



Neutral Citation Number: [2019] EWHC 476 (Comm)

Case No: CL-2017-000499

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

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

Date: 28 February 2019

**Before :**

**THE HONOURABLE MR JUSTICE BRYAN**

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**Between :**

**CARGILL INTERNATIONAL TRADING PTE  
LTD**

**Claimant**

**- and -**

**UTTAM GALVA STEELS LIMITED**

**Defendant**

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**Jackie McArthur** (instructed by **Freshfields Bruckhaus Deringer**) for the **Claimant**  
**Karishma Vora** (instructed by **Marsans**) for the **Defendant**

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**APPROVED JUDGMENT**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Hearing Date: 28 February 2019

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THE HON MR JUSTICE BRYAN

**MR JUSTICE BRYAN:**

**Introduction**

1. An application is made by the Claimant Cargill today for summary judgment on its claim for default compensation under clause 8.12 of two Advance Payment and Steel Supply Agreements (“APSA I and II/the Agreements”) between Cargill and the Defendant Uttam, alternatively for pre-judgment interest at rates which are proposed and post-judgment interest at rates which are proposed.
2. In this regard Cargill's application for summary judgment against Uttam was successful before Teare J in an amount of US\$61,800,000 which represented a sum advanced by Cargill but not repaid and found to be due to Cargill in the circumstances and for the reasons set out in Mr Teare J's judgment dated 9 November 2018, as reported at 2018 [EWHC] 2977 (Comm) (the “November Judgment”).
3. At the handing-down hearing on 9 November 2018 the parties representatives were to address the issues of pre-judgment and post-judgment interest. At that hearing it became apparent that Uttam intended to raise issues that could not be dealt with in the time available and orders were made for a full day hearing on 28 February 2019, i.e. today.
4. In summary, Cargill submits that it is entitled under Clause 8.12 of the APSA Agreements to "default compensation" at a rate of 1 month LIBOR plus 12 %, which is the rate contractually agreed between the parties and which applies both pre-judgment and post-judgment.
5. In the alternative, Cargill seeks (a) pre-judgment interest at a rate proposed by it and (b) post-judgment interest at a rate proposed by it (the judgment being in US Dollars).

6. Uttam does not dispute that the Agreements make provision for Default Compensation as claimed in Clause 8.12. However it raises three points by way of alleged defence:
  - (1) It alleges that Clause 8.12 is unenforceable because it is a penalty.
  - (2) It alleges that Clause 8.12 is illegal at the place of performance as it is said not to be in compliance with the Reserve Bank of India (“RBI”)’s regulations and so invalid under Indian law, which it says is applicable pursuant to the principle in *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287.
  - (3) It alleges that Clause 8.12 is an onerous term of the contract of which Uttam had insufficient notice, as a result of which Clause 8.12 was not validly incorporated into the APSA Agreements.
7. I should add that none of these alleged defences were pleaded in Uttam's Defence dated 5 June 2018, itself supported by a Statement of Truth, but they have subsequently been foreshadowed at and/or after the time of the November Judgment, culminating in a very late application to amend the Defence on 22 February 2019.
8. Cargill submits that Uttam's arguments have no realistic prospect of succeeding at trial and that there is no other compelling reason why the issue should be disposed of at trial, especially in circumstances where the main claim has already been decided in Cargill's favour.
9. At the hand down hearing Teare J directed that Uttam serve its skeleton argument for the present hearing first, no doubt because it was considered sensible that Uttam articulated the defences on which it wished to rely so that Cargill could respond to them as it saw fit; not least in circumstances where its Defence did not, at that time, set out the points

that it had foreshadowed it would raise in opposition to the claim for Default Compensation. It was also envisaged that there should be witness statements addressing the issues arising. Accordingly, on 7 January 2019 a second witness statement of Garsharan Singh Sawhney, (“Sawhney 2”) were served on behalf of Uttam, followed on 28 January 2019 by a fifth witness statement of Thomas William Snelling (“Snelling 5”) on behalf of Cargill. Uttam then served its skeleton argument on 5 February 2019 which raised the alleged defences I have identified.

10. Cargill then served its skeleton argument on 15 February 2019 addressing such matters and pursuing the claim for summary judgment. However on 22 February 2019, so very shortly before this hearing, Uttam filed and served an application requesting permission for reply evidence to be admitted in the form of a third witness of Mr Sawhney of that date (“Sawhney 3”) and for permission to amend the Defence, first at paragraph 14 to state , in headline terms, the three alleged defences I have referred, but also at paragraphs 31 to 34 to plead at some length, and in some detail, why it says that the Default Compensation Rate Clause is unenforceable. Whilst Cargill does not object to Uttam putting in further evidence, it does object to the amendments to the Defence.
11. Uttam's defence can only be amended with either Cargill's consent or the permission of the court (see CPR17.1(2)). Cargill has not given its consent to Uttam's proposed amendments and opposes the grant of permission on the basis, it says, that to allow substantial amendments at this unduly late stage would cause Cargill undue prejudice. It is said that to allow the amendments would also be contrary to the overriding objective in that they would put the parties on an unequal footing with respect to be ability to respond to the other side's case (see CPR1.1(2)(a)) and they will increase Cargill's expenses of the hearing (see CPR1.1(2)(b)), which it is said is especially serious in light

of the fact that Uttam remains in breach of the court's Order that Uttam pay the judgment sum awarded on 9 November 2018, and no payment has yet been made either in respect of that judgment sum or in respect of costs.

**Amendment - Applicable principles.**

12. CPR17.1(2) provides:

"If his Statement of Case has been served a party may amend it only –  
(a) with the written consent of all the other parties; or  
(b) with the permission of the court."

13. The circumstances in which amendments may be put forward are infinitely variable and each contested application for permission to amend will require an exercise of the court's discretion which takes into account the particular facts of the case at hand. In relation to the principles to be applied by the court when exercising its discretion in relation to amendments, Uttam refer to me the case of *Daniel Alfredo Vilca v Xstrata Limited* [2017] EWHC 2096 at [27] to [29] and [46] to [48].

14. For its part, Cargill refer me to what was said by the Court of Appeal in *Swain Mason v Mills and Reeves LLP* [2011] 1WLR 2735 where Lloyd LJ at [69] to [70] quoted from a previous Court of Appeal decision in *Worldwide Corporation Limited v GPT Limited* [1998] CA Transcript No. 1835, noting that the other party would be "mucked around" by a late application to amend the pleading which was especially egregious: "[w]here a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made", stating:

"We accept that at the end of the day a balance has to be struck. The court is

concerned with doing justice but justice to all litigants and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amended party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it."

15. Uttam rightly accept that permission should only be given for an amendment, whatever its timing, if there is a real prospect of success, the same test as on summary judgment (see the Supreme Court Practice at [17.3.6]).
16. In the present case, there was a real danger that the hearing of full argument upon, and the determination of, the application to amend would have occupied a substantial part of the time available today which was fixed to hear and determine the summary judgment application and which would therefore in of itself necessitate a re-fixed summary judgment hearing, something that both Cargill and Uttam wished to avoid.
17. In such circumstances I considered that the best use of the available time was to hear the application for summary judgment, including arguments advanced by Uttam and on which it sought permission to amend, without ruling on the amended application on the basis that if this was an appropriate case for summary judgment then it would not be an appropriate case to allow the amendments, whereas if it was not an appropriate case for summary judgment then the objections to the amendments would in whole or part be likely to fall away given that the matters arising would then have been dealt with at trial.
18. This approach carried the risk that Cargill might find itself in a situation whereby it was unable to obtain summary judgment but might have been able to do so had there been an adjournment and time for it to put in further evidence and develop its submissions further. However, Cargill made clear to me orally at the start of the hearing that it did not wish an adjournment and it was content for me to proceed in the manner I have identified.

Accordingly I considered that the only course that would ensure that today's summary judgment hearing was effective was if I heard argument on all points that Uttam were seeking to raise in defence of the claim for summary judgment and I have done so.

### **Background**

19. The factual background to Cargill's claim, and Uttam's default under the APSA Agreements is described in the November Judgment at [1]-[8] and it is not necessary to set the background out at any great length given that the issue before me today concerns one contractual provision within the Agreements, namely Clause 8.12.
20. In summary, and as already foreshadowed, Cargill and Uttam concluded two almost identical Advance Payment and Steel Supply Agreements in 2015, i.e. the APSA Agreements/the Agreements, which I understand themselves were successors of prior agreements, Cargill and Uttam had enjoyed. As Uttam puts it at paragraph 3 of its Defence supported by a Statement of Truth, "*a cordial business relationship since about 2005*"; Uttam further pleading that "*the agreements were two of a series of similar agreements that governed business relations between the parties for over a decade*".
21. Under the APSA Agreements Cargill agreed to provide advance payments to Uttam in respect of contemplated future sales by Uttam of steel products to Cargill. Uttam was obliged to repay those advances within a specified time period either by the sale of steel products to Cargill if contracts for such sales were concluded or if they were not concluded then in cash. Between February and July 2015 Cargill made advance payments to Uttam under the APSA agreements to a total of US\$61.8 million, that is the full amount of the facility under each of the APSA Agreements (see the November Judgment at [7]).

22. Each of the advance payments amounts had to be repaid to Cargill on different dates from January to March 2016, either by Uttam selling and delivering products to Cargill or by Uttam making repayment in cash. Uttam did neither.

**The procedural history of this hearing**

23. Cargill commenced its claim on 8 August 2017. On 22 September 2017, Uttam applied to strike out the claim under CPR3.4(2) alleging that it had not properly been served (having terminated the appointment of its English process agent notwithstanding the terms of the APSA Agreements which required Uttam irrevocably and unconditionally to maintain such an agent). On 17 April 2018 Popplewell J handed down judgment in Cargill's favour, summarily assessed Cargill's costs and ordered that Uttam file a Defence within six weeks. Uttam then filed its Defence, but more than two weeks late on 5 June 2018.
24. I would repeat that the defences which are now raised were not in fact set out in that Defence, notwithstanding the fact that the Particulars of Claim included a claim for interest under Clause 8.12. In fact an entirely different point, which has now been abandoned, was taken in relation to an alleged estoppel by convention.
25. Cargill applied for summary judgment by an Application Notice dated 26 June 2018 and, as I have said, the application was heard by Teare J on 30 October 2018 for a full day. Uttam raised two arguments in defence. First, that Uttam had made a valid offer to repay the first of the amounts due which Cargill neither accepted nor declined and that this was a breach of the APSA Agreements by Cargill. It was said that Cargill's breach had prevented Uttam from making further offers and so Cargill was debarred from making



a further claim. Teare J dismissed this argument as there were "*several reasons why the suggested defence has no real prospect of success*". [November Judgment at [12]-[20].

26. Uttam's second argument was that there was an estoppel by convention. Teare J found that the contemporaneous documentary evidence was inconsistent with a recognition that the parties were dealing with each other on that basis (see the November Judgment at [26] and [29]). Further, Teare J found that the argued estoppel could not in law provide a defence to the claim: Uttam's asserted estoppel would have obliged Cargill to enter into a fresh contract with Uttam and any such convention would be unenforceable (see the November Judgment at [30]).
27. Teare J concluded that Uttam had "*no real prospect of establishing a defence to the claim at trial*" and that "*(t)o order a trial would merely serve to delay the date on which [Cargill] obtains its inevitable judgment and cause further legal costs to be incurred for no good reason.*" (see the November Judgment at [31]).
28. As I have already foreshadowed, Teare J ordered that judgment be entered in favour of Cargill for the full amount of the advanced payments, that is for US\$61.8 million to be paid to Cargill no later than 30 November 2018, and also ordered that Uttam pay Cargill its costs of the application to date summarily assessed at £100,000, to be paid to Cargill no later than 23 November 2018.
29. Uttam applied for leave to appeal both the award of the judgment sum and Teare J's summary assessment of costs. On 12 February 2019 the Court of Appeal refused leave, finding that none of Uttam's nine grounds of appeal had any prospect of success. The Court of Appeal also refused Uttam's application for a stay of the Order.

30. As I have also foreshadowed, to date Uttam has not paid either the judgment debt or the costs awarded and so has been in breach of the Order since late November 2018.

**Applicable Principles - Summary Judgment.**

31. The applicable principles are uncontroversial and were common ground before me. CPR24 provides summary judgment may only be given where the defendant has no real prospect of defending the claim and there is no other compelling reason for a trial. Prospects of success are considered by reference to the principles set out by Lewison in *Easyair v Opal* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward v Catlin* [2009] EWCA Civ 1098 at [24].

32. They are as follows:

i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* ;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* at [8]

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the

evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63* ;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* .

### **Clause 8.12 of the Agreements**

33. Clause 8.12 of the Agreement provides:

"8.12, default compensation. (A) if the seller fails to pay an amount payable by or under or pursuant to this agreement on its due date Default Compensation shall accrue on the overdue amount from the due date up to the date of actual payment (both before and after judgment) at the Default Compensation Rate. Any Default Compensation shall be immediately payable by the Seller on demand by the Buyer."

"Default Compensation Rate" is defined in clause 1.1 as "the rate per annum equal to one month LIBOR plus an additional margin of 12 per cent."

34. Under Clause 8.12 the Default Compensation Rate applies up to the date Uttam repays its debts, that is both before and after the November Judgment.
35. It is not in dispute that Uttam has not paid Default Compensation to date. In this regard Cargill issued a demand notice requiring payment of total advance payments and payment of default compensation on 24 March 2016. The terms of Clause 8.12 are not in dispute, nor does any issue of construction arise. Unless Clause 8.12 is for some reason not enforceable then Uttam is liable under Clause 8.12 of the APSA Agreements to pay default compensation on the entire debt at a rate of one month LIBOR plus 12% both before and after the November Judgment. The amount of that interest as at today's date is US\$23,669,692.
36. Cargill submits that Uttam has no real prospect of success on any of the three purported defences to which I will now turn. It is convenient to address first those which are intrinsic to Clause 8.12 itself before addressing the alleged defence based on illegality.

**(1) Is Clause 8.12 arguably a penalty?**

37. Uttam submits that Clause 8.12 is a penalty and as such unenforceable. Whether Clause 8.12 of the APSA agreements is a penalty is a matter that is appropriate to be determined at a summary judgment hearing - see Chitty on Contracts, 33rd edition, at

paragraph [36-196] as a short question of law. The leading case is *Cavendish Square Holding BV v Makdessi* [2016] AC 1172. Lord Neuberger JSC and Lord Sumption JSC (with whom Lord Clarke agreed) stated at [32] as follows:

"The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance."

38. At [152] in *Cavendish*, Lord Mance stated:

"152. In my opinion the development of the law indicated by the authorities discussed in paragraphs 145 to 151 above is a sound one. It is most easily explained on the basis that the dichotomy between the compensatory and the penal is not exclusive. There may be interest beyond the compensatory which justify the imposition on a party in breach of an additional financial burden. The maintenance of a system of trade which only functions if all trading partners adhere to it (the *Dunlop* case) may itself be viewed in this light. So can terms of settlement which provide on default for payment of costs which a party was prepared to forego if the settlement was honoured (the *Cine Bes* case), likewise also the revision of financial terms to match circumstances disclosed or brought about by a breach: *Lordsvale* and other cases. What is necessary in each case is to consider first whether any (and if so) what legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable. In judging what is extravagant, exorbitant or unconscionable, I consider (despite contrary expressions of view) that the extent to which the parties were negotiating at arm's length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."

39. At [255] Lord Hodge stated as follows:

"255. I therefore conclude that the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent parties' interest in the performance of the contract. Where the test is to be applied to a clause fixing the level of damages to be paid on breach an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable. In other circumstances a contractual provision that applies on breach is measured against the interest of the innocent party which is protected by the contract and the court asks whether the remedy is exorbitant or unconscionable."

40. Whilst Lord Toulson, at [293] stated as follows:

"293. On the essential nature of penalty clause I would highlight and endorse Lord Hodge JSC's succinct statement at para 255 that

'the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract'."

41. Cargill submits, rightly in my view, that Uttam has failed to have regard to the requirements of that test when it submitted, at paragraph 10 of its skeleton argument that , *"the court has a discretion to hold a secondary obligation unenforceable if it is extravagant/unconscionable/out of all proportion compared to a genuine pre-estimate of damage"* which it traces back, that test, to the well-known decision of *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Co Limited* [1915] AC at 79.

42. That previous test was addressed by Lord Neuberger and Lord Sumption at [31] in these terms:

"31. In our opinion the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and a genuine pre-estimate of loss and between a genuine pre-estimate of loss and a deterrent. These distinctions originate in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field ...

"The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both and the fact that the clause is not a pre-estimate of loss does not therefore at any rate without more mean that it is penal."

43. As is made clear in the passages I have quoted above, in particular at paragraph [32] in *Cavendish*, the question at the first stage is whether Clause 8.12 imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party

in the enforcement of the primary obligation. In this regard Cargill had a legitimate interest in ensuring that Uttam repaid the money Cargill had advanced and at a time at which Uttam had undertaken to repay it.

44. Cargill then submits that the default compensation rate was not disproportionate or exorbitant in relation to that interest because it was commercially justified. The existence of a legitimate commercial justification will mean that a contractual provision is not disproportionate or exorbitant and therefore is not a penalty - see Chitty on Contracts, 33rd edition paragraph 26-210 and *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 952 at 763E-G and 763H to 764A.

45. Thus at page 763E-G, Colman J stated as follows:

"Where, however, the loan agreement provides that the rate of interest will only increase prospectively from the time of default in payment a rather different picture emerges. The additional amount payable is **ex hypothesi** directly proportional to the period of time during which the default in payment continues. Moreover, the borrower in default is not the same credit risk as the prospective borrower with whom the loan agreement was first negotiated. Merely for the pre-existing rate of interest to continue to accrue on the outstanding amount of the debt would not reflect the fact that the borrower no longer has a clean record. Given that money is more expensive for a less good credit risk than for a good credit risk, there would in principle seem to be no reason to deduce that a small rateable increase in interest charged prospectively upon default would have a dominant purpose of deterring default. That is not because there is any real sense a genuine pre-estimate of loss but because there is a good commercial reason for deducing that the deterrence of breach is not the dominant contractual purpose of the loan ... there would therefore seem to be no reason in principle why a contractual provision the effect of which was to increase the consideration payable under an executory contract upon the happening of a default should be struck down as a penalty if the increase could in the circumstances be explained as commercially justifiable provided always that its dominant purpose was not to deter the other party from the breach."

46. As was recognised by the parties during the course of the argument, some of the language of Colman J's judgment is obviously set against the backdrop of the prevailing authorities

at the time including, of course, *Dunlop Pneumatic Tyre*. However, as is clear from the judgments of their Lordships in the *Cavendish* case, the reasoning of Colman J in that case has been approved by the Supreme Court and indeed can be seen in the reasoning of the Supreme Court in the passages that I have identified.

47. The principles to be derived from *Cavendish* were summarised by Nugee J in *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [467]. I will not set them all out, but sub-paragraph (4) in particular is relied upon by Ms Vora who appears on behalf of the Uttam:

"4. Where the rule applies, the test for whether a contractual provision is a penalty is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation (per Lords Neuberger and Sumption at [32]); what is necessary in each case is to consider first whether (and if so what) legitimate interest is served and protected by the clause and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant exorbitant or unconscionable (per Lord Mance at [52]); the correct test is whether the sum or remedy stipulated as a consequence of breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract (per Lord Hodge at [255])."

48. Reference has also been made before me today to the case of *Vivienne Westwood v Conduit Street* [2017] EWHC 350 (Ch) where Fancourt J said as follows at paragraph 41:

"41. The *Cavendish* case shows clearly that, in considering whether a contractual stipulation is or is not a penalty, one must address first the threshold issue - is a stipulation in substance a secondary obligation engaged upon breach of a primary contractual obligation; then identify the extent and nature of the legitimate interest of the promisee in having the primary obligation performed, and then determine whether or not, having regard to that legitimate interest, the secondary obligation is exorbitant or unconscionable in amount or in its effect."



49. In the present case it is common ground that the obligation to pay under Clause 8.12 is a secondary obligation which arises out of the situation where Uttam is in breach of its primary obligation to repay the advanced payment.
50. Turning then to the question whether Clause 8.12 imposes a detriment on Uttam out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation, it is self-evident in my view that there is a good commercial justification for charging a higher rate of interest on an advance of money after a default in repayment. The person who has defaulted is necessarily a greater credit risk and *"money is more expensive for a less good credit risk than for a good credit risk"*. See *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 at 763 and *Holyoake v Candy* supra at [486].
51. Unsurprisingly, the evidence before me is that this is the reason that Clause 8.12 was included in the APSA Agreements, as stated in paragraph 16(d) of Mr Snelling's fifth witness statement. That, of course, leaves a consideration as to whether the rate of default compensation which the parties agreed to in the APSA Agreement was itself legitimate as commercially justified and also whether or not it was exorbitant or unconscionable in amount or in its effect.
52. The evidence before me in paragraphs 16(c) and (d) of Mr Snelling's fifth witness statement is that the compensation rate was fixed to reflect Cargill's genuine assessment of Uttam's creditworthiness especially in the event of default. Clearly in the event of default there is an increased risk that Uttam would be unwilling or unable to repay sums in future. Cargill also rightly point out that the loan concerned is unsecured and unsecured lending necessarily attracts a higher lending rate due to the lack of security.

53. There are issues between the parties as to appropriate comparators to test whether Clause 8.12 imposes a detriment on the contract breaker Uttam that is out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation and also as to whether, having regard to that legitimate interest, the secondary obligation is exorbitant or unconscionable in amount or in its effect.
54. The evidence before me is that this rate was the commercial norm for Indian companies comparable to Uttam - see Mr Snelling's fifth witness statement at paragraph 15(b). There has not been contrary evidence to that evidence, notwithstanding Uttam having had every opportunity to adduce similar evidence as to market rates, and notwithstanding the fact that no less than four witness statements have been served, including two outside the mandated time and once the point was fully in play. Uttam submits that Cargill should have pleaded what it says were market rates, but this was a matter for the witness evidence that was contemplated, and Uttam had every opportunity to lead evidence as to market rates if it had wished to do so. There was also an issue between the parties about the appropriateness of considering rupee borrowings as compared to US\$ loans. Mr Snelling's evidence (at paragraph 17(a)) is that US\$ loans are harder to get than rupee loans.
55. Secondly, the evidence of Mr Snelling was that the Indian steel industry generally was experiencing difficulties in 2015 which meant that companies like Uttam were a greater credit risk and their cost of finance increased - see Mr Snelling's fifth witness statement at paragraph 16. Again, no evidence to the contrary has been adduced before me. Indeed the reason that Uttam has subsequently given for being unable to repay the debt was just such a downturn. Certainly it is common ground that the market was in decline at the

relevant time.

56. These market based factors themselves strongly support the conclusion that there was a legitimate commercial justification for the rate set and indeed that the rate set, having regard to the legitimate interest in enforcement of the primary obligation, was not exorbitant or unconscionable in an amount or in its effect.
57. Such evidence is relevant both at the stage of considering the extent and nature of the legitimate interest and also when determining whether or not, having regard to that legitimate interest, the secondary obligation is exorbitant or unconscionable in amount or its effect. I do not consider that it can be seriously suggested that the sums involved are exorbitant or unconscionable in amount. In addition there can, in my view, be no suggestion that clause 8.12 is incorporated *in terrorem*, nor was the contrary suggested before me.
58. Cargill also made comparisons by reference to Uttam's costs of borrowing. There is some issue taken in relation to that. Cargill's evidence is set out in Snelling 5 at paragraphs 15 and 16(b) and was to the effect that the Default Compensation Rate was a little lower than Uttam's average financing cost at around the time it defaulted under the APSA Agreements (see also Snelling 5 at paragraph 15(a) in this regard).
59. Uttam take issue with such calculation. However, ultimately, on analysis, this debate, which of course only goes to Uttam's borrowing costs and not market rates generally (and market rates are probably the more important comparator) does not assist Uttam in circumstances where Uttam's own evidence suggests that its borrowing costs were significant at the relevant time in question. In particular in a document which has been

referred to as “exhibit C”, at page 36 of bundle 5, Uttam itself puts in evidence in relation to the nature of its ECB US dollar borrowings from no less than nine different banks, all which were a margin above LIBOR between 4.2 and 4.7 above LIBOR with a column headed "Effective ROI", which I understand to be Effect Rate of Interest, ranging between 7 and 7.25 per cent.

60. The very fact that the Effective Rate of Interest comes out between 7 and 7.25 per cent may suggest that these loans in fact are of some standing because by the time under consideration LIBOR rates were very much less than the implicit 3 per cent-odd which is implied by this evidence.
  
61. But on any view this shows that, at a time prior to any default, this defendant Uttam itself had US borrowings of between 7 and 7.25 per cent, and of course a (significant) uplift from that in the event of default has a legitimate commercial justification. Nor do I consider that an uplift from those sorts of figures to a figure of LIBOR plus 12 per cent would be in any way, shape or form exorbitant. I have, however, already referred to evidence of Mr Snelling as to higher market rates, which is unchallenged. In such circumstances there is no real prospect of it being established that the rate under Clause 8.12 was disproportionate or exorbitant.
  
62. I should say that Uttam also put in evidence a document which appears to originate figures from its annual report at page 32 of the same bundle which ends up with an interest cost of 7.09%. There are certain questions as to whether that is an appropriate figure because it includes, as well as long-term borrowings and short-term borrowings and current maturities of long-term debt, trade payables. For its part, Cargill suggests that it is not appropriate to include trade payables and the effect of doing so artificially

decreases the interest rates. But Ms Vora, for the Defendant, says that, in fact, the APSA agreements themselves are examples of trade payment and should be included.

63. It is not necessary for me to resolve that debate between the parties. I consider that the most important evidence is market rate evidence, in the form of the evidence of Mr Snelling. But I am comforted by reference to the evidence adduced by Uttam itself as to Uttam's borrowing, including US\$ borrowings prior to default which are rates prior to default when Uttam was no doubt a (much) better credit risk. Uttam relies on certain other evidence that it also had borrowings at a lower rate. The available evidence in relation to this was limited. One is a loan agreement with the State Bank of India that Uttam had, and Ms Vora draws attention to the fact that under that agreement the default rate was only 1 per cent higher than the rate payable as normal interest.
64. However, I am satisfied that this loan is not a relevant comparator. Firstly, it is a secured loan, as is apparent from clause 4.1. Secondly, and in addition to that, there is a personal guarantee. It is quite clear, therefore, that there is no comparable increase in credit risk because, of course, if the security has been set in advance at an appropriate level the effect of being in default is simply that the security becomes available. That is very different from unsecured borrowing. There are also other terms of that agreement, including the right to nominate either a director on to the board and also to instigate a review of the management set up and require restructuring. I am satisfied that Ms Jackie McArthur, who appears for Cargill, is right when she characterises that agreement as comparing apples with oranges in circumstances where the increase in credit risk is very minimal in that scenario.
65. It is also no answer to say that the default compensation rate was markedly higher than

the rate of effective interest that Uttam paid on the advances prior to its default. That is a point referred to by Uttam in their skeleton argument at paragraph 14. It is well established that a provision for default interest on late repayment is not a penalty just because the rate is higher than the interest rate prior to default. Indeed that is one reason why, in the present case, the default compensation rate in the APSA Agreements was higher than the interest Uttam would have effectively paid had it not defaulted, which applies to agreements such as the present ones generally, which is to reflect the fact that the defaulter, here Uttam, would be a significantly greater credit risk once it defaulted - see paragraphs 16(c) and (d) of Mr Snelling's fifth witness statement. This increased credit risk is a factor that applies to loans generally.

66. A second reason relates to the specific facts of this case, which is that, on the evidence, the normal rate of interest was set artificially low in order to comply with any obligations Uttam had under the Reserve Bank of India regulations, i.e. at under LIBOR plus 1 per cent - see paragraph 23(a) of Mr Snelling's fifth witness statement. Cargill say that the RBI regulations did not put a limit on a default compensation rate, with the result that the default compensation rate was free accurately to reflect market conditions and Uttam's credit risk in a way that the normal rate of interest did not. I will return to the question of the RBI regulations in the context of the issues relating to alleged illegality.
67. Uttam's skeleton argument at paragraphs 8 and 13 also sought to attack evidence filed by Cargill in relation to whether or not the Default Compensation Rate was commercially justifiable and reasonable. I am satisfied that those attacks are without basis. Firstly, it is not true that the only relevant evidence relates to the interest rate that Cargill would have received had it borrowed money once Uttam defaulted under the APSA Agreements. That argument is premised on what I am satisfied is Uttam's incorrect

understanding of the current test for a penalty. Following *Makdessi* the question is not whether the default compensation rate is a genuine pre-estimate of Cargill's damages after default. The question is whether a default compensation rate has a legitimate commercial justification, and, whether the rate is in all the circumstances exorbitant.

68. In the present case, the prevailing commercial rates at the time the APSA Agreements were negotiated is relevant to that inquiry and I have already identified the evidence of Mr Snelling as to market rates at the time which are probably the most useful comparators – though the rates that it appears that Uttam itself borrowed at the time are also relevant as evidence of borrowing rates (although I bear well in mind the marker put down by Ms McArthur that Uttam's evidence as to such borrowing rates is internally inconsistent within itself and so must be approached with a degree of caution).
69. It is also said that interest rates in India are higher than interest rates in the US. That is taken by Uttam at skeleton paragraph 8(a), which may be true but that does not mean that interest for loans nominated in US dollars but advanced to a borrower in India would be calibrated necessarily to the US interest rate. Rather the evidence before me is that the borrower is in an Indian market and the credit risk represented by that borrower is assessed in the context of that market. As a result, interest rates would normally reflect Indian interest rates and therefore it is entirely valid to use Uttam's cost of borrowing in the normal course of events as a comparator. However, as I say, there is now evidence before me from Uttam itself which includes evidence of US\$ borrowing which is in the range 7 to 7.25 per cent, so ultimately I do not consider that point takes Uttam anywhere.
70. Even outside of the context of the Indian market and the Indian steel industry, I am satisfied there is no basis for concluding that the Default Compensation Rate was

arguably so obviously exorbitant or oppressive as to constitute a penalty. On the contrary, as illustrated by a number of existing reported cases, higher rates of default interest have been upheld in numerous cases. For example:-

(1) In *Taiwan Scott Co Limited v the Masters Golf Company Limited* [2009] Civ 685 a default interest rate of 15 per cent per annum was held not to be a penalty;

(2) In *Davenham Trust Plc v Homegold* [2009] WLUK 368 a default rate of 36 per cent per annum, which doubled the normal interest rate, was held not to be a penalty and that was on an application for summary judgment. It should be noted that in *White v Davenham Trust Limited* [2011] Bus LR 615 Floyd J, as he then was, in *obiter dicta* considered whether the same default interest rate was a penalty and found that there was a triable issue in this regard. However that was expressed on the basis that there was no evidence before him about the rationale for the default interest rate being set as it was and Floyd J distinguished *Davenham Trust v Homegold* on the basis that in *Davenham v Homegold* there had been detailed evidence before the court considering the market rate at the time of the agreement, the risk factors involved and the rationale for the default rate at [54] and [59]. Of course in the present case I do have the benefit of Mr Snelling's fifth witness statement which provides similar evidence, I am satisfied, relating to the Default Compensation Rate in the APSA Agreements.

(3) In *ZCCM Investment Holdings Plc v Konkola Copper Mines* [2017] EWHC 3288 (Comm) a default interest rate of LIBOR plus 10 per cent was held not to be a penalty.

(4) In *Holyoake v Candy*, *supra*, a default interest rate of 50 per cent per annum was held



not to be a penalty.

71. Obviously every case turns on its facts and one has to bear in mind the dates of the cases, when rates may be different, but they illustrate that comparable or greater rates have been found not to be a penalty.
72. The Default Compensation Rate is comparable and indeed (subject to LIBOR at any particular time) is lower than many such rates. Most importantly of all, in the present case I have had the benefit of the evidence of Mr Snelling setting out the basis and rationale for the terms of Clause 8.12, which I am satisfied justifies the rate set, and his evidence of market rates which are comparable. The same is true having regard to the rates at which Uttam borrowed prior to default when comparing with a post-default situation.
73. On the evidence before me there is no basis for concluding that the Default Compensation Rate is arguably so obviously exorbitant or oppressive as to constitute a penalty.
74. Courts have consistently stated that they are reluctant to declare a contractual provision to be a penalty where it has been freely negotiated at arm's length between commercial parties and there is no indication of oppression: Chitty on Contracts (33rd edition) at [26-195] and *Cavendish*, supra, at [33] and [152].
75. Mr Snelling's evidence (see Snelling 5 at paragraphs 20 and 26(d)), is that Uttam and Cargill are both sophisticated parties who freely negotiated and agreed the APSA Agreements. I have already referred to how Uttam described their relationship in its Defence, and the history of the APSA Agreement in the Defence is supported by

a Statement of Truth. There is no documentary evidence before me to support the assertion that these were standard form contracts of Cargill, still less that the terms were imposed upon Uttam, contrary to the assertions now sought to be introduced at a very late stage by way of proposed amendment to the defence. In this regard the associated witness evidence on behalf of Uttam is entirely lacking in any contemporary documentary support, which one would have expected Uttam to be able to produce if there had been any substance in the argument advanced, and its new argument lies uneasily with the description of the relationship in the existing Defence supported, as I say, with a Statement of Truth (a description which also appeared in one of the earlier witness statements lodged on behalf of Uttam).

76. In any event I consider the rate speaks for itself and is not arguably so obviously exorbitant or oppressive as to constitute a penalty. On the contrary, it appears to be an entirely normal commercial rate set against the backdrop of unsecured lending in circumstances where by this stage the recipient of the loan is ex hypothesi in default and as such a considerably greater credit risk.
77. In all the circumstances, and for the reasons that I have given, I am satisfied that Clause 8.12 is not arguably a penalty and Uttam's defence to the contrary stands no realistic prospect of success. Nor is there any other compelling reason why the issue should be disposed of at a trial.

**Was Clause 8.12 a valid term of the APSA agreements?**

78. Uttam's next contention in relation to the application of Clause 8.12 is that it was not validly incorporated into the Agreements being, it is said, an onerous term that was not

brought to Uttam's attention. This involves an entirely new set of arguments which are not pleaded in the existing Defence and which were not raised in its skeleton argument for the last hearing. That is hardly a propitious start for the argument and it bears all the hallmarks of a lawyer's construct in an attempt to exclude what is ultimately a common feature of commercial contracts, namely a provision as to the rate of default interest in circumstances where a borrower has defaulted on a loan or equivalent commercial transaction.

79. Subject to the question of whether it is an onerous term, it is premised on the basis that Clause 8.12 is not incorporated into the APSA Agreements because Uttam's representatives did not notice the amount of the Default Compensation Rate when they executed the APSA Agreement - see paragraphs 26 to 30 of Uttam's skeleton. The suggestion that Uttam did not read and was not aware of the contents of Clause 8.12 is surprising and lacking in credibility, being unsupported, as it is, by any cogent evidence. What is more any such argument is (fatally) undermined by the fact that not only are the contracts signed but they are stamped and signed on every page, including the pages on which Clause 8.12 is set out.
80. Where an agreement is in writing and signed by the parties, the parties will ordinarily be bound by those written terms whether or not they have read the agreement and whether or not they are ignorant of the agreement's effect. See Chitty on Contracts 33rd edition at paragraphs 13-002. This is a trite principle of English law taught to every law student and often illustrated by the case of *L'Estrange v Graucob* [1934] 2 KB 34. There are very good reasons why a party is held to its contractual bargain whether or not it has read or paid attention to its terms. As was said in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2016] 1 CLC 582 at [43]:

"This is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community'."

81. No doubt recognising that a party will accordingly usually be bound by the terms of the contract it has signed, Uttam seeks to fall back on that category of case where a particular term is unusual or onerous and the counterparty will not be bound by it unless it was brought specifically to the parties' attention. One of the most well-known illustrations is *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 in which a party who was in practice unable to negotiate the terms of a contract was held not to be bound by unusual or onerous terms unless they were specifically brought to his attention. That case concerned a contract that had been neither negotiated between the parties nor signed by them. It was in relation to a standard form sheet and a failure to return goods was considered to be an acceptance of the contract terms.

82. The principle is also addressed in *Goodlife Foods Limited v Hall Fire Production* [2018] EWCA 1371. In that case Coulson LJ stated as follows at [30]:

"Paragraph 13-015 of Chitty on Contracts (32nd edition 2014) summarises the relevant principle as follows:

'Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention.'

This principle derives from what has been called the 'ticket' cases such as *Thornton v Shoe Lane Parking Limited* [1971] 2QB 163 ..."

83. There is then a reference to *Interfoto* and a quote from *Interfoto* where Lord Justice Bingham observed that: "The more outlandish the clause the greatest the notice to which the party, if he is to be bound, must in all fairness be given."

84. Coulson LJ then continued:

"Speaking for myself, I find that a helpful distillation of the necessary relationship between, on the one hand, the degree of onerousness in the clause and, on the other, the degree of notice required.

33. The authorities do not always agree as to what amounts as to an onerous clause."

85. Then at [46] Coulson LJ said this:

"The question of whether or not clause 11 was particularly onerous or unusual has to be considered in the context of the contract as a whole."

86. And at [91] he stated:

"91. Secondly, as I put to Mr Christie during the course of argument, it cannot be right in principle that a party who did not negotiate over every proposed clause but instead accepted what was being offered is then in a better position to argue subsequently that the clause in question is unreasonable. Every case will turn on its own facts. Clearly if an exclusion clause was retained, despite strenuous attempts by A to remove it, then that might make it much harder for A to say subsequently that it was unreasonable. But the converse is not true, and no part of Lord Justice Chadwick's judgment in *Watford Electronics* should be read as supporting any such proposition."

87. Situations where such considerations arise most often tend to be cases relating to contracts that are not signed and many of them are indeed "ticket cases" and the like from which the principle originates, where a party is presented with printed standard terms and has no time to consider them. The principle offers someone, who is often a consumer, protection against unusual or onerous clauses if they have not been drawn to their attention. It can, however, also apply to standard contracts as well.

88. In contrast, in the present case, the APSA Agreement is signed and stamped on every single page and it is not suggested this was done other than by a person having authority. I have already identified that the normal position is that a written contract signed by

a party will be binding on him regardless of whether the other party expressly drew his attention to specific terms.

89. Of course there are exceptional cases in which the signing party was under undue pressure or had no real opportunity to read and consider the contract before signing, such as an individual at an airport presented with a car rental agreement; as to which see *Amiri Flight Authority v BAE Systems Plc* [2003] 2 CLC 662 at 694 to 695, [15] to [16]. But the evidence before me does not begin to support any suggestion that Cargill exerted any undue pressure upon Uttam to sign or that it had no opportunity or time to read the APSA agreements before they were signed. On the contrary, every page was stamped and signed by Uttam. Ultimately it is a matter for Uttam as to whether they read the terms of the agreement that they entered into repeatedly over a number of years.
90. Uttam, by its very recent proposed amendment, seeks to argue that the APSA Agreements were standard form agreements imposed by Cargill, but as I have already noted, there is no credible evidence before me of that, evidence that I would have expected Uttam to be able to produce had that been the case. As I have already identified, the description of the parties' relationship in the existing Defence and also in Mr Sawhney's second witness statement, is not consistent with the Agreements being standard form contracts. Indeed it was not until the skeleton argument on 5 February, at that stage not supported by any evidence, that this suggestion was first made.
91. In any event, there is no credible evidence before me that this was a standard form contract either in terms of its content or nature, or that it contained particularly onerous terms which would require them to be brought specifically to the attention of Uttam.

92. I should say, in any event, that the mere fact that a contract is on a standard form does not in of itself mean that particular terms within it will not be incorporated absent them being drawn specifically to the attention of a party. In any event Mr Snelling's evidence before me is that the terms of both the APSA agreements were negotiated and agreed between the parties, as had the previous contracts between them. Both Cargill and Uttam are on any view large commercial entities and I consider that they can both rightly be characterised as sophisticated parties. Uttam has advanced no evidence to support the submission that the APSA agreements were standard form agreements and therefore the associated authorities on which Uttam rely do not assist Uttam.
93. There are cases where a term in a contract or an exclusion of liability will not apply unless there is, as it has been put, “a waving red finger” pointing at the clause, but any suggestion that the present clause falls within such principles is, with the greatest respect to the Defendant's counsel, hopeless.
94. The fatal flaw in Uttam's argument is, in any event, that Clause 8.12 is not an unusual or onerous clause. It is readily apparent, from the reported cases that I have referred to, that default interest rate clauses are commonplace. It is not an unusual clause, nor is it particularly onerous in terms of the rate it specifies, not least given the findings I have made in relation to why it is not to be characterised as a penalty clause.
95. It must be expected that a contract under which money is advanced would normally include a provision both for normal interest and for a higher rate of interest, that is default compensation, if money was not repaid on time. The evidence before me shows that these kinds of provisions had indeed been present in prior agreements between Cargill and Uttam. I would also note that, whilst not applicable on the facts, the Late Payment

of Commercial Debts (Interest) Act 1998 effectively makes payment of default compensation mandatory for all English-based business contracts and illustrates that such clauses are the norm.

96. I would also add that Uttam's evidence on the clause in question is itself unsatisfactory.

At paragraph 14 of his second statement, Mr Sawhney says as follows:

"Amidst the cycle of renewing the APSAs it went unnoticed by the defendant when the claimant changed the default compensation rate and increased it to LIBOR plus over 1 per cent. This seems to have been done without discussion or highlighting the change."

97. This paragraph follows on from paragraph 12, which states:

"In prior agreements between Uttam and Cargill the normal interest on advances had always been LIBOR plus 1 per cent or less."

98. But there is evidence before me that in the agreements between Uttam and Cargill prior to the APSA Agreements the default compensatory rate had been LIBOR plus 6 per cent - see paragraph 26(b) of Mr Snelling's fifth witness statement. It would make no sense for Mr Sawhney to refer to a "*change in the prior default compensation rate making it higher than LIBOR plus 1 per cent*" when it has always been higher than LIBOR plus 1 per cent. Therefore either paragraph 14 of Mr Sawhney's second statement must be interpreted as actually referring to the normal rate of interest on advances, in which case it is irrelevant for present purposes, or else, as pointed out by Cargill, to the extent Mr Sawhney is referring to late payment interest it demonstrates that Mr Sawhney has an incomplete understanding of the parties' prior agreements and as such his evidence cannot be relied upon on this point.

99. Be that as it may, the short answer is that Clause 8.12 is neither unusual nor onerous and



on established principles Uttam are bound by the terms of the contracts they have signed, whether or not they have read the contract and whether or not they have noticed any particular terms therein. Uttam's defence that Clause 8.12 is an unusual or onerous term that was not incorporated into the contract stands no prospect of success and as such does not amount to a defence to the claim. Nor is there any other compelling reason why this issue should be disposed of at a trial.

### **Estoppel by convention**

100. Before turning to the question of illegality and Indian law, I should mention the fact that there was one further alleged defence based on an alleged estoppel by convention but which was seemingly abandoned before this hearing, and Ms Vora confirmed to me at the start of the hearing that it was, indeed, not being pursued. It was an argument which had echoes of the argument in relation to liability that was rejected by Teare J. In any event I do not need to address it as it has been abandoned. I simply note that it was, in fact, the only defence that was raised in the Defence as served.

### **Indian law and illegality**

101. Uttam has argued that the Default Compensation Rate provided in the APSA Agreements is invalid on the basis that it is said to be unlawful under Indian law - see paragraphs 18 to 24 of Uttam's skeleton. The APSA Agreements are expressly governed by English law (see Clause 22.1). The contract is not governed by Indian law and accordingly the fact, were it to be the case, that such a contractual term would be invalid and unenforceable as a matter of Indian law is irrelevant. Illegality under Indian law is only relevant if it would render the contract unenforceable as a matter of English law.

102. However the first, and preliminary, question is whether or not in fact the default interest

clause is unlawful as a matter of Indian law. Uttam relies on regulation 15 of the Foreign Exchange Management (Export of Goods and Services) Regulations 2016 (the 2016 Regulation), a foreign law which it did not plead in its Defence, which is not an auspicious start, but on the basis of which it now seeks to advance an illegality defence when faced with an application for summary judgment.

103. On this question expert evidence is admissible and each party has put in expert evidence. Simply because an issue involves consideration of expert evidence on foreign law does not necessarily mean that the issue is not suitable for determination by way of summary judgment in an appropriate case. In the present case the issue is a narrow one and the evidence confined. The court is entitled to look at the evidence and test what, if any, support there is for opinions that are expressed, in circumstances where those experts express different views on the correct interpretation of the Regulation, to see whether the argument advanced by Uttam has any realistic prospect of success.

104. In this regard I have been referred to, and had regard to, the *Eurobank* case at [35], [37] and [39], but I am satisfied that there are no points of general application in that case which would prevent me considering the expert evidence and considering whether, in the light of all the material before me, there is any realistic prospect of success in relation to this point.

105. Regulation 15.1(ii) provides:

"Where an exporter receives advance payment (with or without interest) from a buyer/third party ... outside India the exporter shall be under an obligation to ensure that - the rate of interest, if any, payable on the advance payment does not exceed the rate of interest LIBOR plus 100 basis points ...)"

(100 basis points is, of course, 1 per cent).

106. I will refrain at this point from passing any comment on this provision and turn instead to the expert evidence before me. Cargill relies upon a letter opinion from a Mr Promod Nair a partner in Arista Chambers in Bangalore who states that he has over 17 years of experience in litigation and arbitration in India. When providing that letter of opinion he had the benefit of seeing a "memorandum of opinion" of Uttam's expert Mr Arif Doctor. Mr Nair expresses his opinion in these terms:

"I confirm that as a matter of Indian law: - (a) none of the rules and regulations issued by the Reserve Bank of India, including but not limited to the Foreign Exchange Management (Export of Goods and Services) Regulations ... , imposes a limit on late payment interest or default interest payable under such contracts as the agreements or the rate of such interest; and (b) the default compensation rate was, at the time when the agreements were entered into and is currently, not contrary to Indian law nor subject to any limit pursuant to any of the rules and regulations issued by the RBI."

107. For its part, Uttam relies on a "memorandum of opinion" from Mr Arif Doctor dated 7 January 2019, an advocate enrolled with the Bar Council of Maharashtra and Goa in 1999, who specialises in litigation and arbitration. He opines that the default compensation rate, or the interest rate leviable as per the agreements, is not in accordance with the permissible rate of interest under the Regulation. He does not refer to any Indian court judgment or rule of construction to justify his conclusion, nor to support a construction that the Regulation has any application to default interest rather than normal interest on an advance prior to default, which I find surprising and which I would have expected him to do if they provided any basis to support his opinion.
108. Indeed he makes no attempt to grapple with the language of the Regulation in paragraph 15(1)(ii) or identify any rule of construction or any special meaning that contradicts the

ordinary and natural meaning of the words used as a matter of language. I find this all the more surprising given that he has also provided a second “memorandum of opinion” dated 22 February 2019 in response to that of Mr Nair, in which he again offers neither authority nor any rule of construction, nor indeed any reason why, as he asserts at paragraph 8 of his further opinion, the Regulation extends to default compensation following a breach of contract.

Thus he says, at paragraph 8:

"8. As already set out in my first expert report and not dealt with or touched upon by Mr Nair under the FEMA (Export of Goods and Services) Regulations 2015 the rate of interest, if any, payable on export advance must not exceed the rate of interest LIBOR plus 100 basis points, ie LIBOR plus 1 per cent. Further, clause 15.12 provides that rate of interest on the advanced payment must not exceed LIBOR plus 100 basis points, and this limit on rate of interest would be applicable to the interest levied on the export advanced whether as interest on default amounts or as default compensation rate. The regulations do not make a distinction between the nature of interest levied in each transaction, whether interest on default amounts or as default compensation rate as the case may be. However the payment of interest is regulated by putting an embargo on the quantum of the levy. This is done primarily with intention to avoid a situation where the parties may attempt to circumvent the regulation by merely changing the nomenclature of the interest levied under the contract."

(emphasis added)

109. It will be seen, therefore, that in paragraph 8 there is a bare assertion that the provision of the Regulation concerned relates to default compensation rate. But no attempt is made to grapple with the language of the Regulation, nor indeed to identify any rule of construction of Indian law which would suggest that it is not to be construed in accordance with the ordinary natural meaning of the words, nor any authority which would lead to a contrary construction.

110. In such circumstances I am unable to place any weight on the opinions he expresses, which are unreasoned and are contradicted by those of Mr Nair. In that regard if I had to

prefer the evidence of Mr Nair or Mr Doctor, I would have preferred the evidence of Mr Nair. The consequence of that would be that, on the basis of the evidence, there would be no real prospect that this contract would be found to be illegal in relation to this clause under Indian law.

111. However, in circumstances such as the present, where there is an apparent conflict of expert evidence, it is appropriate and permissible for the court to look at the wording of the regulation itself. See *MCC Proceeds Inc v Bishopsgate Investment Trust Plc* [1999] CLC 417 at [19] to [20] and Dicey, Morris & Collins (15th edition) at paragraph [9-015].

112. I am fortified in the appropriateness of doing so by reason of the fact that neither expert suggests that there is any rule of construction in Indian law that is applicable in this case or which changes the ordinary and natural meaning of the words of the Regulation or gives them any special or customary meaning.

113. It will be recalled that regulation 15.1(ii) provides:

"Where an exporter receives advance payment (with or without interest) from a buyer/third party ... outside India the exporter shall be under an obligation to ensure that- the rate of interest, if any, payable on the advance payment does not exceed the rate of interest LIBOR plus 100 basis points ..."

114. There is also an RBI master circular whose purpose is to explain such provisions which essentially repeats the contents of regulation 15(1)(ii).

115. The ordinary and northerly meaning of the words used on their face is plain - this provision is directed to the rate of interest on an advanced payment - that is the normal interest payable on an advance payment is limited to LIBOR plus 1 per cent. It does not

address, and does not set out any rule or prohibition in relation to, default compensation following a breach of contract where the borrower is in default. That is an entirely separate scenario and not one against which the Regulation is directed on its face and on the basis of the ordinary and natural meaning of the words used.

116. Ms Vora, on behalf of Uttam, suggests the words "if any" are to be understood as meaning that any interest payable in any circumstances must not exceed LIBOR plus 1 per cent. But what is being referred to is, "the rate of interest, if any". In that context the words "if any" are self-evidently referring to if there is any interest payable. They do not relate to, or shed any light upon, whether this provision has any application to a contractual payment due upon an event of default such as default compensation under Clause 8.12 which happens to be calculated by reference to LIBOR plus 12 per cent.
117. There is nothing in the wording of the Regulation to support the construction that it relates to anything other than normal interest on the advance payment in the ordinary course of events.
118. In such circumstances I am satisfied that there is no realistic prospect of Uttam establishing that Clause 8.12 is illegal and unenforceable as a matter of Indian law. That is the end of such defence and no question of illegality arises.
119. However, as I have heard argument on the question of illegality, I will express my views on such plea which upon examination itself would not have stood any real prospect of success as a defence even had it been arguable (contrary to my conclusion above) that Clause 8.12 was illegal as a matter of Indian law.

120. Uttam has argued Indian law is relevant under the rule in *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287. That case held that where a contract requires a party to do something that is unlawful in the place where the obligation has to be performed, in whole or part, then the contractual obligation is unenforceable - see, in particular, pages 291 to 292, 296 and 300 to 301. This rule applies only if the contract actually requires performance to be done in a specific place - see Dicey, Morris & Collins on the Conflict of Laws (15th edition) at paragraph [32-098].
121. The rule in *Ralli Bros* does not result in the law of India being relevant to the validity of Clause 8.12 of the APSA agreements in circumstances where the APSA Agreements require that Uttam pay default interest in Singapore, not India. Clause 9.1(b) of the APSA Agreements states that all payments made by Uttam under Clause 8 of the APSA Agreements were to go into the Collection Account - this would include payments under Clause 8.12. The "Collection Account" is defined in Clause 1.1 as being an account held with JPMorgan Chase Bank in Singapore.
122. Uttam has argued that the place of performance of its obligation to pay interest would be India because "*remittance of interest will be through the defendant's bank accounts in India*" - see paragraph 20 of Uttam's skeleton argument and Mr Sawhney's fourth witness statement at paragraphs 1 and 2, which I have read and bear well in mind.
123. However, this argument is not in point for at least two reasons. First, the APSA Agreements did not require that Uttam pay through its bank accounts in India. It was open for Uttam to pay the default compensation from anywhere in the world. It matters not in this regard where Uttam's bank accounts in fact are. As such the rule in *Ralli Bros* is not engaged.

124. Second, an obligation to pay money into a specified bank account is performed in the place where the bank account is located, not the place where the payer is located. I am satisfied that this is a proposition which is self-evident and is obviously right. It is also supported by authority - see *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] 2 CLC 735 at [80]. I confirm I have borne well in mind the facts of that case, including paragraphs [53] and [54] to which my attention was drawn by Ms Vora. I also had referred to me paragraph [82] of that judgment in order to state a negative, which is to identify what Uttam was not arguing namely any alleged illegality under the principle in *Foster v Driscoll* [1929] 1 KB 470.

Paragraph [82] provides as follows:

"The principle relied on by Dana Gas derives from *Foster v Driscoll* [1929] 1 KB 470 where the Court of Appeal held that a contract which had as its object smuggling a cargo of whisky into the United States at a time when the sale of alcohol was prohibited in that country was contrary to public policy and void. The principle was applied by the House of Lords in *Regazzoni v Sethia* [1958] AC 301, which involved a contract for the sale of jute bags which were to be manufactured in India and shipped to Genoa for resale in South Africa in violation of an embargo under Indian law.

In both cases it was intended that acts prohibited by the laws of the relevant friendly foreign country (the United States and India respectively) should be carried out within the country's own territory; and in *Ispahni v Bank Melli Iran* [1998] Lloyds Report's Bnk 133 at 139 to 140 the Court of Appeal decided this is an essential and necessary agreement to the principle:

"Accordingly, it is only if a contract has as its object and intention the performance in a friendly foreign state of an act which is illegal under the law of that contract that the contract will be considered contrary to English public policy."

125. Ms Vora confirmed to me that it is not suggested by Uttam that the principle in *Foster v Driscoll* applies in the present case. It is not suggested that this contract had an object and an intention that there would be performance in a friendly foreign country of an act which was illegal under the law of that country. So I need say no more about the



principle in *Foster v Driscoll*.

126. As an alternative to its argument on *Ralli Bros*, Uttam has also asserted that the parties must have intended that contractual obligations to pay will be subject to the RBI Regulations - see paragraph 23 of Uttam's skeleton and paragraphs 10 to 11 of Sawhney 2. Uttam relies for this argument on clause 24 of the APSA Agreements by which the parties agreed that Uttam would apply to the RBI for any approvals it needed in order to comply with its contractual obligations. However, Clause 24 when read in its entirety is not consistent with any such common intention. In this regard the second paragraph of clause 24 provides that:

"The failure by, or inability of, [Uttam] to obtain approval from RBI in relation to any payment or action/obligation under or in relation to this agreement ... shall not operate to discharge or otherwise diminish such payment or other obligation by [Uttam]."

127. Equally, I do not consider that Clause 23 changes this analysis. Clause 23 is a common provision seeking to ensure that the contract survives should any provision thereunder be invalid, illegal or enforceable and also provides that if a provision is invalid illegal or enforceable then neither party shall be required to comply with it.
128. In the above circumstances, even were it arguable, which it is not, that Clause 8.12 was contrary to Indian law, Uttam's illegality defence was itself one that stands no real prospect of success on established principles.

### **Conclusion**

129. For the reasons that I have given, none of Uttam's purported defences to the claim for interest stand any real prospect of success and there is no compelling reason for trial.

Accordingly, Cargill is entitled to summary judgment in respect of the interest claimed under clause 8.12 in the amount claimed and I so find.

**The alternative claim for interest**

130. For completeness, I would add that if I had considered that Uttam had an arguable defence to a claim based on the contractually agreed rate of default interest, which I do not, Cargill would have had an unanswerable claim to pre-judgment interest under section 35A of the Senior Courts Act 1981 and in the exercise of my discretion I would have considered what the appropriate rate was. This was debated before me and there are a number of possibilities.

131. However, ultimately the rate advocated by Cargill was LIBOR plus 4.5 per cent which was what Uttam had stated in paragraph 25 of its skeleton was possibly a relevant measure. Had it been necessary for me to do so, I would have considered, in the exercise of my discretion under section 35A, that such a rate of LIBOR plus 4.5 per cent for pre-judgment interest was an appropriate rate.

132. So far as post-judgment interest would have been concerned, in the light of the summary judgment that I have given, post-judgment interest is also based on the terms of the contract, that is clause 8.12, the default compensation rate applying post-judgment - see Chitty on Contracts (33rd edition) at paragraph 26-289, ie LIBOR plus 12 per cent. However, again, had summary judgment not been appropriate, Cargill had a claim for post-judgment interest. If that judgment had been in Sterling that would have been at 8 per cent per annum under the Judgment Debts (Rate of Interest) Order 1993 and indeed the matter would not have been a matter of discretion. However, because it is a non-sterling denominated judgment, that is a US dollar judgment, the position is

discretionary - see section 44A of the Administration of Justice Act 1970. Cargill submits that there is no reason to distinguish the position of dollars and pounds and that an appropriate rate is indeed 8 per cent.

133. In the absence of any evidence before me suggesting any other appropriate rate, I consider, consistent with the Judgment Debts (Rate of Interest) Order 1993 (which would have been mandatory had this been a sterling debt)), that a rate of 8 per cent would have been appropriate had it been necessary for me to award interest in relation to post-judgment interest.

134. Accordingly, and for the reasons set out in my judgment, Cargill's application for summary judgment succeeds in the amount claimed.

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

Court No 27

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

Thursday, 28 February 2019

**Before:**

**THE HONOURABLE MR JUSTICE BRYAN**

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BETWEEN:

**CARGILL INTERNATIONAL TRADING PTE LTD**

Claimant

-v-

**UTTAM GALVA STEELS LIMITED**

Defendant

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**Jackie McArthur** (instructed by Freshfields Bruckhaus Deringer) appeared on behalf of the Claimant.

**Karishma Vora** (instructed by Marsans) appeared on behalf of the Defendant.

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## APPROVED JUDGMENT

### MR JUSTICE BRYAN:

1. The final matter that comes before me today relates to the questions of costs. I consider that costs follow the event and it is not suggested otherwise. There is an application made by the Claimant Cargill for indemnity costs. The question that arises, therefore, is as to whether there are any features of the present case that takes it out of the ordinary on established principles including those set out in the *Fiona Trust* and *Three Rivers* cases.
2. The factors which are relied upon by Cargill are: firstly, very late amendments; secondly, a lack of clarity as to what arguments are being pursued both in relation to *Foster v Driscoll* and estoppel by convention; thirdly, late witness statements; fourthly, inconsistencies between the defence and the evidence; fifthly, the fact that originally the matter of interest was envisaged or scheduled to be dealt with either at the hearing on 30 October or on the handing-down of judgment on 9 November; and, lastly, that really three new defences were raised for the first time at a late stage.
3. I do not consider that any of these factors take the case out of the norm or render it appropriate for there to be an award of indemnity costs. True it is that points were taken at a late stage, that there was a certain lack of clarity; that there were late witness statements, that there were inconsistencies, and that different defences have arisen over a period of time and only fully crystallised to me today. However such matters are not unknown on applications for a summary judgment and they form part of the rough and tumble of commercial litigation. I do not consider that these matters either individually, or collectively, are such as to take this matter out of the norm or suffice to justify an

award of indemnity costs.

4. I am satisfied, however, that the claimant, Cargill, is entitled to costs on a standard basis and, as this is a one-day hearing, that it is appropriate to proceed to a summary assessment of those costs. By the very nature of the exercise, and as is well established, it is something of a broad brush exercise. There are a limited number of points which are taken by Ms Vora and which she asks me to bear in mind.
5. The first one, and the foremost in terms of potential impact on the costs claimed, was that it is suggested that the hourly rate for the partner at £809 an hour and for the associate £469 an hour are neither reasonable nor proportionate. Reference is made to the SRA guideline rates, including for London bands, City of London, as at 2010 for an A grade fee earner of £409, and a B grade fee earner of £206. That is subject to an asterisk, for an A grade fee earner, that an hourly rate in excess of the guideline figures may be appropriate for grade A fee earners in substantial and complex litigation with other factors including the value of the litigation (a factor that applies here). It is also complex litigation, with complex legal argument and a detailed factual case. It is an important matter and there is an international element. These factors individually and collectively justify a significantly higher rate.
6. Ultimately it is a party's choice as to whether to employ a City law firm and a City law firm with the experience and expertise of Freshfields. I bear in mind that the rates in the table are very much out of date, dating back to 2010, and just about every factor that could justify a greater rate in relation to a grade A fee earner is present.
7. Set against that background, and whilst I bear the points made by Ms Vora in mind, I

do not consider that there should be a very substantial reduction (which would be the effect of her submission) in the context of the solicitor rates claimed. Her other submissions were more points of detail, one in terms of the number of hours spent on correspondence with client and any potential overlap with counsel. I bear in mind those points, but I doubt that there would have been overlap given that would result in double counting if that had been the case and I would not expect a signed bill to claim the same costs twice. The disbursements are modest and I have been told they relate to the Indian law evidence.

8. Having regard to the statement of costs as a whole and the document time which is attached, I summarily assess Cargill's costs at £69,500.