



Neutral Citation Number: [2024] EWHC 706 (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: 27/03/2024

**Before :**

**MR JUSTICE FOXTON**

**Between :**

**ABFA COMMODITIES TRADING LIMITED**  
**(formerly VTB COMMODITIES TRADING**  
**DAC) (previously, VTB CAPITAL TRADING**  
**LIMITED)**

**Claimant**

**– and –**

**PETRACO OIL COMPANY SA**

**Intervener**

**Alan Gourgey KC and John Grocott-Barrett (instructed by PCB Byrne LLP) for the**  
**Claimant)**

**Yash Kulkarni KC, Andrew Leung and Rupert Cohen (instructed by Mishcon de Reya**  
**LLPC) for the Intervener**

Hearing date: 18 March 2024

Draft Judgment Circulated: 22 March 2024

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FOXTON

**The Honourable Mr Justice Foxton:**

**A INTRODUCTION**

1. This judgment addresses four issues arising from the judgment in this case reported at [2024] EWHC 147 (Comm) and adopts the abbreviations in that judgment. The four issues are as follows:
  - i) The order to be made in respect of costs and interest, in particular having regard to the offer made by Petraco under Part 36.
  - ii) The amount of any interim payment on account of costs.
  - iii) Whether the court should make a declaration confirming that VTB Commodities has no interest in the amount held by PCB Byrne LLP to the order of the court.
  - iv) The interest rate under the Judgments Act 1838.
2. The first of these is much the most significant.

**B THE PART 36 OFFER**

3. On 16 October 2019 Petraco made an offer to settle the dispute for a payment of \$24m (**the Part 36 Offer**). On 30 January 2024, I upheld Petraco's claim in the amount of \$27,034,184.87. There is no dispute that:
  - i) the Part 36 Offer satisfied the requirements of CPR Part 36; and
  - ii) Petraco has "beaten" the Part 36 Offer.

**CPR 36.17**

4. In these circumstances, CPR Part 36.17 provides (in relevant respects):

“(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—

  - (a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and
  - (b) interest on those costs.

(4) ... [W]here paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

  - (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

- (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
  - (c) interest on those costs at a rate not exceeding 10% above base rate; and
  - (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount [in this case of] ... £75,000 ...
- (5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
- (a) the terms of any Part 36 offer;
  - (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
  - (c) the information available to the parties at the time when the Part 36 offer was made;
  - (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
  - (e) whether the offer was a genuine attempt to settle the proceedings.
- (6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate.”
5. The following matters are common ground:
- i) The effect of CPR r 36.17(4) is that the court does not have an unfettered discretion to depart from the stipulated consequences of failing to beat the Part 36 offer, and the burden on a party who has failed to beat the Part 36 offer to show that it would be unjust for the stipulated consequences to follow is a “formidable obstacle” to the obtaining of a different order.
  - ii) The factors identified r 36(17)(5) are not exhaustive, and the court can have regard to all of the circumstances of the case (*Adrian Smith v Trafford Housing Trust* [2012] EWHC 3320, [13] and *Lilleyman v Lilleyman (No 2)* [2012] EWHC 1056 (Ch), [16]).
6. Nonetheless, the submissions largely followed the factors in r 36(17)(5) and I will address them by reference to those factors.
- (a) “the terms of any Part 36 offer”

7. Neither party suggested that there was any feature of the terms of the Part 36 Offer which bore on the issue of whether it would be unjust for the stipulated consequences to follow.
  - (b) *the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;*
8. Here the Part 36 Offer was made at an early stage of the Proceedings, and to the extent that this factor weighs in the balance, it weighs in Petraco's favour.
  - (c) *the information available to the parties at the time when the Part 36 offer was made*
9. When the Part 36 Offer was made, VTB Commodities was or ought to have been aware that (i) Petraco had paid \$25m for the Disputed Parcel from the evidence filed on Petraco's behalf on 1 May 2019 (paragraph 6 of Mr Dench's witness statement); (ii) of the approximate market value of the Disputed Parcel (VTB Commodities being traders in this product who were themselves arguing that they were entitled to delivery of the Disputed Parcel and would suffer loss if it was delivered elsewhere); (iii) of demurrage liabilities for the ESTHER and LOUIE, which were already \$537,000 by May 2019 and continuing at that date; (iv) that the loss claimed by Petraco including allowance for interest and costs was of the order of US\$30m (this being the figure both counsel were content to work with at the hearing on 15 May 2019 as the approximate sum for "the value of the Disputed Parcel, plus an allowance for interest, costs, demurrage and other ancillary matters").
10. To the extent that VTB Commodities was unaware of the final amount of Petraco's demurrage liabilities, it was at liberty to seek further information.
11. I am not persuaded (as Mr Gourgey KC suggested) that VTB Commodities did not have sufficient information reasonably to assess the Part 36 Offer until Petraco had served its Reply and Defence to Counterclaim setting out its case on Russian law. VTB Commodities was able to and had accessed its own Russian law evidence.
12. It follows that this factor does not support an argument that it would be unjust for the stipulated consequences to follow.
  - (d) *the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated*
13. This and the next factors are the principal matters relied upon by VTB Commodities. In particular, I made a number of adverse findings about the honesty of the evidence given by Petraco as to its knowledge of VTB Commodities' contractual rights and the consequence on VTB Commodities' contractual rights if deliveries of cargo were to be made to MachinoImport for on-sale to Petraco. These can be found at [7]-[8] and [246]-[250] and I shall refer to them as **the Petraco Knowledge issue**.
14. I was taken to a number of cases in which courts had ordered a successful party who had "beaten" their Part 36 offer no or only a proportion of their costs, to reflect disapproval of their conduct of the case or the effects that conduct had had in increasing costs and prolonging litigation:

- i) In *Walsh v Singh* [2010] EWHC 1167 (Ch), no order for costs was made, a “beaten” Part 36 offer notwithstanding.
  - ii) In *Sulaman v Axa Insurance plc* [2009] EWCA Civ 1331, the Court of Appeal rejected an appeal against a costs order which awarded the claimant only a third of her costs, applying the beneficial consequences of beating the Part 36 Offer only to that third ([19]-[20]).
  - iii) In *Lilleyman v Lilleyman (No 2)* [2012] 1 WLR2801, Mr Justice Briggs gave the party who had “beaten” the payment in only 80% of its costs from the date of the payment in, with the Part 36 benefit of interest on those costs applying to the 80% order.
  - iv) In *Ahuja Investments Ltd v Victory Game Ltd* [2021] EWHC (Ch), the court awarded the claimant 75% of its costs, and otherwise applied the Part 36 enhancements.
15. In seeking to resist the argument that the adverse findings I had made as to the honesty of Petraco’s case on knowledge made it unjust to apply the stipulated consequences for beating a Part 36 offer, Mr Kulkarni KC made two principal points:
- i) First, he argued that the principal focus under this factor is on the circumstances of the making of the offer and the provision of information in relation to it (relying on *Lilleyman v Lilleyman (No 2)* [2012] 1 WLR 12801, [14], [16]).
  - ii) Second, he rightly noted that I had already marked my disapproval of Petraco’s conduct by refusing to enforce the undertaking in respect of loss of \$1.6m which I found to be established.
16. As to the first of these points, while I accept that this is the focus of factor (d), the court’s consideration of the parties’ conduct is not limited to those matters. As Briggs J made clear in *Lilleyman*, [16], the manner in which the litigation is conducted more broadly is also relevant, otherwise:
- “The protection of a generous Part 36 offer would enable the offering party to conduct its part in the litigation at the offeree’s potential expense without regard to the obligations and constraints which the achievement of the overriding objective now place upon civil litigants.”
- While I accept that there will be criticisms of the other side’s conduct in a case which might merit a CPR Part 44 allowance absent a Part 36 offer, but which would not be sufficient to make it unjust to apply the CPR 36.17(4) consequences in their full width, the conduct in this case was sufficiently serious and prolonged that I have concluded it does need to be reflected in the orders made by the court, the Part 36 Offer notwithstanding.
17. As to the second, there are two reasons why the court may wish to make an order addressing the consequences of dishonest conduct in litigation: to mark its disapproval of that conduct, and to reflect the causative effect of the dishonesty on the length and cost of

the trial (*Sulaman v Axa Insurance Plc* [2009] EWCA Civ 1331, [17]-[18]). My decision not to enforce the Undertaking to the full extent of Petraco's loss reflected the first of those factors, but not the second. Petraco's dishonest case on its knowledge clearly prolonged the case and occasioned additional legal costs. It also served to fuel the dispute, leading to an understandable sense on VTB Commodities' part that it had been "wronged" and was entitled to recompense.

18. However, I am persuaded that the appropriate means of addressing this factor – particularly in circumstances in which I have already marked my disapproval of Petraco's conduct in financially significant terms – is through the costs order made. This ensures that the consequences of Petraco's conduct are directly linked to its effects in the litigation, and that an important principle underpinning Part 36 – that VTB Commodities could have avoided the Part 36 consequences and the costs of the litigation by accepting the Part 36 Offer – is respected (*West v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365, [38]). I return to this issue below.

(e) *whether the offer was a genuine attempt to settle the proceedings*

19. This factor was introduced in April 2015, against the background of the decision of the majority of the Court of Appeal in *Huck v Robson* [2002] EWCA Civ 398, who held that an offer to accept 85% of the sum claimed was effective in that case, but held that if the offer was "merely a tactical step designed to secure the benefits of [Pt 36]", the court would not give effect to it. The *Huck* test of whether an offer was "tactical" was not easy to apply, and was felt to be insufficient to control potential abuses of the Part 36 regime.
20. The commentary to the White Book notes of (e) that this factor "will be a useful consideration in cases where claimants have made very high Part 36 offers" and suggests that judges are likely to take a broad-brush view largely informed by their own assessment of the strength of the case that they have just tried and therefore the extent to which the offer appeared to be a genuine attempt to settle.
21. Reflecting that discussion, in *Yieldpoint Stable Value Fund LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1512 (Comm), Mr Stephen Houseman KC considered a Part 36 offer to accept \$4.95m inclusive of interest (96% of the claim) and held that this was not a genuine attempt to settle a case which was said to have "a starkly binary nature." He noted that cases in which very high claimant offers had been held to amount to a genuine attempt to settle had generally involved cases with very high prospects of success (e.g. *Rawbank SA v Travelex Banknotes Ltd* [2020] EWHC 1619 (Ch), [30]). However, as Zacaroli J makes clear in *Rawbank*, [29], "the critical question is not a mathematical one – the proportion of the discount – but whether it is possible to infer from the size of the discount that there is no genuine attempt to settle the proceedings." The fact that the claim only permits of a binary outcome does not preclude an offer to settle for a high percentage of the claim being a genuine attempt to settle: *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC).
22. In this case, VTB Commodities point to the following factors in support of their conclusion that the Part 36 Offer was not a genuine attempt to settle:

- i) First, the amount of the offer which was said to be only 4-6% of the amount then claimed. I am satisfied that this understates the position but accept that the offer involved a relatively limited discount on the value of the claim:
    - a) The damages claim was for the value of the cargo, not simply the price, and it was pleaded that Petraco had on-sold the cargo. The prospect of further liability for cancellation of the fixtures was expressly mentioned. Six months' interest would have accrued.
    - b) On the basis of my findings, the total value of the claim at this point was of the order of \$27.034m plus 6 months' interest, which would have exceeded \$600,000. On that basis, this was an offer to settle for about 86% of the claim value, which gave up several distinct heads of loss.
    - c) If viewed by reference to the claims pursued, the offer involved a discount of about 18%. I would note that at the date of the Part 36 Offer, the conduct which led me to refuse to enforce the Undertaking in respect of the demurrage and cancellation liabilities had yet to occur, with the result that this is a truer measure of the discount afforded by the Part 36 Offer at the time it was made.
    - d) As I have explained, I am satisfied that VTB Commodities would have had a good understanding of the likely value of the loss of profit claim and could have made enquiries as to the current amount of the demurrage and cancellation claims which, to the extent that they had yet to be quantified, represented an uncertainty for both parties.
    - e) I accept that the offer was for a high percentage of the value of the claim upheld at trial, but it involved a discount from the value of that claim, which in absolute terms was over \$3m.
  - ii) Second, at a "without prejudice" meeting on 27 September 2019, Stephenson Harwood LLP informed PCB Byrne LLP that Petraco would be making a Part 36 offer "less a nominal sum in order to get enhanced interest and costs if they succeed at trial". This is apparent from an internal PCB Byrne LLP email sent after the meeting, privilege in which was waived, and which I accept is broadly accurate (there having been a mis-recollection on the Mishcon de Reya side prior to waiver as to what was said at the meeting). I accept that it is likely that Petraco sought to pitch the Part 36 Offer so as to gain the benefit of the Part 36 regime while maximising the amount recoverable if the offer was accepted. That of itself does not engage factor (e): most decisions in litigation are tactical. The issue is whether they succeeded in that aim.
  - iii) Third, it is said that this was not a claim with overwhelming prospects of success. I agree with that assessment. Petraco succeeded at trial because I upheld its case on difficult and eminently arguable issues of Russian law.
23. Against that background, the process of determining whether this was a genuine attempt to settle is neither an easy nor altogether satisfactory task. There are two further

difficulties:

- i) While factor (e) is identified in CPR 36.17(5) as one of five “circumstances of the case” which must be “taken into account”, alongside factors which clearly have weight rather than all or nothing effect, in those cases in which the court has found that there has been no genuine attempt to settle, this has been regarded as a factor sufficient on its own to disapply the Part 36 regime altogether (*Yieldpoint Stable Value Fund LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1512 (Comm), *Sleaford Building Services Ltd v Isoplus Piping Systems Ltd* [2023] EWHC 1643 (TCC)).
  - ii) There is also authority which suggests that the court will ordinarily apply all the beneficial incidents of beating a Part 36 Offer or none of them: see *JLE v Warrington & Halton Hospitals NHS Foundation Trust* [2019] 1 WLR 6498, [23(iv)] and [32] approved by Phillips LJ in *Telefonica UK Ltd v Office of Communications* [2020] EWCA Civ 1374, [42]. At first blush, that might be thought curious because CPR 36.17 embraces consequences of two different kinds:
    - a) Provisions which address the fact that the procedural remedies for interest and costs will not ordinarily award full compensation. Indemnity costs merely award a higher proportion of the costs actually incurred but remain compensatory (*Kiam v MGN* [2002] 1 WLR 2810, [12]), and simple interest awards are invariably less than the costs of actual borrowing (commercial lenders requiring compound interest and the payment of associated fees).
    - b) Provisions which are not compensatory in nature: interest awards exceeding any reasonable assessment of the commercial cost of borrowing and the stipulated sum.
    - c) I note that in *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, [23], the Master of the Rolls observed that “it does not seem to me to be inevitable that the relevant “circumstances” will necessarily be identical for each of the four orders that the court will make, unless it would be unjust to do so.”
24. It is not necessary in this case to consider whether there might be scope for giving offers which are found not to constitute a genuine attempt to settle, but which nonetheless offer more than a de minimis discount from the value of the claim which succeeds at trial, some but not all of the Part 36 benefits. I am satisfied that the discounts offered in this case are sufficient, in relative, absolute and subject-matter terms, to constitute a genuine attempt to settle.

### **The appropriate costs order**

25. VTB Commodities submitted that I should make an order in its favour in respect of the costs of the Petraco Knowledge issue, which it estimated as 72% of the costs of the litigation.



26. In *Tokyo-Mitsubishi v Baskan Gida* [2010] 5 Costs LR 657, [19], Mr Justice Briggs summarised the approach to costs orders in cases where a party has succeeded in establishing its own or defeating the other side's case, but has deliberately pursued a case known to be false in the following terms:
- i) There is no general principle that where an otherwise successful party has put forward a dishonest case in relation to an issue in the litigation, the general rule that costs follow the event is thereby wholly displaced.
  - ii) The court's powers in relation to the putting forward of a dishonest case include (a) disallowance of that party's costs in advancing that case, (b) an order that he pay the other party's costs attributable to proving that dishonesty, and (c) the imposition of an additional penalty which, while it must be proportionate to the gravity of the misconduct, may in an appropriate case extend to a disallowance of the whole of the successful party's costs, or an order that he pay all or part of the unsuccessful party's costs.
  - iii) In framing an appropriate response to such misconduct, the trial judge must constantly bear in mind the effect of his order upon the process of detailed assessment which will follow, in the absence of agreement, in particular to avoid unintended double jeopardy.
27. In *Ultraframe (UK) Ltd v Fielding* [2006] EWCA Civ 1660 the Court of Appeal considered a costs appeal in a case in which the respondent had engaged in serious dishonesty in its conduct of the case, including adducing and relying upon documents they had forged, but was nonetheless the successful party. The trial judge, Mr Justice Lewison, made a reduction in the proportion of costs awarded in the respondent's favour, on account of that dishonesty. A key issue on the appeal was whether this order precluded the objection being taken to specific heads of costs on assessment that they had been incurred in falsely seeking to assert the genuineness of the forged documents and had therefore been unreasonably incurred. At [24], the Court recorded a concession by the respondents that "when it came to the assessment of costs, [they] would not be entitled to recover 'as reasonable' those costs incurred in seeking to establish as honest factors found by the judge to be dishonest", a concession the Court held to have been rightly made ([28]). At [33]-[34], Waller LJ stated:
- "[T]ake a case where dishonesty has been found as in the instant case. Would the fact that the paying party had not sought an order from the judge reflecting that misconduct deprive that party of referring on the assessment to the holding of the judge that a forgery had been committed when considering whether the costs incurred by the dishonest party were reasonable? I cannot think that it should. What then is the position if a paying party has a finding of dishonesty of the winning party in his favour, and raises that factor as a ground for a reduction of the costs at the end of the trial? Clearly there is no problem if the judge's order makes "no order as to costs", but if the judge orders a reduction by say 20% without more, what would be the natural construction of that order? My view is that the natural construction of such an order, unless the contrary is expressly stated, is that the party guilty of dishonesty should not be entitled to say on assessment, 'my costs

incurred in seeking to make a dishonest case can be taken as reasonably incurred because the judge has made a reduction'. If the dishonest party was entitled to succeed on such an argument, he will hardly suffer any penalty at all.

It seems to me that consideration of a party's conduct should normally take place both at the stage when the judge is considering what order for costs he should make, and then during assessment. But the court will want to ensure that dishonesty is penalised but that the party is not placed in double jeopardy. Ultimately, the question is one of the proper construction of the order made by the judge. Thus it will be important for the judge, who is asked to take dishonesty into account at the end of a trial when considering the order as to costs, to consider what is likely to occur on assessment. Where dishonest conduct is being reflected in an order made by the trial judge, it must be wise for the future for judges to make clear whether they are making the order on the basis that, on the assessment, the paying party will still be entitled to raise the dishonesty in arguing that costs incurred in supporting the particular dishonesty were unreasonably incurred. Judges may also want to consider whether to make an order under [what is now rule 44.11] and it would be wise to do that before considering precisely what order to make in relation to the costs of a trial generally.”

28. In *Rehill v Rider Holdings Ltd* [2014] EWCA Civ 42, a case in which the claimant had dishonestly inflated a genuine claim and failed to beat a Part 36 offer, the recorder had awarded the claimant its costs up to the effective date of the Part 36 offer, against the background of agreed terms of settlement incorporated into the court's order that “neither party shall be prevented from raising issues of conduct in any detailed assessment proceedings.” The Court of Appeal held that if the effect of the costs order had been that the claimant was entitled to recover the costs of advancing a dishonest case, this would have involved an error in principle ([23]), citing the passages in *Ultraframe* which I have set out above. At [25], the Court stated that the proper exercise of what is now CPR 44.11 would “result in the disallowing of any part of [the claimant's] costs incurred in advancing a dishonest case and might also result in his having to pay the bus company's costs of combating that dishonest case.” However, it held that the effect of the recorder's costs order was not to permit costs incurred in this way to be recovered, because, properly construed, it was open to the defendant to object to costs of that kind on assessment.
29. These cases would suggest that, to the extent that a party who has obtained a costs order has incurred cost in advancing a dishonest case (*Redhill*) or dishonestly supporting a valid case (*Ultraframe*) these costs would not be recoverable on an assessment because, by definition, they have been unreasonably incurred.
30. These cases give rise to the following question:
  - i) First, is it open to the Judge to reflect the costs incurred by the successful but dishonest party in a percentage reduction in the costs awarded, or must they be assessed to avoid any risk of recovery? There have been a number of cases signalling a pragmatic preference for orders of the former kind when an “issue-based” cost order is made: e.g. *Burchell v Bullard* [2005] EWCA Civ 358, [29]-[30] and *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Limited* [2008]

EWHC 2280(TCC), [72(iv)-(v)] and there is a “steer” in this direction in CPR 44.2(7). Provided that the proportion which the Judge deducts is intended, in a broad-brush way, to capture the costs incurred in advancing the dishonest case, I can see no objection to the issue being dealt with exclusively at the stage of the judge’s costs order, such that there would be no ability to raise the issue again on assessment.

- ii) Second, whether any principle that costs in support of a dishonest case are necessarily unreasonably incurred means that the court must refuse to apply CPR 36.17(4)(b) to the extent of any such costs, even though CPR 36.17(3) contemplates that the court has a discretion? In *Morgan v UPS* [2008] EWCA Civ 1476, [21], Longmore LJ upheld the judge’s order that a claimant who had dishonestly exaggerated personal injuries he had suffered, but had nonetheless “beaten” a payment into court was entitled to his costs. In *Fox v Foundation Piling* [2011] EWCA Civ 790, [48], the Court noted that “the fact that the claimant has deliberately exaggerated his claim may in certain instances not be a good reason for depriving him of part of his costs:”.
- iii) Third, there have also been a number of clear signals that costs awards do not simply reflect the costs incurred by reference to the success or failure of a party on each issue fought, but also, to a significant extent, who is the overall successful party in the litigation (e.g. *Fox v Foundation Piling* [2011] EWCA Civ 790, [62] referring to “a growing and unwelcome tendency by first instance courts ... to depart from the starting point set out in rule 44.3(2)(a) too far and too often”). However, the decision in *Ultraframe* suggests that “winner’s premium” in any costs orders will not extend to the recovery of any costs incurred in advancing a dishonest case, which the court should seek to exclude from any costs recovery.

31. These cases reflecting the different, and sometimes competing, concerns which costs orders have to address and I have not found the current state of the law on this issue entirely clear. On the facts of this case I have concluded that the appropriate costs order is to award Petraco a proportion of its costs from a date which is intended to reflect the date when work on the Petraco Knowledge issue is likely to have begun, that reduction being intended to address in full the additional costs incurred by Petraco in advancing the case, and also some credit to VTB Commodities for its costs of that issue. My decision not to award VTB Commodities all of its costs of the Petraco Knowledge Issue is intended to reflect the importance of the fact that Petraco was clearly the successful party in the litigation. The figure I have arrived at is 40%. By way of explanation of what is necessarily a broad-brush exercise:

- i) There were still factual issues on both the VTB Commodities and Petraco sides as to (i) the extent of VTB Commodities’ contractual entitlements from time-to-time; and (ii) whether Petraco acquired title to the Disputed Parcel and the Other Cargoes which would have required some disclosure, witness evidence and cross-examination.
- ii) There would still have been expert evidence on the quantum aspects of the claim.
- iii) The “fixed” costs of the trial would still have been incurred, together with the

costs of determining the disputed issues of Russian law, quantum and relating to the exercise of the court's discretion to enforce the Undertaking.

- iv) In arriving at the 40% figure, I have sought to address all of the costs incurred by Petraco in relation to the Petraco Knowledge case, such that it will not be open to VTB Commodities to seek a further reduction on assessment.
32. So far as the date in [31] is concerned, VTB Commodities advanced its case on the Petraco Knowledge Issue on 7 June 2019, but the proceedings were stayed on 10 October 2019. That stay was not lifted until 9 July 2021, with Petraco first advancing its case on the Petraco Knowledge issue on 12 November 2021 (albeit work would have begun before then and I accept Petraco did file witness statements in May 2019). Overall, I have concluded that the relevant date should be 10 July 2021.
33. Finally, an issue arises as to the recovery of costs prior to the effective date of the Part 36 Offer. I am not persuaded (as Petraco submit) that costs for this period should be awarded to it on an indemnity basis. VTB Commodities' conduct was not "out of the norm", but an understandable response to commercial difficulties which Petraco had played some part in creating.
34. In summary, Petraco is entitled to:
- i) 100% of its costs on a standard basis up to 6 November 2019.
  - ii) 100% of its costs on a standard basis for the period from 7 November 2019 to 9 July 2021; and
  - iii) 40% of its costs on an indemnity basis for the period from 10 July 2021.

### **The applicable interest rate**

35. In *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, [32]-[39], the Court of Appeal gave the following guidance as to the selection of an appropriate interest rate when giving effect to CPR 36.17(4):
- i) The specified rate of 10% was not a starting point but the maximum possible enhancement ([31]).
  - ii) The purpose of the provision was not entirely compensatory ([33]).
  - iii) The court has a discretion to include a non-compensatory element in the award but the level of interest awarded must be proportionate to the circumstances of the case which may include (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer.
36. In this case, interest has been running for a lengthy period – in part because of VTB

Commodities' failed attempt to join additional parties, and partly because of the impact of sanctions on VTB Commodities for which I accept that neither party was at fault. There can be no criticism of VTB Commodities' decision to pursue the claim, nor do I accept that there has been any particular level of disruption to Petraco beyond that inherent in any case where litigation continues instead of settling.

37. Against that background:

- i) I will award an uplift over US Prime of 3% on the interest payable on the damages I have awarded, subject to a maximum overall interest rate of 10% (the court usually assuming in the absence of contrary evidence that a party bringing a US dollar claim is sufficiently compensated by an award of interest at US Prime).
- ii) I will award an uplift over the Bank of England base rate of 4% on the interest payable on costs subject to a maximum overall interest rate of 10% (the court usually assuming in the absence of contrary evidence that a party bringing a sterling claim will borrow at base rate plus 1%).

### **The £75,000 additional amount**

38. I see no reason why it would be unjust to award Petraco this additional amount, which is a very small percentage of its recovery and of the concession offered by the Part 36 Offer.

### **PAYMENT ON ACCOUNT**

39. The approach the court should take when determining how much to award is that set out by Christopher Clarke J in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), [22]-23]:

“It is clear that the question, at any rate now, is what is a “*reasonable sum on account of costs*”. It may be that in any given case the only amount that it is reasonable to award is the irreducible minimum. I do not, however, accept that that means that “*irreducible minimum*” is the test. That would be to introduce a criterion (a) for which the rules do not provide’ (b) which is not the same as the criterion for which they do provide; and (c) which has potential drawbacks of its own, not least because it begs the question whether it means those costs which could not realistically be challenged as to item or amount or some more generous test. On one approach it admits of every objection to costs, which cannot be treated as fanciful.

What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.”

40. Petraco's costs total £5.849m, comprising £818,037.47 incurred prior to 6 November 2019 and £5,031,904.06 incurred afterwards. I am satisfied that:
- i) Petraco is likely to recover at least 60% of the £818,037.47 incurred prior to 6 November 2019 on a standard basis: which I round to £500,000.
  - ii) I am unable to apportion costs incurred after 6 November 2019 as between those incurred up to 9 July 2021 and those incurred afterwards, but I would assume that by far the greater proportion of these costs fall within the latter period. 40% of the total costs for that period is about £2m. As I have ordered assessment on an indemnity basis, I am satisfied that at least £1.4m will be recovered on assessment.
  - iii) As a result, I order an interim payment of £1.9m to be paid within 14 days.

### **THE OWNERSHIP OF THE SUMS HELD IN ESCROW**

41. Finally, Petraco seek a declaration that the amount held by PCB Byrne LLP to the order of the court (referred to as the Secured Sum) is immediately payable to Petraco and are not owned, held or controlled by a designated person within the meaning of Regulation 11 of the Russia (Sanctions) (EU Exit) Regulations 2019. I confirmed at end of hearing that I was willing to order immediate payment of the Secured Sum to Petraco and to make the declaration sought. I now set out my reasons for doing so.
42. The procedural background is as follows:
- i) On 17 May 2019, Sir William Blair made an order for sale of the Disputed Parcel and required VTB Commodities to pay US\$30m or its Euro or Sterling equivalent into court, to be held to the order of the court.
  - ii) On 28 May 2019, Mr Justice Robin Knowles varied that order by consent, to allow the US\$30m or equivalent to be paid into the client account of VTB Commodities' then solicitors to be held to the order of the court, as an alternative to payment into court. This was not intended to affect the substantive position – in each case the sum was held to the order of the court.
  - iii) On 28 September 2020, Mr Justice Jacobs varied that order by consent, to allow the US\$30m or equivalent to be paid into the client account of VTB Commodities' new solicitors, PCB, as an alternative to payment into court. Once again, this was not intended to affect the substantive position – in each case the sum was held to the order of the court.
43. As Mr Justice Hobhouse noted of a similar arrangement in *Halvanon Insurance Co Ltd v Central Reinsurance Corpn* [1988] 1 WLR 1122, 1128, in which money was paid into escrow to abide by the outcome of the action:

“I consider that the use of this phrase is intended to create a situation which is equivalent to that where the money has been paid into court. The difference is simply a ministerial difference for the convenience and benefit of the parties.”

44. In circumstances in which VTB Commodities acquired possession of the Disputed Parcel by order of the court, and sold it with the court's authority, it is far from clear whether VTB Commodities ever held an interest in the Secured Sum, as opposed to a possible claim upon it if it established its case at trial. I accept, however, that the beneficial interest must lie somewhere, and it might be said that the effect of the court order for sale was to enable VTB Commodities to pass good title to the Disputed Parcel and obtain title to the Secured Sum.
45. Assuming that the Secured Sum is viewed in the same way as a payment by a litigating party of its own money into court, the position is as follows:
- i) While the money was held to the order of the court, it could not be treated as an asset available to VTB Commodities' creditors in the event of insolvency (*Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 386 (Ch), [41]-[43] and *WA Sherratt Ltd v John Bromley Ltd* [1985] QB 1038).
  - ii) VTB Commodities would retain an equity of redemption over the funds which might, if the court so ordered, be paid out (*Crumpler v Candey Ltd* [2018] EWCA Civ 2256, [87]).
  - iii) However, Sir William Blair's order provided that the trial would determine "the rights and obligations" of VTB Commodities and Petraco in respect of the Secured Sum including VTB Commodities' right to seek repayment of those amounts. I have held that VTB Commodities had no rights or interests in the Secured Sum.
  - iv) The effect of that determination was to extinguish any right of redemption VTB Commodities may have had, and the order I made on 18 March 2024 for payment of the Secured Sum to Petraco would also have had that effect, to the extent any equity of redemption had not already been extinguished.
46. Regulation 11 of the Russia (Sanctions) (EU Exit) Regulations 2019 applies to "funds or economic resources owned, held or controlled by a designated person." Funds are "owned, held or controlled" by a designated person if that person has a "legal or equitable interest" in them. The effect of my findings is that VTB Commodities has no legal or equitable interest in the Secured Sum, and I so declare.

### **INTEREST UNDER THE JUDGMENTS ACT 1838**

47. It was not clear to me whether, if I made the declaration I have made, VTB Commodities maintained its argument that the court should delay the point from which interest should run under the Judgments Act 1838. To the extent, however, that the issue is raised in respect of any amounts payable in excess of the Secured Sum, I have seen no evidence to suggest that VTB Commodities is unable, by reason of the effect of sanctions, to make payment of those amounts, and I am not persuaded that any postponement of the date for the running of Judgments Act interest is appropriate.