Neutral Citation Number: [2020] EWHC 72 (Comm)

Case No: CL-2019-000281

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: 20 January 2020

Before:
LORD JUSTICE PHILLIPS

- -

Between:

VTB COMMODITIES TRADING DAC	**Claimant**
- and -	
JSC ANTIPINSKY REFINERY	**Defendant**
- and –	
PETRACO OIL COMPANY SA	**Intervener**

- -

Stephen Cogley QC, Alan Gourgey QC, Alexander Wright, Christopher Jay and **Michael Ryan** (instructed by **PCB Litigation LLP**) for the **Claimants**
Kenneth MacLean QC and **Alexander Brown** (instructed by **Candey Limited**) for the **Defendants**
Louis Flannery QC and **Andrew Leung** (instructed by **Stephenson Harwood LLP**) for the **Intervener**

Hearing dates: 16-18 October and 4, 5 and 12 December 2019

- -

Approved Judgment
In Public

.....

Lord Justice Phillips:

1. By application notice dated 13 May 2019 the claimant ("VTB") applied to continue an injunction granted on 30 April 2019 by Teare J against the defendant ("Antipinsky") on a without notice basis ("the Continuation Application"). The injunction, made urgently pursuant to section 44 of the Arbitration Act 1996 ("s.44") in support of six London arbitrations commenced by VTB the day before, comprised two elements:

    i) a worldwide freezing order ("the WFO") in relation to Antipinsky's assets up to the value of €225,000,000;

    ii) an order ("the Cargo Injunction") (i) restraining Antipinsky from selling, transferring or otherwise disposing of High Sulphur Vacuum Gasoil ("VGO") to third parties save to the extent that such dealings did not inhibit Antipinsky's ability to supply VGO to VTB under contractual arrangements between them or pursuant to bona fide agreement with third parties entered before those contractual arrangements; and (ii) requiring Antipinsky to comply with its delivery obligations under the contractual arrangements in respect of shipments of VGO.

2. On 8 July 2019 Antipinsky applied to set aside the order of Teare J in its entirety ("the Discharge Application").

3. When the Continuation Application and the Discharge Application first came before me on 16 October 2019 (which was also the adjourned Return Date specified in the WFO and the Cargo Injunction) Antipinsky took a preliminary objection to the court's jurisdiction to entertain the Continuation Application under s.44.

4. On 18 October 2019 I ruled (with reasons to follow) that Antipinsky's objection was well founded on the ground that, the matter no longer being urgent within s.44(3), VTB required but had not obtained either the permission of the Tribunal (which had been appointed in the six arbitrations, by then consolidated) or the agreement of Antipinsky to the making of the Continuation Application in order for the court to have jurisdiction to act on that application by virtue of s.44(4). However, I declined to allow the WFO and Cargo Injunctions simply to lapse or to allow Antipinsky to argue the Discharge Application, instead further adjourning the Return Date and all applications generally, with liberty to restore.

5. On 20 October 2019 the Tribunal gave VTB permission to make the Continuation Application (and associated applications) to this court, the Tribunal further deciding that it was not in a position to act effectively in that regard.

6. The adjourned Return Date and associated applications were thereafter restored for hearing before me on 4 December 2019. Antipinsky initially raised a further jurisdictional objection, asserting that the Tribunal had been wrong to consider that it was unable for the time being to act effectively in relation to the applications, so that the requirement imposed by s.44(5) was not satisfied. Antipinsky again contended that the injunctions should be allowed to lapse and/or that only the Discharge Application should be determined. However, following my indication that, if I were to accept the

further argument on jurisdiction, I would nonetheless be minded again to adjourn the Return Date and all other applications and continue the injunctions pending a decision of the Tribunal on whether they should be continued, Antipinsky sensibly decided not to pursue the point further.

7. Once objections to the court's jurisdiction were resolved or withdrawn, Antipinsky's only remaining ground for applying to discharge the WFO (and, correspondingly, for opposing its continuation) was that VTB, in making its without notice application to Teare J, had been guilty of material non-disclosure in two respects, considered below.

8. The applications to continue or to discharge the Cargo Injunction turned on the question of whether it was appropriate, as a matter of law and as a matter of discretion, to make an order which amounted, in effect, to an order for specific performance of a contract to sell commodities.

9. Also before me was an application by VTB dated 8 October 2019 for an order that all VGO remaining on a floating storage vessel, MT POLAR ROCK ("the Polar Rock") be sold and directions given for the preservation of the proceeds ("the Polar Rock Application"). VTB contended, for reasons explained below, that such an order should be made regardless of whether the Cargo Injunction was continued.

10. On 12 December 2019 I ruled (with reasons to follow) that the WFO be continued until the termination of the arbitral proceedings (save for an agreed amendment to paragraph 7(2) of the order of Teare J), but that the Cargo Injunction be discharged. I also refused to make any order in relation to the sale of the balance of VGO stored on the Polar Rock.

11. This judgment sets out the reasons for my rulings of 18 October and 12 December 2019.

The background facts and procedural chronology

12. Antipinsky, a company incorporated in Russia, owns and operates the largest independent oil refinery in that country, producing VGO, among other petroleum products.

13. By three offtake contracts, dated respectively 19 October 2018, 15 March 2019 and 8 April 2019, VTB, a commodity trader incorporated in Ireland and a subsidiary of VTB Bank, agreed to purchase quantities of VGO from Antipinsky, FOB Murmansk ("the Offtake Contracts"). In practice delivery was to be by way of transhipment from floating storage on the Polar Rock in the port of Murmansk.

14. Each of the Offtake Contracts was accompanied by a prepayment agreement of the same date ("the Prepayment Agreements"), pursuant to which VTB prepaid Antipinsky a total of €194,759,518.45 in respect of the deliveries of VGO that Antipinsky was obliged to make under the Offtake Contracts between April and July 2019. All of the Offtake Contracts and the Prepayment Agreements were governed by English law and provided for arbitration of any disputes in London pursuant to the rules of the LCIA.

15. In April 2019 Antipinsky and its forwarding agent, JSC Machinoimport ("Machinoimport") stopped communicating with VTB and VTB learned that cargoes of VGO were being delivered to the Intervener ("Petraco"). VTB feared that, despite

having prepaid for delivery of effectively all of Antipinsky's production of VGO, that oil was being sold to third parties, notwithstanding Antipinsky's assurances to the contrary.

16. On 29 April 201 Notice of Default under each of the Prepayment Agreements and exercised its right to accelerate Antipinsky's obligation to repay all outstanding pre-payments and interest accrued thereon 9 VTB:

    i) served Notice of Default under each of the Prepayment Agreements and exercised its right to accelerate Antipinsky's obligation to repay all outstanding pre-payments and interest accrued thereon;

    ii) commenced the six LCIA arbitrations against Antipinsky;

    iii) issued the arbitration claim form in these proceedings seeking the WFO and Cargo Injunction;

    iv) applied urgently and without notice to Waksman J, who granted cargo injunctions until a further without notice application could be heard the next day, in the event by Teare J.

17. The following day Teare J made the order referred to above, providing that the WFO and the Cargo Injunction thereby granted were to continue until after the Return Date (originally 15 May 2019), or further order of the court or award or order of the Tribunal. In the interim, pursuant to the Cargo Injunction, Antipinsky was to deliver a consignment of 33,000mts on 27-28 April 2019 by transhipment to the MT Stone and two further consignments, each of 33,000mts, on 4-5 May 2019 by transhipment to the MT Meganisi.

18. On 8 May 2019 the Intervener ("Petraco") issued an application to vary the WFO and the Cargo Injunction to allow it to take delivery of 60,608.905mts of the VGO aboard the Polar Rock ("the Disputed Parcel"). Petraco claimed that Machinoimport had title to the Disputed Parcel, having purchased it from Antipinsky, and had on-sold the Disputed Parcel to Petraco.

19. On 15 May 2019 Sir William Blair:

    i) ordered VTB to pay US$30 million into court by way of fortification of its undertaking in damages;

    ii) ordered the sale of the 85,675 mts of VGO stored aboard the Polar Rock pursuant to two contracts of sale between VTB and third parties, by loading aboard the MT Stone and the MT Meganisi;

    iii) directed an expedited trial of the rights and obligations of VTB, Antipinsky and Petraco in respect of the Polar Rock Cargo and/or the sums paid into court by VTB;

    iv) adjourned the Return Date to a date to be fixed.

20. On 28 May 2019 Knowles J varied the order of Sir William Blair to permit VTB to pay the fortification sum to be held by its solicitors.

21. On 31 May 2019 Moulder J further varied the order of Sir William Blair so that, provided VTB undertook to pay US$2.5million to Machinoimport, Petraco was required to nominate the MT Stone and MT Meganissi to take delivery of the Disputed Parcel in furtherance of the order for sale and in performance of Petraco's purchase contract with Machinoimport.

22. The Disputed Parcel was duly loaded onto the MT Stone and the MT Meganissi, following which a balance of about 26,000 mts of VGO remained aboard the Polar Rock.

23. The Tribunal was constituted by the LCIA Court on 1 July 2019 and comprised William Rowley QC, Michael Tselentis QC SC and Duncan Matthews QC.

24. On 16 July 2019, the adjourned Return Date, Sir Jeremy Cooke rejected Antipinki's contention that the applications before Waksman J and Teare J did not satisfy the requirements of s.44 because they were not urgent and/or could have been dealt with by an application to the LCIA for the appointment of an emergency arbitrator. The Return Date was further adjourned, the WFO and the Cargo Injunction continuing in the meantime.

25. As set out above, on 18 October 2019 I further adjourned the Return Date and all applications and continued the WFO and Cargo Injunction in the meantime.

26. On 20 October 2019 the Tribunal granted VTB permission to make the Continuation Application to this court (as set out above) and also to make an application pursuant to s.32 of the Arbitration Act 1996 in respect of Antipinsky's challenges to the Tribunal's jurisdiction. The Tribunal further gave directions for the expedited trial of VTB's debt claim.

27. The trial of VTB's debt claim took place between 11 and 14 November 2019, but Antipinsky did not attend.

28. On 26 November 2019 the Tribunal issued a Partial Final Award in respect of VTB's debt claim, awarding VTB a total of €208,102,208 in respect of sums repayable to VTB under the Prepayment Agreements together with contractual interest.

29. VTB's s.32 application was heard on 27 and 28 November 2019. On 3 December 2019 Teare J delivered judgment determining that the Tribunal did have jurisdiction to hear and determine the disputes before it.

30. As set out above, the adjourned Return Date and associated applications were restored before me on 4-5 December 2019 and I delivered my ruling on 12 December 2019.

31. On 14 January 2020 Antipinsky's solicitors wrote to inform me that on 30 December 2019 Antipinsky had been declared insolvent and had entered into a formal liquidation procedure following a decision of the Arbitration Court of the Tyumen region. Whilst this development may have implications for the future conduct of these proceedings, it comes after my rulings of 16 October and 12 December 2019 and plays no part in my reasons set out below.

Jurisdiction under s.44

32. S.44 provides as follows:

> "(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
>
> (2) Those matters are—
>
> (a) the taking of the evidence of witnesses;
>
> (b) the preservation of evidence;
>
> (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
>
> (i) for the inspection, photographing, preservation, custody or detention of the property, or
>
> (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;
>
> and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;
>
> (d) the sale of any goods the subject of the proceedings;
>
> (e) the granting of an interim injunction or the appointment of a receiver.
>
> (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
>
> (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
>
> (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

> (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.
>
> (7) The leave of the court is required for any appeal from a decision of the court under this section."

33. On 16 October 2019 Antipinsky contended that the court did not have jurisdiction to entertain VTB's applications. It was common ground that the applications were not urgent and so did not fall within s.44(3) and that the Tribunal had not given (nor been asked to give) its permission within s.44(4).

34. VTB's response was (i) that once the court had made an urgent order under s.44(3) (as in this case), it retained jurisdiction to deal with the continuation or variation of that order even after the matter had ceased to be urgent, regardless of whether the requirements of s.44(4) were satisfied; further or alternatively (ii) that there was an agreement in writing between the parties, to be found in the correspondence between them or in the relevant LCIA rules, thereby satisfying s.44(4).

35. As the Tribunal in the event gave permission just two days after my ruling and the matter returned to court before me on 4 December 2019, the issue was of only transient relevance in this case. However, as the issue could potentially arise in many other cases (although usually the parties will adopt the pragmatic course of agreeing the venue of any application to continue an order made urgently under s.44(3) or otherwise the applicant will obtain the permission of the tribunal for the matter to be dealt with by the court), it is appropriate that I set out my reasoning.

(i) Continuing jurisdiction

36. VTB relied upon an *obiter dictum* of Flaux J (as he then was) in *The Nicholas M* [2008] 2 Lloyds Rep 602 to support the contention that the court retained jurisdiction to continue or vary an order made urgently under s.44(3), even after the urgency had passed and even absent the consent of the tribunal. In that case the respondent, in its skeleton argument for the extended return date, had argued that the court did not have jurisdiction in such circumstances. The point was not pursued, however, because, shortly before the extended return date, the tribunal gave its permission for the application. Nevertheless, at §71-72 Flaux J expressed his preliminary view that the argument was misconceived, stating:

> "On the basis that the matter was urgent on 2 May 2008 (which it clearly was) the court had jurisdiction under section 44(3) to grant the freezing order. Once clothed with jurisdiction and seised of the matter, the court clearly had jurisdiction to continue or vary the injunction at the return date which was set out in the order made on 2 May 2008. It does not seem to me that section 44 (4) is concerned with the continuation or variation of orders already made by the court. Rather it is focusing on the initiation of applications to the court…"

37. However, an urgent without notice injunction is almost invariably expressed to come to an end on (or immediately after) the return date, and the applicant is required to issue and serve a fresh "on notice" application for the relief it seeks for hearing at the return date. On the return date the burden is on the applicant to persuade the court afresh to grant the relief sought, including establishing that the court has jurisdiction, without any benefit or presumption from the fact that the court has previously made an order on a without notice basis. Although the order resulting from a successful on notice application may often be expressed as a continuation or variation of the order made without notice, the reality is that a new "on notice" order is made which supersedes the "without notice" order.

38. In those circumstances, and notwithstanding the persuasive force of Flaux J's preliminary view (formed, as Flaux J himself indicated, without the benefit of argument), in my judgment the court's jurisdiction to act on a non-urgent application for relief under s.44 cannot be dependent on whether or not the court has or has not previously made an urgent order under s.44(3). In particular:

    i) An application notice for relief on notice is "the initiation of an application", both as a matter of analysis and practice;

    ii) It would be strange if a party applying afresh, on notice, for relief which could only be granted under s.44 did not have to establish that the court had jurisdiction to entertain his application under that section because it had previously obtained an order without notice to the respondent, being the very relief it was now required to justify on an *inter partes* basis. It would mean that an applicant would be in a better position through having obtained a without notice order than had no such order been obtained. There appears to be no rationale for such a distinction, which would be counter to the rule (based on the fundamental principle that a party is entitled to be heard) that the applicant must establish its entitlement to relief afresh, with no benefit from having obtained a prior without notice order;

    iii) S. 44 is designed to respect party autonomy and to restrict the scope of the court's jurisdiction accordingly, consistently with the general principle set out in s.1 of the 1996 Arbitration Act. As Lord Mance stated in *AES Ust-Kamengorsk Hydropower Plant LLP v Ust-Kamengorsk Hydropower Plant JSC* [2013] 1 WLR 1889 at §46: "The power to grant an interim injunction is limited, save in cases of urgency, to circumstances in which either the tribunal permits an application to the court or all the other parties agree in writing..";

    iv) S.44(3) therefore gives the court jurisdiction to act where an application is urgent, but it is plain from s.44(4) that once such urgency has ceased the court should not act further without the consent of the tribunal or all parties, and that even then it is necessary to consider (under s.44(5)) whether it remains the case that the tribunal cannot itself act effectively for the time being. There is no reason why that approach and mechanism cannot be applied to applications for relief where a without notice injunction is due to expire on a return date. It will often be the case that a tribunal will be appointed between a without notice injunction being granted and the return date (particularly one which has been adjourned) and it is plainly right that the requirements of s.44(4) and (5) should be considered and applied in the context of that new situation.

39. It follows that a party applying to continue a without notice injunction granted under s.44(3), where the urgency has since passed, must satisfy the requirements of s.44(4). As VTB had not obtained the permission of the Tribunal to make its applications on 16 October 2019, the court did not have jurisdiction to act on them absent written agreement between VTB and Antipinsky.

(ii) Written agreement

40. VTB argued that an agreement that the court should act on its applications was to be found in the correspondence between the parties as to the listing and directions for the hearing of the adjourned Return Date. I see no merit whatsoever in that contention. In letters to VTB and the court on 17 and 19 July 2019 respectively, Antipinsky clearly recorded its position that, after the constitution of the Tribunal on 1 July 2019, the court did not have jurisdiction under s.44 in respect of VTB's applications. Nothing in subsequent correspondence amounted to a reversal of that position: the fact that Antipinsky cooperated in the arrangements for the adjourned Return Date did not amount to an agreement that it would not take a point on jurisdiction at that hearing.

41. In his oral reply submissions Mr Cogley QC, for VTB, developed a new argument based on article 25.3 of the LCIA Rules 2014 (to which, it is accepted, the parties are taken to have agreed in writing) which provides:

> "The power of the Arbitral Tribunal under Article 25.1 shall not prejudice any party's right to apply to a state court or other legal authority for interim or conservatory measures to similar effect: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award…. "

42. Mr Cogley contended that, as the Continuation Application was issued on 13 May 2019, VTB had applied to court before the formation of the Tribunal as expressly permitted by Article 25.3 and as therefore agreed between the parties in writing to be permissible.

43. The question which arises is whether the right to "apply" in Article 25.3 should be interpreted as relating to the issuance of an application notice before the formation of the Tribunal (even if the resulting court hearing is after its formation), or whether it relates to the making of the application in court. Although the rule is arguably ambiguous in this respect, I consider that the latter is obviously correct for the following reasons:

i) strictly speaking, an application notice only gives notice of the intention to make an application. The application itself is made in court;

ii) a rule which permitted a party to move an application in court long after the formation of the tribunal (even if a notice of the application notice was "issued" before its formation) would drive a coach and horses through the intended scheme of the rules; and

iii) s.44 (to which the LCIA rules plainly have regard in this respect) is expressed in terms of the jurisdiction of the court to "act" on an application, indicating that

> the application in question is that to be argued in court, not the notice of an application.

(iii) Conclusion on jurisdiction under s.44

44. For the above reasons, as of 18 October 2019, the court did not have jurisdiction to act on VTB's applications as the requirements of s.44(4) were not met. However, I was satisfied (and Antipinsky accepted) that I nevertheless had discretion, as a matter of my general case management powers, to adjourn the Return Date, the effect of so doing being that the WFO and the Cargo Injunction continued according to their terms.

45. I should record that VTB also advanced an argument that it was an abuse for Antipinsky to take a point on jurisdiction under s.44 as such a point could and should have been taken before Sir Jeremy Cooke on 16 July 2019. However, the point determined at that hearing was whether, on 29 and 30 April 2019, the court had jurisdiction under s.44(3) and (5) to act on VTB's without notice applications. The issues were whether the applications were truly urgent and whether or not the possibility of applying to the LCIA for the appointment of an emergency arbitrator affected the position. In my judgment advancing those matters in no way precluded Antipinsky from objecting to the jurisdiction of the court to deal with the Continuation Application as and when that was advanced.

Material non-disclosure

46. Antipinsky contended that, in advancing the without notice applications, VTB failed to give full and frank disclosure in two material respects. The first related to the possibility that VTB might cease to have title to part of its claim. The second related to the fact that the wording of the WFO departed from that of the Commercial Court precedent, without that departure being drawn to Teare J's attention.

(i) Novation of the April contracts

47. VTB applied for a worldwide freezing order in the sum of €225m on the basis that its money claims under the three sets of contracts totalled about €197m, the April Offtake Contract and Prepayment Agreement accounting for just over €70m of that total.

48. However, VTB did not disclose to Teare J that a company named Crudex SA ("Crudex") had been a sub-participant in VTB's purchase and financing of the April Offtake Contract and Prepayment Contract, and that, on 8 April 2019, VTB, Antipinsky and Crudex had entered into a Deed of Novation in relation to the April Offtake Contract and Prepayment Agreement (both also executed on 8 April 2019).

49. By clause 1 of the Deed of Novation, the transfer of VTB's rights and obligations under the contracts to Crudex was conditional on the occurrence of either a "Sanctions Event" or:

> "… a default ... under the [Prepayment Agreement] which would mean that the Non-Assigning party is prevented from delivering Commodities … and which has been continuing unremedied for 60 days."

50. Further, by a Deed of Assignment also executed on 8 April 2019, Crudex had assigned its rights in respect of the April Offtake Contract and Prepayment Contract (including those under the Deed of Novation) to its bankers, ING Belgium. VTB and Antipinsky were also parties to that Deed. On 6 April 2019 ING had served a notice of assignment on all other parties.

51. Antipinsky submitted that the Deed of Novation was material to the court's consideration of whether to grant relief to VTB on a without notice basis and, if so, on what terms, and so VTB was under duty of good faith to disclose its existence: see *Gee, Commercial Injunctions* [9-001]. The effect of the Deed was that VTB might lose title to over one third of its debt claim against Antipinsky through matters outside its control, a matter which might well have impacted on the Teare J's consideration of the appropriate amount, duration or other terms of the WFO. Antipinsky further pointed to the fact that, on 7 October 2019, VTB's solicitors stated that the position was "not entirely clear" and gave notice that it was VTB's "present intention to seek a reduction of the WFO to €152 million".

52. VTB subsequently, however, reversed that position and sought to maintain the WFO at its existing level. VTB asserted that it was not obliged to disclose the Deed of Novation (or the Deed of Assignment) and that its non-disclosure was in any event of no significance for the following reasons:

    i) The novation was not conditional on mere default by Antipinki, but on Antipinsky being "prevented" from delivering VGO, an event which had not occurred on 30 April 2019, as now determined by the Tribunal in the PFA at paragraph 7.4.3;

    ii) It followed that any novation would not have occurred for at least 60 days after the grant of the WFO, well after the Return Date specified in the order of Teare J. As Antipinsky was party to the Deed of Novation and was well aware of the arrangements, it was in a position to raise the existence of the Deed and its effect well before VTB's claim could have been reduced;

    iii) In the event, Antipinsky did not seek a reduction of the WFO by reason of the Deed of Novation on the original return date, nor on 16 July 2019;

    iv) Further, ING and Crudex have (out of an abundance of caution) executed re-assignments of the cause of action against Antipinsky in respect of the April contracts, so there is no doubt that VTB has title to the entirely of its claim. There can be no doubt that, had any question of that title been raised, steps could and would have been taken in conjunction with ING and Crudex to perfect the position;

    v) Antipinsky belatedly raised the matter by way of defence to VTB's debt claim in the arbitrations, but that defence was rejected by the Tribunal, which awarded VTB the full amount of its claim.

53. I accept Antipinsky's contention that the existence of the Deed of Novation was sufficiently material that VTB was under an obligation to disclose it. The fact that VTB had entered a contract which might result in its losing title to €70m of its claim was plainly relevant to considerations as to quantum of or duration of any order, and a matter

that a Judge considering the issue would expect to be told. The fact that disclosure may have been unlikely to have affected the result is not an answer: see *Behbehani v Salem* [1989] 1 WLR 723 at 729. Neither is it an answer that Antipinsky would have been able to raise the matter on the Return Date: if a matter is material to the court's consideration on a without notice application, it is not for the applicant to decide that it can await consideration until a later date, by which time the order will have been in force for a period without the material matter having been taken into account.

54. However, the further question arises as to whether the material non-disclosure should result in the discharge of the injunctions. As explained by Ralph Gibson LJ in *Brink's-MAT Ltd. v Elcombe* [1988] 1 WLR 1350 at 1357:

> "… it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded": *per* Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex-parte order, nevertheless to continue the order, or to make a new order on terms."

55. It has been emphasised in recent decisions of this court that the usual result of a finding of material non-disclosure on an application for a without notice order is that the order will be discharged. As Popplewell J (as he then was) stated in *Banca Turco Romana S.A. v Cortuk* [2018] EWHC 662 (Comm) at [45]:

> "The sanction available to the court to preserve [the integrity of the court process] is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in *Re OJSC ANK Yugraneft v Sibir Energy PLC* [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

56. In the present case, however, the matters VTB failed to disclose were, at most, of peripheral relevance, relating to part only of its debt claim and to a possible future problem which was well known to Antipinsky and would not arise until after the Return Date. It is unlikely that disclosure of the Deed of Novation would have affected Teare J's order, but if it had it is plain that VTB could and would have taken steps to cure the perceived difficulty in its future title. In the event the Deed of Novation was effectively reversed and Antipinsky was in no way prejudiced by the non-disclosure.

57. Whilst such matters in no way excuse the non-disclosure, they do justify me in exercising my discretion to continue the WFO notwithstanding that failure (and

notwithstanding that it appears that non-disclosure was a deliberate decision based on a mistaken view of relevance rather than an inadvertent slip). An additional powerful factor is that the Tribunal has now awarded VTB the full amount of its claim, changing VTB's status from claimant to, in effect, judgment creditor.

(ii) Alteration to the Commercial Court precedent

58. The Commercial Court precedent for a worldwide freezing order contains the following provision in relation to assets abroad:

> "…If the Respondent has other assets outside England and Wales, she, he or it may dispose of or deal with those assets outside England and Wales so long as the total unencumbered value of all its, her or his assets whether in or outside England and Wales remains above £ ."

59. However, paragraph 7(2) of the order of Teare J provided that

> ".. If the Respondent has other assets outside England and Wales, he may dispose of or deal with those assets outside England and Wales so long as the total unencumbered value of all of his assets within England and Wales remains above €225,000,000."

60. The omission of the phrase "whether in or outside" England and Wales would, if taken literally, have a very different effect than the standard wording. It would prevent Antipinsky, if it had assets worldwide valued above €225,000,000, from dealing with its assets unless it also had €225,000,000 in England and Wales.

61. Antipinsky contended that VTB failed to disclose that very significant departure to Teare J., in breach of the well-established principle that any changes should be specifically identified.

62. However, whilst VTB did not explain precisely how the error came about, I am satisfied that the change was an innocent typing error which was not spotted by anyone until Antipinsky raised it in November 2019. In my judgment there was not, strictly, a departure from the standard form because any Commercial Court Judge would appreciate that an error had been made and that the intention was to make the standard order. But in any event, if there was a non-disclosure, it does not justify the discharge of the order.

(iii) Conclusion on non-disclosure

63. It follows that I decline to discharge the order of Teare J, or otherwise reduce the amount of the WFO, on the grounds of material non-disclosure.

64. As indicated above, Antipinsky advanced no other ground for opposing the WFO, so VTB's application to continue that order succeeds, subject to the necessary amendment of paragraph 7(2).

The Cargo Injunction

65. In broad terms, paragraph 14(1) of the order of Teare J restrained Antipinsky from selling VGO to third parties without the consent of VTB and paragraph 14(2) ordered Antipinsky to comply with delivery obligations to VTB under the Offtake Contracts.

66. Shortly before the restored hearing on 4 December VTB indicated that it would not seek the continuation of the mandatory injunction in paragraph 14(2) as the contractual delivery dates had long since passed (although VTB maintained that paragraph 14(2) was properly applied for and granted). However, it was common ground that the effect of paragraph 14(1), even though expressed as a negative restraint on sales to third parties, was tantamount to an order for specific performance by Antpinski of the Offtake Contracts. As recognised by Goulding J in *Sky Petroleum Ltd. v V.I.P. Petroleum Ltd.* [1974] 1 WLR 576, it is a matter of substance rather than form.

67. The question therefore arises as to whether VTB is entitled to an interim order for specific performance of contracts for the sale of quantities of unascertained VGO. VTB asserts in passing that VGO on the Polar Rock may be "ascertained" by the principle of exhaustion, but that is not a conclusion I could come to at this interim stage in circumstances where there are numerous competing claims to that cargo, both proprietary and contractual.

(i) The legal principles

68. Section 52 of the Sale of Goods Act 1979 expressly permits an order for specific performance of a contract for the sale of goods where the goods are "specific" or "ascertained".

69. In *Re Wait* [1927] 1 Ch 606 sub-purchasers sought specific performance of a contract for the sale of 500 tons of wheat in circumstances where they had paid the middle-man (Wait) in full and he had received the bill of lading for a consignment of 1000 tons of wheat, but became bankrupt before the ship arrived.

70. The majority of the Court of Appeal held the sub-purchasers were not entitled to an order for specific performance, the goods not being specific or ascertained. Atkin LJ, at p 629-630 stated that:

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

> the remedy of specific performance was not open to the creditors….

71. At pp. 637-637 Atkin LJ continued:

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

72. Atkin LJ further stated at p. 639 as follows:

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

73. VTB pointed out that, to the extent that Atkin LJ suggested that there is no power to order specific performance of a contract for the sale of goods outside of s.52 (that is to say, of specific or ascertained good), that does not represent the modern law, not least in the light of the recognition by the Supreme Court in *The Res Cogitans* [2016] AC 1034 (albeit obiter and in relation to a different section, s.49) that the Sale of Goods Act 1979 was not a complete code. Indeed, VTB contended that, even in the case of non-specific and unascertained goods, a party was entitled to specific performance on ordinary equitable principles, in particular, where damages are not an adequate remedy.

74. Antipinsky accepted that there was jurisdiction to order specific performance outside of s.52 of the Sale of Goods Act 1979, but contended that it was only to be exercised in exceptional circumstances, either where the goods were effectively unique or in which the normal market was not functioning.

75. Both parties referred to the decision in *Sky Petroleum*, a case in which an order was made requiring performance of a contract for the supply of oil. The purchaser was obliged to buy all its motor fuel for 10 years from the seller, but during the 1973 oil crisis the seller ceased to supply (and was able to obtain a far better price elsewhere). Goulding J. granted an interim injunction restraining the seller from breaching the contract (recognised to be, in effect, an order for specific performance), stating at p. 578 as follows:

> "There is trade evidence that the plaintiffs have no great prospect of finding any alternative source of supply for the filling stations which constitute their business. The defendants have indicated

> their willingness to continue to supply the plaintiffs, but only at prices which, according to the plaintiffs' evidence, would not be serious prices from a commercial point of view. There is, in my judgment, so far as I can make out on the evidence before me, a serious danger that unless the court interferes at this stage the plaintiffs will be forced out of business. In those circumstances, unless there is some specific reason which debars me from doing so, I should be disposed to grant an injunction to restore the former position under the contract until the rights and wrongs of the parties can be fully tried out.
>
> Now I come to the most serious hurdle in the way of the plaintiffs which is the well known doctrine that the court refuses specific performance of a contract to sell and purchase chattels not specific or ascertained. That is a well-established and salutary rule … However, the ratio behind the rule is, as I believe, that under the ordinary contract for the sale of non-specific goods, damages are a sufficient remedy. That, to my mind, is lacking in the circumstances of the present case. The evidence suggests, and indeed it is common knowledge that the petroleum market is in an unusual state in which a would-be buyer cannot go into the market and contract with another seller, possibly at some sacrifice as to price. Here, the defendants appear for practical purposes to be the plaintiffs' sole means of keeping their business going, and I am prepared so far to depart from the general rule as to preserve the position under the contract until a later date. I therefore propose to grant an injunction."

76. In *SSL International plc v TTK LIG Ltd* [2012] 1 WLR 1842 the Court of Appeal upheld the refusal of an interim order to deliver quantities of condoms on the grounds that the goods were not manufactured at the date of the contracts, were not ascertained in accordance with the terms of the contract, and an order could not be made in relation to identifiable goods. Although the order was sought under s.52 of the Sale of Goods Act 1979, Stanley Burnton LJ stated that the difficulties in granting relief under that section were not technical, but symptomatic of more general objections to the grant of injunctive relief.

77. In my judgment the rationale for refusing specific performance of contracts for the sale of future unascertained goods goes beyond the fact that damages will usually be an adequate remedy, although that is an important aspect of the rule. The granting of such a remedy effectively turns a contractual claim into a quasi-proprietary right in respect of goods which have not been allocated to the contract and may have been sold to a third party. That gives rise to both conceptual difficulties as referred by Atkin LJ in *Re Wait* and to practical difficulties as identified by Stanley Burnton LJ in *SSL*.

78. There is, in my judgment, a strong presumption that specific performance will be limited to cases of specific or ascertained goods, a presumption to be gleaned from s.52 and from the judgment of Atkin LJ and recognised in *Sky Petroleum*, the one case where the rule has been overridden.

79. It follows that I accept Antipinsky's contention that, as recognised in *Snell's Equity* (33rd ed) at [17-009]:

> "In practice, the courts are reluctant to exercise this discretion [to grant specific performance outside of s.52] unless the goods are effectively unique. However, in very exceptional circumstances in which the normal market is not functioning, the courts may be more flexible about specific remedies, even for goods that are not specific or ascertained."

(ii) Application of the legal principles to the facts of this case

80. VTB argued (and Teare J accepted on the without notice application) that damages were not an adequate remedy in the present case, not least because VTB had entered sub-sales in respect of VGO to be shipped from Murmansk of a specification only available, in practical terms, from Antipinsky's refinery. Further, exclusion clauses in the Offtake Contracts might well preclude VTB from recovering losses incurred in the sub-sale contract from Antipinsky, which was in any event not likely to be good for any damages due to VTB.

81. However, the fact that Antipinsky was in financial trouble and was double-selling its production of VGO, notwithstanding that VTB had prepaid to purchase that production, does not take the matter out of the ordinary, let alone justify granting an injunction which gives priority to VTB over other purchasers of Antipinsky's goods, whether their contracts were before or after VTB's contracts. The Cargo Injunction in effect runs directly counter to the recognition in *Re Wait* that, even where the seller is dishonest in taking prepayment and has sold its entire production to a third party, the innocent purchaser does not acquire any form of equitable or other proprietary interest in that production and is not entitled to orders which would have that effect.

82. Further, in the present case there is no question of a more general failure in the market which is being exploited by a large supplier, putting a purchaser out of business, as was the position in *Sky Petroleum*.

83. For those reasons I refuse to continue the Cargo Injunction on the basis that this is not an exceptional case where the discretion to grant such an injunction arises. But even if it was such a case, I would decline to exercise my discretion in circumstances where:

i) there are multiple claimants to Antipinsky's production of VGO (including that aboard the Polar Rock), both contractual claims (in the case of Petraco) and proprietary claims (in the case of Machinoimport); and

ii) it appears that Antipinsky was in deep financial difficulties and might well have creditors with equal if not better claims than VTB to the preservation and ultimate distribution of its assets.

84. Paragraph 11 of the order of Teare J contained a parallel restriction (in the context of the WFO) on Antipinsky selling VGO to third parties. In view of my decision in relation to the Cargo Injunction, that paragraph falls to be removed.

The Polar Rock Application

85. In view of my decision that the Cargo Injunction should not be continued, it would appear to follow that any order requiring Antipinsky (or Machinoimport) to sell or deliver VGO to VTB should also be discharged, and certainly no new order made. The restriction on Antipinsky dissipating its assets in the form of the WFO of course remains in force.

86. However, Mr Cogley argued that, as no application had been made to discharge the order of Sir William Blair for the sale of the VGO on the Polar Rock, that order continued in force and, further, should be given effect by a further order for the sale of the balance of 26,000mts stored aboard the Polar Rock and the preservation of the proceeds of sale.

87. I see no merit in that contention for two reasons. First, Sir William Blair's order was firmly premised on the order of Teare J, referred to in the first recital. The order for sale was clearly made in the context of the Cargo Injunction which required Antipinsky to meet delivery obligations to VTB. Once the Cargo Injunction is discharged, the basis for the order for sale falls away and it must be discharged (to the extent it remains operative).

88. Second, however, the order appears to have ceased to be operative. Sir William Blair ordered the sale by loading onto two named vessels, which appears to have taken place. Whilst the order of Moulder J permitted the nomination of other vessels by Petraco "forthwith", it appears that did not happen and that loading was on to the MT Stone and the MT Meganissi. It follows that there is no extant order for the sale of the balance on the Polar Rock and no justification for making a new order.

Conclusion

89. I have already made an order continuing the WFO until the termination of the arbitration proceedings, subject to the revisions indicated above, but dismissing the application to continue the Cargo Injunction. I will hear from the parties as to consequential matters arising from this judgment and my order.