr Kulkov distinguishes between a “restitution claim”, where a party claims the consequences of an invalid transaction (e.g. return of property) which falls within the first limb of Article 166(3), and a “negation claim” which seeks to have the transaction invalidated without claiming relief which follows from invalidity (under the second limb of Article 166(3)). The effect of Mr Kulkov’s evidence is that a third party can only seek invalidation of a contract where the effect of doing so would restore the right infringed – he gives examples of the owner of a building having standing to invalidate a lease which limits his right to use the property; or to invalidate a subsequent contract of sale so that he can recover the property through an action of vindication against a second buyer; or a judgment creditor having standing to invalidate a sale by the debtor of the debtor’s property, which would then be available for execution.

155. The following is common ground between the experts:

“A transaction may be challenged by a third party whose rights will be restored (directly or indirectly) as a result of invalidation of the transaction”.

That opinion is consistent with Plenum Decision No 25 of 23 June 2015, which stresses the need for the third party to have “a legitimate interest in recognising such a transaction invalid”, and requires the third party to “specify the right (statutorily protected interest) protection of which will be ensured as a result of return of all received under the transaction by each of the parties”. It is also consistent with the view expressed by Fedyaev DA, “Right of Action in Challenging Transactions Involving the Establishment of Control by Foreign Investors over Business Entities of Strategic Importance” (2021) (referring to “the right (legitimate interest), the protection of which is *ensured* by the return to each party of everything received in the transaction”, emphasis added).

156. Mr Kulkov argues that the return of property to MachinoImport and then to Antipinsky would not restore VTB Commodities’ right to receive VGO under the various offtake contracts (which were never rights to receive specific VGO), nor would invalidating those contracts have the effect that VTB Commodities could obtain delivery of the VGO (still less on the contractual delivery dates). By contrast, Professor Schwarz largely addressed this issue through the prism of a conventional double sale of identified property, and identifies VTB Commodities’ interest in the following terms:

- i) “In cases of ‘double sale’ the interested party whose legally protected interests require that the transaction be declared invalid is the buyer under the first transaction, *whose claim for the transfer of the goods cannot be performed* due to the execution of the second contract” (emphasis added).
- ii) “VTB asserts the nullity of the contract between Antipinsky and MachinoImport in defence of its own rights to receive the prepaid goods affected by Antipinsky’s conclusion of a second supply contract and the dispatch of the goods to the second buyer, MachinoImport, despite having received prepayment for them from VTB”.
- iii) “The purpose of VTB is to obtain the right to demand the transfer of the Goods from Antipinsky, for which purpose they must be returned to Antipinsky. The only legal recourse by which the return of the Antipinsky Goods by Petraco to Antipinsky can be ensured is if the MachinoImport-Petraco contract is invalid”.

157. The difficulty with Professor Schwarz’s analysis is the assumptions it makes as to the nature of VTB Commodities’ rights under its (English law) contracts with Antipinsky and Edima. These are not contracts under which VTB Commodities has a right to the transfer of identified goods, which could be enforced by a claim for transfer of the VGO delivered to MachinoImport if the contracts between Antipinsky and MachinoImport or MachinoImport and Petraco are reversed. Under s.52 of the Sale of Goods Act 1979, an order for specific performance may be made for the sale of goods, where the goods are “specific or ascertained”, but not otherwise. As noted in *In re Wait* [1927] 1 Ch 606, 629-630 of an application for specific relief of a contract to sell goods which were not specific or ascertained:

“...to grant the relief claimed would violate well established principles of common law and equity. It would also appear to embarrass to a most serious degree the ordinary operations of buying and selling goods, and the banking operations which attend them ... Speaking generally, courts of equity did not decree specific performance in contracts for the sale of commodities which could be ordinarily obtained in the market where damages were a sufficient remedy. Possibly the statutory remedy was intended to be available even in those cases. But the Code appears to have this effect, that in contracts for the sale of goods the only remedy by way of specific performance is the statutory remedy, and it follows that as the goods were neither specific nor ascertained the remedy of specific performance was not open to the creditors ...

Does it make any difference that the creditors here paid their purchase money in advance of the due date, and in any case before they could get delivery under the contract? I think not. So far as specific performance is concerned, the right seems to exist, if at all, independently of whether one party or the other has performed his part of the contract; and I have already dealt with the objections to the demand for specific performance under the provisions of section 52 of the Code ...”

158. While in exceptional cases a court might nonetheless order specific performance of a contract for the future sale of unascertained goods, it has already been conclusively determined that this is not one of them. In *VTB Commodities Trading DAC v JSC Antipinsky Refinery v Petraco Oil SA* [2020] EWHC 72 (Comm), Phillips LJ rejected

VTB Commodities' claim that it had an arguable claim to relief of this kind against Antipinsky, holding at [80]-[83]:

- “80. VTB argued (and Teare J accepted on the without notice application) that damages were not an adequate remedy in the present case, not least because VTB had entered sub-sales in respect of VGO to be shipped from Murmansk of a specification only available, in practical terms, from Antipinsky's refinery. Further, exclusion clauses in the Offtake Contracts might well preclude VTB from recovering losses incurred in the sub-sale contract from Antipinsky, which was in any event not likely to be good for any damages due to VTB.
81. However, the fact that Antipinsky was in financial trouble and was double-selling its production of VGO, notwithstanding that VTB had prepaid to purchase that production, does not take the matter out of the ordinary, let alone justify granting an injunction which gives priority to VTB over other purchasers of Antipinsky's goods, whether their contracts were before or after VTB's contracts. The Cargo Injunction in effect runs directly counter to the recognition in *Re Wait* that, even where the seller is dishonest in taking prepayment and has sold its entire production to a third party, the innocent purchaser does not acquire any form of equitable or other proprietary interest in that production and is not entitled to orders which would have that effect.
82. Further, in the present case there is no question of a more general failure in the market which is being exploited by a large supplier, putting a purchaser out of business, as was the position in *Sky Petroleum* [1974] 1 WLR 576.
83. For those reasons I refuse to continue the Cargo Injunction on the basis that this is not an exceptional case where the discretion to grant such an injunction arises. But even if it was such a case, I would decline to exercise my discretion in circumstances where: (i) there are multiple claimants to Antipinsky's production of VGO (including that aboard the *Polar Rock*), both contractual claims (in the case of Petraco) and proprietary claims (in the case of MachinoImport); and (ii) it appears that Antipinsky was in deep financial difficulties and might well have creditors with equal if not better claims than VTB to the preservation and ultimate distribution of its assets.”
159. That is the “law of the case”, as US lawyers would describe it. The invalidation of the Antipinsky-MachinoImport and MachinoImport-Petraco contracts would not restore to VTB Commodities the right to specific performance of the Addendum 4 cargo to VTB Commodities which it never had, nor would it restore a right to receive shipments of specified quantities of VGO by specified dates which have long since passed. VTB Commodities retains such rights for delivery of a generic and non-specific product as it previously had, whether the Antipinsky-MachinoImport and MachinoImport-Petraco contracts are held to be invalid or not. VTB Commodities' right to damages from Edima/Antipinsky also remains. It has not even been shown that invalidation would increase the prospects of damages being paid to VTB Commodities (although there was no suggestion that that would constitute a sufficient interest for invalidation of contracts

between other persons under Russian law). As Mr Kulkov noted, MachinoImport paid for the cargo, and there is no evidence it did so at an undervalue.

160. In closing, Mr Gourgey KC argued that a different result followed in the circumstances of the case, because the effect of the combination of the Cargo Injunction and Sir William Blair’s order permitting VTB Commodities to sell the cargo and pay the proceeds into an account to be held to the order of the court is such that the result of invalidating the Antipinsky-MachinoImport-Petraco contracts would be that VTB Commodities have obtained delivery of the cargo, and their rights thereby restored by the invalidation. However, I cannot accept that, for the purposes of resisting an application pursuant to the Undertaking brought following the court’s determination that the Cargo Injunction should not have been granted, VTB Commodities can rely on a state of affairs which only came into existence because the Cargo Injunction was wrongly granted. In any event, the various orders relied upon were interim in nature, and did not have the effect of creating substantive rights for VTB Commodities which the invalidation of the Antipinsky-MachinoImport-Petraco sales could restore.

161. That leaves the alternative interest relied upon by VTB Commodities at the trial – that invalidation would enable VTB Commodities to defend themselves against Petraco’s claim for damages under the Undertaking. This argument relied on the Supreme Court Plenum No 25 which provides:

“The defendant’s objection that the claimant’s claim is based on a void transaction is evaluated on the merits regardless of the expiration of the limitation period for declaring this transaction invalid.”

162. Mr Kulkov – the only expert who referred to this paragraph in his reports – explained that this was referring to a case where “party A claims something from party B based on the contract between them, it means that B may rely on the invalidity of such contract and so therefore A has no ground to claim anything from B because the contract is invalid”, which involves B protecting “its legal right to defend from the claim”. In cross-examination, he did not accept that this applied to a case such as the present, in which Petraco’s claim was brought on the Undertaking (and the status of the Antipinsky-MachinoImport-Petraco contracts was relevant only to the quantum of the amount claimed, albeit by far the greater part of the quantum).

163. I accept Mr Kulkov’s evidence for the following reasons:

- i) Professor Schwarz did not give evidence on this issue in either of his reports or the joint memorandum, although he did make this suggestion in cross-examination that defending Petraco’s claim was a sufficient interest, suggesting the concept of a legitimate interest was very wide.
- ii) Mr Kulkov’s interpretation of the Supreme Court Plenum No 25 was more considered, and I find it more persuasive. The Supreme Court’s decision appears to be aimed at formulating an exception to a limitation period (which I infer, albeit this was not addressed in evidence, was Article 181 of the RCC which provides “the limitation period in respect of claims for applying the effects of invalidity of a void transaction and for declaring such transaction invalid (Item 3 of Article 166) shall

be three years.”). It seems more likely that the Supreme Court was formulating a narrow exception to a limitation period where the void transaction is the supposed source of the right sued upon rather than a wider category of legitimate interest.

- iii) Further, it has been noted that a party to a void transaction always has a legitimate interest in invalidating it, but a third party must establish one (see [152], [154], [155]). If the Plenum Decision No 25 is, as Mr Kulkov says, concerned with a case where one party to an invalid transaction sues the other in reliance upon it, then the requisite legitimate interest will automatically be satisfied, and the parties to the transaction will be before the court. By contrast, if a party to litigation can automatically (and without limit as to time) seek the invalidation of a transaction between the other party and a third party (or two third parties) where the transaction is legally relevant to the claim faced, but not the source of it, the third party(ies) would not be before the court. That is a further factor which provides support for Mr Kulkov’s evidence.

164. That is also the answer to the variant of that argument relying on clause 17.1 of the VTB October 2018 Offtake Contract and similar provisions in other contracts (that they were entitled to cargo free and clear of any claims and encumbrances), it being suggested that:

- i) VTB Commodities had a legitimate interest in receiving cargo without such an encumbrance.
- ii) When VTB Commodities received the Disputed Parcel through sale order, they did so “subject to its cross-undertaking in damages”, and they need to be permitted to defend Petraco’s claim under the cross-undertaking to defeat that encumbrance.

Once again, this treats the court’s interim sale order as performance of the substantive contract which was subject to clause 17.1. However, that was not the purpose or nature of the sale order, which was intended to “hold the ring”, not move it in one party’s favour. The court’s interim orders cannot themselves provide a basis for resisting enforcement of the Undertaking which is intended to remedy the fact that the orders should never have been granted. Finally, clause 17.1 is concerned with proprietary or possessory interests over the cargo delivered, not the personal undertaking voluntarily assumed by VTB Commodities as the price of obtaining injunctive relief.

165. It follows that I accept Mr Kulkov’s evidence that, as a matter of Russian law, VTB Commodities does not have standing under the RCC to ask the court to invalidate or confirm the invalidity of the Antipinsky-MachinoImport-Petraco contracts of sale.

166. Mr Kulkov advanced a related argument in his expert report, to the effect that there is a general rule of Russian law that where generic goods are transferred under an invalid contract, the transferor cannot re-acquire property by a restitution action, but has only a right to the return of equivalent goods, whether or not the generic goods are ascertained. There is some academic commentary which supports that contention: for example, Blinkovsky LA, *Rights in Rem: Statement of the Problem and its Solution* (2019) states “the transfer of things defined by generic characteristics, when passing from the possession of one person into the possession of another person, lose their individualisation. As such, any claim for the return of such things implies that the person

will be satisfied with similar things which have the characteristics specified in the agreement or in law.” Professor Sklovskiy, *Ownership in Civil Law* (2010) makes a similar statement. However, the oral evidence on this issue did not clearly distinguish between a number of different concepts – whether goods are generic, whether they are ascertained, and whether they have been commingled. That argument did not feature in Petraco’s closing and for that reason I have not relied upon it.

Bona fide purchaser

167. Whatever the position as between MachinoImport and Antipinsky, it was common ground between the experts that if Petraco would have acquired the Addendum No 4 cargo in good faith, it would have obtained good title. There was a dispute as to the legal route by which that conclusion was arrived at, which it was not necessary to explore in evidence. As a result, there was no exploration of the issue of what bad faith in this context entailed (cf. the dispute under English law, *SFO v Litigation Capital Limited* [2021] EWHC 1272 (Comm), [132]-[136]). Both sides were content to proceed on the basis that bad faith sufficient to engage Article 10 would preclude Petraco being a bona fide purchaser.

Does the owner of commingled fungible goods retain property in those goods?

168. This issue arose on the assumption that MachinoImport did not acquire title to the VGO obtained from the refinery and loaded into railcars, which VGO (ex hypothesi belonging to Antipinsky) was later pumped into the POLAR ROCK and commingled with other VGO belonging either to MachinoImport or someone else.

169. English law, drawing on Roman sources, would treat this as a case of *confusio*, with the owner of each portion of VGO pumped into the common storage tank becoming a tenant in common in the whole, to the extent of their contributory share (*Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* [1988] QB 345, a case featuring characteristically erudite submissions from the late Gordon Pollock QC).

170. Soviet law appears to have followed the same route, Article 432 of the Civil Code of the Soviet Union providing:

“If several persons deposit goods which are defined in the contract by generic characteristics, and such goods are commingled by the deposittee, the persons who have made the deposits become owners by shares of the mass in proportion to the quantities which they have deposited. If there is an agreement to the effect that such goods are transferred to the ownership of the deposittee, he is required to return to each person who has made a deposit an equal quantity, or the quantity stipulated by the parties, of goods of the same type and quality.”

171. Whether by accident or design, the position under the RCC is far less straightforward:

- i) Mr Kulkov’s evidence was that if fungible goods belonging to A were mixed with fungible goods belonging to B at a time when the goods were in B’s possession, B acquired property in the combined mixture, with A having a claim in restitution against B. He points to the fact that Article 244(4) of the RCC provides that “common ownership of divisible property arises in cases stipulated by statute or

agreement”. It is common ground that there is no statute here. He said that if the cargo of A and B was commingled when in the possession of C, C acquires ownership of the combined cargo. In support, he relies upon the Russian law principle of specialisation, by which only individually defined things can be the objects of rights in rem.

- ii) Professor Schwarz’s evidence is that the combined quantity of VGO is held by way of tenancy in common by the contributing owners. He accepted that this conclusion was “not postulated directly” by the RCC, but he suggested that it was the only fair outcome.

172. While Professor Schwarz’s conclusion is more intuitively appealing for those brought up in the common law tradition (or indeed the Roman law one), the view expressed by Mr Kulkov finds greater support in Russian legal literature, or at least from that placed before the court: for example Rudovkas AD, *Legal Regime of Goods in Depersonalised Storage* (2006), Belov BA, *Essays on Property Law* (2015), AA Makovskaya, *Major Transactions and interested party transactions: Analysis and Commentary on the Laws ‘On Joint Stock Companies’ and ‘On Limited Liability Companies’* (2020) (suggesting that title passes to the custodian), and Dr Gerbutov, *Review of Dissertations on Unjust Enrichment* (2008). Professor Egorov in *Restitution for Invalid Transactions in Bankruptcy* (2010) suggests “when a party to an invalid transaction is obligated to return money or generic things (i.e. things that cannot be individually defined and separated from other property of the debtor), it becomes the owner of said money and generic things ... It can be considered that the majority of Russian scholars have reached a consensus on this issue.” While this would appear to constitute the majority view among Russian legal scholars, it is not the only view. Braginsky MI and Vitryansky VV in *Contract law, Conditions for the Performance of Work and Services* (Book 3) (2002), note that “despite the widespread use of irregular storage in commerce, there is still no consensus in dogma and doctrine as to who should be regarded as the owner of the stored goods in such cases”, offering three views: ownership by the custodian where the mixing takes place; common ownership (which these authors do not support because the RCC provisions on shared ownership are not applicable) and survival of the original property rights. Sklovskiy KL, *Ownership in Civil Law* (2010) supports the common ownership theory. Professor Schwarz referred to other opinions said to support his view, from Professor Tolstoy and Professor Gongalo. The extracts provided to the court did not directly address the issue. For differing reasons (each academic in the minority no doubt reaching their opinion in their own way), they suggest that common ownership may arise not simply arise by law or agreement, but “by virtue of other circumstances entailing the formation of common shared ownership”, but without specifying what those circumstances might be.

173. I shall assume, in accordance with the preponderance of the material placed before me, that common ownership can only arise by agreement or by statute, and that no relevant statute is engaged.

Article 1064

174. Article 1064 of the RCC provides:

“(1) Harm caused to the person or property of an individual, as well as harm caused to the property of a legal entity, should be compensated in full by the person who caused the harm.”

175. Two points of Russian law arise in relation to VTB Commodities’ claim for damages under Article 1064:

- i) First, whether interference with contractual rights can constitute “harm” for the purposes of Article 1064.
- ii) Second, whether a claimant is precluded from bringing a tort claim against a third party where it has a contract claim to recover the same loss until that contract claim has been pursued and enforcement failed.

While these points are clearly related, they are different, albeit the exploration of the issues in evidence did not always distinguish between the two.

Does interference with contractual rights constitute harm within Article 1064?

176. Russian law distinguishes between absolute rights, available against the world, such as right of property or bodily integrity, and relative rights which only avail against particular persons, in particular rights under a contract. The distinction mirrors that drawn by the American jurist WN Hohfeld between multital and paucital rights. At one point, it was the case that tort claims could not be brought in respect of loss taking the form of interference with or loss of the benefit of a contractual right. In *Karelian Territorial Compulsory Medical Insurance Fund v Children’s Republican Hospital State Healthcare Institution*, in a judgment of 29 November 2005, the Federal Commercial Court of the North-West Circuit observed:

“A distinctive feature of the emergence of tortious legal relations is the violation of rights that are absolute in nature, where a right holder is opposed to an indeterminate number of obligated persons. In contrast the improper performance of obligations to spend CMI funds in a targeted manner is in the framework of relative legal relations where the right of the right-holder is protected against violations by strictly defined persons.”

177. Mr Kulkov described this as the “traditional view”, leading Professor Schwarz to observe that “if you mean that the events of 17 years ago is a tradition in Russia, then you can say [that], but 17 years in Russia in the legal meaning is a gigantic length of time and everything changes immensely”. There are more recent statements of a Russian law principle to the same effect (for example Professor Sergeev, *Civil Law Vol 3* (2019): “Therefore tort obligations do not arise when relative rights are violated but as a general rule when absolute rights are violated, resulting in property or non-property (non-pecuniary) harm”. Similarly, an essay written by RR Lugmanov, “Tort Law as a Tool for Recovery of Pure Economic Loss” (2019) expressed the view that “if we are not talking about the wishes of individual ‘revolutionary lawyers’, but rather about the current state of Russian tort law, it should be recognised that it still aims only at the protection of absolute rights”. Mr Lugmanov was a former student of Professor Schwarz, although on

this issue Professor Schwarz clearly thought Mr Lugmanov had paid insufficient attention in class.

178. However, it is common ground that Russian courts have awarded damages under Article 1064 for harm in the form of interference with relative rights. In *Federal Tax Service v Ivkin*, a Russian Supreme Court judgment of 27 January 2015, the court held that impairment of the right to receive tax from a company was compensable, stating that “within the meaning of Article 1064 of the Civil Code of the Russian Federation, harm is deemed to be any impairment of a legally protected tangible or intangible benefit, any adverse change in a legally protected benefit, which may be both proprietary and non-proprietary”. In *SibNefteProm v Komek Machinery*, a Russian Supreme Court judgment of 20 September 2022, the court observed that “the victim may also be compensated for harm caused to property rights (claims of obligations and other contractual rights)”. In the Russian Supreme Court decision in the *Magadan-Test* case, a decision of 11 May 2018, a claimant had acquired an imported car under some form of hire purchase agreement but could not use the car because the certificate of conformity which the testing agency had wrongly issued was invalid. The claimant was permitted to sue that agency in tort for its loss. The Russian Supreme Court decision in the *Beaumarchais* case (judgment of 22 May 2017) is often identified as another example, although I accept the result in that case can be explained on the basis that the tort claim was brought against someone further up the contractual chain only after the immediate contract of sale had been invalidated. There are commentaries which suggest that these decisions represent a relaxing of the former rule (e.g. Kopyakov AA, *Problems of Compensation for Pure Economic Loss under Russian Civil Law* (2020)).
179. Mr Kulkov (and Petraco) also relied on a finding as to Russian law made in *PJSC Tatneft v Bogolyubov* [2021] EWHC 411 (Comm), [673]-[675], although no notice was served under s.4 of the Civil Evidence Act 1972 to give that conclusion evidential status in these proceedings. However, the issue addressed in those passages in *Tatneft* was not whether harm to a contractual right could be the subject of an Article 1064 claim, but harm in the form of interference with the legitimate expectation of receiving economic benefit falling short of a contractual right (see [656] and [658]). The finding is not relevant to the issues in this case.
180. There was a dispute between the experts as to whether the various cases in which it was acknowledged that compensation had been awarded under Article 1064 for harm to contractual rights represented a series of exceptions to a general rule (as Mr Kulkov suggested) or the fact that there is now no general rule to this effect (Professor Schwarz’s position). It is not necessary to resolve this debate, because both experts accept that harm in the form of interference with a contractual right resulting from an Article 10 abuse of rights is recoverable under Article 1064. If VTB Commodities had been able to establish an Article 10 claim, I am satisfied that the mechanism and type of VTB Commodities’ loss – non-performance of the offtake contracts – would not have precluded recovery.

Can a party who has a contract claim pursue a third party in tort for the same loss, and if so, when?

181. There was no dispute that where there are contractual and tortious claims between the same parties for the same loss, Russian law requires the contract claim to be pursued. This

principle of “competition of claims” or “non-cumul” is a feature of many civil law systems, and it is not difficult to find a principled justification for it, even if the elegance of such an approach has not commended itself to English lawyers (*Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 186). Where the parties are able, through their agreement, to agree the level of performance required, the types of loss which can be recovered and the extent to which it can be recovered, permitting a concurrent tort claim could bypass the agreed regime. As Mr Kulkov noted, “there is a logic behind it because otherwise if the claimant would disregard the contractual provisions, well, it would create ... disorder.”

182. That principled basis does not appear to be engaged where the claimant has a contractual claim against one party, and a tortious claim against another, in respect of the same loss. I accept, however, that there are a number of decisions of the Russian courts which apply some form of competition of claims rule in a three-party situation. Thus, in *Alliance Insurance Co v Golding-Integral Limited*, a Supreme Commercial Court Presidium Resolution of 3 June 2014, tobacco stored in a warehouse was damaged when the heating pipes burst. The owner had a claim in contract against the custodian with whom it had deposited the goods, but its insurer (exercising rights of subrogation) sought to sue the company responsible for the management of the leased premises in tort. The court held:

“In the event of harm caused as a result of the non-performance or improper performance of a contractual obligation, the rules on liability for the infliction of harm shall not apply ... The depositor is therefore entitled to claim damages from the custodian under the agreement concluded with it, but not from third parties under the rules on tortious liability, if the property deposited is damaged ...”

A conclusion to similar effect was arrived in a case with a similar fact pattern in *Chistakov v Ufavodokanal*, a judgment of the Commercial Court of the Uralskiy Circuit of 12 April 2016.

183. Those decisions might suggest the existence of an absolute rule in which the bare availability of a contract claim against one party is sufficient to preclude a tortious claim against a different party in respect of the same loss. However, Mr Kulkov accepted that any rule that a claim could not be brought at all was subject to the same exceptions as outlined above. His position in the Joint Memorandum is as follows:

“If a party has been harmed by non-performance of a contract, such a claimant is obligated to bring a claim against its counterparty without possibility of missing this stage. Some case law allows, as an exception to the general rule, a tort claim against a third party only when all available avenues of recovery against the direct contractual debtor have been exhausted. This rule is based on the inadmissibility of competition between contractual and tortious claims”.

184. As a matter of English law, rules relating to the sequencing of claims are seen as raising questions of procedural law and the efficient use of court process rather than any question of substantive law (*Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173). Mr Kulkov described the principle for which he contended as reflecting “the practice of the Russian courts”, and suggested in the course of his evidence that, faced with limitation issues, the rule would not prevent a party commencing both contract and

tort claims, with the tort claim against the non-party then being stayed. However, if there is a principle of (judge-made) Russian law to the effect contended for, it was not suggested that it was a rule of procedure rather than substance for private international law purposes.

185. The sources relied upon by Mr Kulkov to establish that “practice” were as follows:

- i) The decision of the Russian Constitutional Court in *Akhmadeeva* of 8 December 2017 in which the state sought to recover damages in the sum of tax due from a company from a director. The court said that damages could be recovered “after the exhaustion or the objective impossibility” of recovering the tax from the tax payer, including “cases where the taxpayer organisation is actually inactive and therefore it is impossible to recover tax arrears”. This was, obviously, not a case in which there were related contract and tort claims, but an attempt to recover tax from someone other than the tax payer (an issue of some difficulty under the law of England and Wales: *Total Network v Customs & Excise Commissioners* [2008] UKHL 19). The decision suggests that there is no strict rule as to what is required to establish irrecoverability from the tax payer.
- ii) The decision of the Russian Supreme Court in *Territorial Generating Company* of 6 November 2015, in which damages were sought against the Settlement Centre which had continued making payments of debts due to the debtor in contravention of the bailiff’s order to pay the claimant. The claim failed because enforcement was continuing, there was “no information” that the debtor was in liquidation or in bankruptcy and so loss had not been established. The case appears to be concerned with the issue of when the relevant loss has been established, rather than any substantive law requirement to exhaust claims.
- iii) The decision of the Russian Supreme Court of 15 February 2017 in *Centre of Legal Support for Business*, in which the Federal Bailiff Service was sued for damages for failing to maintain an attachment on a judgment debtor’s real property, which permitted the real property to be sold to a third party. The court rejected the claim, noting that enforcement efforts were ongoing, that “the plaintiff has not proved that its claims for foreclosure of the disputed land plots would have been unconditionally satisfied” and “it has not been reliably established that the debtor has no other property at the expense of which it is possible to satisfy the claimant’s claims in enforcement proceedings”. Once again, the case turns on what appears to be a factual issue – had the claimant done enough to establish loss?
- iv) Finally, the findings of Russian law made by Hamblen J in *OJSC VTB Bank v Parline Limited* [2015] EWHC 1135, although once again no notice had been served to give those findings evidential status. *Parline* was a case in which a bank who had lent money to a company in liquidation sought to sue the controllers of the company for causing its bankruptcy and reducing the assets available in the bankruptcy. The claim failed. There were a series of provisions providing for the liability of a company’s members for its bankruptcy which could only be invoked after the liquidation had finished, and the issue was whether the position would be different if the claim was advanced under Article 1064 instead. That is clearly a very different context, and the particular features of the case (undermining a

specific subsidiary liability regime, and allowing claims for loss caused in the bankruptcy against a company's officers by claims brought outside the bankruptcy) do not apply here.

186. Professor Schwarz relied on two Russian Supreme Court decisions. In *Trust National Bank*, 5 March 2019, the Supreme Court stated that “the fact that there is a right of claim to one person cannot exempt another person (other persons) for the same damage”. In *Media Soft*, 6 December 2022, money recovered by a bailiff was paid away, and proceedings brought to recover it from the payer when the enforcement process had been set aside. The court made the general observation:

“The applicant’s reference to other remedies available to the company cannot be taken into account either, as the mere existence of any other remedies to protect the infringed right does not rule out the possibility of the person whose rights have been violated to make a claim seeking damage on the basis of Article 1069 of the Civil Code of the Russian Federation, which correlates with the right of the plaintiff to independently determine the most effective way of protection of the right provided by law”.

The operation of Article 1069 is identical to Article 1064 for present purposes.

187. I am willing for present purposes to proceed on the basis that there is some form of rule in Russian legal practice which requires the court to be satisfied that the claimant seeking to bring a tort claim in these circumstances is unable to recover from its contractual counterparty (thereby avoiding double recovery). However, the mode of proof of that state of affairs is a matter for English law, as the law of the forum. I am not persuaded that there is any substantive Russian law requirement to prove enforcement has been attempted and failed.

The principles of causation

188. The approach to establishing causation does not appear to differ to any material extent as between Russian law and the law of England and Wales: there must be “a direct (immediate) causal link between the unlawful behaviour of one person and the harm” with “the existence of such a link ... presumed if the infliction of harm is a normal consequence of wrongful behaviour”: the Russian Supreme Court decision in *Komek* of 20 September 2022 and Plenum Resolution No 7 of 24 March 2016. I note that the existence of such a test under Russian law was common ground in *Yukos Finance BV v Lynch* [2019] EWHC 2621 (Comm), [105] and *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm), [432] (although once again these findings have no evidential status in this case).

THE APPLICATION OF THE PRINCIPLES OF RUSSIAN LAW TO THE FACTS AS FOUND

Addendum No 1

189. Given my conclusions on Russian law, it follows that I am not persuaded that entry into Addendum No 1 involved an abuse of rights under Article 10 by Petraco:

- i) It did not enter into Addendum No 1 for the purpose of injuring VTB Commodities, nor for any purpose other than that for which the right to contract is ordinarily exercised (viz for its own benefit, in order to make a profit in the course of its ordinary business of trading petroleum products).
- ii) This was not a case of “double sale” under Russian law, even if Russian law did regard entering into a contract to buy goods in the knowledge that the seller had already contracted to sell them to someone else automatically constituted bad faith for Article 10 purposes (a position which I am not persuaded represents the current state of Russian law). There was no sale of an individually defined object to VTB Commodities, and Petraco contracted with MachinoImport, and did so not for evasive reasons but because it had entered into the Petraco October 2018 Contract with MachinoImport, and saw sufficient benefits in having MachinoImport as its counterparty to resist attempts at that time to change the identity of the seller.

190. That is sufficient to reject VTB Commodities’ case, but there are three further reasons why I am not persuaded that the entry into Addendum No 1 involved an abuse of rights by Petraco on the basis of the Russian law materials provided to me:

- i) The foreseeable consequence of Petraco’s conduct was not to prevent delivery of the promised quantities to VTB Commodities altogether, but to delay delivery. That is not to diminish the significance of the latter, but there is a real commercial difference between the two, as Mr Kabir acknowledged in an email of 8 February 2019 when he stated:

“While we will probably have a plan to restructure the loan somehow, please ensure that all physical deliveries are made even if they are delayed to future months. The total number of physical cargo deliveries must be honoured by Antipinsky.”

This further distinguishes this situation from the “double sale” which was the (unscaled) peak of VTB Commodities’ Russian law case.

- ii) In relation to Addendum No 1, the only knowledge I found Petraco had was that delivery of this cargo would further delay cargoes due for delivery over preceding months (such that the relevant breach had already taken place and was continuing, rather than being caused by performance of Addendum No 1). I saw nothing to suggest that this was actionable under Russian law.
- iii) While I accept Petraco must have been aware of a risk that performance of Addendum No 1 might cause a fresh breach, I was not persuaded that knowledge of a risk of this kind was sufficient under Russian law.

191. I have placed no reliance in this context on an explanation which it might have been open to Petraco to advance – that in order to obtain delivery of its cargo under the Petraco October 2018 Contract, they had to commit themselves to rolling the funding forward and ordering future cargoes. There were occasional hints late in the litigation process of such an explanation – for example in evidence from Mr Morello when cross-examined about Addendum No 2 and, somewhat surprisingly, in Mr Heilpern’s supplemental report when,

in the context of an earlier shipment, he stated “Petraco has informed me that there was ‘leftover’ financing from the HAFNIA BERING which they felt could only be recovered by topping up and getting a second cargo.” However, Petraco chose not to advance their claim by a candid acknowledgement of what they did, with “confession and avoidance” as why they did it. VTB Commodities had no opportunity properly to explore any such case in cross-examination or consider its Russian law implications. I must approach this case on the basis on which Petraco fought it – that from December 2018 it entered into four separate contracts with MachinoImport to acquire VGO, rather than an overarching agreement for multiple cargoes which then played itself out.

192. Had I found that entry into Addendum No 1 constituted an abuse of right under Russian law, I would have upheld VTB Commodities’ claim for damages:

- i) If VTB Commodities had established an abuse of rights, I am satisfied that it could have claimed for loss comprised by interference with its contractual rights under Russian law.
- ii) An award of damages would not be precluded by the existence of a claim in contract against Antipinsky. VTB Commodities did bring a claim against Antipinsky in contract, commencing six arbitrations on 29 April 2019. Antipinsky filed for bankruptcy on 20 May 2019, their liabilities exceeding their assets by around US\$3 billion, and their net loss for 2018 being US\$500m. The evidence established that Sberbank held a series of pledges over Antipinsky’s assets which covered more than 98.5% of Antipinsky’s property. I am amply satisfied that VTB Commodities cannot recover the loss it claims from Antipinsky and that there is no prospect of double recovery.

193. Had Petraco not entered into Addendum No 1, it argues that the Addendum No 1 cargo would have been sold to someone else anyway and that for this, and various other, reasons, there is no sufficient causal link between their entry into Addendum No 1 and VTB Commodities’ loss:

- i) I accept that Antipinsky was under considerable financial pressure and keen to obtain cashflow by prioritising deliveries to those traders who provided further rollover funding (to the detriment of VTB Commodities). If another buyer had been willing to purchase the cargoes purchased by Petraco, I have no doubt that Antipinsky and MachinoImport would have acted as they did.
- ii) However, there is no sufficient evidence of any other buyer who would have purchased the cargo – Petraco’s late attempt to suggest Coral Energy as such a purchaser resting on documents of no evidential weight.
- iii) In the absence of credible evidence as to the existence of an alternative buyer, I think it likely that the prepayments envisaged by the Antipinsky-MachinoImport contracts would not have been made (MachinoImport having used the prepayments by Petraco to fulfil its payment obligations), those contracts would then have been cancelled and the cargo would have been delivered by Antipinsky to VTB Commodities. I am not persuaded that MachinoImport would have been interested in acquiring the VGO without an identified buyer.

- iv) In any event, had such an alternative sale taken place, on the assumptions on which this part of the analysis is proceeding, VTB Commodities may well have had a claim under Article 10 against that buyer. There was no Russian law evidence before me that an argument of this type would prevent a finding of causation under Russian law (cf. *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, [82]).
- v) Nor can Petraco argue that Antipinsky's failure to reimburse VTB Commodities for non-delivered cargoes precludes causation. Delivery of the cargoes would have acted as a means of repayment, and was the only realistic means of repayment at the relevant time (hence VTB Commodities' continued forbearance in enforcing its rights arising on Antipinsky's defaults). In any event, the loss claimed is non-performance of the obligation to deliver the requisite quantity of VGO. Repayment by Antipinsky would not have prevented non-delivery or excused it (see [28]).
- vi) If Petraco's purchase of the Addendum No 1 cargo had been wrongful because it interfered with VTB Commodities' contractual rights, and given my finding on the material before me that the Addendum No 1 cargo would have been delivered to VTB Commodities "but for" Petraco's wrongful act, the argument that Petraco's wrongful act was not the "direct and immediate" cause of VTB Commodities' non-receipt of the cargo is without merit. Had VTB Commodities' case succeeded up to this point, this would have been because it was wrongful for Petraco knowingly to interfere in the performance of the Antipinsky-VTB Commodities contract. Non-performance of that contract would have been the most obvious, direct and immediate consequence of wrongful conduct of that kind.

194. In their closing, Petraco also argued that VTB Commodities would "need to give credit for the cargoes which, had [MachinoImport] not made those purchases and had Antipinsky ceased business as a result, it would not have received". However, Petraco made no attempt to show that, but for Addenda No 1, 2 and/or 4, Antipinsky would have stopped trading earlier than it did (still less at what point). A single sentence in a written closing does not provide anything like a sufficient basis for arguing that VTB Commodities would have to give some form of credit.

Addendum No 2

195. The conclusions at [189] and [190 (i)] (but not [190(ii)] and [190(iii)]) and [192] to [194] apply equally.

196. As a result, Petraco did not commit an abuse of right under Russian law in entering into Addendum No 2, and for that reason is not liable to compensate VTB Commodities. The damages claim would otherwise have succeeded.

Addendum No 4

Did title in the cargo from which the Disputed Parcel was comprised pass from Antipinsky to MachinoImport?

197. Given my conclusions on Russian law, it follows that I am not persuaded that entry into the contracts evidenced by Specifications 2F and 3P involved an abuse of rights under Article 10 by Antipinsky or MachinoImport:
- i) Neither Antipinsky nor MachinoImport entered into Addendum No 1 for the purpose of injuring VTB Commodities, nor for any purpose other than that for which the right to contract is ordinarily exercised (viz for their own benefit, in order to secure cash to meet ongoing expenses in the case of Antipinsky and to make a trading profit in the case of MachinoImport).
 - ii) This was not a case of “double sale” under Russian law for the reasons set out at [147]-[148] and [157]-[159] above.
 - iii) I am not persuaded that VTB Commodities can seek negation orders for the contracts evidenced by Specifications 2F and 3P, in circumstances in which orders for the invalidation of those contracts would not permit VTB Commodities to vindicate its contractual rights, VTB Commodities being confined to a claim to damages against Antipinsky under the law governing the contracts between VTB and Antipinsky.
198. In circumstances in which Specifications 2F and 3P evidence valid contracts, I am not persuaded that title in the 60,608 mt of VGO on the POLAR ROCK which MachinoImport would have delivered to Petraco but for the Cargo Injunction had not passed to MachinoImport prior to the date of the Cargo Injunction, for the reasons set out at [104]-[108] and [113] above.
199. Given these conclusions, it is not strictly necessary to address Petraco’s alternative case that, even if the Antipinsky-MachinoImport contract was invalidated, title in the 60,608 mt passed to MachinoImport anyway as a consequence of commingling aboard the POLAR ROCK. However, I can briefly state that I am satisfied that there is no merit in this argument for three reasons:
- i) The argument assumed both that the 60,608 mt was mixed with other VGO belonging to MachinoImport, and that the co-mixture occurred when both quantities were in MachinoImport’s possession or it was the “store-keeper”. I am not persuaded either premise is made out. As set out at [113] above, the contemporaneous record suggests that the other cargo on the POLAR ROCK at this time was Antipinsky cargo loaded by MachinoImport as freight forwarder – so all of the cargo would, on this premise, have been Antipinsky cargo. Further, the evidence suggests that it was Command Service LLC which had possession of the commingled cargo when the commingling occurred and was acting as the store-keeper – clause 19.3 of the Command Service LLC contract refers to product being transferred to it “for storage”.
 - ii) On Mr Kulkov’s legal analysis, applied to the facts as they appear to be, title in the commingled cargo would pass to Command Service LLC, with the contributing owners having a right to call for delivery of an identical quantity of the contributed volume. That would have precluded MachinoImport calling for delivery of the 60,608 mt for delivery to Petraco.

- iii) Finally, the terms on which MachinoImport contracted with Command Service LLC, the operator of the POLAR ROCK, are set out in Contract No 1/2016 of 1 April 2016. Clause 7.2 provides that “the right of ownership of Petroleum Products to the Contractor does not transfer”, and clause 19.3 that “ownership of the Petroleum Products shall remain with the customer”.
- iv) To the extent that Antipinsky transferred possession of VGO to MachinoImport without transferring title (as would be the position where MachinoImport was acting as freight forwarder as well as where there was no contract of sale), and MachinoImport discharged that product into the POLAR ROCK, I am satisfied that the terms of the agreement as between Command Service LLC and MachinoImport would have the effect that Antipinsky’s property would not be transferred to Command Service LLC. In those circumstances, the store-keeper (Command Service LLC) would be holding commingled cargo for two different owners. In those circumstances, I am satisfied that co-ownership in the commingled product can be said to arise by agreement, each owner having (either directly or through an agent) contracted with the store-keeper to that effect.

Would title in the Disputed Parcel have passed from MachinoImport to Petraco?

- 200. The conclusions at [189] and [190(i)] (but not [190(ii)] and [190(iii)]) apply equally, with the result that Petraco did not commit an abuse of right under Russian law in entering into Addendum No 4.
- 201. Further, I am not persuaded that VTB Commodities can seek a negation order for Addendum No 4, in circumstances in which orders for the invalidation of those contracts would not permit VTB Commodities to vindicate its contractual rights, VTB Commodities being confined to a claim to damages against Antipinsky under the law governing the contracts between VTB and Antipinsky.

Is Petraco liable in damages to VTB Commodities for entering into Addendum No 4?

- 202. Had I been persuaded that entering into Addendum No 4 constituted an abuse of rights under Russian law, the conclusions at [192] to [194] would apply equally. There was no attempt to argue that delivery of the Disputed Parcel by Antipinsky to VTB Commodities would have been precluded by Antipinsky’s financial condition. The evidence of Mr Andriasov of the refinery is that it was VTB Commodities’ letter of 17 April 2019 which led him to consider filing for bankruptcy, and the acceleration of indebtedness by VTB Commodities of 24 April 2019 which made this necessary. I am satisfied that if Addendum No 4 had not been entered into, it is likely that the Disputed Parcel would have been delivered to VTB Commodities before any bankruptcy petition was issued.

QUANTUM ISSUES

Petraco’s Claim under the Undertaking

The value of the Disputed Parcel

203. It is common ground that the value of the Disputed Parcel less the outstanding amount payable for that cargo is US\$25,050,600. On my findings, the granting of the Cargo Injunction caused Petraco loss in that amount.
204. The only challenge to this claim is that it is said that Petraco must prove that “its loss was not in fact caused by its failure to sue MachinoImport pursuant to” the contract between them. However, even assuming that MachinoImport could be held liable for the fact that it did not load cargo in the face of the Cargo Injunction (a rather unattractive submission to make to the court which granted the order in the expectation it would obeyed, and in the presence of the force majeure clause in the contract which extended to “cases which are not in competence or control of the Parties and which impede proper execution of the present Contract”), this argument does not break the chain of causation, but simply gives Petraco alternative claims for the same loss. In circumstances in which VTB Commodities gave the Undertaking as the price of obtaining the Cargo Injunction, and this trial was ordered when Petraco exercised their right to apply to discharge the Cargo Injunction, it cannot be (and is not) said that Petraco has not acted reasonably in not pursuing a claim against MachinoImport, nor was any attempt made to advance such a case on the facts. Under English law, subject only to considerations of procedural efficiency, a party with alternate claims against different parties in respect of the same loss is generally permitted to choose who to sue, and in what order.

Demurrage

205. Petraco claims demurrage incurred on the two vessels chartered by Petraco to lift the Disputed Parcel which, after giving credit for saved port expenses, was:
- i) US\$478,247.66 on the MT ESTHER.
 - ii) US\$360,057.75 in the MT LOUIE.
206. VTB Commodities has advanced three challenges to these losses.
207. The first raises an issue of a kind which judges do not ordinarily expect to encounter when deep into the quantum elements of a case. Both charterparties were on BPVOY3 terms, clause 19(a) of which provides:
- “(a) laytime or, if the Vessel is on demurrage, demurrage shall at each loading and each discharge port or place commence at the expiry of 6 hours after Notice of Readiness to load or discharge has been received from the Master or his agents by Charterers or their agents, berth or no berth, or when the Vessel commences to load or discharge at the berth or other loading or discharging place, whichever first occurs. Such Notice of Readiness may be given either by letter, facsimile transmission, telegram, telex, radio or telephone (and if given by radio or telephone shall subsequently be confirmed in writing and if given by facsimile transmission confirmed by telex) but Notice of Readiness shall not be given without Charterers' sanction, before the commencement of laydays ...”
208. The Notices of Readiness were given by email, which VTB Commodities contends means that they are invalid. This point was not developed at trial, but has rather more to it than

might have been supposed. This is because, as Petraco commendably pointed out in their closing submissions, there is Commercial Court authority holding that the six methods of service in clause 19(a) of the BPVOY3 terms are exclusive, and that a NOR served by email is invalid: *Trafigura Beheer BV v Ravenni SPA (The Port Russel)* [2013] 2 Lloyd's Rep 57, a decision which Petraco invites me not to follow.

209. I am not willing, particularly without the benefit of any argument, to revisit the issue determined in *The Port Russel*, which has stood for 10 years and is cited without criticism in the leading shipping law textbooks. However:

- i) The loading instructions sent by Petraco's shipping department to Bravo Tankers Ops for transmission to Owners provided for ETA Notices at the load port and position reporting to be sent to various email addresses. While those orders do not specifically address the NOR, I am satisfied that they objectively have the effect of agreeing to email as a relevant means of communication (and I would observe, in this regard, that given the prevalence of email as a means of ship-shore communication in the maritime industry, I would take relatively little persuading that the parties had agreed to vary clause 19(a) of the BPVOY3 to permit NOR to be given by email).
- ii) Those documents in the bundle for the LOUIE produced by Petraco – recap fixture, documentary instructions – are generally in the same form as for the ESTHER. I am willing to infer that the loading instructions given to the Master of the LOUIE (which are not in the bundle) were in the same terms as those for the ESTHER so far as the form of communications are concerned.
- iii) I would also note that it is apparent from the vessel's Statement of Facts that after the service of the NOR, Petraco instructed the ESTHER to proceed to anchorage. I am satisfied this waived any objection to any defect in the means of transmission of the NOR.

210. Second, VTB Commodities has put Petraco to proof that the Cargo Injunction and the Blair Order did not constitute an event of "force majeure" for the purposes of the ESTHER and LOUIE charterparties. However, there was no attempt to develop this point or even take me to the relevant provisions (and it has been suggested that there was no such clause in the LOUIE charterparty), while the clause in the ESTHER charterparty would halve the demurrage payable but only if the force majeure event was "not within the reasonable control of Charterers or Owners", which would have provided some scope for argument. If VTB Commodities had wished to run the affirmative defence that the amounts Petraco has in fact paid for demurrage were not payable, it had to do more than simply put Petraco to proof.

211. Third, VTB Commodities contends that these amounts were unreasonably incurred, because Petraco failed to mitigate its loss by keeping the vessels on demurrage until 1 June 2019, in circumstances in which the Teare Order continuing the Cargo Injunction on the return date was made on 30 April 2019 and the Blair Order authorising sale of the cargo on 15 May 2019. It is well established that the steps required for a party faced with a breach of contract to mitigate its loss are not exacting (*Chitty on Contracts* 35th, [30-101]). In this case, VTB Commodities was not entitled to sell the Disputed Parcel

pursuant to the Blair Order until they had fortified the Undertaking. I am satisfied that Petraco acted reasonably in waiting for this to happen, both because it was not a foregone conclusion that fortification would take place (it took VTB Commodities two weeks), and because it was reasonable for Petraco not to throw itself on the mercy of enforcing the Undertaking, and give up all hope of performance, until fortification had been provided. Petraco acted reasonably in releasing the ESTHER and the LOUIE once the fortification sum had been paid into court.

Liability for failure to load

212. Petraco settled claims by the disponent owners of the ESTHER and the LOUIE for damages for failing to load as follows:
- i) US\$410,741.95 for the ESTHER, comprising freight (US\$408,000) and bunkers (US\$34,444.80) less saved expenses (US\$21,771) and address commission;
 - ii) US\$360,057.75 for the LOUIE, comprising an agreed cancellation fee which was less than the freight payable of US\$391,745.25.
213. VTB Commodities did not challenge these amounts in closing, and I am satisfied that they represent a loss to Petraco caused by the Cargo Injunction.

Loss of profit

214. Petraco claims that, had they taken delivery of the Disputed Parcel, they would have made a profit on re-sale.
215. The cargo scheduled to be loaded onto the MT ESTHER had been on-sold to Totsa Total Oil Trading on 25 April 2019 at a US\$4.50/barrel premium over Brent. This involved a profit of US\$910,844.61 over the price payable to MachinoImport, and it is conceded that Petraco has suffered a loss in this amount.
216. At the intended date of loading, the market price for cargo scheduled to be loaded onto the MT LOUIE was at a US\$5.25/barrel premium over Brent. Petraco claims lost profit of US\$1,072,740.26. That figure is challenged by VTB Commodities on the basis that Petraco would not or could not have sold the cargo at that point, having moved the loading window forward from 19-24 May to 3-4 May on 23 April 2019. However, that argument is misconceived. The ordinary measure of loss for non-delivery of goods (the legal analogue for determining loss caused by the granting of the Cargo Injunction for the purposes of the Undertaking) is the difference between the contract price and the market value at the date of delivery: s.51(3) of the Sale of Goods Act 1979. There is no reason to displace that measure here. It does not matter whether Petraco would later have sold the Disputed Parcel at that price, or a higher or lower one (*Benjamin's Sale of Goods* 12th, [17-028]).

VTB Commodities' Damages Claim

217. In addition to any liability to Petraco, VTB Commodities claim the following amounts by way of damages.

218. First, the value of the Addendum Nos 1 and 2 cargoes, which VTB Commodities were prepared to treat at the price paid by Petraco: US\$28,788,455 (US\$15,518,199 for the HAFNIA RAINIER cargo and US\$13,267,246 for the STI ROTHERHITHE cargo). I am satisfied that the Addendum No 1 price was no lower than market, and those for Addenda Nos 2 and 4 were above market price. It is not realistically credible, as Petraco argued in closing, that the value of these cargoes would have been lower if they had been delivered to VTB Commodities.

219. Second, demurrage:

- i) US\$81,134 paid to Crudex SA;
- ii) US\$798,165 for the STONE 1; and
- iii) US\$629,912 for the MEGANISI;

caused by MachinoImport giving priority to berthing Petraco's vessels. I accept that the vessels would not have waited for as long as they did if Petraco had not purchased the Other Cargoes and the Disputed Parcel. While it is possible some demurrage would nonetheless have been incurred, I would have been willing to assume the vessels would have been loaded within their laydays if Petraco had not purchased any cargoes, applying the "broad axe" appropriate for damages assessments in accordance with the approach to proof in this forum. Petraco has made no attempt to calculate the amount of any alleged credit.

220. I am not persuaded that MachinoImport's conduct in prioritising loading cargoes for Petraco represents an independent cause of this loss: the delay to vessels loading VTB Commodities' cargoes was a natural consequence of the MachinoImport-Petraco contracts and the priority given to them. Nor am I persuaded that delay in providing fortification for the Undertaking required (on the current hypothesis) to address the consequences of Petraco's Article 10 conduct would have broken the chain of causation.

221. Third, the sum of US\$2.5 million said to have been paid to MachinoImport under an agreement of 3 June 2019 to release the Disputed Parcel (against which VTB Commodities asserts a claim of US\$2,371,417.65 for a balancing payment). I understand that only the net amount – US\$128,582.35 – is claimed. There was no real challenge to this figure, and I am satisfied that VTB Commodities suffered a loss in that sum.

222. Had VTB Commodities made out its claim under Article 10, I am satisfied that all of these amounts would have been recoverable from Petraco.

223. I understand it to be common ground that, to the extent credit would be required as set out in paragraph 116 of VTB Commodities' Re-Amended Points of Defence and Counterclaim, the appropriate amount is that in the invoice attached to PCB Byrne's letter of 28 July 2023.

SHOULD THE COURT PERMIT PETRACO TO ENFORCE THE UNDERTAKING AND, IF SO, IN WHAT AMOUNT?

The nature of the discretion

224. The enjoyment of legal proprietary or contractual rights is not generally denied merely because a party has acted in a way deserving of moral censure in relation to those rights or their enforcement, absent illegality sufficient to invoke the maxim *ex turpi causa non oritur actio*, a contractual forfeiture provision of the kind found in some insurance policies where there has been a fraudulent or dishonestly exaggerated claim or where a statute confers a discretion to do so. As Lord Hope noted in *Fisher v Brooker* [2009] 1 WLR 1764, [7]-[9] when rejecting the suggestion that unconscionable delay in asserting copyright provided a reason for the court not to make declarations which would provide the basis for giving effect to that right in the future:

“But there is a crucial difference in principle between the exercise of an undoubted right of property and resort for its protection to discretionary remedies. In so far as Mr Fisher may seek to restrain what the other joint owner may do in the exercise of its share of the copyright by means of injunctions, he will be subject to the court's discretion. Unconscionable delay may well have a part to play in the court's decision whether or not he is entitled to such a remedy. But it would be a very strong thing, in the absence of a proprietary estoppel, to deny him the opportunity of exercising his right of property in his own share of the copyright.

The law of property is concerned with rights in things. The distinction which exists between the exercise of rights and the obtaining of discretionary remedies is of fundamental importance in any legal system. There is no concept in our law that is more absolute than a right of property. Where it exists, it is for the owner to exercise it as he pleases ...

... The majority in the Court of Appeal were, for understandable reasons, reluctant to offer the court's assistance to someone who had delayed for so long in asserting his claim. But it appears that, when they decided to deny him these further declarations which were designed to give effect to the rights that flowed from his co-authorship of the work which was found on unassailable grounds to have been established by the trial judge, they overlooked this fundamental distinction.”

225. By contrast, as Lord Hope noted, the granting of equitable relief may well be withheld where the party seeking it has acted unconscionably, or, as it is sometimes put, come to equity with “unclean hands.” In this context, however, the court does not withhold relief merely because some general moral culpability can be attributed to the party seeking it. As the matter is set out in *Snell's Equity* (34th), [5-010]:

“The question is not whether any general moral culpability can be attributed to B, the party seeking relief, but is rather whether relief should be denied because there is a sufficiently close connection between B's alleged misconduct and the relief sought. It is accepted therefore that 'the scope of the application of the 'unclean hands' doctrine is limited' and the maxim is applicable only in relation to conduct of B which has 'an immediate and necessary relation to the equity sued for', so that B is 'seeking to derive advantage from his dishonest conduct in so direct a manner that it is considered unjust to grant him relief'. It is also accepted that: '[u]ltimately in each case it is a matter of assessment by the judge, who has to examine all the

relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought' and the application of the maxim thus requires 'one of those multi- factorial assessments to be conducted by the trial judge ...'".

226. In *Re Smith* [2021] EWHC 1272 (Comm), [312], when addressing the argument that dishonest statements in litigation provided a sufficient basis to reverse the order of priority of rival equitable assignees, I stated:

“Careful consideration is required before holding that a false statement made in legal proceedings in support of an otherwise valid claim for equitable relief justifies the court in refusing that relief. An (admittedly absolute) rule to similar effect in insurance cases was rejected by the Supreme Court in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45; [2017] AC 1, [36], Lord Sumption JSC noting that ‘there are principled limits to the role which a claimant's immorality can play in defeating his legitimate civil claims’. The Supreme Court conclusion that there was no such common law rule made it unnecessary to consider the alternative argument advanced in that case that such a rule infringed Article 1 Protocol 1 of the ECHR (at least to the extent that it was not subject to limitations similar to those which apply to dishonestly exaggerated personal injury claims under s.57 of the Criminal Justice and Courts Act 2015). The suggestion that false statements at trial can themselves provide a basis for refusing relief has also been rejected in insurance cases (*Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 AC 469). While there is an obvious point of distinction between relying on conduct in litigation to refuse substantive discretionary relief, and as a basis for forfeiting otherwise absolute contractual entitlements, the policy considerations which have led to the restatement of insurance law in this context may have implications for similar arguments in equity.”

227. In this regard, it is often said that the discretion as to the granting of equitable remedies is a “weak” discretion, to be exercised in accordance with “fixed and settled rules” (*Haywood v Cope* (1858) 25 Beav 140, 151 and FW Maitland, *Equity: A Course of Lectures* (1936), 308).
228. By contrast, courts frequently have regard to unacceptable behaviour on the part of a party when exercising purely procedural discretions, which are often characterised as “strong” discretions. When determining whether and to what extent to make an award of costs under s.51 of the Senior Courts Act 1981 and CPR Part 44, for example (an award which is compensatory in its purpose and in its effects), the court will have regard to “the conduct of all the parties” (CPR 44.2(4)(a)) which includes “conduct before, as well as during, the proceedings” and “the manner in which a party has pursued or defended its case or a particular allegation or issue” (CPR Part 44.2(5)).
229. Where does the discretion to award damages pursuant to an undertaking offered as a condition of obtaining injunctive relief fall on this continuum? It has been suggested that the “undertaking in damages” originated with Sir James Knight Bruce, Vice-Chancellor between 1841 and 1851 (*Smith v Day (No 2)* (1882) 21 Ch D 421, 424; *F Hoffmann-La Roche & Co AG v Secretary of State* [1975] AC 295, 360, Lord Diplock). However, it appears to have been already established by 1841. In *Sanxter v Foster* (1841) Craig and

Phillips 302, 303-4 (a case in which James Knight Bruce acted for the claimant), Lord Cottenham LC stated:

“The Court ought not to interfere for the purpose of preventing a party from enforcing a legal claim, without securing to itself the means of putting him in the same position, in the event of his turning out to be right, as if the Court had not interfered: whereas, by making a prospective order like the present, the Court could not determine what security it ought to require the Plaintiff to give, as the condition of his obtaining the injunction, so as to enable the Court to do justice to the Defendant, in the event of the Plaintiff’s failing to make out his case at the hearing.”

230. At all events, the injunction is generally characterised as “a form of equitable relief and should be considered on equitable principles” (*Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545, 1554). Peter Gibson LJ stated in the same case (at 1554):

“The practice of requiring an undertaking in damages from the applicant for such an injunction as the price for its grant was originated by the Court of Chancery as an adjunct to the equitable remedy of an injunction ... The form of the undertaking indicates that the court has a discretion whether to enforce it at all and that discretion is not limited in any way. The power to enforce the undertaking being incidental to the power to grant an injunction the discretion will be exercised in accordance with ordinary equitable principles.”

231. The determination of the correct characterisation of the discretion to enforce the undertaking in damages is made more complicated by the very different contexts in which the issue might arise:

- i) Where the injunction does not involve the interim enforcement of an asserted substantive right (for example a freezing injunction or search order) there will be no necessary connection between the loss suffered by reason of the granting of the injunction and the determination of the parties’ substantive rights at the trial. In such a scenario, Neill LJ’s observation in *Cheltenham & Gloucester Building Society*, 1555, that the granting of an injunction does not involve “a breach of some legal or equitable rights of the defendant” is correct in its purest sense. In such a context, it may be easier to view an application to enforce the undertaking as akin to an application for the grant of procedural relief.
- ii) As Neill LJ noted in *Cheltenham & Gloucester Building Society*, 1551, “a *Mareva* injunction can be distinguished from an injunction which anticipates on an interlocutory basis the form of relief which is sought in the proceedings”. Where the injunction does anticipate the relief sought in the proceedings, particularly where the anticipatory enforcement of the injunction applicant’s asserted substantive rights necessarily interferes with the respondent’s asserted substantive rights (which will be the case where the litigation involves conflicting claims to the same property, and the injunction enforces the applicant’s asserted rights on an anticipatory basis to the exclusion of the respondent), the enforcement of the undertaking more closely resembles a means of giving effect to the respondent’s substantive rights.

- iii) There may be cases in which the injunction does not simply interfere with the respondent's substantive right, but in a real sense extinguishes it (for example the destruction of a building, the forced sale of the respondent's property or an order preventing the exercise of a time-limited right). In these circumstances, a refusal to enforce the undertaking in damages would constitute the "very strong thing" against which Lord Hope cautioned in *Fisher*.

232. The case law offers the following guidance as to the exercise of the court's discretion whether or not to enforce an undertaking in damages:

- i) Where it is determined that the injunction should not have been granted, the court is "likely" to enforce the undertaking (*Cheltenham & Gloucester Building Society*, 1551 (Neill LJ), and the undertaking will be ordinarily be enforced, "save for special circumstances" (ibid, 1556 (Peter Gibson LJ)). That last expression appears to have originated in the judgment of James LJ in *Graham v Campbell* (1878) 7 Ch D 490, 494. There are stronger formulations – for example in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [42], Neuberger LJ observed that if the injunction should not have been granted, the undertaking will be enforced "virtually as of right".
- ii) It has been suggested that where the respondent's conduct is relied upon as a reason not to enforce the undertaking, "[t]here must be ... a link between the Defendant's conduct and the obtaining or continuing of the injunction or the enforcement of the undertaking. Outrageous or dishonest conduct in itself and not so linked will not suffice" (*Eliades v Lewis (No 9)* [2005] EWHC 2966 (QB), [29]). In that case (in which a freezing order had been wrongly obtained), it was held that the defendant's dishonest behaviour during foreign proceedings which led to the judgment the claimant was seeking to enforce, and in the injunction proceedings themselves, satisfied this test, "in that it was designed to assist in the discharge of the injunction and to put forward a false level of loss to arise out of it" ([124]).
- iii) In *Universal Thermo Sensors Limited v Hibben* [1992] 1 WLR 840, 857, a case in which an injunction had been granted to protect the claimant's confidential information which had been stolen by departing employees to set up a rival business, but the injunction had been granted in over-wide terms which had the effect of destroying the defendant's business, the court enforced the undertaking even though the defendants' conduct was "outrageous and dishonest" and their evidence to the court had not been frank, holding that it was not part of the court's function when determining whether or not to enforce the undertaking to punish the respondent.
- iv) In *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [50], the Court of Appeal held that it was open to the judge to refuse to enforce the undertaking where the injunction had prevented the respondents doing what they were not entitled to do, the respondents had brought the interlocutory injunction on themselves by their unreasonable and high-handed conduct, and the respondents' position in relation to their rights was very different at the time the interlocutory injunction was obtained when compared with the time that the court came to consider whether to grant a perpetual injunction at trial.

- v) At least as to the measure of recovery, that “the Court should act as nearly as may be on fixed rules, or by analogy with fixed rules” (*Smith v Day* (1882) 2 Ch D 421, 427-28, Brett LJ). I return to this topic below.

233. In addition, I was referred to cases in which the court had refused discretionary equitable relief because of the applicant’s misconduct during litigation:

- i) In *Fiona Trust & Holding Corp v Privalov* [2008] P&CR DG 21, [19]-[20], Mr Justice Andrew Smith suggested that the “clean hands” maxim is directed “at least typically, to conduct that is in some way immoral and deliberate” and that “the court will assess the gravity and effect of misconduct cumulatively.” He accepted that this could include conduct in the course of the litigation in which the equitable relief was sought, including attempts to mislead “not only where the purpose is to create a false case but where it is to bolster the truth with fabricated evidence.”
- ii) In *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328, [158]-[159], Aikens LJ stated:

“There is no dispute that there exists in English law a defence to a claim for equitable relief, such as an injunction, which is based on the concept encapsulated in the equitable maxim ‘he who comes into equity must come with clean hands’. Mr Nicholls accepted that the doctrine applies to a claim for an anti-suit injunction where the claim is based on an allegation that the defendant has started proceedings in a foreign jurisdiction in breach of contract because the claimant and defendant had agreed to an exclusive jurisdiction clause in favour of the English courts. It is clear from the speech of Lord Bingham in *Donohue v Armco Inc* that this defence is distinct from that of there being ‘strong reason’ not to grant an anti-suit injunction.

It was common ground that the scope of the application of the ‘unclean hands’ doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in *Dering v Earl of Winchelsea* the misconduct or impropriety of the claimant must have ‘an immediate and necessary relation to the equity sued for’. That limitation has been expressed in different ways over the years in cases and textbooks. Recently in *Fiona Trust & Holding Corp v Privalov* Andrew Smith J noted that there are some authorities in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief, not only where the purpose is to create a false case but also where it is to bolster the truth with fabricated evidence. But the cases noted by him were ones where the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief. *Spry: Principles of Equitable Remedies* suggests that it must be shown that the claimant is seeking ‘to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief’. Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought.”

- iii) Those passages were approved in *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig* [2017] EWCA Civ 1567 [170]-[171] when addressing the

equitable remedy of rescission, where the exercise was described as “one of those multi-factorial assessments to be conducted by the trial judge, with which an appellate court will be slow to intervene, unless the judge's conclusion was clearly wrong, or based upon some evident failure of analysis.”

234. Finally, I should note that if the enforcement of an undertaking in damages is regarded as a form of discretionary equitable relief, it is a form which arises in a context in which there is no right to damages at law to fall back on where that relief is refused. As the editors of *Snell's Equity* (34th), observe at [5-011] of the “clean hands” maxim:

“In considering the question of whether denying a remedy would be disproportionate, it may be important in the equitable context to distinguish between cases where denying the requested remedy would leave B with no protection and may give another party a windfall (as may be the case where B is attempting to assert a beneficial interest under a trust) and cases where B may instead turn to a different remedy for protection if the equitable remedy is denied (as may be the case where, for example, specific performance is denied but a money claim may still be available).”

The significance of the distinction between “necessary” and “supererogatory” remedies in the context of the “unclean hands” doctrine is emphasised in Nicholas McBride’s “The Future of Clean Hands” in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (2017) 267, 281-285.

The matters relied upon

235. VTB Commodities relied on two matters in support of its contention that the court should not enforce the Undertaking:

- i) Petraco’s bad faith in its commercial dealings in the period from January to May 2019, both in entering into Addenda Nos 1, 2 and 4, and in its communications with VTB Commodities in relation to those dealings (i.e. the conduct which formed the basis of VTB Commodities’ failed Russian law claims).
- ii) Petraco’s lack of clean hands in the conduct of this litigation.

Petraco’s conduct in the period from January to May 2019

236. I have essentially upheld VTB Commodities’ factual case as to Petraco’s knowledge when entering into Addenda Nos 2 and 4, and in most respects in relation to Addendum No 1, and I have also found that Ms Srenger and Mr Morello made various untruthful or dissembling statements to Mr Kabir. However, I have also found that this conduct was not actionable under the law which the parties agree determines whether there is civil liability for these events, and that they did not prevent Petraco obtaining valid contractual rights to the Disputed Parcel which would, absent the injunction, have caused property in the Disputed Parcel to pass to it.

237. Can it be said in these circumstances that Petraco brought the injunction on itself? It is plain, in my determination, that Petraco’s conduct relating to Addenda Nos 1 and 2 does

not have a sufficiently close connection to the granting of the Cargo Injunction or the enforcement of the Undertaking to provide a proper basis for refusing to enforce the Undertaking. These were separate and chronologically anterior transactions, and the Cargo Injunction did not extend to them. However, even focussing on Addendum No 4 alone, I am not persuaded that it is appropriate, in this context, to go back to the origin of the contractual rights which Petraco acquired and which I have held cannot be legally impugned, when determining whether or not to enforce the Undertaking. That behaviour is too remote from the enforcement of the Undertaking. The Cargo Injunction was obtained because VTB Commodities (wrongly as it has been held) contended that the court should grant mandatory relief by way of enforcing its contractual rights which would “trump” such rights as Petraco had in relation to the Disputed Parcel. That contention having failed, I am not persuaded that the circumstances in which Petraco acquired its rights provides a sufficient basis for denying it the compensation to which it would ordinarily have been entitled.

238. Nor am I persuaded that, in circumstances in which Petraco’s conduct does not provide a basis for impugning its contractual rights under the applicable law, it would be appropriate for the court to deny Petraco compensation for the loss which it has suffered by reason of the interference with those rights occasioned by the injunction merely because Petraco may have engaged in commercially reprehensible conduct. While it is possible to find older cases in which concurrent equitable relief has been denied in similar circumstances (e.g. *Falcke v Gray* (1859) 4 Drew 651, in which Kindersley V-C denied the purchaser of two Chinese vases specific performance because they had knowingly paid far below their real value), the remedy here is a “necessary” one (c.f. [234]).
239. The private law consequences of particular acts, and whether they give rise to tortious claims, is a matter for the applicable law, the identification of which (in tort claims) places significant emphasis on the place where the relevant events take place. For that reason, I am not persuaded that the legal consequences of the facts I have found under other systems of law is a relevant factor. However, lest it be argued that for the purposes of determining whether to enforce the Undertaking, which is a creature of English law, the court should have regard to the legal consequences of the conduct under English law rather than the *lex causae*, I am not persuaded that the result in this case would have been different if English rather than Russian law had applied. In particular, I do not believe that Petraco’s state of mind would have prevented them from acquiring title to the Disputed Parcel under English law. In *In re Wait* [1927] 1 Ch 606, 637, Atkin LJ posited the example of a farmer who agreed to sell a lamb out of his flock, a ton of potatoes out of his crop grown on his farm, a bushel of apples from his orchard, a gallon of milk from this morning’s milking or an egg out of the eggs collected yesterday. At 629-630, Atkin LJ observed:

“Many would think that deliberately to break a contract for the sale of future goods, where no question of property at law or in equity could arise, would be dishonest; but the law gives only a remedy in damages. In the simple cases suggested, which I hesitate to repeat, the farmer might be acting dishonestly in parting with the whole of his flock, his apples, his potatoes or his eggs to a different purchaser; but I venture to think that if he does the purchaser even with notice acquires a complete title to the property bought.”

240. Nor am I persuaded that VTB Commodities would have had a claim for damages against Petraco, although I accept there is more room for argument here. Professor Paul S Davies, in the leading monograph on the subject, *Accessory Liability* (2015), 145-46, notes that cases in which a third party's conduct had prevented the performance of a contract, without the third party acting on the mind of the contracting party, had generally required the third party to act in a way which was tortious in itself before the innocent contracting party would have a claim in tort. Professor Davies referred to the decision in *DC Thomson & Co Ltd v Deakin* [1952] Ch 646, 680, in which Lord Evershed MR observed:

“Let it be supposed today that A had made a contract to supply certain goods to B and that the intervener knowing of the contract and intending to deprive B of its benefit had proceeded to go into the market and buy up all the goods he could find of that character, so as to render it impossible for A in fact to perform the contract. Again I think it is impossible to say, according to the principles of our law that the intervener in such a case was acting tortiously”.

241. Professor Davies suggests that “the better view is that mere prevention is insufficient... and very different from inducement. Acts of inducement influence the choice of the contract-breaker to breach his or her obligations. Whereas in instances of prevention, it is the ability of the contract-breaker to perform which is impaired.” That is consistent with the analysis of Lord Hoffmann and Lord Nicholls in *OBG Ltd v Allan* [2008] 1 AC 1, which criticised attempts in cases such as *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376 (see *OBG*, [22]-[25], [176]-[180]) to include “prevention” cases alongside the *Lumley v Gye* tort in a unitary tort of interfering with contractual relations, and the consequent distinction between “direct” and “indirect” interference (*OBG*, [34]-[[38], [186]). In *Kawasaki Kisen Kaisha Ltd v James Kimball Ltd* [2021] EWCA Civ 33, Popplewell LJ at [23] noted that the premise of liability under the *Lumley v Gye* tort was that the defendant (A) “does something which joins in with the conduct of B in a way which makes him an accessory to the breaking of the contract by B”. He summarised the effect of the authorities at [32]-[34]:

“First, they make clear that conduct cannot qualify as inducement if it constitutes no more than preventing B from performing the contract with C as one of its consequences. There must be some conduct by A amounting to persuasion, encouragement or assistance of B to break the contract with C.

Secondly, this participation by A in B's breach, must, in Lord Hoffmann's words, have 'a sufficient causal connection with the breach by the contracting party to attract accessory liability' or, in Lord Nicholls' words, so as to amount to 'causative participation'. It is because of the causative requirement that 'inducement requires the defendant's conduct to have operated on the will of the contracting party' in the words of Toulson LJ. If A's conduct is not capable of influencing a choice by whether or not to breach the contract, it is not capable of amounting to inducement; it cannot operate on the mind or will of B so as qualify as causative participation as an accessory to his breach.

Thirdly, the mental element of the tort requires that there must be an intention that the breach of the contract must at least be the means to an end, rather than simply the foreseen or intended consequence of the tortious conduct.”

David Richards LJ agreed.

242. The issue of whether entering into an inconsistent contract, the performance of which would prevent the other party from complying with an existing contractual obligation, can itself constitute “persuasion, encouragement or assistance” in the breach has been considered in two cases. In *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1301, the sale of a lease by the second Defendant had the effect of placing it and the first Defendant in breach of contract. A claim for the tort of inducing breach of contract against the purchaser of the lease failed. Toulson LJ held that the third party’s conduct “had to operate on the will of the contracting party”, and he rejected the suggestion that the purchaser was liable merely because “the sale of the lease prevented the enforcement of the leaseback option” ([176]-[177]). However, in *Lictor Anstalt v Mir Steel* [2011] EWHC 3310 (Ch), [49]–[52], David Richards J held that it was arguable that entering into an agreement to purchase equipment as part of a business which the other party had already agreed to sell to a third party was sufficient for liability in the tort of inducing breach of contract. The correctness of that conclusion has been doubted (see for example Thomas Grant and David Mumford, *Civil Fraud: Law, Practice & Procedure* (2018), [3-039], noting that *Meretz* was not cited). Toulson LJ’s judgment in *Meretz* was cited with approval in *Kemball* by a Court which included David Richards LJ. The decision in *Lictor* was explained in *Kemball* as follows:

“That case does not assist Mr Jacob's argument on inconsistent dealings, and does not cast any doubt on the proposition that inconsistent dealings can be a form of inducement if, but only if, they meet the accessory liability and causative participation criteria articulated in *OBG v Allen*. It is an example of a case which fits within such principles, and within Lord Hodge's formulation in paragraph 13 of *Global Resources v Mackay*, because it involves conduct which attracts accessory liability in the form of assistance rather than persuasion. Mir Steel's involvement in the hive down arrangement was a participation in Alphasteel's breach of contract because it was a necessary part of the arrangements with the administrators, and Mir Steel's participation was necessary in order to enable Alphasteel to breach its contract as it wished to.”

243. In any event in this case, as I have noted, Antipinsky had not agreed to sell the same goods twice (as in *Lictor*). This is a case in which it was a foreseeable consequence of Petraco’s decision to purchase Antipinsky VGO from MachinoImport that Antipinsky would supply MachinoImport and as a result not have sufficient VGO to make timely deliveries of the quantities of the non-specific VGO it had agreed to sell to VTB Commodities. In closing, VTB Commodities suggested that there would have been liability under English law because:

“By entering the Addenda and making prepayments to [MachinoImport], which were in turn passed on by it to ANPZ, Petraco induced ANPZ to sell the cargoes in question to Petraco and as an inevitable consequence breach ANPZ’s contracts with ABFA ... While the dealings between ANPZ and Petraco were not direct ... the reality is that from ANPZ’s point of view (namely the viewpoint of the party that needs to be induced) it regarded itself as selling to Petraco”.

244. However, the argument that the contracts between Antipinsky and MachinoImport were shams was not pursued in oral closing, and it is an argument I would have rejected on the facts (see [104]). No case was advanced that Petraco was directly involved in the conclusion of the contracts between Antipinsky and MachinoImport, merely that it was aware that the inevitable consequence of MachinoImport performing its contracts with Petraco would be that MachinoImport would acquire and take delivery of VGO from Antipinsky which would prevent Antipinsky from performing its contract with VTB Commodities on a timely basis. If relevant to the exercise of the court's discretion to enforce the Undertaking, I am not persuaded that the conduct in this case would have given VTB Commodities a claim for procuring breach of contract under English law against Petraco.
245. Finally, so far as Petraco's claim to the value of the Disputed Parcel is concerned, there are independently very strong factors supporting the enforcement of the Undertaking, which I address at [251]-[252] below.

Petraco's conduct of the proceedings

246. VTB Commodities also argues that I should not, as a matter of discretion, enforce the Undertaking because Petraco's key witnesses gave dishonest evidence to the court, and sought to conceal key events from the court.
247. It will be apparent from my findings of fact that I am satisfied that Ms Srenger and Mr Morello gave untruthful evidence at trial on the following matters:
- i) Mr Morello's knowledge in the last quarter of 2018 of the extent of VTB Commodities' dealings in Antipinsky VGO.
 - ii) Mr Morello's suggestion he had understood the reference to VTB in his 22 November 2018 exchange with Mr Quigley to be a reference to the bank, and not to VTB Commodities.
 - iii) Ms Srenger's evidence as to her reasons for attending the 4 December 2018 meeting and her suggestion that her 7 May 2019 statement was "not accurate".
 - iv) Ms Srenger and Mr Morello's evidence on the outcome of the interactions between Petraco and Antipinsky/Sberbank/MachinoImport culminating in the 25 December 2018 WhatsApp exchange including the exchange itself.
 - v) The contents of the Langham meeting.
 - vi) Mr Morello in his account of his 6 March 2019 exchanges with Mr Kabir and Ms Srenger in her evidence about these exchanges when they were forwarded to her.
 - vii) Ms Srenger and Mr Morello regarding the "pdm" exchange on 17 April 2019.
 - viii) Mr Morello's claim he spoke to Mr Kabir by telephone on 17 or 18 April 2016.
 - ix) Mr Morello when he claimed that Petraco had not made a significant profit on the Addendum No 2 cargo.

248. I am also satisfied that they both sought to downplay the extent of their knowledge of the level of Antipinsky's VGO production, the production difficulties and the information available in market as to who was lifting VGO from Murmansk:

i) All of Petraco's witnesses pursued a line at trial that this was an opaque market with limited flows of accurate information, with traders giving very little away because of confidentiality obligations, and not trusting what they were told. Ms Srenger even went so far as to suggest for the first time in cross-examination that she thought Mr Kabir had been lying in one of his communications to Petraco when describing VTB Commodities' contractual position. I am satisfied that this did not reflect the actual view or experience of Ms Srenger and Mr Morello.

ii) While I accept that there was not complete transparency and symmetrical information flow, I am sure that Ms Srenger's 2019 evidence to the court that:

“the major players in the energy market are well connected and in regular contact. The relationships are strong and in many cases long lasting. The VGO market is smaller still and everyone knows everyone else's business. There is a lot of market gossip”;

portrayed a more realistic picture than the reticent, confidentiality-constrained, sceptical and disconnected market which Petraco's witnesses sought to present to the court.

249. VTB Commodities also alleges that Ms Srenger, Mr Morello and Mr Vukman sought to conceal the significant interactions with Sberbank/Antipinsky between the end of the 4 December 2018 meeting and the end of the year, in the course of which some form of understanding was reached as I have found at [49] above. I am satisfied that this criticism is made out:

i) In the first round of witness statements served at the end of June and early July 2023, the Petraco witnesses did not address the steps taken to contact Antipinsky/Sberbank after the Alvarez & Marsal email of 7 December 2018 stating no deliveries would take place until March 2019: the arrangements for and occurrence of the 13 December 2018 telephone call; the 17 December 2018 meeting; and the understanding reached. Mr Vukman's statement moved from the 4 December 2018 meeting to the Langham meeting of 26 February 2019; Ms Srenger suggested that Mr Baron's 9 December 2018 message was concerned with gasoil supplies from Afipsky, and she did not mention the contacts on 13 and 17 December 2018. Mr Morello suggested that an email he had sent on 17 December 2018, in the immediate aftermath of the 17 December 2018 meeting, was a reference to the 4 December 2018 meeting.

ii) At the Pre-Trial Review on 24 October 2023, VTB Commodities sought further disclosure and to amend its case to make allegations concerning contacts on 13 and 17 December 2018, referring to material which had been obtained through disclosure. That application was opposed root and branch by Petraco, who adduced evidence through their solicitor that the 13 December 2018 call had been concerned with gasoil from Afipsky, not VGO, and denying that there had been any meeting on 17 December 2018, merely a telephone call. Petraco's skeleton for the Pre-Trial

Review said that the telephone calls “have nothing to do with these proceedings” and the amendments were opposed because VTB Commodities had “not identified any basis for asserting that the Refinery’s operations and future loadings were discussed during these calls” and that “the assertion is ... even more fanciful because these discussions related to gasoil, not VGO”.

- iii) When further witness statements were served after the Pre-Trial Review, Mr Vukman confirmed he had attended an in-person meeting in Moscow on 17 December 2018 with Ms Srenger, and accepted that the meeting was, at least in part, about VGO. Ms Srenger gave evidence to similar effect. Even then, I have concluded that the accounts given in the second set of statements were misleading and incomplete, failing to give a candid account of the events I have summarised at [47] to [48] above.
- iv) However, the failure to address these interactions – in whatever terms – in the first round of witness statements, and the misleading position advanced at the Pre-Trial Review in an attempt to foreclose enquiry into these events – remains wholly unexplained. Ms Srenger and Mr Vukman both failed to offer a straight answer when asked why these issues had not been addressed in their first round of witness evidence. Mr Morello’s evidence that he did not address the events because he did not know of them was untrue – he sent his 17 December 2018 email immediately after and with knowledge of the events at the 17 December 2018 meeting, and his attempt in his first statement to suggest that the reference to “per various meetings” in that email was to the 4 December 2018 meeting was untrue, and part of the effort to put VTB Commodities off the scent.

250. I accept that the manner in which Petraco presented their case, and the evidence the key individuals gave on its behalf has a sufficient connection with the application to enforce the Undertaking that I am entitled to have regard to it when determining whether or not to enforce the Undertaking.

The consequences of refusing to enforce the Undertaking

251. The effect of my findings is that, but for the Cargo Injunction, Petraco would have acquired title to the Disputed Parcel. Were the court to refuse to enforce the Undertaking at all, the effect would be as follows:

- i) Petraco would realise none of the value of the Disputed Parcel to which it was contractually entitled, and of which it would, but for the Court’s order, have become the owner.
- ii) VTB Commodities would (at least on its case) be entitled to the sum in court which represents the Disputed Parcel, and thereby be placed in the same position as if it had obtained delivery of the Disputed Parcel, even though the Cargo Injunction was discharged because it was held to amount to an order of specific performance, to which VTB Commodities was not entitled.

252. The first of those consequences comes very close to the “very strong thing” Lord Hope referred to in *Fisher* ([224]), because it is only the granting of an injunction which it has

been held should not have been granted which means that Petraco does not have a proprietary claim to the proceeds of the Disputed Parcel. The second would have the effect of wholly cutting across Phillips LJ's judgment, and means that by obtaining a court order it should not have obtained, VTB Commodities would secure a substantial windfall.

253. If there might be circumstances which are sufficiently extreme to justify those outcomes (as to which I express no view), they are not present in this case. I am therefore satisfied that the court should (and I would go further and say has no realistic alternative but to) enforce the Undertaking so far as concerns:

- i) The sum of US\$25,050,600 (the value of the Disputed Parcel less the outstanding amount of the price).
- ii) The profit which I have found Petraco would have made on the Disputed Parcel, which represented the realisable value of the Disputed Parcel in Petraco's hands, and which can be seen as one of the beneficial incidents of the right of property which Petraco would have acquired but for the Cargo Injunction. Adopting Lord Hope's language in *Fisher*, it is an entitlement which would have "flowed from" the proprietary right.

254. No such issues arise in relation to Petraco's claims for demurrage or the amounts paid in settlement of its liability for failure to load. That raises the issue of whether the court can, and if it can, whether it should, permit enforcement of the Undertaking as to only some of the heads of loss claimed. There are cases which suggest that the choice for the court is a binary one. In *Financiera Avenida v Shiblaq* 7 November 1990, Lloyd LJ outlined the task of the judge asked to enforce an undertaking in damages in the following terms:

"Two questions arise whenever there is an application by a defendant to enforce a cross-undertaking in damages. The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a question of discretion. The discretion is usually exercised by the trial judge since he is bound to know more of the facts of the case than anyone else. If the first question is answered in favour of the defendant, the second question is whether the defendant has suffered any damage by reason of the granting of the injunction."

255. In addition, there are a number of the statements to the effect that "the measure of the damages payable under [the undertaking] is not discretionary" (e.g. Lord Diplock in *Hoffmann-La Roche*, 361; *Eliades*, 44). Those statements seem to be intended to preclude alternative approaches to the *quantification* of loss, rather than the issue of whether it would be appropriate to order damages for all the loss properly quantified, and even when considering the measure of loss, more recent cases have suggested that the court can adopt an alternative approach (*Abbey Forwarding Ltd v Hone* [2014] EWCA Civ 711, [44], [63]).

256. I am not persuaded that my discretion is so circumscribed that the fact that particular heads of loss present a particularly compelling case for relief must necessarily carry all with them. Even if enforcing an undertaking in damages is properly to be regarded as an

application for discretionary equitable relief in the fullest sense, the court’s ability to do equity is not constrained by an “all or nothing” approach (as seen, for example, in the court’s ability to grant equitable relief on terms). *Spry on Equitable Remedies* (9th, 2014), 685-686 states (without supporting authority) that:

“Inequitable conduct on the part of the defendant may, on the one hand, render it just that no order as to damages be made at all, or on the other hand, it may be appropriate simply that the amount of damages that would otherwise have been ordered should be diminished to such an extent that it can no longer be said that the order of the court is ‘practically unjust’”.

257. Even if, contrary to my determination, the effect of unclean hands is to present the court with a binary choice as to whether or not to grant a discretionary equitable remedy properly so-called, the court’s discretion whether or not to enforce an undertaking in damages is only analogous to the granting of equitable relief. It also bears some similarities with the exercise of a procedural discretion where the court has more freedom to fashion solutions to reflect the particular justice of the case before it – not least because the undertaking is ultimately a means by which the court regulates the use of its processes.
258. In these circumstances, I have concluded that the conduct of Petraco in these proceedings makes it appropriate for me to enforce the Undertaking only so far as it seeks relief in respect of the value of the Disputed Parcel and the loss of profit thereon, but not otherwise.

CONCLUSION

259. In these circumstances:
- i) Petraco is entitled to enforce the Undertaking in respect of its claims for the value of the Disputed Parcel and loss of profits but not otherwise.
 - ii) VTB Commodities’ Part 20 claim fails.
260. I would like to conclude by thanking all of the legal representatives for their hard work. The course of these proceedings, with a twice-adjourned trial, has been far from smooth, and the interruptions and their consequences have placed particular burdens on the parties’ lawyers, and on the parties themselves. I should also note the very effective part played by junior counsel in the oral presentation of the case at trial, with the court hearing from all three junior counsel, and with Mr Friedman and Mr Leung making particularly significant contributions.