Neutral Citation Number: [2016] EWHC 2892 (Comm)

Case No: CL-2016-000140

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2016

Before:

THE HONOURABLE MRS JUSTICE CARR DBE

- -

Between:

NATIONAL BANK OF ABU DHABI PJSC	**Claimant**
- and -	
BP OIL INTERNATIONAL LIMITED	**Defendant**

- -
- -

Mr Rhodri Davies QC and Mr Nicholas Sloboda (instructed by **Slaughter and May**) for the **Claimant**
Mr Bankim Thanki QC and Mr Christopher Lewis (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing date: 7th November 2016

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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.

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THE HONOURABLE MRS JUSTICE CARR DBE

Mrs Justice Carr:

Introduction

1. This is a claim by the Claimant, National Bank of Abu Dhabi PJSC ("NBAD"), for compensation for breach of warranty and representation against the Defendant, BP Oil International Limited ("BP"). Judgment is sought in the sum of US$68,881,854.62 plus interest.

2. NBAD, a commercial bank, purchased from BP 95% of a receivable due to BP pursuant to a Purchase Letter dated 3rd September 2014 ("the Purchase Letter"). The receivable was a debt owed to BP by a Moroccan oil-refining company, Société Anonyme Marocaine de L'Industrie de Raffinage ("SAMIR") in respect of an oil consignment ("the Receivable"). The Purchase Letter represented a form of non-recourse receivables financing under which BP transferred almost all of the credit risk of SAMIR failing to make payment to NBAD and received a cash advance in respect of the Receivable in advance of the date on which the underlying invoice was due for payment.

3. By the Purchase Letter BP agreed, amongst other things, that by selling 95% of the Receivable it had assigned to NBAD "*in equity irrevocably"* the purchased part of the Receivable. BP also went on to represent and warrant to NBAD that it was:

> *"…not prohibited by any security, loan, or other agreement... from disposing of the Receivable evidenced by the Invoice as contemplated herein and such sale does not conflict with any agreement binding on [BP]."*

4. Under the Purchase Letter, BP was to reimburse NBAD for a specified sum if any such representation or warranty was breached.

5. NBAD duly paid for the Receivable. However, SAMIR went into insolvency proceedings in or around late November 2015 and NBAD has received no payment. In the course of pursuing the matter with BP, and in particular the question of assignment, NBAD discovered the existence of a prohibition on assignments in the terms of the sale and purchase agreement between BP and SAMIR.

6. There is a single issue of interpretation to be resolved, namely whether or not the existence of this prohibition means that the representation given by BP to NBAD in the Purchase Letter as set out above was false. NBAD contends that it was; BP contends that it was not.

7. By agreement between the parties and as approved by the Court, the action, which was commenced on 4th March 2016, has proceeded under the pilot for the Shorter Trials Scheme (see CPR PD51N), resulting in a one day hearing on 7th November 2016. There has been very limited disclosure and there are no witness statements and there has been no oral evidence. The parties and their lawyers are to be congratulated for the co-operative spirit in which the litigation has been conducted which has resulted in an effective and speedy process, all as envisaged by the Shorter Trials Scheme. The total costs of the action on each side are estimated to be approximately £350,000. This judgment has been handed down within two weeks of the hearing.

Background

8. On 9th December 2013 BP and SAMIR entered into an Agreement for the Sale and Purchase of Crude Oil which was expressly subject to English law ("the BP/SAMIR Agreement"). Under the BP/SAMIR Agreement the parties agreed to enter into a series of sales and purchases in accordance with the terms and conditions set out in the BP/SAMIR Agreement. Payment was due some two months after delivery. By clause 14, BP's (lengthy) General Terms and Conditions for Sales and Purchases of Crude Oil (2007 edition) ("BP's General Terms and Conditions") were incorporated. Section 34 of BP's General Terms and Conditions ("section 34") provided:

> *"Section 34 – Limitation on Assignment*
>
> *Neither of the parties to the Agreement shall without the previous consent in writing of the other party (which shall not be unreasonably withheld or delayed) assign the Agreement or any rights or obligations hereunder. In the event of an assignment in accordance with the terms of this Section, the assignor shall nevertheless remain responsible for the proper performance of the Agreement. Any assignment not made in accordance with the terms of this Section shall be void."*

9. Thus, written consent to assignment was required, and failure to comply with this requirement wholly invalidated any assignment. There was an exception in the confidentiality provisions in the body of the BP/SAMIR Agreement allowing for its disclosure where agreement to assign in accordance with section 34 was obtained.

10. The BP/SAMIR Agreement was therefore a large-scale "umbrella" agreement under which individual transactions would then take place. One such transaction, and the transaction underlying the Purchase Letter, was the sale by BP to SAMIR of 100,000 metric tonnes of Russian Export Blend crude oil (plus or minus 10% Seller's operational tolerance) at a price of Brent plus US$0.45 per US barrel pursuant to an addendum to the BP/SAMIR Agreement which has been treated as dated 16th January 2014. The invoice was to be based on the bill of lading quantity. The bill of lading was dated 5th August 2014 and showed a quantity of 99,937.054 metric tonnes (net in vac), equating to 722,205 US barrels, as reflected in BP's invoice dated 29th August 2014, showing an invoice value of US$72,507,215.39.

11. On 12th August 2014 BP and NBAD entered into a Payment Guarantee Agreement (no. TF141015) ("the Guarantee") in relation to the BP/SAMIR Agreement. By clause 2 of the Guarantee, which was again expressly subject to English law, NBAD agreed to guarantee payment by SAMIR to BP in an amount of 95% of the Estimated Cargo Value or the full final invoice value, subject to a maximum liability of US$75m. In exchange for that guarantee, BP paid a commission fee of 4.5% p.a., payable for the number of days between the discharge date and the earliest of a) the date payment in full was received by BP from SAMIR; b) the date a Demand was made under the Guarantee; and c) the Expiry Date (which was 29th January 2015, unless extended).

12. BP also gave certain undertakings under the Guarantee. These included as follows in the event of a payment by NBAD under the Guarantee (at clause 6.1):

> *"(a) to promptly pay to [NBAD] a proportion of any amounts subsequently recovered from [SAMIR] under the Contract which proportion shall be equal to the proportion of the Payment as against the Shortfall;*
>
> *(b) to promptly pay to [NBAD], a proportion of any interest for late payment recovered from [SAMIR] which proportion shall be equal to the proportion of the Payment as against the Shortfall;*
>
> *(c) where possible under any applicable laws and the Contract, to promptly assign (at its own expense) to [NBAD], following a request from [NBAD], all [BP]'s rights under the Contract to the extent of any payment made by [NBAD] to [BP] under Clause 5 and not subsequently paid under Clause 6.1(a) or Clause 6.1(b) and to do all things reasonably necessary to achieve such assignment; and*
>
> *(d) if assignment under Clause 6.1(c) is not possible or effective for any reason, that [NBAD] shall be subrogated to [BP]'s rights in respect of the Delivery under the Contract and [BP]'s rights in respect to the payment undertaking up to the amount paid by [NBAD] and to take legal proceedings against [SAMIR] under the Contract/payment undertaking to the extent of any such payment made by [NBAD] under Clause 3 [sic] and not subsequently paid under Clause 6.1(a) or Clause 6.1(b), upon [NBAD] agreeing to meet its proportionate share of [BP]'s reasonable instructions received by [BP] from [NBAD]."*

13. Annexed to the Guarantee was the Form of Demand which BP was to use in the event of a claim under clause 5.2 of the Guarantee. This made provision for a possible assignment (in accordance with clause 6.1(c)), as follows:

> *"In consideration of you [NBAD] agreeing to pay the amount demanded to us [BP] in accordance with the Agreement, and to the extent legally possible, including for the avoidance of doubt any contractual restriction on assignment in the Contract, we hereby assign to you up to an amount equal to [NBAD's] Share of our rights and interest in relation to the Delivery under:*
>
> *(i) the Contract;*
>
> *(ii) our invoice to [SAMIR] in respect of the Delivery under the Contract;*

> *(iii) the bill of lading or the inspector's report or the vessel nomination or a letter of indemnity to [SAMIR] under [the] Contract; and*
>
> *(iv) if a Verdict has been issued and a copy is available, the Verdict in our favour."*

14. In its written submissions BP points to the fact that at the date of the Guarantee both parties expressly contemplated and made distinct provision for the possibility that there might be a prohibition against or restriction on the assignment of rights under the BP/SAMIR Agreement. Whilst the Guarantee is admissible context (see *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 All ER (Comm) 39, at [83]), I have gained no material assistance from its terms for the purpose of construing the Purchase Letter. Even ignoring the fact that the Guarantee imposed a quite different legal obligation on quite different terms (in that, for example, NBAD would only be paying in the event of default by the debtor as opposed to "*up front*"), the Guarantee was fully cancelled and replaced by the Purchase Letter (as set out below). As the judgment of Rix LJ in *HIH Casualty* makes clear (at [83]), where the later contract replaces the earlier one (as here), "*a cautious and sceptical approach"* to finding any assistance in the earlier contract is "*a sound principle"*. In the event, Mr Thanki QC for BP did not press the point orally.

The Purchase Letter

15. BP and NBAD entered into the Purchase Letter on 3rd September 2014. The Purchase Letter was stated to be: "*In full cancellation and replacement of the [Guarantee]"*.

16. The Purchase Letter was on BP-headed notepaper. In its opening section it stated:

> *"We, [BP], hereby request [NBAD] (the **'Bank'**) to purchase from [BP] on a non-recourse basis, a proportion of a receivable evidenced by [BP]'s commercial invoice (the **'Invoice'**) addressed to [SAMIR] (the **'Buyer'**), in a form satisfactory to the Bank. The Invoice relates to a sale and delivery by [BP] of Goods as defined below (the 'Delivery') under a contract dated 16 January 2014 and entered into between the Buyer and [BP] (the 'contract'), and represents a legally valid and binding obligation on the Buyer to pay **USD72,507,215.39** (the **'Invoice Value'**) to [BP] on the Repayment Date as defined below (the **'Receivable'**).*
>
> *Subject to the terms of this Purchase Letter (including, without limitation, the conditions set out in Clause 1 below), the Bank hereby agrees to purchase the Receivable up to an amount of and thereafter to pay to [BP] the Discounted Value as calculated in accordance with Clause 1 below. The Discount Percent of the Invoice shall not exceed 95% of the Invoice Value. The obligations of the Bank under [the Guarantee] shall be terminated and reduced to zero on the Discount Date following the Bank's payment of the Discounted Value (as defined below)."*

17. The Invoice, the Invoice Value and various dates were then identified. The resulting key figures can be set out as follows:

	US$
Invoice value from [BP] to SAMIR:	72,507,215.39
Discount Percent (95%) purchased by NBAD:	68,881,854.62
Discounted Value paid by NBAD to [BP]:	67,662,173.54
Margin between the Discount Percent and the Discounted Value:	1,219,681.08

18. There then followed numbered clauses which provided materially as follows:

a) Clause 1 provided:

> *"[NBAD] hereby agrees that provided that [NBAD] has received (in satisfactory form to it) a copy of this Purchase Letter duly signed by [BP]… a certified true copy of the Invoice and a certified true copy of the Contract, in each case no later than one business day prior to the Discount Date….it will purchase the Discount Percent of the Receivable…, on a without recourse basis, by paying to [BP] the Discounted Value …on the Discount Date…."*

It then set out the detail of the calculation of the Discounted Value. As indicated above, this was 95% of the Invoice Value (US$72,507,215.39), discounted in turn by NBAD's cost of funds (the Rate) plus the Margin of 4.6% p.a., applied over the period (N days) between the date on which NBAD made payment (the Discount Date of 4 September 2014) and the Repayment Date plus 2 Business Days (assumed in the Purchase Letter to be 15th January 2015). Thus the amount paid by NBAD to BP was US$67,662,173.54, NBAD's premium of US$1,219,681.08 being deducted from 95% of the Invoice Value (which came to US$68,881,854.62);

b) Clause 3 needs to be set out in full and provided:

> *"[BP] shall, within two business days, pay to [NBAD] all payments received from the Buyer in connection with the Invoice up to the maximum amount of the Discount Percent of the Invoice Value. In case of partial payment from the Buyer under the Invoice, [BP] shall pass onto [NBAD] within two Business Days of receipt the Discount Percent of such partial payment. In the event that payment from the Buyer is not received on the Repayment Date, [BP] shall, for a maximum of 5 business days, reimburse to [NBAD] on demand [NBAD]'s cost of funds on the unpaid amount for the period between the Repayment Date and the date of receipt of payment at [NBAD]'s counter of the full amount of the Discount Percent of the Invoice Value. [BP] furthermore undertakes to make all reasonable efforts to support the settlement of [NBAD]'s debt*

by the Buyer and to pass to [NBAD] the Discount Percent of any amounts recovered by [BP], net of reasonably incurred costs, and in particular agrees:

(i) *to pass onto [NBAD] within two Business Days of receipt the Discount Percent of any amounts subsequently recovered by it from the Buyer, which sums shall be received and held by [BP] as trustee on behalf of [NBAD];*

(ii) *to pass onto [NBAD] within two Business Days of receipt the Discount Percent of any interest on any late payment recovered by it from the Buyer, which sums shall be received and held by [BP] as trustee on behalf of [NBAD];*

(iii) *where an assignment under sub-clause 3(iv) below is not able to take place, that [NBAD] will be subrogated as at the date of receipt of payment from [NBAD], if legally possible, to [BP]'s rights, title, interest and claims against the Buyer under the Invoice to the extent of any payment made by [NBAD] and not paid under (i) and (ii) above;*

(iv) *that [BP] will assign as at the date of receipt of payment from [NBAD] under paragraph 2 above, if legally possible under applicable laws and the Contract, to [NBAD], its rights, title, interest and claims against the Buyer in respect of the Discount Percent of the Receivable and the rights and benefits of the relevant transaction arising from the* ***Contract*** *to the extent of any payment made by [NBAD] and not paid under (i) and (ii) above, or, where, if not legally possible or effective for any reason, to take legal proceedings against the Buyer under the Contract to the extent of any payment made by [NBAD] and not paid under (i) and (ii) above. The Discount Percent of any reasonable costs, or out of pocket expenses incurred by [BP] in these proceedings shall at [BP]'s request be promptly reimbursed by [NBAD] and the Discount Percent of any amounts recovered by [BP] shall be passed promptly to [NBAD] (except in so far as the same are damages accruing to [BP]) in addition to the amount due plus interest and in addition to any recovery of costs incurred in connection with the proceedings;*

(v) *that by selling the Receivable hereunder it has assigned the Discount Percent of the Receivable in equity irrevocably to [NBAD] subject to the terms hereof (such assignment shall be deemed to take effect immediately following payment by [NBAD] of the Discounted Value),*

and that [NBAD] has beneficial ownership of any such amounts paid by the Buyer and of the debts in respect of which such amounts are paid, and accordingly [NBAD] shall have a right of recourse to [BP] to the extent of the Discount Percent of any amount received (whether in respect of principal, interest, fees or otherwise) by [BP] from the Buyer relating to the Receivable sold and purchased hereunder and not paid by it to [NBAD];

(vi) to hold on trust for [NBAD] the proceeds of the Discount Percent of the Receivable; and

(vii) if any assignment in connection with this Purchase Letter is invalid or unenforceable for any reason, [NBAD] shall instead be entitled to a funded sub-participation in the rights to receive payment in respect of the Discount Percent of the Invoice on terms equivalent to those of this Purchase Letter."

c) Clause 4 provided:

"If any default or failure in the payment of all or part of the Discount Percent of the Invoice Value occurs as a result of any justified deduction or withholding by the Buyer from such discounted Receivable by reason of a valid claim against [BP], [BP] shall promptly pay to [NBAD] an amount equal to the Discount Percentage of the amount deducted [or] against an assignment by [NBAD] to [BP] of all the right, title and interest of [NBAD] in a corresponding amount of the Discount Percent of the Invoice Value."

There is a dispute between the parties as to whether the word "*or*" which I have placed in square brackets is unnecessary surplusage. Nothing significant however appears to turn on this: the point is that as against any set-off asserted by SAMIR, clause 4 insulated NBAD as a matter of contract;

d) Clause 5 set out a series of warranties and representations by BP. By clause 5(b) BP represented and warranted to NBAD that at the date of the Purchase Letter (3rd September 2014) and at the Discount Date (4th September 2014):

"b) [BP] is not prohibited by any security, loan or other agreement, to which it is a party, from disposing of the Receivable evidenced by the Invoice as contemplated herein and such sale does not conflict with any agreement binding on [BP];…";

e) Clause 7 provided:

"It is hereby agreed that [NBAD] shall have no recourse to [BP] in connection with the purchase of the Discount Percent of the Receivable save in the following situations, in which

> *[BP] will reimburse [NBAD] in an amount up to the unpaid amount of the Discount Percent of the Invoice Value together with interests thereon for the period from the Repayment Date to the date of repurchase by [BP] at a rate (based on a year of 360 days for the actual number of days elapsed) equal to [NBAD]'s cost of funds plus a margin of 4.6%:*
>
> *(a) [BP] breaches the representations made in Clause 5 of this Purchase Letter or any material representation or warranty under the Contract;*
>
> *(b) [BP] breaches its undertakings under Clause 6 of this Purchase Letter;*
>
> *(c) [BP] fails to perform any of its material obligations under the Contract and such breach by [BP] is not legally justified and the Buyer's failure to pay is legally justified, or*
>
> *In any event where non-payment of the Receivable occurs and [NBAD] has no recourse to [BP] under the terms of this Purchase Letter, [BP] will use all reasonable endeavours to help [NBAD] to recover its claim against the Buyer."*

f) Clause 17 provided for the Purchase Letter to be governed by English Law and for the English Courts to have exclusive jurisdiction.

19. It is common ground that BP did not seek or obtain SAMIR's consent to any assignment under section 34 at any material time.

20. NBAD paid the Discounted Value to BP in the sum of US$67,662,173.54 on 4th September 2014. The terms of the Purchase Letter were amended by subsequent letters dated 16th January, 15th April, 29th April, 29th June, 6th July and 20th October 2015, providing for agreed payment extensions to 30th November 2015 and consequential amendments. For each extension BP paid a discounting fee for the additional time over which the money was to be outstanding. This was not a surprising commercial arrangement. To the extent that it has been suggested otherwise by BP, the making of these payments (for the use of the money in accordance with the agreement between the parties) in my judgment can have no bearing on the proper construction of the Purchase Letter and whether or not there has been a breach of clause 5(b).

21. NBAD received no payment in respect of the Receivable. In late November it learned that SAMIR had filed for insolvency protection in Morocco. NBAD contacted BP seeking a "*full and legal assignment"* in respect of the Receivable, and one that would be compliant with Moroccan law, including certification by the Moroccan Embassy Consulate. On about 2nd December 2015, BP emailed NBAD to say that the BP's General Terms meant that SAMIR's consent was required for any assignment of rights from BP to NBAD, and that BP would need to seek such consent to make any assignment to NBAD. It stated that, once it had been confirmed that that was the best option, BP would do so.

The Law

Contractual interpretation

22. It is not necessary for present purposes to look beyond the speech of Lord Neuberger in *Arnold v Britton* [2015] AC 1619 to be reminded of the relevant legal principles of contractual interpretation. They are to be found at [15] to [20]:

> *"[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn [1971] I WLR 1381, 1384-1386; Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] I WLR 989, 995-997, per Lord Wilberforce; Bank of Credit and Commerce International SA v Ali [2002] I AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in Rainy Sky [2011] I WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.*
>
> *[16] For present purposes, I think it is important to emphasise seven factors.*
>
> *[17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook [2009] AC 1101 , paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have*

been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

[18] Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

[19] The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191 , 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should

avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party…"

Assignment

23. It is common ground that the prohibition in section 34 applied to both legal and equitable assignments (see *R v Chester and N Wales Legal Aid Office, ex p Floods of Queensferry Limited* [1998] 1 WLR 1496 at 1501F-G), although BP has reserved its position for the purpose of any appeal.

24. Further, the following uncontroversial principles provide material context to the resolution of the issue before me:

    a) A contractual term limiting or prohibiting assignment of a debt is valid and not contrary to public policy (see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85);

    b) An assignment of contractual rights in breach of a prohibition against such assignment is ineffective to vest the contractual rights in the assignee (see *Linden Gardens*, per Lord Browne-Wilkinson at 109C-D);

    c) Where assignment is prohibited without the prior consent of the debtor which is not to be unreasonably withheld, an assignment made before the debtor's consent is sought is ineffective as regards the debtor and it is irrelevant whether or not the debtor could have reasonably withheld its consent if asked in time (see *Hendry v Chartsearch Ltd* [1998] C.L.C. 1382 per Henry and Millett LJJ at 1393-4);

    d) Part of a debt cannot be the subject of a legal assignment but can be the subject of a valid equitable assignment (see Chitty at [19-015] and *Williams v Atlantic Assurance Company Ltd* [1933] 1 KB 81 at 100). Thus it is common ground that there could not have been a legal assignment of the Discount Percent of the Receivable;

    e) An equitable assignee may (i) give notice to the debtor and such notice gives priority over subsequent assignees (whether legal or equitable) and over set-offs arising from other subsequent dealings between the debtor and the assignor; (ii) bring proceedings against the debtor in his own name. In the case of subject matter such as an existing debt, the only significant difference between the position of an equitable assignee and a legal assignee is that the equitable assignee may be required to join the assignor to the action (see *Chitty*, 32nd Ed, at [19-039] - [19-040], [19-069], [19-071]).

25. As set out below, BP relies on the concept of assignment of the fruits of performance: see Smith and Leslie, The Law of Assignment (2nd ed) at paras. 25-08 to 25-10 and 25-33 to 25-36 and *Re Turcan* (1888) 40 Ch D 5 and *Glegg v Bromley* [1912] 3 KB 474. More recent decisions have also recognised the distinction between the assignment of the fruits of a cause of action and the assignment of the cause of action itself: see *Barbados Trust Co Ltd v Bank of Zambia* [2007] 2 All ER (Comm) 445 (at [74] to [90]; *Masri v Consolidated Contractors International UK Ltd (No 2)* [2007] EWHC 3010 (Comm) at [126] to [127] and *Freakley v Centre Reinsurance*

International Co [2004] EWHC 2470 (Ch) at [20] to [21]. An assignment of the fruits of performance will not generally be invalidated by a non-assignment clause: see *Linden Gardens Trust Ltd v Sludge Disposals Ltd* [1994] 1 AC 85 in the speech of Lord Browne-Wilkinson (at 108) where it was said:

> *"…a prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of the chose in action; in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and assignee and even then it may be ineffective on the grounds of public policy."*

26. BP refers additionally to the concept of an agreement to assign an expectancy (or future property): see Chitty on Contracts (32nd ed.) at para. 19-033 and *Raiffeisen Zentralbank Osterriech AG v Five Star Trading LLC* [2001] QB 825 (at [80]). The assignor and assignee are bound from the moment of their agreement to assign the expectancy.

27. Again, these principles are not essentially disputed by NBAD. NBAD freely accepts that there can be an agreement to dispose of proceeds when received, and that a clause such as section 34 would not stand in the way of such an agreement. What is disputed is whether the principles apply to the facts of this case, and clause 3(v) in particular, as will become apparent below.

The Issue: in light of section 34, was the representation made by BP to NBAD at clause 5(b) of the Purchase Letter false as at 3rd and 4th September 2014?

The parties' respective positions

28. NBAD contends that by clause 5(b) of the Purchase Letter BP gave a false commitment that no agreement which BP had made prevented it from making the equitable assignment that it did in clause 3(v) of the Purchase Letter. BP agrees that it was unable to make an equitable assignment because of section 34 but contends that there was no breach of clause 5(b) because it could provide other rights to NBAD, in particular subrogation rights, or because clause 5(b) did not cover the BP/SAMIR Agreement or because in truth clause 3(v) did not provide for an assignment that was caught by section 34.

29. NBAD submits that both the contemplated disposal of 95% of the Receivable and "*such sale"* referred to in clause 5(b) required BP to give NBAD an assignment of (the Discount Percent) of the Receivable, as set out in clauses 3(iv) and (v). Clauses 3(iv) and (v) use different language. BP agreed by clause 3(v) that it had made an irrevocable equitable assignment. By contrast, by clause 3(iv) it agreed to do something in the future if it legally could. Assignment was a central component of the rights being acquired by NBAD – it was at the "*front and centre"* of clause 3 – all in accordance with commercial common sense. Once notice was given, a (legal or equitable) assignment would enable NBAD to enforce in its own name against SAMIR, insulate NBAD against any difficulties affecting BP and avoid future set-offs arising out of other dealings with BP. Because of section 34 BP was in breach of

clause 5(b), because BP was prohibited from making the assignment (i.e. "*from disposing of the Receivable*") by section 34 and because section 34 was in conflict with BP's obligation to make an equitable assignment (i.e. to make the *"sale"*) of the Receivable.

30. NBAD submits that this interpretation constitutes the natural and ordinary meaning of the words of clause 5(b), as well as making commercial sense. In return for its agreement to purchase 95% of the Receivable to BP, BP promised NBAD a disposal and sale of the Discount Percent of the Receivable through an assignment. The commercial purpose of clause 5(b) was to warrant to NBAD that, so far as it could control matters through its own contractual arrangements, BP was not prohibited from doing that which it had agreed to do in clause 3, including the making of an equitable assignment.

31. In broad terms, BP relies on the non-recourse nature of the parties' dealings. The credit risk passes to NBAD only in "*exceptional circumstances"*. What BP sells and what NBAD buys is the right to receive the proceeds, if any, of SAMIR's contractual performance to BP. What "*disposal"* means in clause 5(b) is the transfer of the right to receive proceeds. The Purchase Letter is not prescriptive as to the precise mechanism by which such proceeds are to be made available to NBAD. There are two alternative routes, namely direct payment by BP to the extent that BP received the proceeds (under clauses 3 (i), (ii), (v) and (vii)) and direct payment by SAMIR (by way of assignment or subrogated claim under clauses 3(iii) and (iv)). Only if all possible routes are blocked will there be a breach of clause 5(b). The flaw in NBAD's position is to elevate one possible mechanism to the status of NBAD's only right. It ignores NBAD's rights of subrogation and the other sources of payment via BP. NBAD cannot insulate itself from the credit risk that it assumed simply because assignment is unavailable.

32. Thus BP argues that NBAD's case ignores both the overall scheme of the Purchase Letter and the detailed provisions in the whole of clause 3. The parties agreed a range of different and alternative methods by which BP might support NBAD in recovering the value of the Discount Percent of the Receivable. And they did so in the express contemplation that any form of assignment might be impossible. Any assignment contemplated by clause 3(iv) can only have been an equitable assignment since it is not possible to effect a legal assignment of part of a debt, as is common ground. Express provision was made for what would happen if assignment under clause 3(iv) was not possible, namely NBAD would be subrogated, if legally possible, to BP's rights, title, interest and claims against SAMIR under the Invoice. A non-assignment clause such as section 34 would not invalidate any such rights. Clause 3(vii) made yet further express provision for what was to happen in the event of assignment not taking place. NBAD would be entitled to a funded sub-participation in the rights to receive payment in respect of the Discount Percent of the Invoice on terms equivalent to those of the Purchase Letter.

33. BP therefore contends that it is over-simplistic to assert that it is only an assignment which amounts to a sale or disposal under the Purchase Letter. Rather, what is being sold or disposed of is the right to share in the proceeds of SAMIR's performance of its payment obligations. Thus, section 34 did not mean that BP was prohibited from *"disposing"* of the Receivable *"as contemplated"* in the Purchase Letter because the Purchase Letter contemplated that assignment might not be open to BP, went on to

make provision for other means of disposal and expressly stated what was to happen where assignment was not possible.

34. Alternatively, BP argues that clause 5(b) does not make any representation or warranty in relation to the BP/SAMIR Agreement. That agreement was not "*any other agreement"* within the meaning of clause 5(b). The BP/SAMIR Agreement was defined in the Purchase Letter as "*the Contract*". BP points to the fact that elsewhere in clause 5 the BP/SAMIR Agreement is specifically referred to as "*the Contract*". Clause 5(b) is much better construed as being directed at the allocation of risks posed to NBAD by agreements other the BP/SAMIR Agreement and of which NBAD might be deemed to be unaware.

35. As a further alternative, BP contends that, on a proper construction, clause 3(v) is not an equitable assignment of a chose in action against SAMIR at all. The BP/SAMIR Agreement does not therefore bite on clause 3(v), which can be effected without inhibition. BP's analysis is as follows: clause 3(iv) necessarily deals with the equitable assignment of a chose in action against SAMIR, whilst contemplating that this may not be possible (including by reference to the terms of the BP/SAMIR Agreement). Clause 3(v) must deal with different ground. The opening words of clause 3(v) (which refer to assignment in equity) must be read with the rest of the clause. That makes it clear that what is being regulated in clause 3(v) is the relationship between BP and NBAD (not between them and SAMIR as in clause 3(iv)). As between BP and NBAD, clause 3(v) provides for the division of legal and equitable ownership of funds received by BP from SAMIR in respect of the Discount Percent: hence the words that NBAD has "*beneficial ownership"* of any such amounts paid by SAMIR and of the debts in respect of which such amounts "*are paid*". Notably, clause 3(v) does not speak of a beneficial entitlement to a thing in action (as was the case in *Bexhill v Razzaq* [2012] EWCA Civ 1376), but rather beneficial ownership of amounts paid. So without any assignment, clause 3(v) is effective, designating NBAD as the beneficial owner. It effects an assignment not of a chose in action but rather of the fruits of SAMIR's performance or of an expectancy in respect of such performance.

Discussion

36. The Purchase Letter, as the parties agree, is a poorly drafted document likely to have evolved over time. It appears to contain a combination of standard or boiler-plate clauses from other contracts with or without modifications. It is redolent of a draftsman adopting a "belt and braces" approach. Caution therefore needs to be exercised in terms of over-analysis of some of the fine print.

37. The Purchase Letter was a form of non-recourse funding. But it made express provision for recovery by NBAD against BP in certain prescribed circumstances (see clause 7). It is the scope of those circumstances that arises for scrutiny.

38. For ease of reference, and without ignoring the full terms of clauses 3 and 5, I set out the terms of clause 3(v) again:

> *"(v) that by selling the Receivable hereunder it has assigned the Discount Percent of the Receivable in equity irrevocably to [NBAD] subject to the terms hereof (such assignment shall be*

> *deemed to take effect immediately following payment by the Bank of the Discounted Value), and that [NBAD] has beneficial ownership of any such amounts paid by the Buyer and of the debts in respect of which such amounts are paid, and accordingly [NBAD] shall have a right of recourse to [BP] to the extent of the Discount Percent of any amount received (whether in respect of principal, interest, fees or otherwise) by [BP] from the Buyer relating to the Receivable sold and purchased hereunder and not paid by it to [NBAD];"*

and clause 5(b):

> *"b) [BP] is not prohibited by any security, loan or other agreement, to which it is a party, from disposing of the Receivable evidenced by the Invoice as contemplated herein and such sale does not conflict with any agreement binding on [BP];…"*

39. In a contract that is otherwise sometimes difficult to follow, the opening lines of clause 3(v) could not be clearer: upon the sale BP had irrevocably assigned the Receivable. Unlike clause 3(iv), clause 3(v) does not speak of the future, or of an assignment that might or might not be possible. It speaks of an actual event that has taken place by BP's sale of the Receivable (defined as including a legally valid and binding obligation on SAMIR to pay). For the avoidance of doubt, I do not accept BP's submission that the words "*subject to the terms hereof*" in clause 3(v) in some way qualify the making of the assignment. The assignment in equity was irrevocable. The words "*subject to the terms hereof*" do not affect or qualify that; rather they make clear that other clauses in the contract, such as clause 7 for example, will apply where relevant.

40. Viewed in this way, it can be seen that, properly construed, clauses 3(iii) and 3(iv) relate to legal and not equitable assignment. Clause 3(iii) addresses the situation where an assignment is not possible under clause 3(iv) (but not under 3(v)). Likewise, clause 3(iv) contemplates that an assignment might not be possible. But in clause 3(v) the parties have agreed that an equitable assignment has taken place. There is no question of impossibility. This is consistent with the fact that clause 3(iii) (dealing with subrogation) does not refer to impossibility of assignment under clause 3(v), only impossibility under clause 3(iv). Unlike clause 3(iv), clause 3(v) is not qualified by any reservation as to legal possibility. It is right that later clause 3(vii) (which provides for funded sub-participation) refers to the possibility of "*any assignment in connection with*" the Purchase Letter being *"invalid or unenforceable for any reason"*; but clause 3(vii) (which did not give rise to any proprietary rights) is tagged on at the end of the clause as a whole and reflects the "belt and braces" approach that can be seen elsewhere in the Purchase Letter. Additionally, the reference to an assignment "*in connection with*" the Purchase Letter does not refer easily to an equitable (as opposed to a legal) assignment. In any event, clause 3(vii) cannot objectively in my judgment be construed as cutting across the express and unequivocal words of clause 3(v), which do not contemplate impossibility in the context of an equitable assignment and which refer to the equitable assignment actually taking place.

41. BP submits orally that it was unlikely that clause 3(iv) addressed legal assignment, since subrogation (as provided for in clause 3(iii)) was an unlikely alternative to legal assignment. In my judgment it would be wrong in context to place any significant weight on this type of nuance: it is clear from clause 3(iv) (providing for legal assignment of only part of a debt) that the legal subtleties were not fully thought through by the drafter(s) of this contract. But in any event, subrogation would still give the legal assignee some benefit in terms of control over proceedings in the original creditor's name. The unqualified nature of the equitable assignment in clause 3(v) still stands good.

42. BP also relies on the fact that legal assignment was always impossible, because the sale only ever involved a portion of a debt, in support of its position that clause 3(iv) must refer to equitable assignment. However, objectively, it is not to be assumed that the parties had carried out any such analysis or understood this to be the position as a matter of law at the time. As Mr Davies QC put it for NBAD, "*it is not the law that everyone is deemed to know the law*". Whilst inadmissible for construction purposes, (and I have not relied on this in reaching my conclusions), it is nevertheless noteworthy that in 2015 NBAD at least (incorrectly) believed that legal assignment of the partial debt was legally possible.

43. Thus, and although my ultimate conclusion does not turn on it, in my judgment clauses 3(iii) and 3(iv) are most naturally to be construed as addressing the question of legal assignment only.

44. Turning then to clause 5, NBAD submits that only an assignment can properly be described as a "*disposal*" or a "*sale*" of the Receivable itself and thus the subject of the warranty and representation at clause 5(b), since all the other provisions of clause 3 are concerned with dealings with the proceeds of other secondary rights. Clauses 3(i) and (ii) repeat the obligation on BP to pass on to NBAD monies received, such monies being held and received by BP as trustee for NBAD. Clause 3(vi) repeats that the monies will be held by BP on trust for NBAD. All the other clauses (3(iii) to (v) and (vii)) deal with assignment, the consequences of assignment if possible and the consequences if assignment is not possible. "*Disposal*" or "*sale*" are odd concepts to use for anything other than assignment. The existence of a subrogated right does not naturally fit with the concept of "*disposal*", as an assignment does.

45. I accept NBAD's submission that assignment lies at the heart of clause 3 and the benefit being passed to NBAD as part of its bargain with BP. NBAD points, amongst other things, to the last paragraph of clause 7, where in the event of non-payment by SAMIR and no recourse to BP, BP agreed to use all reasonable endeavours to help NBAD to recover "*its claim"* against SAMIR. As set out above, assignment carries important benefits. Thus an equitable assignee can give notice giving priority over subsequent (legal or equitable) assignees and priority over set-offs from other subsequent dealings between the parties; an equitable assignee can bring proceedings against the debtor in its own name, with conduct and control of the proceedings. Assignment is of considerably more value than, say, a right to sub-participation (see *Lloyds TSB Bank plc v Clarke and another* [2003] 1 LRC 590 at [2]).

46. But even if there were more than one method of disposal contemplated in the Purchase Letter that would fall within the meaning of a "*disposal*" or "*sale*" for the purpose of clause 5, the flaw in BP's position is that it confuses two quite different

issues. Whether or not NBAD would have additional methods of recourse (or disposal) unaffected by any prohibition on assignment does not mean that BP is not liable for breach of its warranty and representation that it was not prohibited by any other agreement from making the contemplated (equitable) assignment. The existence of alternative or additional rights does not detract from the fact that assignment was at least a (and indeed the primary) method of disposal or sale contemplated in the Purchase Letter.

47. Nor does the fact that the Purchase Letter may have contemplated disposal by assignment being impossible, including by reason of the BP/SAMIR Agreement (see clause 3(iv)), diminish the force of NBAD's position. As set out above, in my judgment the parties are not to be taken to have contemplated an equitable assignment as being impossible, only a legal one. But even if I am wrong in this conclusion, there were many possible reasons why an assignment might have been impossible when a foreign debtor is involved, such as mandatory rules of foreign law. Those are risks which NBAD could be said to have assumed. But, when clauses 3 and 5(b) are read together, as they must be, objectively construed, the parties cannot be taken to have intended that disposal by the assignment in equity would be impossible because of the existence of a contractual prohibition on such assignment contained in another agreement to which BP was bound. What NBAD cannot be taken to have accepted is the risk that an assignment would prove invalid or unenforceable because of a contract made by BP with another party. That is consistent with the theme of clause 5, which is to protect NBAD against BP, by its own acts, having disabled itself from delivering on the promise in clause 3.

48. As for the suggestion that the wording of clause 5(b), specifically the reference to "*other agreement"* and *"any agreement",* does not cover the BP/SAMIR Agreement, the wording of clause 5(b) is very broad. The words on their face cover any agreement to which BP was bound without limitation. The fact that the BP/SAMIR Agreement was defined as "*the Contract*" does not mean that it was not such an agreement. "*[T]he Contract"* was an "*agreement"*. There was no attempt to exclude it from clause 5(b). The fact that elsewhere in clause 5 there is specific reference to the BP/SAMIR Agreement does not assist BP's argument: in context (see clauses 5(c) (d) and (f)) there had elsewhere to be express reference to the BP/SAMIR Agreement. Nor does the fact that NBAD was entitled to see a copy of the BP/SAMIR Agreement under clause 1 assist BP as a matter of construction, not least since NBAD was not entitled to sight of the document until after it had signed the Purchase Letter. Indeed it would be commercially a very odd situation if the BP/SAMIR Agreement was not the subject of the representation and warranty in clause 5(b). The BP/SAMIR Agreement was the one obvious contract to be the subject of the warranty, which provided valuable protection to NBAD.

49. As to BP's third and final submission, I cannot accept that clause 3(v) was only about assignment of the *"fruits of the proceeds"* or of *"an expectancy"* of performance by SAMIR. In this regard, BP relies at least in part on the submission that clause 3(iv) relates to equitable assignment which, as set out above, I do not accept. But in any event, I am not persuaded that the reasonable reader could read clause 3(v) as covering different ground to clause 3(iv) (even if clause 3(iv) were to be construed properly as relating to equitable assignment), given the express reference in clause 3(v) to equitable assignment.

50. Beyond that, put shortly, it is not possible to square BP's suggestion with the plain opening words of clause 3(v). It is right that the words there do not refer to an assignment of *"rights, title, interest and claims against [SAMIR]"* as the words in clause 3(iv) do, but the Receivable is clearly defined as SAMIR's *"legally valid and binding"* obligation to pay BP. The ensuing reference to beneficial ownership accurately reflects the consequences of the equitable assignment. Its language is not consistent with the creation of a free-standing obligation, such as a trust of the debt, which is in fact already catered for in clauses 3(i) and (ii). It is important also to note that the declaration of beneficial ownership relates not just to amounts paid by SAMIR but also of "*the debts in respect of which such amounts are paid"*. Those debts must be the debts owed by SAMIR in context: the clause speaks of beneficial ownership of amounts "*paid by [SAMIR] and of the debts in respect of which such amounts are paid*" (emphasis added). Thus NBAD obtains an interest in the debts which exist before the proceeds arrive. That cannot be reconciled with a mere interest in the "*fruits of the proceeds*" or in an *"expectancy"*. BP suggested that the reference to "*debts"* must be a reference to the debt arising from BP to NBAD upon receipt of money from SAMIR in respect of the Discount Percent of the Receivable. But this ignores the wording of the clause and would also produce the surprising result that the contract would be going out of its way to say that NBAD would have a beneficial ownership in a debt owed to it, when that would be the legal and equitable position in any event. It is right that SAMIR's debt is discharged upon payment, but the premise of this part of clause 3(v) is clear: it addresses ownership in debts preceding payment. BP also places reliance on NBAD's right of recourse to BP in clause 3(v). I do not consider that that right can be said to add substantively to the debate. The right is dependent on what has gone before: if SAMIR had paid BP instead of NBAD under the assignment, NBAD would have a right of recourse against BP. In summary, in my judgment, clause 3(v) concerns the assignment of an existing debt readily assignable in equity in principle, not future proceeds.

51. Even if the subsequent reference to "*beneficial ownership"* in clause 3(v), objectively construed, did create a free-standing assignment of the fruits of the proceeds, or of an expectancy, that would not in some way override the earlier clause making the equitable assignment of the Receivable. By the opening and dominant clause in clause 3(v), there was to be an irrevocable equitable assignment of the Receivable. The additional following words cannot alter that.

52. Thus in my judgment, objectively construed, clause 3(v) does not contain an assignment merely of the fruits of performance or of an expectancy. And even if the reference to "*beneficial ownership"* of proceeds did lead to such an assignment, it would not in some way extinguish the earlier equitable assignment of the Receivable.

53. Standing back in all the circumstances, there is in my judgment therefore force in NBAD's forensic submission that, had it failed to pay on 4th September 2014, and had BP come to court to compel such payment, it is difficult to see how the court could have made an order in BP's favour in circumstances where the debt was not assignable in equity without the debtor's (written) consent and such consent had not been obtained.

54. For all these reasons, I have reached the conclusion that the representation and warranty in clause 5(b) was false, because of section 34. As at 3rd and 4th September 2014, BP was prohibited by section 34 from disposing of the Receivable as

contemplated in the Purchase Letter, namely by making an irrevocable equitable assignment of (the Discount Percent) of the Receivable, and such sale conflicted with section 34. It represented and warranted to the contrary.

Quantum

55. There is no dispute at to quantum under clause 7 of the Purchase Letter, in the event of NBAD's claim succeeding. The Discount Percent of the Invoice is US$68,881,854.62. The applicable interest rate after 1st November 2015 is NBAD's cost of funds plus 2%. By reference to NBAD's cost of funds in accordance with USD LIBOR period over the relevant period, the interest due to 1st November 2016 totals US$1, 576,234.25.

Conclusion

56. As set out above, I conclude that, because of section 34, the representation and warranty made by BP in clause 5(b) of the Purchase Letter was false as at 3rd and 4th September 2014. BP's approach, ably articulated as it was, involves a strained approach to what is in my judgment the plain and natural reading of the relevant clauses in the Purchase Letter.

57. NBAD is entitled to judgment on its claim in the sum of US$68,881,854.62 together with interest to date, which I invite the parties to agree by reference to NBAD's cost of funds plus 2%. I also invite the parties to agree all outstanding consequential matters so far as possible, including costs.