



Neutral Citation Number: [2024] EWCA Civ 1330

Case No: CA-2023-002058

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT**

**Mrs Justice O'Farrell**  
**[2023] EWHC 1765 (TCC)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 05/11/2024

**Before:**

**LORD JUSTICE COULSON**  
**LORD JUSTICE PHILLIPS**  
and  
**LORD JUSTICE ZACAROLI**

-----  
**Between:**

**Topalsson GmbH**  
**- and -**  
**Rolls-Royce Motor Cars Limited**

**Appellant**

**Respondent**

-----  
**Matthew Lavy KC and Gideon Shirazi** (instructed by **Spring Law**) for the **Appellant**  
**Alex Charlton KC and Iain Munro** (instructed by **Clarkslegal Solicitors**) for the **Respondent**

Hearing Date: 9 Oct 2024  
-----

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 5 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

## **LORD JUSTICE COULSON:**

### **1 INTRODUCTION**

1. By a Services Agreement dated 11 October 2019 (“the Agreement”), the respondent (“RRMC”) engaged the appellant (“Topalsson”) to design, build, implement and maintain digital visualisation software, which was intended to allow RRMC’s prospective customers to configure and see realistic renderings of the vehicles that they were considering purchasing. There were delays to the project and disputes between the parties and, in April 2020, RRMC purported to terminate the Agreement.
2. Topalsson issued proceedings in the TCC against RRMC. RRMC defended the claims and counterclaimed for their losses arising out of the termination. There was a lengthy trial before O’Farrell J (“the judge”). In her judgment dated 12 July 2023 ([2023] EWHC 1765 (TCC)), the judge made a number of key findings against Topalsson, including that:
  - (a) They failed to comply with the revised timetable, known as the March Plan [260];
  - (b) They were primarily responsible for the delays [282];
  - (c) RRMC validly terminated Topalsson’s appointment as supplier under the Agreement [299].
3. The judge found that the sums due to RRMC by way of “termination damages” amounted to a total of €7,962,323 [365]. She reduced that by the amount she found due to Topalsson at termination of €794,759. That left a balance due to RRMC of €7,167,564. She then applied to that net figure the contractual cap of €5 million, and awarded RRMC damages in the sum of €5m. In addition, she awarded contractual interest to RRMC [370], subsequently calculated by reference to the dates when the sums had fallen due.
4. This appeal gives rise to two broad issues. The first issue concerns the interplay between the contractual cap and the set-off. It is Topalsson’s case that the cap applied separately to both RRMC’s liability to Topalsson, and to Topalsson’s liability to RRMC. This would have the effect of fixing Topalsson’s liability to RRMC at €5 million (because the sum found due to RRMC was in excess of the cap), whilst RRMC’s liability to Topalsson would be the €794,759 figure noted above, which was below the cap and therefore unchanged. Having applied the cap to each party’s liability to the other, the €794,759 otherwise due to Topalsson would fall to be deducted from the €5 million due to RRMC, leaving an overall sum due to RRMC of just over €4.2 million.
5. The second issue concerns the interplay between the cap and interest, it being Topalsson’s case now that both RRMC’s substantive claim, and the claim for interest on late payments, fell to be capped at €5 million. In addition, Topalsson want to argue that there can be no alternative claim for statutory interest. One effect of these arguments, if Topalsson was unsuccessful on Issue 1, would be that RRMC could recover no interest in respect of the admitted late payments by Topalsson<sup>1</sup>. This

---

<sup>1</sup> Indeed, Topalsson even suggested in their Supplementary Skeleton that RRMC had no entitlement to interest even if Topalsson was successful on Issue 1.

second issue gives rise to a number of interlocking points concerned with the pleading and presentation of the interest issues at trial.

6. Although the two issues that arise on this appeal affect the amount due from Topalsson to RRMC, they cannot reduce that sum below €4.2 million odd. Neither would success by Topalsson on those two issues make any difference to the interim payment on account of costs which the judge ordered in favour of RRMC in the sum of £1.246m. Notwithstanding that, no part of either sum has been paid.
7. Concurrently with their application for permission to appeal, Topalsson sought a stay in respect of both the judgment sum and the interim payment on account of costs. That was refused by Lord Justice Stuart-Smith. Topalsson renewed that application. I reconsidered it, and again refused to grant a stay. I am concerned that Topalsson continue to pursue this appeal, whilst at the same time they have failed to pay any part of the judgment sum, or any part of the interim payment on account of costs.
8. In addition, I note that, on 20 February 2024, Constable J ordered Topalsson (amongst other things) to serve a witness statement addressing the identity and source of their funding of this litigation. Topalsson failed to comply. On 20 May 2024, Constable J issued another order, accompanied with a penal notice, warning Topalsson that they may be in contempt of court if they did not serve the necessary witness statement. Topalsson have now served such a statement, although there is a dispute as to its adequacy.
9. In my judgment, this unsatisfactory background is directly relevant to the exercise of discretion that arises in respect of the second issue on appeal: see paragraph 56 below.

## **2 THE RELEVANT CLAUSES OF THE AGREEMENT**

10. For the purposes of this appeal, it is only necessary to have regard to four clauses of the Agreement: clause 13, entitled ‘Delivery, Acceptance and Remedies’; clause 14, entitled ‘Charges, Payments and Expenses’; clause 20, entitled ‘Liability’; and clause 26, concerned with termination.
11. The relevant parts of clause 13 are as follows:

“13 Delivery, Acceptance and Remedies

...

13.10 RRMC may reject any of the Deliverables which in its reasonable opinion do not conform with the Specification or Purchase Order or are otherwise incomplete, delivered late or damaged or do not comply with the terms of this Agreement Title to the Deliverables passes to RRMC on payment

13.11 If in the reasonable opinion of RRMC the Supplier fails to perform the Services in accordance with this Agreement or to deliver Deliverables by the applicable delivery dates or milestone dates or if RRMC rejects the Deliverables, without limitation to any other of its rights or remedies, RRMC shall have the following rights:

13.11.1 at RRMC’s request the Supplier shall at its cost and expense immediately rectify the nonconformance so that the relevant Services or Deliverables conform with the Specification or Purchase Order,

13.11.2 at RRMCs request the Supplier shall at its cost and expense promptly re-provide and redeliver the Deliverables in conformance with this Agreement;

13.11.3 to terminate this Agreement in whole or part with immediate effect by giving written notice to the Supplier;

13.11.4 to refuse to accept any subsequent performance of the Services or Deliverables which the Supplier attempts to make;

13.11.5 to perform the relevant Services itself or purchase substitute services from a third party and recover from the Supplier any loss and additional costs incurred in doing so;

13.11.6 to have all relevant Charges associated to the specific failure to supply the Deliverables or perform the Services previously paid by RRMC to the Supplier under this Agreement refunded by the Supplier;

13.11.7 at the request of RRMC the Supplier will promptly produce and deliver to RRMC a remediation plan setting out how and when the Supplier will effectively solve and address the non-conformance, default or failure and once the proposed remediation plan has been approved by RRMC the Supplier will undertake and perform the remediation plan to the satisfaction of RRMC at no additional cost to RRMC; and

13.11.8 to hold the Supplier accountable for any additional costs, loss or expenses incurred by RRMC.”

12. The relevant parts of clause 14 are as follows:

“14. Charges, Payments and Expenses

14.1 RRMC shall pay the Charges with such Charges being the only, full and fixed remuneration of the Supplier for the Services.

...

14.6 RRMC shall pay the Charges due in accordance with the Payment Terms specified in the Key Terms. Unless the Parties otherwise agree, the Supplier shall pay any sums due to RRMC within thirty (30) days from the date of receipt of a properly verifiable Supplier's invoice. Unless otherwise provided under this Agreement the Charges shall be payable only upon acceptance by RRMC of the Services or Deliverables to RRMCs satisfaction.

...

14.8 RRMC shall be entitled to set off any Charges due to the Supplier under this Agreement against any amount owed by the Supplier to RRMC under this Agreement (including any Service Credits) or owed by the Supplier to any BMW Group company under any other agreement between RRMC or a BMW Group company and the Supplier.

14.9 RRMC shall be entitled to withhold payment of any Charges in whole or In part without breaching this Agreement where it determines that there is a dispute regarding the Services or Deliverables or if any invoice is inaccurate. RRMC shall pay the balance of any invoice which is not disputed by RRMC Each Party may charge interest in respect of any disputed amount that is found to be payable.

14.10 Payment by RRMC shall not prevent or exclude any claims or rights which RRMC may have against the Supplier, shall not prevent RRMC from later questioning the amount paid and shall not constitute acceptance by RRMC of any Deliverables.

14.11 Each Party may charge simple interest at the rate of 4% per annum above the Bank of England base rate from time to time compounded at monthly intervals from the due date for such payment until the actual date of payment. No interest shall be payable under the circumstances of late payment resulting from invoices that are not properly raised or submitted by the Supplier.

14.12 Each Party agrees that any interest that is payable under Clause [14.11]<sup>2</sup> is a substantial remedy for late payment of any sum payable under this Agreement for the purposes of section 8(2) of the Late Payment of Commercial Debts (Interest) Act 1998 and shall be the sole remedy available to the Party entitled to interest for late payment whether in contract tort or restitution or otherwise.”

13. Clause 20 is in the following terms:

“20. Liability

Subject to clause [20.1]<sup>3</sup>, the total liability of either Party to the other under this Agreement shall be limited in aggregate for all claims no matter how arising to the amount of €5m (five million euros).

20.1 Nothing in this Agreement shall limit either Party's liability for:

20.1.1 death;

20.1.2 personal injury;

20.1.3 breach of confidentiality (clause 20); and

20.1.4 the breach of third party Intellectual Property Rights (clause 22.6).”

14. Clause 25 is concerned with termination. The judge concluded that RRMC had validly terminated the agreement under clause 13.11.3 and at common law, and there is no appeal against that finding. Clause 26 deals with the consequences of termination. The relevant parts of that clause are as follows:

“26 Consequences of Termination

26.1 Upon termination of this Agreement by RRMC for any reason:

26.1.1 RRMC's sole liability shall be to pay the Supplier the proportion of the Charges applicable to the Services carried out prior to termination and any outstanding unavoidable commitments necessarily and solely incurred in properly performing this Agreement prior to termination that are not reflected in such Charges;

26.1.2 RRMC shall not pay for any commitments that the Supplier entered into after the date of notice of termination or those that the Supplier is able to mitigate and RRMC shall not be obliged to pay any Charges for Services which at the date of termination RRMC is entitled to reject or has already rejected. RRMC shall only pay for commitments that RRMC has validated to its satisfaction;

26.1.3 RRMC's total liability under Clause 25,1.1 above shall not in any circumstances exceed the Charges that would have been payable by RRMC to complete the Services If this Agreement had not been terminated; and 26.1.4

---

<sup>2</sup> The Agreement is riddled with cross-referencing errors of the most basic kind. It is common ground that this is the clause that should have been referred to.

<sup>3</sup> See Footnote 1.

RRMC shall be entitled to terminate any Purchase Order with effect from the date of service of notice of termination of this Agreement,

26.2 Upon termination of this Agreement by RRMC under Clause 24.3.1, Clause 24.4.3, Clause 24.4.4 or Clause 24.4.7, RRMC shall without limitation to any other of its rights, have the right to recover from the Supplier any additional cost of having the Services completed by a third party.

...

26.5 Any termination of this Agreement howsoever occasioned, shall not affect any accrued rights or liabilities of either Party nor shall it affect the coming into force or the continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination.”

### **3 ISSUE ONE: THE INTERPLAY BETWEEN THE CAP AND THE SET-OFF**

#### **3.1 The Judgment**

15. Having set out the relevant contractual terms, the judge addressed the interplay between the cap and set-off in the following way:

“329. The Agreement contains a complete scheme for allocating liabilities and entitlements as between Topalsson and RRMC on termination. Thus, the express terms of the Agreement require the parties to carry out the following accounting exercise:

- i) calculation of the sums due to Topalsson on termination;
- ii) calculation of the sums due to RRMC on termination;
- iii) calculation of the net sum due to Topalsson or RRMC;
- iv) application of the cap on liability.

330. Topalsson seeks to argue that the set-off exercise to establish the net sum due should be carried out after the application of the cap on liability to the sums calculated as due to either party. In this case the effect would be that if RRMC established an entitlement to damages in excess of the cap of €5,000,000, that sum could then be reduced by any sums found to be due to Topalsson. I reject that argument because it is contrary to the express provisions in the Agreement.

331. Reliance is placed on the rationale explained in *The Tojo Maru (No.1)* [1969] 2 Lloyd’s Rep 193 per Denning MR at 203:

‘Suppose a laundry has a clause limiting their liability to 10s. for any article that was damaged or lost, and the customer agrees to it ... The laundry washes a lot of articles in one week at a charge of £2, but during the next week loses a shirt worth £3. It seems to me that the laundry ought to be paid £2 for the work done, and to be able to limit its liability for the shirt to 10s.. Equity does not in that case require a set-off of the £3 against the £2, but only of the 10s. against the £2. Were it otherwise, the clause could be rendered useless by an adroit customer. The customer would only have to let his laundry bill fall into arrear, and he could get round the clause. I do not like these limitation clauses, but,

if they are truly agreed between the parties-or provided by statute-we ought to give effect to them.’

332. In that case, the limitation on liability was expressed as applicable to any article that was damaged or lost. Therefore the cap was required to be applied separately to each article damaged or lost. In contrast, under the Agreement, the cap on liability is applicable to the total liability of either party to the other in aggregate for all claims no matter how arising. The total liability of either party to the other requires the application of the above provisions to ascertain the balance of sums due or payable. On a proper construction of the express terms agreed between the parties, under the Agreement the accounting exercise to determine the net sum due to or from each party must be carried out before the cap is applied.”

### **3.2 The Submissions**

16. It is Topalsson’s case that the judge’s calculation of the net loss to RRMC after the set off of its own claim, with the liability cap only being applied at that stage, was wrong. They maintain that the liability cap should have instead been applied separately to each party’s liability to the other, with any set-off then applying after application of the cap. On the facts of this case, that would reduce the amount recoverable by RRMC by just under €800,000. Mr Lavy KC made three specific submissions in support of that position.
17. First, he relied on the wording in clause 20 and its reference to the “total liability” of either party to the other, not the net liability once all claims and cross-claims have been taken into account. He said that this was consistent with clause 13.11 (pursuant to which the judge found that Topalsson were liable to RRMC for the cost consequences of the termination); and clause 26.1 which identified RRMC’s “sole liability” to Topalsson on termination to pay the proportion of the charges applicable to the services carried out prior to termination. He argued that the set-off provisions at clause 14.8 do not affect that construction, and that there is nothing elsewhere in the contractual language to support the judge’s conclusion that the contractual scheme was intended to reflect a ‘net loss’ approach.
18. Secondly, Mr Lavy submitted that this interpretation reflected commercial common sense. He argued that RRMC should not be in a better position as a result of its failure to pay the Charges otherwise due under the Agreement because the parties had agreed a cap of €5 million, not €5 million plus whatever amount happened to be owed by RRMC to Topalsson at the time that a set-off was applied. He also maintained that the judge’s interpretation allowed RRMC to take advantage of its own wrong by withholding payments and then, on termination, recovering the €5 million and keeping payments that it should otherwise have paid.
19. Thirdly, Mr Lavy submitted that Topalsson’s interpretation reflected the authorities, and in particular the judgement of Lord Denning MR in *The Tojo Maru (No.2)*, as set out above. Although the judge sought to distinguish this authority because the liability cap in Lord Denning’s example was expressed as applicable on a “per article” basis, whilst the liability cap under the Agreement was on a total liability basis, Mr Lavy submitted that that was not a fair distinction. In *The Tojo Maru* the court was considering a single aggregate cap on the salvors’ liability for all relevant losses. It

was the Court of Appeal that identified the “per article” cap as an example, so if it was an inapplicable example, it would have been equally inapplicable to *The Tojo Maru* case itself. Instead, Mr Lavy argued that Lord Denning’s logic applied precisely to the facts here: if Topalsson’s liability to RRMC were to be set-off prior to application of the cap, the effect would be not to limit Topalsson’s liability to €5 million, but to limit it to €5 million, plus whatever sums were otherwise due to Topalsson which RRMC had chosen to withhold.

20. The primary point taken by Mr Charlton KC in response to the appeal was, by reference to the words in clause 20, that “total liability” was (as he put it) the “aggregate for all claims, no matter how arising”. He submitted that those words were both wide enough and apt to include claims, cross-claims and counterclaims. He said that it therefore followed that the context in which “the total liability of either party to the other” was to be ascertained was one that included all claims and cross-claims, such that the end point was to establish who owes what to whom. Any rights of set-off were part and parcel of the process of establishing “total liability”. It was only once the set-off process had been completed that the cap was to be applied.
21. Secondly, Mr Charlton argued that the construction given to the clauses by the judge was consistent with the common law approach to the assessment of damages (i.e. a ‘net loss’ basis): see Lord Leggatt in *Stanford International Bank Limited v HSBC Bank PLC* [2022] UK SC 34; [2023] AC 761 at [55]. He argued that Topalsson’s construction represented a significant departure from the norms of commerce, and relied on *Triple Point Technology v PTT Public Co* [2021] UK SC 29; [2021] AC 1148 at [108] for the proposition that, in the absence of clear words, the court will assume that the parties did not intend the contract to derogate from their normal rights and obligations. He also distinguished *The Tojo Maru* in the same way that the judge did.

### 3.3 Analysis and Conclusion

22. The judge’s interpretation of clause 20 (set out at paragraph 15 above) is typically crisp and neat. It envisages this sequence: i) a consideration of Topalsson’s liability to RRMC; ii) a consideration of RRMC’s liability to Topalsson; iii) the netting off of one liability against the other; and iv) then – and only then – the application of the cap. But is that what the words of clause 20 provide for? For the reasons set out below, I do not think they do.
23. There is nothing in clause 20 which suggests that the cap only applies once the net financial position between the two parties has been calculated. If that had been the intention of the parties, it would have been very easy for the clause to say that, and to make clear that the cap only applied to the *net* liability between the parties. But instead the words refer to “the *total* liability of either party to the other” (my emphasis). I agree with Mr Lavy that those words suggest a totting up, not a netting off. They are contrary to the idea that the net position has to be ascertained before the cap is applied.
24. Moreover, I consider that those same words positively indicate that the cap must be applied to Topalsson’s liability to RRMC *and* to RRMC’s liability to Topalsson. That is the meaning I would give to the words “the total liability of *either party to the other...*” (my emphasis). To me, those words assume the calculation of two separate



liabilities, either party to the other, with each liability being the subject of the cap. In this way, the cap would be applied to Topalsson's liability to RRMC of €7 million odd and would reduce it to €5 million. It would be applied separately to RRMC's liability to Topalsson, but that would have no financial effect because that liability was much less than €5 million. The two liability figures would then be netted off at that stage, resulting in the sum due to RRMC of €4.2 million odd.

25. I am fortified in this construction by my conclusions, noted below, that it accords both with commercial common sense and the only existing authority in point.
26. Clearly, the cap was intended to apply either at the end of the Agreement or on an earlier termination. But it must apply to the financial position across the Agreement as a whole. So, to take a simple example, assume that Topalsson had previously incurred liabilities to RRMC in the total sum of €2 million, and RRMC had exercised their right to set off against that liability €2 million in Charges otherwise due to Topalsson. Let us also assume that, on termination, RRMC's claim against Topalsson for additional costs and expenses was €5.5 million.
27. The cap in clause 20 would apply to RRMC's claim and limit it to €5 million, but on their construction, their earlier set-off would not be caught by the cap. On that basis, therefore, RRMC would have recovered €7 million, being their termination claim capped at €5 million, together with the €2 million that they had previously set-off against the Charges which were otherwise due to Topalsson. In this way, RRMC would have avoided the effect of the €5 million cap.
28. In my judgment, that is the mischief that Lord Denning MR had in mind in *The Tojo Maru*. I accept of course that his laundry illustration was *obiter*. I also accept that his illustration talked about a 'per article' claim. But it is clear that that latter point can make no difference to the analysis: if it did, Lord Denning would not have been using it as an illustration of the point in *The Tojo Maru*. That is because the court there was considering an aggregate cap on the salvors' liability for all relevant losses suffered by the ship-owners.
29. At pages 67F-68D of the report, Lord Denning assumed that the salvors were entitled to £125,000 for their work, but were potentially liable in damages to the ship owners for £331,767 because of the damage to the ship caused during their salvage operation. There was a statutory cap on those damages of £10,725. The question was when the cap applied. The shipowners argued that there should be a set-off before the cap was applied. That would have had the effect of extinguishing the salvors' claim in full because the shipowners' claim over-topped it. The Court of Appeal rejected that submission, and used the laundry example, noted above, to illustrate why the cap had to be applied *before* the set-off. On the correct sequence, based on these assumptions, the salvors would have recovered about £114,000, being the costs of the salvage operation, less the damages due to the shipowners, which were capped at £10,725.
30. In my judgment, the laundry illustration was designed to demonstrate that, if the claim for set-off was taken into account before the cap was applied, the result could be manipulated, so that the party with a right to set-off can avoid the consequences of the cap altogether. Although it was plainly at some distance from the principal decision in the case, that is what this part of the judgment in *The Tojo Maru* was all about: not readily allowing the cap to be circumvented by the happenstance of set-off.

31. That basic point arose in other examples explored during the hearing in this appeal. My Lord, Lord Justice Phillips, pointed out that, on RRMC's construction, they could withhold the entirety of the contract sum (€9million) by way of set-off, and then also claim damages, to the tune of the cap of €5 million. Although Mr Charlton argued that that was unrealistic (and of course I accept that it is most unlikely that Topalsson would have carried out all of this work for no remuneration), it illustrates the central flaw in RRMC's construction. If you take into account the set-off before applying the cap, the cap can become potentially meaningless. Similarly, it could fairly be said that, on RRMC's construction, the cap of €5 million would be over and above the sums owed to Topalsson under clause 26.1.1. Mr Charlton said that that was what the words of the Agreement said, but for the reasons I have given, I disagree.
32. The parties were agreed at the hearing that the Charges due to Topalsson under the Agreement were not the subject of the cap. That must be right: otherwise Topalsson could have done €9 million worth of work and only recovered €5 million. But I do not consider that that affects the analysis. There is no unfairness in such a conclusion. Moreover, clause 14.8 refers to the set-off being "against any amount owed by the Supplier to RRMC under this Agreement" and it seems to me that an amount owed by Topalsson under the Agreement must be subject to the cap. I reject the suggestion that because the Charges were not the subject of the cap, any set-off under the Agreement against those Charges was similarly uncapped. I do accept that the set-off in respect of amounts owed by Topalsson to "any BMW Group company under any other agreement" would not be capped, but that is because such liability would not arise under this Agreement (but under "any other agreement"), and would therefore be outside the words of the cap in clause 20. That too has no effect on Issue 1 in this appeal.
33. As noted above, the other authority cited to us on Issue 1 was *Triple Point*, because Mr Charlton relied on Lord Leggett's restatement of the position that parties do not give up their common law entitlement (in this case 'the net loss' approach) without clear words. But I do not consider that that principle is in play in respect of Issue 1. All that matters for Issue 1 is the correct sequencing of the set-off and the cap, and that is a pure matter of construction. Moreover, it is an undeniable fact that a contractual cap is, at least potentially, a denial of both parties' common law rights. It is a commercial limit designed to promote certainty. It is therefore a blunt instrument which may ride roughshod over what might otherwise have been obvious rights and obligations.
34. In their further supplementary skeleton argument dated 1 October 2024, RRMC introduced the possibility that Topalsson's construction ran the risk of double counting, because the sums payable by RRMC to Topalsson for services carried out before termination and not otherwise paid for would fall to be deducted twice: i) once in the calculation of RRMC's loss of bargain damages, and ii) again in the 'proportion of the Charges' found payable to Topalsson under clause 26.1, which are then set-off against the €5 million payable to RRMC. In my view, for the reasons briefly outlined below, there is no double counting; insofar as it was suggested that the calculation actually carried out by the judge involved double counting if the cap was applied before set-off, that is far from being an obvious consequence of Topalsson's construction, and would involve unpicking elements of the judge's judgment which

are not the subject of any appeal; and on the figures, the point would appear to be academic.

35. I do not agree that there is double counting. At stage i) above, any deduction is only of the Charges payable to Topalsson which RRMC have been relieved from paying as a result of the termination. RRMC was not relieved of the Charges payable under clause 26.1 (stage ii)). So the 'proportion of the Charges' due have not been taken into account at stage i) but are taken into account at stage ii). There is therefore no double-counting.
36. Moreover, the calculation of quantum, which neither side criticise, was necessarily a broad-brush exercise (see in particular [354] – [356] of the judgment). Any exploration of RRMC's double-counting argument may involve a consideration of, for example, whether RRMC received anything of value for the work done by Topalsson in the run-up to termination, and that is not something which was explored in the judgment (because this was never an issue at trial). Indeed, there is force in Mr Lavy's submission that, in truth, what RRMC are seeking to do with their double-counting argument is to unpick parts of the judge's calculation of quantum, for which they have no permission.
37. In any event, the point is of academic interest only because, even if – contrary to my view - the €800,000 was included twice and should not have been, that would simply mean that Topalsson's liability to RRMC would have been €7.8 million rather than €7 million odd, and it is accepted that the cap of €5 million applied, whichever is the right figure.
38. Accordingly, I do not consider that RRMC have established any double-counting, either in theory or in fact.
39. Finally, Mr Charlton argued that, because of the way in which clause 26.1.1 worked, if Topalsson's construction of the cap was correct, RRMC would never recover the full €5 million because there would always be an amount due to Topalsson under that clause. However, there are two answers to that. The first is that such a result is the inevitable function of when and how much RRMC had paid Topalsson prior to termination. So if RRMC had paid all that was due and no work had begun on any new Delivery Packages, nothing would be due to Topalsson under clause 26.1.1 and there would be no deduction. The second is a repeat of the point I made earlier: contractual caps of this kind are a relatively blunt instrument and will often cut across more detailed provisions (such as clause 26.1.1). Again, therefore, I do not consider that this point makes any difference to the analysis. The same is true of Mr Charlton's reference in his oral submissions to clause 26.2, which was not the basis of the claim at trial, and therefore not a route ever considered by the judge.
40. For all those reasons therefore, I would allow the appeal on Issue 1. Although it is plain that this issue was ventilated in far greater detail on appeal than it ever was before the judge, I conclude that her construction of clause 20 was wrong, and that both the liability of RRMC to Topalsson and Topalsson's liability to RRMC were each separately the subject of the €5 million cap. This conclusion arises from the words actually used; it is the only result that accords with commercial common sense; and it is in accordance with the only authority directly in point. It would mean that the sum due to RRMC would be reduced to €4.2 million.

## **4 ISSUE TWO: THE INTERPLAY BETWEEN THE CAP AND INTEREST: THE PLEADING/PRESENTATION POINTS**

### **4.1 The Issue and its Genesis**

41. Topalsson now say that RRMC’s entitlement to interest also fell within the cap. They did not plead that point. In an 18-day trial, the only passing reference to the topic was at paragraph 200 of their written closing submissions (apparently provided one working day before the final oral hearing) when they asserted - in a single sentence - that it was “sufficient to note” that RRMC’s loss and damage “including any contractual interest that is held to be due” could not exceed €5 million. It was entirely unsurprising that the judge did not pick up on this new and unpleaded point.
42. Topalsson raised the issue expressly for the first time at the consequential hearing on 27 July 2023. They sought to invite the judge to exercise what is often called the *Barrell* jurisdiction to alter the judgment, and deal with the cap argument, before it was perfected. The judge declined to do so because the point had not been pleaded<sup>4</sup>.
43. It was not until 23 August 2024 that Topalsson sought permission to re-re-amend the Reply and Defence to Counterclaim to raise the cap argument in relation to interest. Up until then RRMC’s interest claim had been the subject of a bare denial at paragraph 138 of the pleading. The proposed re-re-amendment to paragraph 138 reads as follows:

“Paragraph 136.7 above is repeated. Further interest cannot be awarded under s.35A of the Senior Courts Act 1981 because there is contractual right to interest.”

Paragraph 136.7 was where Topalsson pleaded the €5 million cap as a defence to RRMC’s counterclaim for loss and damage.

44. As can be seen, the proposed re-re-amendment is not limited to the argument that the cap covers any interest claim for late payment. Topalsson also seek to argue that the court has no jurisdiction to award RRMC interest under s.35A of the Senior Courts Act 1981. This is because, by reference to s.35A(4), it is argued that the sum due from Topalsson to RRMC was a contractual debt, and therefore RRMC must be held to their contractual remedy for late payment only.
45. In this way, the re-re-amendment for which Topalsson now seek permission could deprive RRMC of any financial remedy for interest of any kind prior to judgment. Perhaps unsurprisingly, RRMC oppose the application to amend.

### **4.2 The Law on Amendments in the Court of Appeal**

46. There are two modern authorities on the approach to be adopted by this court to late applications to amend. In *Singh v Dass* [2019] EWCA Civ 360, Haddon-Cave LJ said:

---

<sup>4</sup> In the original Grounds of Appeal, Topalsson suggested that there had been a procedural irregularity because the judge had not properly explained why she rejected the argument that interest was caught by the cap. Mr Lavy did not pursue this argument orally and he was wise not to do so. The judge explained that the point had not been pleaded so it did not fall to be decided. That was a complete explanation.

“15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).

18. Third, even where the point might be considered a ‘pure point of law’, the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] R.T.R. 22 at [29])”

47. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337; [2019] 4WLR 146, Snowden J (as he then was) considered *Singh* and the earlier authorities and went on to say:

“**26** These authorities show that there is no general rule that a case needs to be “exceptional” before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

**27** At one end of the spectrum are cases such as the *Jones* case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in the *Jones* case (at para 38), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at para 52), there might none the less be exceptional cases in which the appeal court could properly exercise its discretion to do so.

**28** At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. *Preedy v Dunne* [2016] EWCA Civ 805 at [43]–[46]. In such a case, it is far more likely that the

appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irreparable prejudice in the meantime.”

### 4.3 Analysis and Conclusion

48. Taking first the point that the €5 million cap applied to RRMC’s interest claim, I am in no doubt that this point needed to be pleaded. It is a positive defence by Topalsson to the claim for interest, which had itself been separately pleaded by RRMC. In my judgment, it is not good enough to say, as Mr Lavy does, that interest had been denied; that the cap point had been relied on in the defence to the damages claim; and that, therefore, in some way, the point was in issue before the judge. As this court said in *Soteria Insurance Ltd v IBM United Kingdom Ltd* [2022] EWCA Civ 440 at [167]:

“Cases like this are complicated and difficult to try. Judges are entitled to proper assistance from the extensive legal teams mustered for trial to identify what issues they are being asked to decide. The conventional place for those issues to be identified is the pleadings. The pleadings shape the subsequent evidence and provide the agenda for the trial.”

49. Furthermore, the proposed re-re-amendment to rely on the cap as a defence to the interest claim is inconsistent with the way in which Topalsson put their own case before the judge. Their Particulars of Claim made clear that Topalsson were seeking sums due and damages, and interest was then sought on top of those sums (paragraphs 33 and 34) without any regard to the cap of €5 million. It was certainly not part of Topalsson’s case at the trial that their own interest claim was caught by the cap; in their closing submissions, they suggested that contractual interest did not run on the damage’s claims, but that statutory interest could be recovered.

50. For these reasons, therefore, I consider that Topalsson require permission from this court to re-re-amend to raise the argument that interest was caught by the clause 20 cap. This first element of the application may, on its own, just about pass the test in *Singh and Notting Hill Finance*, because it is a point of law and no real prejudice has been identified, but I remain concerned about its blatant contradiction of Topalsson’s own pleaded claim and presentation at trial. Considerable caution is required before allowing a party on appeal to run a wholly different case to the one they ran at trial. I am also not persuaded that costs is an adequate remedy, given that Topalsson have not paid any part of the judgment sum so far, let alone the interim payment on account of costs.

51. In any event, this is only one aspect of the proposed amendment. By the second element of the amendment, what Topalsson now seek to do is to argue that the sum found due by the judge was a debt and that, on these facts, s.35A of the Senior Courts Act 1981 is not available. It is in this way that Topalsson hope to stymie any interest claim whatsoever for late payment on the part of RRMC. That is why the proposed amendment has to be looked at in the round.

52. In my view, there are a myriad difficulties with this second element of the proposed amendment. It seems to me to fall foul of the applicable test in *Singh and Notting Hill*.

53. First, it is again contrary to Topalsson's own pleaded claim, because they sought interest under the contract or, in the alternative, under s.35A of the Senior Courts Act. In other words, Topalsson are again seeking now to run an argument which is directly contrary to their own pleaded case.
54. But it does not end there. The argument turns on the submission that the sum which the judge found due to RRMC was a debt under the Agreement. But that submission is contrary to the terms of her judgment. At [324], the judge correctly noted that RRMC claimed damages for repudiatory breach or termination claims under the Agreement. At [325]-[328] the judge deals with the net loss principle (which would of course have been irrelevant if she was not awarding damages). Having then dealt with quantum, the judge said at [365] that the net sum due to RRMC as "termination damages" was €7,167,564 before the application of the cap.
55. In this way, any exploration of Topalsson's new argument that RRMC are not entitled in law to the statutory interest which they always claimed, would involve, not only a *volte face* on the part of Topalsson, but also an assertion that the sums found due to RRMC were due as a debt, not damages, which is directly contrary to the terms of the judge's judgment. There is no application to appeal her findings. It would be contrary to the overriding objective to allow Topalsson to turn the case on interest on its head at this late stage.
56. For these reasons, I would not allow the late amendment proposed by Topalsson as a matter of principle. Still further, since allowing such a late amendment is a matter of discretion for this court, I would not exercise that discretion in favour of Topalsson in any event. That is for the reasons foreshadowed at paragraphs 6-9 above. Topalsson are in breach of numerous court orders. They are not a party who should be granted any further indulgence by this court. Again, costs would not be an adequate remedy for any late amendment because there is nothing to suggest that Topalsson will pay them.
57. If my Lords agree with that, it is unnecessary to go on and consider Issue 2 on this appeal on its merits, the new arguments raised by Topalsson in respect of interest not being properly before this court. However, in case I am wrong about that, I go on to consider the Issue 2 on its merits.

## **5 THE INTERPLAY BETWEEN THE CAP AND INTEREST: CONSTRUCTION**

### **5.1 The Arguments**

58. Mr Lavy relied on two matters in support of his case that, as a matter of construction, the claim for contractual interest fell within the cap. First, he said that interest was a debt "under this Agreement" and thereby fell within the definition of the cap, which was a party's "total liability...under this agreement". He said that this was consistent with the distinction in *Sempra Metals v IRC* [2007] UKHL 34 between non-statutory interest, which is claimed as a debt or damages, and statutory interest, which is a debt on damages.
59. Secondly, he argued that there were a number of related cases which all pointed the same way. So he relied on *Fiona Trust v Privalov* [2007] UKHL 40, where the words "under this charter" were deemed to include associated claims in tort, and the decision

in *Triple Point*, to the effect that liquidated damages fell within a contractual cap in respect of the contractor's total liability.

60. Furthermore, Mr Lavy relied on the decision of Steel J in *Markerstudy Insurance v Endsleigh Insurance* [2010] EWHC 281 (Comm) who held that contractual interest fell within the liability cap's reference to "total liability in contract". Steel J does not provide any explanation as to why he had reached that conclusion.
61. In response, Mr Charlton rejected the suggestion that interest fell within the cap. First he said that interest was an ancillary remedy: that the reference in the cap to "liability...under this agreement" covered the financial consequences of breach or termination, whilst contractual interest was a secondary entitlement which only arose where there was a pre-existing failure to pay timeously. Accordingly contractual interest could not be a self-standing liability under the contract.
62. Mr Charlton distinguished both *Fiona* and *Triple Point* which, he said, were concerned with different kinds of provisions: *Fiona Trust* being concerned with an arbitration clause, and *Triple Point* concerned with principal liabilities, including damages for delay. He also distinguished *Markerstudy* although, if necessary, he also maintained it was wrongly decided. He pointed to a more recent decision of Mr Roger Ter Haar KC (sitting as a Deputy High Court Judge) in *Irwell Riverside Development Ltd v Arcadis Consulting (UK) Ltd* [2024] EWHC 1857 (TCC) in which the judge concluded that what was referred to as "court interest" fell outside the liability caught by the contractual cap. In addition, it was Mr Charlton's case that treating interest as being outside the cap better accorded with business common sense, because a right to interest was not only compensation for the loss of money, but was also an inducement to pay. He pointed to the clear words of clause 14.12 and the express agreement that the contractual interest was the sole remedy for late payment.

## 5.2 Analysis and Conclusion

63. I deal first with the contention that interest for late payment was caught by the cap in clause 20.
64. First, I should say that I do not consider that there are any authorities which are of direct assistance. They all turn on the particular clauses of the contract in question. They can all be distinguished from the clauses here. Moreover, there is no authority in which the point has been analysed in any detail: the judgments in both *Markerstudy* and *Irwell* announce their (different) results without any explanation.
65. Secondly, I can see that, just looking at clause 20 on its own, there is an argument that a liability to pay interest on late payments may fall within the word 'liability' in the cap. On the other hand, there is force in the counterpoint that the cap was designed to promote certainty, and if interest for late payment was included within the cap, then the potential effect of any late payment would be uncertain, because it would never be clear for how long the monies would remain unpaid, and therefore what interest may become due, and when or if the limit of the cap may be reached.
66. Thirdly - and this is much the most important point for present purposes - the cap cannot be considered in isolation. In particular, it needs to be looked at in the context of clauses 14.11 and 14.12, set out at paragraph 12 above. Those clauses make plain



that the parties were agreed that interest payable under clause 14.11 was “a substantial remedy for late payment” and that it was “the sole remedy” available.

67. In my judgment, it would be contrary to the express agreement embodied in those two clauses if interest on late payment was said to be within the cap at clause 20. It would mean that the innocent party (in this case RRMC) was denied the “sole and substantial remedy” for late payment that the parties had expressly agreed. When read together, I consider that the express intention and agreement of the parties, as recorded in clauses 14.11 and 14.12, was that any entitlement to that remedy was outside the cap identified in clause 20. I am confirmed in that view by the fact that both parties pleaded their claims in this case on that very assumption. In addition, the express agreement as to interest on late payment in those two clauses provides a complete answer to Mr Lavy’s submission that there was no difference between Topalsson’s liability for interest on late payments, and any other liability caught by the cap. It was a different liability because it was the subject of a separate and clear agreement as to when that liability accrued and how it would be quantified.
68. Fourthly, it seems to me that a provision that interest for late payment was included within the cap would require clear words, because otherwise it would be an obvious denial of RRMC’s common law rights (see *Triple Point* and [393] and [395] of *Irwell*). Of course, on my analysis, the clear words of clauses 14.11 and 14.12 point inexorably in the other direction.
69. Fifthly, because such a construction would be a positive disincentive on Topalsson to pay the sums due when they fell due, it would be contrary to commercial common sense. It would provide Topalsson with an unjustified windfall, of the sort deprecated by Colman J in *The Athenian Harmony (No 2)* [1998] 2 Lloyds Rep 425 at 427. It would simply encourage non-payment of sums due and benefit the wrong-doer.
70. For all those reasons, therefore, I conclude that Mr Charlton was right to say that interest on late payment fell outside the cap in clause 20. That means that I would refuse the second ground of appeal against the judge’s conclusion that contractual interest is due and is not capped.
71. Although I should deal briefly with Topalsson’s argument that statutory interest would not apply in these circumstances, it is academic in the circumstances. Moreover, the submissions about s.35A(4) were dealt with relatively briefly (although with considerable skill) by Mr Shirazi on behalf of Topalsson, and even more briefly by Mr Charlton in reply, so I am not persuaded that we have been provided with all of the necessary material in order to make a fully reasoned decision on this new point.
72. I do not accept the proposition that the sums claimed by RRMC and awarded by the judge are properly categorised as a contractual debt. They were not; she called them “termination damages”. The simple truth is that the sum identified by the judge can be categorised either as a sum due under the provisions of the Agreement, or as damages for repudiatory breach. That is also the answer to Topalsson’s claim that in some way the judge found that they were liable to indemnify RRMC: indeed, at no stage did the judge even use the word ‘indemnity’. Accordingly, Topalsson’s s.35A(4) point – which relies on the characterisation of the sum due as a debt and/or an indemnity only – does not get off the ground.

73. There is no authority for the proposition that, if a sum found due can be categorised either as a debt or as damages, s.35A interest does not apply. Section 35A(1) gives the court wide powers in respect of interest. Section 35A(4) provides:

“Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs.”

The provision is designed to prevent a party who has an entitlement to contractual interest on a debt from seeking more advantageous rates or other terms under s.35A. A party is to be held to its contract. Of course, on one view, that is precisely what RRMC are seeking to do in this case.

74. The authorities to which we were taken, including those usefully summarised by Foxton J in *Rolls-Royce Holdings PLC v Goodrich Corporation & Ors* [2023] EWHC 2002 (Comm) involved claims for debt, or as Foxton J put it at [20v], “as near a debt claim as makes no difference”. For the reasons that I have given, that is not this case. The decision of Warren J in *Codemasters Software Co Ltd v Automobile Club De L’Ouest (No 2)* [2009] EWHC 3194 (Ch) is even less in point, being concerned with whether questions of mitigation could arise under contracts of indemnity.
75. There is no authority for the proposition that a claim which is properly categorizable as a claim for damages, as this one plainly is, would not attract statutory interest. Neither is there any authority for the proposition that a party in the position of RRMC could be denied interest completely because the sum due was a debt, and the contract allowed the contract-breaker (Topalsson) to refuse to make the payments due without any liability for interest whatsoever (once the cap was reached).

## **6 CONCLUSIONS**

76. If my Lords agree, I would allow the appeal on Issue 1. I would dismiss the appeal on Issue 2.

### **LORD JUSTICE PHILLIPS**

77. I agree.

### **LORD JUSTICE ZACAROLI**

78. I also agree.