Neutral Citation Number: [2023] EWHC 295 (Comm)

Case No: CL-2022-000284

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

Rolls Building
Fetter Lane
London, EC4A 1NL

14th February 2023

Before :

MR SIMON COLTON KC
(sitting as a Deputy High Court Judge)

- -

Between :

ANRON BUNKERING DMCC	**Claimant / Respondent**
- and -	
GLENCORE ENERGY UK LTD	**Defendant / Applicant**

- -
- -

Mr Benjamin Coffer (instructed by **Clyde & Co**) for the **Defendant / Applicant**
The **Claimant** did not appear and was not represented

Hearing date: 8 February 2023

- -

Mr Simon Colton KC:

Introduction

1. The Defendant ('**Glencore**') seeks summary judgment on the claim brought against it by the Claimant ('**Anron**'). In the alternative, Glencore seeks security for its costs.

The pleaded facts

2. For the purposes of this summary judgment application, I assume that the facts pleaded in the Particulars of Claim are true.

3. So far as material, the relevant facts are as follows.

4. The parties entered into a written contract dated 15 July 2015 (the '**July Contract**') under which Glencore would sell Anron 60,000 metric tonnes (m.t.) of unleaded gasoline, to be delivered to Hodeida (Yemen). By a further written contract dated 27 November 2015 (the '**November Contract**'), Glencore agreed to sell two instalments of 30-35,000 m.t. of unleaded gasoline to Anron, again for delivery to Hodeida.

5. In performance of the July Contract, unleaded gasoline was shipped by Glencore and discharge was completed on or around 29 November 2015. The place of delivery of the November Contract was varied by the parties to Mukalla (Yemen). About 12,500 m.t. of unleaded gasoline was discharged there by 27 April 2016 (the '**first instalment**'), at which point the vessel discontinued discharging and sailed instead to Fujairah, where the remaining cargo was discharged and placed into storage before being sold to a third party pursuant to a contract dated 4 May 2016. The remaining quantity under the November Contract (the '**second instalment**') was not delivered because in about late December 2015 Anron elected to accept Glencore's repudiation of the remainder of the November Contract.

6. Advance payments totalling around US$ 48.8 million were made by or on behalf of Anron between July and November 2015. Further payments of around US$ 3.3 million were made by Anron in April 2016.

7. An email was sent on behalf of Glencore on 10 December 2015, providing information as to the accounting position under the July and November Contracts. On 10 June 2016, a further email was sent by Glencore, which attached two statements of account. The first statement of account showed overpayments of US$ 8.7 million on the July Contract, which was allocated to the November Contract; the second statement of account showed this allocation, together with the advance payments made under the November Contract, giving a total amount received on the November Contract of just under $12 million. After deducting costs in respect of performance of the first instalment of the November Contract, this statement implicitly accepted a balance of US$ 1,957,479.40 standing to Anron's credit, but then showed the entire sum being expunged by entries purporting to produce a debt owed by Anron to Glencore of just under US$

75,000. Anron says these entries lacked any proper basis, and that the statement should have accepted a balance owed to it of US$ 1,958,219.40.

The claims made in these proceedings

8. These proceedings were begun by issue of a claim form on 6 June 2022.

9. In its claim form, Anron pleads:

> *"The Claimant claims the sum of USD 1,958,219.40 due under two contracts for the sale and purchase of gasoline dated 15 July 2015 and 27 November 2015 respectively, as more particularly described in the attached particulars of claim."*

10. It may be noted that the sums are described as sums "*due under*" the two contracts, which might give the impression that these are claims for contractual debts. However, the Particulars of Claim re-cast the claims.

11. First, the Particulars of Claim allege that there were implied terms in the July Contract and the November Contract that:

> *"(1) in respect of any advance payments made by the Claimant to the Defendant, the Defendant would render an account in respect of those advance payments which correctly stated the amounts of any debits falling to be deducted; and/or*
>
> *(2) that it would not incorrectly deduct amounts from advance payments for which there was no proper basis when rendering such an account."*

12. It is pleaded that the statements of account rendered on 10 June 2016 breached these implied terms, so that the sum of US$ 1,958,219.40 is recoverable as damages for breach of contract. Alternatively it is pleaded that this sum is recoverable "*as money had and received by the Defendant to the Claimant's use*".

13. In the further alternative, Anron brings claims for US$64,972.60 and US$ 197,609.43, each on the basis that entries expunging the debt owed to Anron under the November Contract were miscalculated with, again, a claim for money had and received in the alternative.

14. Glencore served a Request for Further Information under CPR 18, which was answered by Anron on 11 July 2022. Anron was asked to explain the basis on which the alleged enrichment was said to be unjust. Anron replied:

> *"The facts upon which the Claimant relies as entitling it to restitution for unjust enrichment have been adequately stated in the Particulars of Claim. Without prejudice thereto, the Claimant responds as follows. As stated in the Particulars of Claim, the Advance Payments were made in respect of the July Contract and the first instalment of the November Contract and they exceed what was, following the performance of the July Contract and the first instalment of the November contract, due and owing to the Defendant. The excess was*

> *in the amount of USD 1,957,479.40. In the premises, the Defendant has been unjustly enriched by reason of such overpayment."*

The summary judgment application

15. Glencore acknowledged service on 16 June 2022 and then, without serving a defence, on 20 July 2022 issued the present application. The application was supported by witness evidence from Ms Anna Fomina of Glencore's solicitors, Clyde & Co.

16. Glencore indicated in its evidence in support the basis on which it was pursuing the summary judgment application. In summary, Glencore argues:

    i) The pleaded implied terms were not to be implied in the July Contract or November Contract. In any event, if they were implied, the alleged breach of these terms did not cause Anron any loss because the alleged error on the part of Glencore did not cause Anron to lose any right to return of the advance payments.

    ii) The claims for money had and received are time-barred, on the basis that the relevant payments were made, and the alleged non-delivery occurred, more than six years before the claim was issued.

17. Anron served no evidence in response.

The adjournment application

18. On 6 February 2023, two days before the present hearing, the court was emailed on behalf of Anron by someone signing themselves Hamza Abbass, requesting that the present hearing be adjourned (the '**adjournment application**'). The email was in the following terms:

> *"Dear Sirs,*
>
> *We are Anron Bunkering DMCC, The claimant of the above cited claim filed on 6th of June 2022 agains Glencore Energy UK Ltd. We have wrote to Clyde & co on 3rd of February 2023 requesting for the hearing session to be pospone due to the following fact:-*
>
> *1- Our Solicitors have come off record on 27th of January 2023*
>
> *2- We have been in discussion with solicitors since then and yet have not been able to appoint a solicitor due to the fact that we are based out side uK.*
>
> *3- On 3rd of February we have wrote to Clyde & Co requesting for a possible postpone to hearing session to be held on 8th of February by 30 days and this will enable us find a solicitor who can act on our behalf in a effective timely manner.*
>
> *4- We have been trying to appoint a new solicitor bust all of the solicitors and barrister we have approached have declined due to time constraint as they need to study the whole case and issue witness*

> *statement having gone through all case documents which is impossible to do it in a very short time, in addition to this, since payment are made from yemen and yemen is under war conditions payments are delayed and hence it take some time to reach beneficiary*
>
> *In view of the above explaination given above we are pleading for an extention of time so that we are file our defence and present all fact and circumstances surrounding the case."*

19. In accordance with my direction, Mr Benjamin Coffer, Counsel for Glencore, filed brief submissions on the adjournment application shortly before 10am on 7 February 2023. These submissions helpfully set out the relevant principles to be considered on an adjournment application, the procedural background, and Glencore's case as to why an adjournment should not be permitted. Glencore also submitted that if the Court were minded to adjourn the hearing, it should be on terms that unless the summarily-assessed costs of the present hearing were paid within 21 days, the claim would be struck out.

20. In accordance with my further direction, Anron submitted a reply shortly before 4pm on 7 February 2023. According to Anron's email sent at this time:

    i) Anron blames its (now former) solicitors for numerous "*professional mistakes leading to professional negligence*", such as "*Failing to respond to our emails and call pertaining to the dispute in a timely manner… Failing to advise on the merits of the case in a clear way… Failing to prepare A particular claim consistent with Case Factual facts and circumstances… Failing to prepare a RFI in consistent with submitted Claim Particulars*".

    ii) Anron says that it emailed its solicitors on 21 October 2022, but only received a reply on 22 December 2022. On 8 January 2023 Anron emailed its solicitors asking for their complaints procedure, but received a response on 10 January saying the solicitors were terminating their retainer. On 11 January, the solicitors indicated their intention to come off the record.

    iii) Anron (presumably, Mr Abbass) wrote: "*Being a Yemeni National and residing in Yemen, foreign payments are experiencing delay due to war conditions subsequently we approached [Anron's solicitors] to have funds remitted to their Dubai based account but they have informed by phone that they would not accept such payment*".

    iv) Anron says that prospective new counsel was approached on 1 January 2023, who replied on 4 January seeking more materials, and scheduled an initial call on 18 January, subsequently moved to 20 January and then 24 January. Counsel recommended a solicitor, who on 27 January confirmed his willingness to assist but requested immediate payment "*which Anron cannot do for reasons explain above*".

    v) On 1 February, Anron approached their previous counsel to appear at this hearing, but he declined as he is not licensed for direct access and has taken on other work.

vi) Overall, "*We believe that Anron has been doing its best to be prepared for the scheduled hearing session and has taken all the necessary steps to meet the hearing date but as it can concluded from the above points time was of constraint and Anron could not succeed in appoint solicitor who can do the work in a very short time given the continuous failure in acting in the best interest of Anron.*"

21. I indicated to the parties on the evening of 7 February 2023 that I was minded to reject the adjournment application, and that I would give my reasons in writing in due course.

22. Shortly thereafter, Anron provided a bundle of materials to support its reply. This bundle contained Anron's original retainer letter with its former solicitor; correspondence with its former solicitor; and correspondence with prospective new legal representatives. That included, in particular:

i) An email of 21 October 2022, from Anron to its solicitors, beginning "*We do apology for the delay on the requested payment and hopefully we should be able to send you the swift by end of next week. Many thanks for your patiences*". This email set out a significant number of arguments which Anron wished to advance, for the solicitor's consideration;

ii) An email of 6 December 2022, in which Anron was informed that its previous counsel "*has resigned from the case saying that he does not wish to be further involved in a case he considers not to be of any merit*", and that the solicitor's view was that "*were I to instruct a new barrister at this late stage, I see little prospect that the barrister would disagree*". The solicitor also asked for payment – "*I have asked for monies on account on numerous occasions. I have wasted a ridiculous amount of time endlessly chasing for payment*";

iii) An email of 14 December 2022 from Mr Abbass taking issue with the solicitor's analysis, and saying "*Funds requested by you has been made available and no issue in getting the same paid to you within 24 hours but We need a commitment to the case in return*";

iv) An email of 20 December 2022 from Anron's solicitors to Mr Abbass, giving detailed advice on the matters raised in the 21 October 2022 email, but repeating many of the same matters set out in the 6 December email, with added details including that the sum requested on account was £25,000, which had been requested since early August 2022, and that the solicitor was not prepared to incur further time costs without being put in funds, which the solicitor said was not unreasonable given that he acted for "*a UAE entity that no longer trades and is insolvent*";

v) An email of 8 January 2023 from Mr Abbass to Anron's solicitors, saying "*we are not satisfied with the services that have rendered to us, so please share with us your standard procedures for complaints at the earliest possible time*";

vi) Anron's solicitor's email of 11 January 2023, attaching the application to come off the record, and seeking Anron's consent to such application;

vii) Anron's complaint email of 16 January 2023 (signed by a 'Mohammed Muather'), together with Anron's solicitor's acknowledgment that same day, which also stated: "*To be clear, we have terminated our retainer, so if you intend to instruct new solicitors in Anron's action against Glencore, then you should do so*";

viii) Emails with prospective new counsel in January 2023, including the provision of relevant documents for his consideration on 18 January, and counsel's recommendation of a solicitor on 24 January;

ix) Emails with the recommended new solicitor on 27 January 2023, who advised "*if we are to proceed with the hearing then clearly we need to address the statements and draft your statement in response. You will need to concede the security for costs application, i.e. you will need to agree to pay some security on file*";

x) Email correspondence with Anron's original counsel, from 1 February 2023, in which he said he could not accept instructions on a direct access basis, and in any event did not have availability for the hearing on 8 February, and confirming that he had informed Anron's solicitors "*that I did not consider there to be a viable argument to be made in response to the summary judgment application… [and] that I did not therefore consider it to be in keeping with my professional obligations to attempt to resist the application*";

xi) Email correspondence with alternative new counsel from 3 and 4 February 2023, which included an email from Mr Abbass stating: "*Anron has not been able to file its defence in response of the application due to the fact it was not able to take instruction from its director Mr Mohammed Mutaher who has been hospitalised from 17th of October till 29th of January 2023, payment required for our solicitors who are supposed to submit the defence were not remitted in a timely manner so the solicitors have applied to come off record*". This alternative new counsel refused the instructions, on the basis that there was insufficient time to properly complete the work he regarded as necessary, in the time available.

23. Having considered the additional material, I was confirmed in my judgment that the adjournment sought by Anron would not be consistent with the overriding objective, for the following reasons.

24. First, adjourning the hearing would have caused significant further delay. While Anron sought an adjournment of just 30 days, published lead times for the Commercial Court show that applications with a time estimate of one day are currently being listed from 9 October 2023 onwards, suggesting that the delay was more likely to be of the order of seven months. An adjournment would also be a waste of the court's resources (since the application was made too late to enable allocated judicial resources – i.e., me – to be re-deployed efficiently), and would be a waste of money (since Glencore would incur additional costs for an

adjourned hearing). There is a real risk that Glencore would never recover the additional costs, since Anron appears to be an insolvent company based in the UAE, although its emails refer to residence in Yemen.

25. Second, I was not satisfied with Anron's explanation for why it is without legal representation.

    i) In the context of applications to adjourn hearings on medical grounds, it is well-established that the court must scrutinise carefully the evidence relied on in support of the application: see *Decker v Hopcraft* [2015] EWHC 1170 at [24]. So too, here, where the adjournment is sought in order to obtain advice and representation, I must scrutinise Anron's evidence: *Barclays Bank plc v Shetty* [2022] EWHC 19 (Comm) at [50].

    ii) In my judgment, the unsworn emails signed by Mr Abbass need to be treated with caution. In these emails he has told the court that Anron is unable to find funds at short notice, despite having recently told his former solicitors that money was available and could be paid within 24 hours. His description of events concerning the termination of Anron's solicitors' retainer misleadingly omitted the extensive period during which Anron's solicitors chased in vain for payment of their fees. He also told prospective new counsel that Anron did not respond to the summary judgment application because its director was unable to give instructions between mid-October 2022 and end-January 2023, despite there being clear evidence in the materials that this was not what had happened.

    iii) I was unable to accept Mr Abbass's assertion that Anron's failure to pay legal fees is as a result of an inability associated with its connections to Yemen. There is no document to support this assertion, and it is undermined by Mr Abbass's earlier statement that money could be made available "*within 24 hours*". Rather, on the materials I have seen, it seemed to me more likely that – as Anron's former solicitors believed – Anron is simply unwilling to do so: Anron is seeking to litigate without spending money.

    iv) I was, accordingly, unpersuaded that Anron could not have obtained legal representation at this hearing, if it had been willing to spend the money to do so. The efforts it made, approaching (on the evidence) just two alternative counsel, and one alternative solicitor, over the course of January 2023, were, in my judgment, very limited and inadequate in the context of what is to be expected of a claimant in the Commercial Court.

26. Overall, I was not satisfied that it is unfair to Anron for the summary judgment application to proceed. The burden lies on Anron to justify the adjournment, and it did not satisfy me that it is not itself responsible for its lack of legal representation. On the contrary, on the materials I have seen it appears to me to be more likely than not that Anron – having been advised that its claim was bound to fail – has been dragging its heels, in the hope that it can achieve a negotiated resolution of these proceedings without the need to incur legal fees.

27. For these reasons, I rejected the adjournment application.

The court's approach to a summary judgment applications

28. The principles applicable to summary judgment applications are well known. In *Easyair Limited v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at [15], Lewison J provided a much-cited summary of them. Of particular relevance to the present application, at [15(vii)] he held:

> *"On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

29. The present application turns on points of law where, in my judgment, it is appropriate for the court to 'grasp the nettle' and decide the issue on the basis of the pleaded facts. In particular, it forms no part of Anron's pleaded case that there is some factual matrix to which the court should have regard in deciding the question whether a term is to be implied into the July Contract or November Contract.

30. Two other matters are worthy of note:

    i) First, following my refusal of the adjournment application, Anron did not attend the hearing and was not represented. Mr Coffer drew to my attention the summary of core principles, which apply when one party does not attend a hearing, set out by the court in *Hirbodan Management Co v Cummins Power Generation Ltd* [2021] EWHC 3315 (Comm) at [15]. These include that "*the participating party is under an obligation to present the case fairly. This is not the same as a duty of full and frank disclosure on without notice applications, but an obligation to present the facts and arguments fairly*". On that basis, Mr Coffer brought to my attention in the course of his submissions on the summary judgment application two arguments which, though not identified by Anron, might have been taken on their behalf.

ii) Second, I find myself in the very unusual position in this case of having seen the views of Anron's former solicitors and counsel as to the merits of the claim and of the summary judgment application. These opinions have, in my judgment, no relevance to the task before me, and I disregard them.

The implied term issues

The law on the implication of terms

31. The circumstances in which a term is to be implied into a contract are well known, having been helpfully summarised by Lord Neuberger PSC in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [15] and following.

32. At [18] Lord Neuberger cited Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283:

> *"for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."*

33. At [19], Lord Neuberger cited Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, where Bingham MR held:

> *"The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [*He then quoted the observations of Scrutton LJ in the *Reigate* case, and continued*] it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred . . ."*

34. At [21], Lord Neuberger held:

> *"In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the BP Refinery case 180 CLR 266, 283 as extended by Bingham MR in the Philips case [1995] EMLR 472 and exemplified in The APJ Priti [1987] 2 Lloyd's Rep 37. First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the*

> *implication of a term was 'not critically dependent on proof of an actual intention of the parties' when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care', to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."*

The implication of the pleaded terms

35. In my judgment, the terms for which Anron contends are not to be implied into the July Contract or the November Contract. I reach this conclusion for the following reasons:

    i) Each of the contracts are lengthy contracts. They have sections headed (and dealing with) 'Product', 'Quality', 'Quantity', 'Delivery', 'Price', 'Payment', 'Determination of Quantity / Quality', 'Risk and Property', 'Laytime and Demurrage', 'Discharge clause', 'Force Majeure', 'Assignment', 'Law and Jurisdiction', 'Liability', 'Entire Agreement', 'Taxes, Duties and Charges', 'Liquidation', 'Destination Restriction', 'Third Party Rights' and 'Other Terms'. These are "*detailed commercial contracts*", in the language of Lord Neuberger.

    ii) There is no need to imply the proposed terms, in order to give business efficacy to the contracts. The contracts work perfectly well as contracts for the sale and purchase of unleaded gasoline, incorporating a requirement for

advance payments, without the need for the pleaded implied terms. They do not lack commercial or practical coherence. For the same reason, it is not obvious that such a term should be implied.

iii) While it might assist a party in Anron's position to receive a statement of account from Glencore, and the parties might have agreed to such a requirement had that been suggested at the time of contracting, that is insufficient to justify the implication of a term. Similarly, although it may be tempting to imply such a term in circumstances where (on the assumed facts) Glencore produced a statement of account containing errors, it would (as Bingham MR observed in *Philips* case) be wrong to do so on the basis only that, with hindsight, it seems fair to do so.

iv) Even if there were an implied obligation on Glencore to render a statement of account, the proposed implied terms go further than is necessary by requiring that such a statement "*correctly stated the amounts of any debits falling to be deducted*", or (which seems to me to be much the same) does "*not incorrectly deduct amounts… when rendering such an account*". This places an absolute burden on Glencore, so that any error, even if made in good faith, would place it in breach of contract. But even if there were some reason why it was necessary for Glencore to be under an obligation to produce a statement of account, a lesser obligation – for example, to provide a statement of account setting out in good faith the sums deducted – would have sufficed. I do not find that even this lesser obligation is to be implied, but the possibility of its implication in my judgment serves to underline the lack of necessity for, or obviousness of, the more extreme obligation for which Anron contends.

36. For these reasons, I consider Anron's claims based on breach of an implied term can be summarily dismissed, and I accordingly do not need to deal with Glencore's alternative argument that, even if the terms were to be implied, they did not cause Anron loss.

The claim for money had and received

37. Turning to the alternative claims, for monies had and received, I find that these too are bound to fail.

38. These are claims for unjust enrichment which are "*founded on simple contract*" within the meaning of section 5 of the Limitation Act 1980: *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47 at [7]. The limitation period is accordingly six years.

39. The claims are for the recovery of sums transferred on a basis that subsequently fails: compare *BP Oil International Ltd v Vega Petroleum Ltd* [2021] EWHC 1364 (Comm) at [199]-[203]. The causes of action accrued when the failure of basis occurred: see Goff & Jones on Unjust Enrichment (10th edition) at ¶33-17; and A Restatement of the English Law of Unjust Enrichment (Burrows) at p145.

40. This leads to the question: when, on the pleaded case, did the failure of basis occur?

41. In this regard, Mr Coffer identified a possible argument, potentially assisting Anron, that a claim in unjust enrichment on the ground of failure of basis arising out of a contract which has failed, might require the contract in question to have been terminated, determined or discharged. In *BP Oil International Ltd v Vega Petroleum Ltd* [2021] EWHC 1364 (Comm), [2022] 1 Lloyd's Rep 89, at [202], Mrs Justice Cockerill identified this as one of two hurdles to be established to make good such a claim, a point which she described at [205] as "*not controversial*". In the present case, if such were a hurdle to be established in bringing this claim, and that hurdle was first overcome after 6 June 2016, then the claim for unjust enrichment would have been brought in time.

42. This is an argument which affects only the first instalment of the November Contract, since the July Contract was fully performed by 29 November 2015, and the second instalment of the November Contract was terminated: see paragraph 5 above.

43. Mr Coffer advanced three responses to this putative argument of Anron. First, he submitted that if termination of the November Contract in respect of the first instalment is indeed an essential element of the cause of action, then the claim is bound to fail because there is no pleading of such termination. Second, however, he submitted that subsequent to the decision in *BP v Vega* it has been decided that termination of the contract in question is not a necessary ingredient in a claim for unjust enrichment on the ground of failure of basis. Mr Coffer cites in this regard the decision of the Court of Appeal in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, especially at [67] and [77]-[80]. Third, and adopting the approach in *Dargamo*, he submitted that from the facts pleaded in Anron's claim it can be seen that there was no further prospect of the first instalment being delivered by (at latest) 4 May 2016, and so by that time (adopting the extended meaning of failure of basis in *Dargamo* at [80]), "*the state of affairs contemplated as the basis or reason for that payment [had] failed to materialise*". I note that *Dargamo* was approvingly mentioned in all of the speeches in *Barton v Morris* [2023] UKSC 3, with this extended meaning expressly approved by Lord Burrows (dissenting in the result), who observed "*Identifying the basis is a matter for objective interpretation*".

44. It seems to me that the question whether, following *Dargamo*, it remains the law that in a case such as this the contract in question must be terminated before a claim can be brought in unjust enrichment, is a question I should grasp the nettle and decide. While I would have preferred to hear contested argument on the point, that was not possible in light of Anron's non-attendance at the hearing.

45. In my judgment, it is not a requirement that the contract in question be terminated in a sale of goods case before a claim in unjust enrichment can be brought. The test is whether "*the state of affairs contemplated as the basis or reason for that payment [had] failed to materialise*", and that test may, in appropriate circumstances, be met without termination of the contract. To be clear, there will be circumstances where the test is not met without termination: for example, where defective goods are delivered, the buyer cannot recover an advance

payment, or an instalment, unless and until it has decided to reject the goods: *Yeoman Credit v Apps* [1962] 2 QB 508 (CA). Similarly, in the case of late delivery, if delivery remains a possibility under the contract, then it may not be possible to conclude that there is a failure of basis unless and until delivery ceases to be a possibility – which may, in reality, be only if and when the contract is brought to an end. But in other circumstances, it may be concluded that the basis has failed to materialise even without any party terminating the contract.

46. I consider the present case to be an example of the latter circumstance. On Anron's pleaded case, any real possibility of delivery of the first instalment of the November Contract had gone by 4 May 2016, by which time the goods destined for Anron had been delivered to Fujairah, and sold to a third party. From such time, Glencore was no longer entitled to hold the advance payments, since the state of affairs contemplated as the basis for such payments – viz., deliveries under the July Contract and the November Contract – had failed to materialise. Accordingly, on the facts pleaded by Anron, I consider that the cause of action in unjust enrichment on the ground of failure of basis had arisen by, at latest, 4 May 2016.

47. If I am wrong about that, and it is necessary for the contract in question to have terminated (or, if it is not necessary, but the sale by Glencore to a third party was not sufficient to cause the basis to fail), then I would hold that Anron's claim must fail in any event because there is no pleaded allegation that the November Contract, in respect of the first instalment, was ever terminated, nor any plea in the Particulars of Claim of some event after 4 May 2016 which might be said to be the failure of basis. As set out at paragraph 14 above, Anron in its Further Information was asked to identify the facts on which it relied as entitling it to restitution for unjust enrichment, and identified no facts going beyond the Particulars of Claim.

48. Mr Coffer then identified an alternative argument which might have been open to Anron. This was an argument that the statements of account, sent on 10 June 2016, were sufficient to constitute an acknowledgment of the debt owed, within the meaning of sections 29(5) and 30 of the Limitation Act 1980. In this regard, however, Mr Coffer drew my attention to McGee on Limitation Periods (9th ed, para 18-035) which deals with the question whether a document which acknowledges a debt, but asserts a set-off which extinguishes (or, as in the present case, overtops) the debt, constitutes a statutory acknowledgment. McGee cites two (pre-Limitation Act 1939) authorities which held that such a document does not constitute an acknowledgment, notes the different doctrinal underpinning of the current Act, and continues:

> *"The second point is that in both cases the alleged set-off exceed the amount of the debt which the claimant claimed, so that, quite apart from the difficulty of finding an implied promise, there is great difficulty in construing the letters as admissions of any net liability. It is therefore submitted that at the present day an acknowledgment of a debt coupled with an admission of a smaller set-off or counterclaim is capable of being an acknowledgment of the net amount of the debt. However, both of the cases discussed in this*

> *paragraph are still good law on the ground of the absence of any net acknowledgment."*

49. I agree with that analysis. I do not consider that the statements of account, which list various debits and credits between the parties but, overall, show a net amount owed to Glencore, can be taken to be a statutory acknowledgment of any debt owed to Anron. There is no admission in them of a legal liability to pay the sum which Anron now seeks to recover: compare *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 WLR 565, 575E-G.

50. Accordingly, in my judgment it is clear that these claims were time-barred by at latest 4 May 2022, at least a month before the claim form was issued.

Conclusion

51. For these reasons, I conclude that the claim should be summarily dismissed. It has no prospect of success.

52. In the circumstances, I do not need to deal with Glencore's alternative application for security for costs.