Neutral Citation Number: [2026] EWHC 2514 (Comm)

Claim No: CL- 2024-000583

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY DIVISION
COMMERCIAL COURT

Rolls Building
Fetter Lane
London
EC4Y 1NL

Date: Friday 2 October 2026

Before:

Ms Lesley Anderson KC sitting as a Deputy Judge of the High Court

- -

Between:

GTLK MALTA FOUR LIMITED

Claimant

(1) POLA MARITIME LIMITED
(2) CAPSTANS HOLDINGS LIMITED
(3) VALBRIDGE LIMITED
(4) VOJE HOLDING LIMITED

Defendants

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Robert Thomas KC and Koye Akoni (instructed by **Freshfields LLP**, 100 Bishopsgate, London, EC2P 2SR, for the Claimant)

Steven Berry KC and Joseph Rich (instructed by **MFB Solicitors Limited**, 1 Fishmongers' Hall Wharf, London, EC4R 3AE, for the Defendants)

Hearing dates: 7 and 8 July 2026

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JUDGMENT

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Ms Lesley Anderson KC:

Introduction

1. This is my reserved judgment on the application by the Claimant, by application notice dated 31 March 2025 (sealed on 1 April 2025), for summary judgment pursuant to CPR Part 24 against the First, Second, Third and Fourth Defendants in the sum of US$12,902,156.02 plus interest and against the First, Second and Third Defendants, in the sum of US$29,134,156.98 plus interest (**the Application**). The underlying claim is to enforce twelve (materially identical) Joint Deeds of Guarantee and Indemnity (**the Joint Guarantees**), entered into between 26 June 2018 and 18 September 2020, relating to the contractual obligations of Pola Logistics Limited (**Pola Logistics**), a company incorporated in Cyprus.
2. The Claim Form was sealed on 18 October 2024 and the Particulars of Claim are dated 28 November 2024. The Amended Defence is dated 4 July 2025. The allegations are firmly denied by the Defendants and it is denied that the Claimant is entitled to summary judgment.
3. The Application was initially listed for hearing in November 2025 with an estimated length of hearing of 1 day. The parties exchanged Skeleton Arguments, including a Claimant's Skeleton Argument dated 6 November 2025 and one on behalf of the Defendants. That hearing was adjourned because the judge before whom it was listed considered the time set aside to be insufficient. He was plainly correct. By the time of the hearing before me, I also had a detailed Skeleton Argument on behalf of the Defendants dated 2 July 2026, and a Supplemental Skeleton Argument dated 3 July 2026 on behalf of the Claimant. Despite it being listed for a full two days (with one day's advance judicial reading) there was insufficient time at the hearing before me for the Claimant to deliver all of its oral closing reply submissions, and I directed that these be made in writing, which were provided on 17 July 2026. I also have the Defendants' written comments on those closing submissions in a short note dated 31 July 2026.
4. Although there were some bad-tempered exchanges between them during the hearing, principally around whether the other side were trying to rely on "new" points in oral argument which had not been foreshadowed by their respective Skeleton Arguments, I am grateful to both Leading Counsel, and their Juniors, especially Mr Rich who also addressed me orally, for the quality and diligence in preparation of their oral and written submissions. It is simply not possible in a judgment like this to reflect all of the

submissions which were made, or to incorporate references to all of the case-law which was cited to me, but I have taken all of them into careful account. I am also grateful to their respective solicitors for their preparation of the Application and bundles, including providing me, at my request, a hard copy of the extensive authorities bundles (which run to a total of 3523 pages consisting of 74 different authorities) to assist me in preparing this judgment.

The Claimant

5. The Claimant is a Maltese registered company which, at the material time, was the registered owner of 7 vessels (**the Vessels**): (i) two Maltese-flagged floating cranes named "LUFT 1" and "LUFT 2"; (ii) three Belize-flagged tugboats named "SEA GULL", "ORION" and "HERCULES" and (iii) two Belize-flagged barges named "BARGE 1905" and "BARGE 1906".
6. The Claimant was, at the relevant time, a subsidiary of, and ultimately owned by, **JSC GTLK**. JSC means "Joint Stock Company" and GTLK means "State Transport Leasing Company". JSC GTLK was an international transport business which is wholly owned by the Russian Federation and for whom it was generating revenue. The Claimant's immediate parent is GTLK Europe Designated Activity Company (**GTLK Europe**), a company incorporated in Ireland. GTLK Europe was placed into liquidation in Ireland on 31 May 2023 and is now under the control of Irish insolvency practitioners.
7. The Claimant entered into seven, separate, bareboat charterparties, on substantially the same terms, in amended BARECON 2001 forms, for each of the Vessels with Pola Logistics (**the Charters**). The Charters were each for a period of 10 years from between February 2018 and April 2020. For convenience, the parties' arguments were directed only to the LUFT 1 Charter and to the LUFT 1 Guarantee, and this is adopted in this Judgment.

The Defendants

8. Pursuant to the various different deeds of Joint Guarantee, the Defendants are guarantors and indemnifiers of Pola Logistics' obligations under the Charters as follows: (i) all four Defendants are joint guarantors in respect of the LUFT 1 Charter; (ii) the First, Second and Third Defendants are joint guarantors in respect of the LUFT 2 Charter and (iii) the First, Second and Third Defendants are joint guarantors in

respect of the SEA GULL Charter, the ORION Charter, the HERCULES Charter, the BARGE 1905 Charter and the BARGE 1906 Charter. It is not in dispute that these obligations are joint and several.

The Evidence

9. The witness evidence before me was as follows, together with their respective exhibits:
   9.1. Witness statement of Craig Montgomery, a solicitor and partner in Freshfields LLP, dated 31 March 2025 (**Montgomery 1**) on behalf of the Claimant;
   9.2. Witness statement of Asad Naqvi, a solicitor and partner in MFB Solicitors, dated 13 May 2025 (**Naqvi 1**) on behalf of the Defendants;
   9.3. Second witness statement of Mr Naqvi dated 13 May 2025 (**Naqvi 2**) on behalf of the Defendants, in support of an application to amend the Defence;
   9.4. Witness statement of Stephanie Brown Cripps, a member of the New York Bar and a partner in Freshfields US LLP, which acts as the Claimant's US legal advisers, dated 30 June 2025 (**Cripps 1**) on behalf of the Claimant;
   9.5. Second witness statement of Mr Montgomery dated 2 July 2025 (**Montgomery 2)** on behalf of the Claimant;
   9.6. Third witness statement of Mr Naqvi dated 5 September 2025 (**Naqvi 2**) on behalf of the Defendants;
   9.7. Witness statement of Adam Franklin Hensel-Briscoe, a member of the Maryland and District of Columbia Bars and a partner in Squire Patton Boggs (US) LLP, dated 19 September 2025 (**Hensel-Briscoe 1**) on behalf of the Defendants;
   9.8. Second witness statement of Ms Brown Cripps, dated 1 October 2025 (**Cripps 2**) on behalf of the Claimant.
10. Whilst I was able to read these before and again after the hearing, it seems to me that, aside from that of Ms Brown Cripps and Mr Hensel-Briscoe, which was really quasi-expert evidence on the meaning and effect of the US sanctions, much of these witness statements dealt with factual matters which were not really in dispute or consisted of submissions, rather than true factual evidence, especially given that a large part of the hearing was directed to matters of the true construction of the relevant contractual documents. Nevertheless, I have taken all of them into consideration when reaching my decision and preparing this judgment.

The Factual Background

11. The factual background is largely common ground.
12. Each of the Vessels was duly delivered into the Charters.
13. However, on 8 April 2022, following the Russian invasion of Ukraine, JSC GTLK and named associated entities, were designated under Regulation 269/2014 (**the EU Regulation**) on the grounds that it was financially supporting and benefitting from the Government of the Russian Federation. For the reasons explained in Montgonery 1, this meant that the Claimant was also caught by the Regulation. Pola Logistics immediately ceased paying hire under the Charters.
14. On 19 April 2022, the Shipowners' Club wrote to Pola Logistics saying that, in light of the designation of JSC GTLK under the EU Regulation, the insurance cover for the Vessels had automatically terminated on 8 April 2022, and this was confirmed by endorsements entered on 25 July 2022.
15. On 21 April 2022, JSC GTLK was designated by the UK Government under the Russia (Sanctions) (EU Exit) Regulations 2019 (**the UK Regulation**).
16. On 17 May 2022, Pola Logistics informed the Claimant that, by reason of the EU Regulation, it was in breach of the terms of each of the Charters because, it said, it had been deprived of the quiet and peaceful use, possession and enjoyment of the Vessels because it could not use the Vessels, pay hire in respect of them, keep them insured or comply with many of the provisions of the Charters.
17. On 2 August 2022, JSC GTLK was designated by the US by Executive Order 14024 of April 15, 2021 – Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation (t**he US Regulation**).
18. On 1 September 2022, Pola Logistics served notices of termination under the Charters relying on the sanctions in the EU Regulation and the UK Regulation (**the Pola Logistics Notices of Termination**). The Pola Logistics Notices of Termination stated, amongst other things, that Pola Logistics regarded the Claimant as being in repudiatory breach of their obligations under the Charters (particularly clause 42), further or alternatively, that the Charters had been frustrated.
19. On 7 February 2023, the Claimant rejected Pola Logistics' termination of the Charters and asserted that they continued in effect.
20. As I have already set out, on 31 May 2023, GTLK Europe was put into liquidation, by Order of the Irish Court. Damien Murran and Julian Moroney of Teneo Restructuring (Ireland) Limited were appointed as Joint Liquidators.

21. On 11 July 2023, the Irish High Court declared that the presumption of control which arose under the Regulation was rebutted as a matter of EU and Irish Law by reason of its liquidation and GTLK Europe was no longer assumed to be subject to the asset freezing effect and, on 1 August 2023, the Central Bank of Ireland confirmed that this was its understanding.
22. On 1 August 2023, the Office of Financial Sanctions Implementation (the UK sanctions enforcement agency), issued a licence (**the OFSI General Licence**) permitting GTLK Europe and its subsidiaries, including the Claimant, to make and receive payments and to take actions in connection with the insolvency of GTLK Europe, and this was extended on 24 April 2025.
23. Further, specific, licences were granted in the US by OFAC on 18 September 2023 (**the OFAC Licence**), and extended on 20 September 2024 and 15 September 2025. There is a dispute between the parties as to the precise meaning and effect of the sanctions, and in particular whether they prohibited the payment and hire of the Vessels, but in substantive terms, the effect of the sanctions on Pola Logistics was arguably abated because payments under contracts that pre-existed designation, could now be made provided they were made into blocked accounts.
24. On 28 February 2024, two and a half years after Pola Logistics had served the Pola Notices of Termination and eight months after the liquidation of GTLK Europe had been initiated, the Claimant issued its own termination notices under the Charters and sent letters of demand under them to Pola Logistics (**the GTLK Notices of Termination**). The GTLK Notices of Termination were sent under Clause 28(a)(i) of the Charters and relied on a failure to pay hire since 7 June 2022 (said to be a breach of Clauses 11(a), 28(a)(i) and 38.1) and asserted the Claimant's right to require Pola Logistics to purchase the Vessels at **the Purchase Option Price** within 15 days of the termination notice (pursuant to clause 46.2 of the Charters). Pola Logistics did not pay within 15 days of the termination notice or at all.
25. On 10 October 2024, the Claimant made demands under the Guarantees for payment, within 3 business days, of the Purchase Option Price for each of the Vessels and the outstanding hire and interest which the Claimant claimed had accrued (**the Demands**). The Defendants did not pay within 3 days of the Demands or at all.
26. Meanwhile, on 30 September 2024, Pola Logistics had commenced LMAA arbitration proceedings against the Claimant (**the Charter Arbitration**). Amongst other things, the Charter Arbitration raises legal issues as to whether the Charters were terminated

and/or frustrated by the time of the GTLK Notices of Termination, and whether Pola Logistics is obliged to make payment to the Claimant of the Purchase Option Price, the same issues which arise in these proceedings.

The test on summary judgment

27. This is an application for summary judgment pursuant to CPR Part 24. The relevant test in CPR Part 24.3 is whether the Court considers that: (i) the Defendants have "no real prospect of succeeding on the defence or issue" and (ii) there is "no other compelling reason why the case or issue should be disposed of at trial".

28. The parties agree that the relevant principles can be derived from the observations of Lewison J (as he then was) in the case of *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at paragraph, a case with which I am very familiar, at 15 where he said this:

> "*As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91;*
>
> *ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal*

Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

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

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

29. In determining whether the case is suitable for summary determination, the Court is entitled to take into account not only the evidence actually placed before it on the application for summary judgment, but also the factual evidence that can reasonably be expected to be available at trial. However, there has to be real grounds for believing that something may emerge and that it will materially alter the evidence as to whether there is a real prospect of success. A mere assertion by the defendant is insufficient. It is not a licence for a defendant to such an application to speculate that something might turn up. Mr Thomas KC, rightly I think, pointed to the distinction between factual

matters and disclosure, on the one hand, and expert evidence, on the other. In relation to the latter, he submitted that the Court can reasonably expect that to be available even at the interlocutory stage, because it can expect the party facing the summary application to put its best foot forward.

30. On the other hand, as the Defendants rightly submit, the Court should not be drawn into an evaluation of the weight of the evidence (see *Okpabi v Royal Dutch Shell Plc* [2021] 1 WLR 1294 at [107] and [119]) and if a point of law to which an application gives rise raises a serious question to be tried which calls for detailed argument and mature consideration, the point may not be one which is suitable for summary determination at all (*Home & Overseas Insurance Co Ltd v Mentor Insurance (UK) Ltd* [1990] 1 WLR 153 at 159 and 163).

31. However, as Mr Thomas KC also reminded me, the Court should be alert to the Defendants making overblown and exaggerated assertions, especially on factual issues, as being a tactic often deployed by Defendants who are desperate to avoid summary judgment. This submission is perhaps best characterised as a reminder that the Court should "grasp the nettle" and decide points, especially of construction, if they are straightforward and suitable for summary determination.

The Law on Frustration and Termination

32. There is no dispute between the parties as to the relevant law on frustration.

33. In *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 706, Lord Simon stated:

> "*... frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances"*.

34. The relevant legal principles and modern approach was summarised by Rix LJ in *The Sea Angel* [2007] 2 All ER (Comm) 634 starting at [83] with a careful review of the earlier authorities but especially at [111] to [112].

35. The application of the doctrine requires a multi-factorial approach which means looking at:

"*the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances"*.

36. Rix LJ goes on to say that whether performance in the new circumstances is radically different involves inquiring whether there has been "*a break in identity between the contract as provided for and contemplated and its performance in the new circumstances"*.

37. The parties agree that where provision is made in the contract for the circumstances or events said to give rise to frustration, there is no place for the doctrine of frustration since the legal consequences of the event must be determined by applying the relevant contractual provisions. In *Bunge SA v Kyla Shipping Co Ltd (the "Kyla")* [2012] EWHC 3522 (Comm) at [70] Flaux J (as he then was) said:
"*It follows that I accept Mr Kendrick QC's submission that the correct approach in each case is to ask whether on its true construction, the contract under consideration provides for the event or contingency which has occurred or allocates the risk of that event or contingency to one other of the parties"*.

38. That is of importance here: as Mr Berry KC put it succinctly towards the beginning of his oral submissions, in the present case, that essentially means a contest between clause 42 of the Charters (which he submits places the risk of interference with use of the Vessels on the Claimant as owner) and clause 38.10, the so-called "hell or highwater clause", (which the Claimant says allocated the risk to Pola Logistics). He accepted that it was only if the Court concluded that they were both wrong, that frustration became relevant.

39. Frustration may arise where there is a supervening impossibility of performance (see *Joseph Constantine SS Line v Imperial Smelting Group* [1942] AC 154 at 163-264) or as a result of some supervening illegality (see *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2011] 2 All ER (Comm) 609 at [100] and Frustration and Force Majeure (4th ed) at [8-005]).

40. As the cases reveal, cases of delay as a cause of frustration are particularly difficult. In *The Sea Angel* at [89], Rix LJ said:

"*The particular problem of delay as a cause of frustration has to be tested as at the time it had to be considered by the parties, but on an objective basis. For these purposes past and prospective delay has to be taken into account".*

41. Where a supervening event is said to interrupt the performance of a contract that calls for ongoing performance over a long period of time, whether that contract has been frustrated has to be judged at the time when the delay to performance caused by the interruption is alleged to have become excessive and not with the benefit of hindsight – see per Branson J in *Court Line Ltd v Dant, Russell, Inc.* (1939) 64 Ll L Rep 212 at 219.

42. However, I accept the Claimant's submission that this does not mean that the Court freezes the moment of time and cannot look beyond it. As Rix LJ acknowledges at [90], citing from a passage of Lord Roskill in *Pioneer Shipping Ltd v BTP Tioxide Ltd (the Nema)* [1981] 2 Lloyd's Rep 239 at 253, in cases of delay, it may be necessary to: "*wait upon events in order to see whether the delay already suffered and the prospects of further delay from the case will make any ultimate performance of the relevant contractual obligations "radically different", to borrow Lord Radcliffe's phrase, from that which was undertaken under the contract*".

43. The fact that the interruption is likely at the time of the alleged frustration to be of very substantial duration, in relation to the unexpired balance of the contract, is an important consideration but is not decisive – see per Rix LJ in the *Sea Angel* at [118].

44. The Claimant contends that frustration and supervening illegality are separate concepts. It seems to me that nothing turns on this, aside from a forensic point about the way in which the Defence has been drafted. The parties are agreed that the relevant principles on foreign law illegality are summarised in the decision of Cockerill J (as she then was) in *Banco San Juan Internacional Inc v Petroleos de Venezuela SA* [2020] EWHC 2937 (Comm), especially at [75] to [83]. This makes clear that the so-called Ralli Brothers principle offers only a limited exception to the general principle that illegality under foreign law does not frustrate or otherwise relieve a party from performance of an English law contract. It provides that an obligation under an English law contract is invalid or unenforceable, or suspended in the case of a payment obligation, insofar as the contract requires performance in place where it is unlawful under the law of that required place of performance.

45. Here, it is common ground that the currency and method of payment in the Charters is US dollars and that the effect of the sanctions in the US Regulation was to prevent

payment of hire illegal in the place of performance because it required payment to be made in US dollars by telegraphic transfer, and so would have to pass through US intermediary banks – see the evidence in Montgomery 2 at [44(2)(a)] and Cripps 1 at [8]. I accept, at least for present purposes, that the Ralli Brothers exception is in principle in play.

46. In addition to *Banco San Juan* at [77], I was also referred by the Claimant to the decision of the Court of Appeal in *Celestial Aviation Services Ltd v Unicredit Bank GMBH* [2024] 1 Lloyd's Rep 215 at [68] which makes clear that the legal effect of supervening illegality affecting a contractual obligation to pay is to suspend the obligation to pay, not to frustrate the entire agreement.
47. There is also no dispute as to the relevant law on contractual termination for repudiatory breach.

The Material Terms of the Relevant Deeds

48. In Part I the Charters are described as "BIMCO BAREBOAT CHARTER CODE NAME: "BARECON 2001".
49. Boxes 13-15 of the Charters indicate that the Vessels were to be purchased by the Claimant from Pola Maris NV, the relevant seller, on terms set out in the Memorandum of Agreement (**the MOA**).
50. Box 16 provides for a Port or Place of redelivery: "as is, where is" at the time of payment of the Payment Option Price as may be applicable or other location to be specified by the [Claimant]".
51. Box 21 provides for a charter period of 10 years.
52. As I have already noted, the Charters provide, at Box 26 for the currency to be US dollars and the method of payment to be wire transfer.
53. Clause 10(a)(i) provides:

> "Maintenance and Repairs - During the Charter Period the Vessel shall be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and, except as provided for in Clause 14(I) if applicable, at their own expense they shall at all times keep the Vessel's Class fully up to date with the Classification Society indicated in Box 10 and maintain all other necessary certificates in force at all times."

54. Clause 33 of the Charters contains a conclusive evidence clause such that the Claimant was not on risk to Pola Logistics as to the condition of the Vessels.

55. Clause 37.1 of the Charters provides:

"The Charterers shall pay to the Owners hire for the Vessel on each Payment Date in the amount set out in column B of Schedule 1 hereto at such Payment Date (the "Charter Hire")."

56. Clause 37.2 of the Charters provides:

"The amounts of the Charter Hire and the Purchase Option Price payable under this Charter have not, as at the date of this Charter, been determined and figures shown in Schedule 1 of this Charter are indicative figures only which have been prepared based on a series of assumptions, including, without limitation:
(a) assumed Delivery Date for the purposes of calculations is 1 May 2018;
(b) assumed first payment of Charter Hire is 1 September 2018;
(c) assumed Purchase Price is USD 11,200,000;
(d) the Purchase Price financed by the Owners shall be repaid in equal instalments amortising to zero subject to a grace period of three (3) years from the Delivery Date;
(e) interest shall accrue at the Interest Rate on the outstanding amount of the Purchase Price throughout the term of the Charter; and
(f) assumed EUR/USD exchange rate is 1.20.

On or before the Delivery Date, as a condition precedent to the delivery of the Vessel to the Charterers, the Owners and the Charterers will agree, in Schedule 1, a new repayment schedule for the payment of the Charter Hire and the Purchase Option Price in respect of the Vessel in amounts sufficient to enable the Owners to meet their respective obligations in respect of the financing of the Vessel. Upon any such agreement being made, the Owners shall promptly replace the existing Schedule 1 with a new Schedule 1 and shall send a copy to the Charterers. Upon receipt of the same the existing Schedule 1 to this Charter shall be treated as null and void and shall be replaced by such replacement Schedule 1 and all payments of the Charter Hire and the Purchase Option Price shall be made or determined in accordance with such replacement Schedule 1."

57. Clause 38.10 is important. Counsel for the Claimant describes this as a "*hell or highwater"* provision and it is central to the submissions made on the Claimant's behalf:

"**Obligation absolute**. The Charterers' obligation to pay Charter Hire in accordance with the requirements of this Charter shall be absolute irrespective of any contingency whatsoever, including (but not limited to) (i) any set-off, counterclaim, recoupment, defence or other right which any party hereto may have against any other party hereto, (ii) any unavailability of the Vessel for any reason, including (but not limited to) condition, design, operation, performance, capacity or fitness for use of the Vessel or the ineligibility of the Vessel for any particular trade or for documentation under the laws of any country or of any damage to the Vessel, (iii) any failure or delay on the part of any party hereto or thereto, whether with or without fault on its part, in performing or complying with any of the terms or covenants hereunder (iv) any insolvency, bankruptcy, reorganisation, arrangement, readjustment of debt, dissolution, liquidation or similar proceedings by or against the Owners or the Charterers or the Guarantor or any other person or any change in the constitution of the Owners or the Charterers or the Guarantor or any other person, (v) any invalidity or unenforceability or lack of due authorisation of or other defect in the Charter, or (vi) any other cause which would or might but for this provision have the affect of terminating or in any way affecting any obligation of the Charterers under the Charter."

58. Clause 42 of the Charters is also of central importance. It is central to the Defendant's case as to the overall nature of the Charters and to its case on termination. It provides:

"QUIET ENJOYMENT
42.1 Covenant. The Owners hereby covenant and undertake that so long as they shall have not lawfully commenced the exercise of any of their rights under or pursuant to Clause 28(a) of the Charter, neither the Charterers (nor any permitted sub-charterers) shall be disturbed or interfered with in their quiet and peaceful use, possession and enjoyment of the Vessel."

59. The Charters incorporate Part IV of the BARECON 2001, in amended terms which, so far as material provides:

"Subject to additional clause 46, on expiration of this Charter it is agreed that on payment of the final payment of hire as per Clause 11 and the Purchase Option Price the Charterers have purchased the Vessel fully paid for. The Charterers shall also have the right at any time to purchase the Vesel by giving irrevocable notice to the Owners providing for delivery no earlier than thirty (30) days after the submission of such notice to the Owners."

60. Clause 46.2 of the Charters provides:

"Upon termination of this Charter as a result of a default of the Charterers under Clause 28(a), but not later than 15 (fifteen) Business Days from the date of such termination, the Buyers shall pay the Purchase Option Price to the Sellers applicable as at the month of such termination. In exchange for the Purchase Option Price the Sellers shall provide the documentation listed in Part IV (Hire/Purchase Agreement) hereof and shall transfer title to the Vessel free and clear of any security over the Vessel created by the Owner to Buyers and Buyers shall accept such transfer. For the avoidance of any doubt whatsoever, the Charterers shall not be obliged to pay the Purchase Option Price in the event the Vessel becomes a total loss or is declared as a constructive, compromised or arranged total loss. The Charterers shall however and do hereby indemnify the Owners in respect of any shortfall of the insurance proceeds as a result of such loss from policies arranged by the Charterers under this Charter but only to the extent that such shortfall is directly and solely the fault of and attributable to the actions (or omissions) of the Charterers. The Seller shall not sell the Vessel to any third party except any such party nominated by the Buyers unless the Buyers are in breach of this clause 46.2."

61. Clause 2 of the LUFT Guarantee provides that the Guarantor irrevocably and unconditionally:

"(a) guarantees to the Beneficiary the punctual performance by the Charterer of all of its obligations under the Transaction Documents (the "**Guaranteed Obligations**");
(b) undertakes with the Beneficiary that whenever the Charterer does not any any amount when due under or in connection with any Transaction Document, that Guarantor shall pay promptly and in any event within three (3) Business Days of written demand that amount as if it were the principal obligor; and
(c) agrees with the Beneficiary that if any obligation guaranteed by it is or becomes unenforceable, invalid or illegal, it will, as an independent and primary obligation, indemnify the Beneficiary promptly and in any event within three (3) Business Day of written demand against any cost, loss or liability it incurs as a result of the Charterer not paying any amount which would, but for such unenforceability, invalidity or illegality, have been payable by it under the Transaction Document on the date when it would have been due. The amount payable by a Guarantor under this indemnity will not exceed the amount it would have had to pay under this Deed if the amount claimed had been recoverable on the basis of a guarantee."

62. Clause 5(f) of the LUFT Guarantee provides under the general heading Waiver of Defences that:

> "The obligations of the Guarantor under this Deed will not be affected by an act, omission, matter or thing which, but for this Deed, would reduce, release or prejudice any obligations of any of the Guarantor under this Deed (without limitation and whether or not known to any of them or the Beneficiary) including: (f) any unenforceability, illegality or invalidity of any obligation of any person under any Transaction Document or any other document or security."

The issues for determination

63. By the time of the hearing both parties' submissions were helpfully directed to four main issues, although they expressed them slightly differently.

    63.1. **The construction issue**: the proper meaning and effect to be given to the provisions of the relevant Deeds and, in particular, whether they apply even if there has been frustration or termination;

    63.2. **The termination issue**: whether the Defendants have a real prospect of establishing that the Charters were terminated on 1 September 2022 if they had not already been frustrated;

    63.3. **The frustration issue**: whether the Defendants have a real prospect of establishing that the Charters were frustrated by impossibility/impracticability or discharged by supervening illegality in 2022;

    63.4. **The suspension of hire issue**: if the Charters survived, is the Claimant able to prove that Pola Logistics' obligation to pay hire was un-suspended by the grant of the OFAC Licence on 18 September 2023 such that hire was due and unpaid on 28 February 2024. This is one of the arguments which is said by the Claimant to be "new".

64. Although the Defence had originally argued that the Defendants' liability under the Guarantees was conditional upon the liability of Pola Logistics being determined in the Charter Arbitration, by the time of the hearing before me, this was no longer being pursued.

65. However, it became apparent at the hearing that, in addition to those issues, there was, although not fully articulated on the pleadings, a fundamental dispute between the parties as to the true nature of the Charters.

66. Paragraph 8 of the Particulars of Claim had set out that for each Vessel:
"*the Bareboat Charter formed part of a wider arrangement whereby [the Claimant] financed the purchase of the respective Vessel for the benefit of Pola Logistics, and the*

Bareboat Charter constituted a finance lease by which Pola Logistics operated the respective Vessel and repaid the financing through the quarterly payment of hire and balloon payment at the end of the charter period after which ownership of the Vessel would pass to Pola Logistics".

67. Paragraph 6 of the Amended Defence responds to paragraph 8 of the Particulars of Claim in the following terms:
"*Paragraph 8 is admitted save that it is not admitted that each Bareboat Charter former part of a "wider arrangement". It is not understood what the Claimant asserts the "wider arrangement" to be or to have been*".

68. Accordingly, as I read this, the Defendants took issue with the Claimant as to the existence of a wider arrangement, but not as to the essential character of the Charters as being "a finance lease".

69. The Claimant's case is that the Charters are essentially "finance Charters which are <u>part</u> of a wider arrangement whereby the Claimant financed the purchase of the relevant vessels – i.e. loaned the money to [Pola Logistics]". They point to the Facility Agreement, which was part of the suite of agreements entered into at the same time of the Charters which refers to them as "finance lease (bareboat charter) agreements" to be entered into.

70. I was referred to the leading textbook "Bareboat Charters", 2nd ed, 2005 by Edward Jones and Others and to the distinction drawn there between the two principal uses of bareboat charters:
"(a) ***Finance leases/charters*** *under which the bareboat charter forms part of a financing arrangement for the construction or purchase of a vessel with the financing bank taking ownership of the vessel on purchase or delivery, and leasing it to the owners, who will usually obtain title to the vessel when the finance is repaid through payments of hire;*
(b) ***Operating leases/charters*** *under which the owners part with possession of a vessel for a specified period of time (typically, to work on a specific offshore project of contract) with possession reverting to the owners at the conclusion of the charter and before the end of the vessel's economic life.*"

71. In the case of a finance lease, the authors go on to note at II.7:
"*In this scenario, the interest of the financing bank (as "owner" under the charter-party) is purely economic, with no reversionary interest or intention to own or possess the vessel. The owner's credit risk is secured by ownership of the vessel, rights to*

terminate the charter for failure to pay hire, and by other common securities such as assignments (of earnings, bank accounts, and insurances etc) and guarantees".

72. To the contrary, the Defendants submit that the parties chose to enter bareboat charters, not financing leases, and that it is the express terms and applicable law to bareboat charters that applies. They submit that the entire essence of such a charter is that the owner of the vessel delivers the vessel, promises quiet enjoyment in return for the charterer's promise to pay hire and redelivery at the end of the period (but with an option to purchase). They point to the express covenant in clause 42.1 of the Charters for quiet enjoyment.

73. There is even a disagreement between them as to whether the Charters in fact provide, in the repayment mechanism, for what has been termed "*a balloon payment"* or purchase option although I note that this is precisely the term which Mr Montgomery used in Montgomery 1 at paragraph 11 and, as I have already noted, appears in paragraph 8 of the Particulars of Claim. Rather, the Claimant points to clause 37.2(c) of the Charter which provides that the Purchase Price financed by the Owners shall be repaid in equal instalments amortizing to zero.

74. Without diminishing its significance, or the particular emphasis which has been placed on it in the parties' written and oral submissions, it seems to me that the submissions made on behalf of the Claimant as to the nature of the Charters in Section D of their Skeleton Argument are correct. These were finance charters and this is at the heart of the way they allocate the risk of loss of use, especially through the "hell or highwater" clause in clause 38.10. More generally, I am satisfied that I should interpret the Charter and the Joint Guarantees in their commercial context, which is as part of a suite of documents, defined as "Transaction Documents" in the Additional Clauses in the Charters. As the authors of that textbook note, in any dispute concerning a finance charter it is essential to consider the full suite or package of documents.

75. I turn then to the first of the dispositive issues.

The Proper Construction of the Deeds

76. By way of summary, the Claimant's position is that: (i) the issue of the proper construction of the Joint Guarantees, read in the context of these as finance Charters, is a complete answer to the Application; (ii) that, in light of the proper construction of those deeds, even if there is an arguable case on frustration, it does not matter; (iii) that, in light of the proper construction of those deeds, even if there is an arguable case on

termination, it does not matter; (iv) even if they are wrong in relation to the effect of the deeds in relation to termination, they say the Defendants have no prospect of establishing a valid termination and so they are entitled to summary judgment; (v) finally, they also submit that the Defendants have no prospect of establishing frustration in any event. They also then address what has been described as the suspension of hire issue.

77. Accordingly, whether the Joint Guarantee deeds respond to the Defendants' case on frustration and/or termination in any event, is of central, determinative, importance if the construction placed on them by the Claimant is correct. For this reason, I address it first. There is inevitably an overlap between some of the submissions which were made on frustration and those on termination.

78. It is common ground that the Joint Guarantees (and for that matter the Charters) are to be construed according to their terms and in the usual way.

79. The Claimant's position is articulated in its main Skeleton Argument at paragraphs 150 to 159 and in its Closing Submissions at paragraphs 11 to 22 (dealing with their effect on frustration) and 23 to 29 (which deal with their effect on termination). The Defendants rebuttal is at paragraphs 80 to 92 of its Skeleton Argument (which for the reasons I explain below deals only with the frustration issue) and its note at paragraphs 6 to 12.

80. However, it is convenient to deal first with the proper meaning and effect of clause 38.10 of the Charters because the Claimant submits that this is key to the categorisation of the Charters as being a finance charter whose primary subject matter is not the hiring of the vessel but the repayment of the finance. Properly so understood, it says that it was never within the contemplation of the parties that the Charters would come to an end in the way that the Defendants contend, by writing off Pola Logistics' debt and leaving the Claimant with vessels for which they have never had any use.

81. The Defendants dealt with clause 38.10 in section 7 of their Skeleton Argument. Although they acknowledge that it is concerned with ensuring that Pola Logistics continue to pay hire in certain circumstances, they say that clause 38.10 does not purport to deal with circumstances that result in discharge of the Charters as a whole, and simply does not apply after discharge.

82. However, the Defendants do not, whether in their Skeleton Argument or otherwise, set out any case as to why the Claimant's interpretation of clause 38.10 is wrong, or even advance any alternative construction of it. Moreover, the Defendants have to accept (in

paragraph 71 of their Skeleton Argument) that even on their case as to the inter-play between clause 38.10 and clause 42, this is a challenging context in which to establish frustration.

83. The Defendants also argued that clause 38.10 does not expressly allocate the risk of sanctions to Pola Logistics. As Mr Berry KC pointed out there is no express reference to sanctions in the Charters and no express provision for the consequences of the imposition of sanctions on the Claimant. He submits that it is to be inferred that the parties either did not foresee such a situation or considered that adequate provision was made for the effect of the same by the common law of frustration. True it is, clause 38.10 of the Charter makes no explicit reference to sanctions but its wording is in the broadest terms. In any event, it is not correct to say that there is no mention of sanctions. The definitions section in the Charters defined "Sanctions and Export Controls" widely and so contemplates sanctions being imposed on the owner and so is one of the contingencies which is capable of falling within clause 38.10.

84. It seems to me that on both of these arguments advanced by the Defendants have no real prospect of success. The effect of clause 38.10 was to allocate the entirety of the risk of the unavailability or inability to use the Vessels to Pola Logistics which is consistent with them being finance charters.

The Proper Construction of the Deeds as applied to the alleged frustration

85. In oral submissions, the Claimants drew particular attention to clauses 2(c) and clause 5(f) of the Joint Guarantee, and submitted that they are complementary but achieve the same thing – clause 2(c), by providing for the full indemnity of the Claimant for any losses they suffer as a result of any guaranteed obligation being unenforceable, invalid or illegal; and clause 5(f) by ensuring that the guarantor's obligation to pay the Claimant in the event of the charterer's failure to pay subsists even if the charterer was not legally obliged to pay for the stated reasons. If clause 5(c) did not exist, the Guarantor's obligation to pay could otherwise have been reduced.

86. The Claimant also submits that clauses 2(c) and 5(f) are clear and unambiguous in their wording and self-evidently broad and striving to be as broad as possible.

87. The Claimant relies on two cases in particular in support of this argument.

88. The first is the decision of Leigh-Ann Mulcahy KC, sitting as a Deputy Judge of the High Court, in *IDBI Bank Ltd v IDH International Drilling Holdco Ltd (formerly known as Essar Shipping & Logistics Ltd)* [2021] EWHC 1908 (Ch). There, the Judge

had to consider a clause which provided an indemnity if an underlying contractual obligation had become "*unenforceable, invalid or illegal"* in circumstances where the relevant borrower had been dissolved and it was therefore impossible to enforce against it. It was argued on behalf of the guarantor that "unenforceable" should be restricted to mean unenforceable contracts in the strict legal sense, that is a contract which, although valid, could not be sued upon, for example because of a want of written evidence under the statute of frauds. Counsel for the Claimant in that case argued that there was simply no basis to limit the words in that way and that, as a matter of ordinary language, the situation which had arisen was one of unenforceability. The learned Judge held, on an application by the Claimant for summary judgment, that unenforceability was wide enough to include the situation where the borrower had been dissolved and it was impossible for the beneficiary of the guarantee to enforce the loans against it. She adopted a broad construction of the word "unenforceable". It seems to me that she was right to do so. Clause 2(c) and clause 5(f) of the Joint Guarantees are materially identical.

89. The second case is *Gulf Bank K.S.C v Mitsubishi Heavy Industries Ltd* [1994] 2 Lloyds Rep 145, 151R. This concerned a supply of generation equipment to the Kuwaiti Ministry. Clause 11 of the relevant counter indemnity provided: "*Our obligation … shall not be in any way discharged or diminished … by any… variation or amendment to any guarantee or by any total or partial invalidity, illegality or unenforceability thereof."* This is again a materially identical clause to the ones I am called upon to construe. There was a trial of a preliminary issue whether Mitsubishi remained liable to indemnify the bank under the counter indemnity if the bank were required to make payment to the Ministry under the advance payment guarantee on the assumption of fact that the underlying construction contract and the advance payment guarantee itself had been of no legal effect, under Kuwaiti law, in the events which had happened. The Court of Appeal held that neither clause 11, nor any of the other provisions, drew a distinction between illegality, invalidity or unenforceability from the beginning and illegality, invalidity or unenforceability at some later stage, and that there was no commercial reason for such a distinction and nothing in the context in which the counter indemnity was given to support it. On the contrary, the Court held that, as a matter of commercial common sense, it was a clear objective of the agreement to preclude any debate or discussion about legal effectiveness or validity of the guarantee when the question arose either of payment under the guarantee or reimbursement under

the terms of the counter indemnity; to draw the suggested distinction would frustrate that clear objective. Thus, the fact that the underlying contract there had been void ab initio did not matter. The only question is whether, when the relevant demand is made, the underlying contract was unenforceable, illegal or invalid.

90. I accept the submission made by the Claimant that these cases are directly on point here. The underlying commercial rationale here, as in the *Gulf Bank* case, is that the joint guarantors bear the risks associated with the failure by Pola Logistics to repay the loan even if it cannot be enforced legally or practically against it. This is consistent with the underlying commercial purpose of the Charters as finance charters.

91. Although the Defendants sought to distinguish these two cases, and raised a further eight sub-issues in reply, I am satisfied that the Defendants have no real prospect of succeeding on these arguments for the reasons articulated by the Claimant. This means that even if there is an arguable case of frustration, it does not matter because the Joint Guarantees still respond.

The Proper Construction of the Deeds as applied to the alleged termination

92. The next issue of construction, assuming for this purpose that the Defendants have an arguable case that the Charters were terminated by the Pola Logistics Notices of Termination, is whether the deeds, in particular clause 2(c), also responds to that situation. The Defendants put it in two ways: first, they submit that upon termination (and for that matter frustration), accrued rights survive but no further rights accrue. Although the Claimant suggested otherwise in its written closing, it seems to me that there is still a live issue between the parties as to the proper meaning of the Joint Guarantees and, in particular, whether clause 2(c) bites on "unaccrued" obligations. Secondly, the Defendants submit that, on the true construction of clause 2(c) of the Joint Guarantees, the guarantee cannot be construed as applying to a repudiatory breach by the Claimant itself because of the well-established general principle that contracts cannot be construed to so as to give rights arising from one's own wrong.

93. It seems to be common ground that the issue of how the deeds respond to the Defendants' case on termination, was not raised in either of the Skeleton Arguments filed on behalf of the Claimant the first of which described Issue 4 as being: *"Whether, even if the Charter was frustrated at any point by 2 August 2022, the Defendants are still liable under the Guarantees"*. In the Skeleton Argument for the Defendants at paragraph 20(b), the clause 2(c) issue was described as relating only to frustration and

in paragraph 21 it expressly stated that the clause 2(c) issue "*does not apply to or after discharge for repudiatory breach"*.

94. However, early in his oral submissions, Mr Thomas KC expressly disagreed with paragraph 21 of the Defendants' Skeleton Argument and later on, he accepted that it was put in issue by his oral submissions. For his part, Mr Berry KC submitted that the clause 2(c) point was a bad one, in the case of frustration and in the case of breach. In circumstances, where both parties have argued the point, it would be wrong for me to ignore it.

95. To put this in its proper context, the Defendants submit that the Claimant was in repudiatory breach of the Charters on two grounds. First, they argue that the sanctions constituted a restraint on Pola Logistics' control of the Vessels, imposed by the Claimant or as a result of their nature which constitutes a breach of clause 10(a)(i) of the Charters. Although not relied on as a breach in the Pola Logistics Notices of Termination, I accept that it is open to the Defendants to rely on it. Secondly, the Defendants submit that there was a breach of the covenant for quiet enjoyment in clause 42.1 of the Charters because Pola Logistics was unable to use the Vessels.

96. So far as the "accrued" right argument is concerned, first, the Claimant submits that the obligation to pay Charter Hire in clause 38.10 of the Charter appears under the sub-heading "Obligation absolute". Next, it relies on sub-clause (vi) which provides expressly for the contingency where "*any other cause which would or might but for this provision have the effect of terminating or in any way affecting any obligation of the Charterers under the Charter"*. They submit that this makes plain that the obligation to pay hire subsists even in the case of termination, indeed that is its very purpose. They point also to the fact that clause 28(d) of the Charters, when read with clause 38.10(iv), which permits termination even in the event of bankruptcy or insolvency, means that the hire remains payable even in the case of termination for insolvency. Thus, the Claimant submits, even if the Defendants have an arguable case for termination (which the Claimant disputes), it still does not matter because the Claimant is entitled to call upon the Defendants to pay under the Joint Guarantees.

97. Although Mr Berry KC sought to argue strongly that these are fact-sensitive issues which are not suitable for summary determination, including by reference to the matters set out in Appendix 1 to their Skeleton Argument, I am unable to see that. As I have already indicated, the facts are not really in issue. Whether the Joint Guarantees responds to those facts is an issue as to their proper construction.

98. In their oral submissions, Mr Berry KC for the Defendants developed this submission to say that in this case, it was not a case of an obligation that accrued but was always or became illegal, it simply did not accrue. Without intending any disrespect, I found this part of his argument to be somewhat obscure and difficult to follow, perhaps because it had not been articulated at all in writing.

99. The difficulty for him is that there is no support for any distinction between "accrued" and "unaccrued" obligations in the wording of any of the provisions in the Joint Guarantees of the Charters or in any of the caselaw. In particular, it seems to me to be inconsistent with the observations in the *Gulf Bank* case that it did not matter how the underlying obligation had become unenforceable and even if there was no underlying right. Moreover, I am unable to see how the argument can be reconciled with the broad waiver of defences in paragraph 5 of the Joint Guarantees. Under clause 2(b) of the Joint Guarantees, the Defendants were obliged to pay amounts which had fallen due "*as if it were the principal obligor"* and under clause 2(c) of the Joint Guarantees, the Defendants agreed to indemnify the Claimant "*as an independent and primary obligation"*, or as primary obligors.

100. In my judgment, the Claimant is right to say that once there was a failure to pay the hire, the Claimant was entitled to terminate under clause 28(a) and the Defendants then stood in the shoes of Pola Logistics and were obliged to pay the Purchase Option Price under clause 46.2 of the Charter. Although the Defendants argued that a valid repudiation had the effect of terminating clause 46 of the Charter "*along with everything else, if there's a valid repudiation"* I can see no basis for this submission.

101. Leaving aside the Claimant's fall back argument that the EU sanctions did not in fact prevent payment of hire, the Defendants' argument that there is a distinction to be drawn in clause 38.10 between rights that had accrued and those that had not accrued, has no real prospect of success. The very purpose of clause 38.10 is to ensure that hire does continue to accrue.

102. The Defendants also submitted that clause 2(c) of the Joint Guarantee cannot be construed to apply to a repudiatory breach by the Claimant itself because the clause should be construed *ex turpi causa*. This is a matter of interpretation of clause 38.10 of the Charters, not clause 2(c) of the Joint Guarantee and as I have already noted, clause 38.10 provides expressly that the obligation to pay hire will survive a cause which might, but for that provision, have the effect of terminating the relevant obligation.

103. In my judgment, the Defendants have no real prospect of arguing that the Joint Guarantees do not also respond to the termination case.

The Application of the Doctrine of Frustration

104. As to the application of the doctrine of frustration in this case, the Defendants submit that the Charters were frustrated on 8 April 2022 (on the designation by the EU); or on 21 April 2022 (on the designation by the UK) or 2 August 2022 (on the designation by the US). At its highest level; they say: (i) the sanctions deprived Pola Logistics of use of the quiet and peaceful use of the Vessels; (ii) that the deprivation was potentially endless; (iii) deprivation of use due to the sanctions was not a risk allocated to Pola Logistics and (iv) the performance of the Charters was thereby rendered impossible, alternatively, radically different, from their contemplated performance.

105. They also contend for a narrower case based on frustration by supervening illegality because they submit that: (i) the sanctions made aspects of the performance of the Charters illegal; (ii) the Vessels were global pariahs, which were virtually incapable of being serviced, insured or flagged and (iii) it was impossible for Pola Logistics to comply with various provisions in the Charters.

106. It is important to emphasise that the only case advanced by the Defendants on frustration is that the Charters were frustrated at the point at which the sanctions were imposed. The sanctions were all imposed in April and August 2022. At that time, the Charters themselves had between five and eight years left to run. Moreover, Pola Logistics had the option to purchase the Vessels and to bring the Charters to an end at any time during their remaining duration. As I have already noted, after August 2023 there was the prospect of obtaining a licence from the relevant EU authorities, and after 2 August 2022, from OFAC to complete the purchases as long as the purchase monies were paid into a blocked account. This is precisely what Pola Logistics in fact did.

107. The Claimant accepted in their written and oral submissions that, for the purpose of the hearing before me, the factual premise of the Defendants' frustration case on use, whether or not the Vessels were capable of being used, was not suitable for summary determination. It would otherwise involve the Court rejecting the evidence in Naqvi 3 especially paragraphs 31 (a), (b) and (c). I agree that this concession is properly made.

108. However, its case is that even if all the factual matters are assumed in the Defendants' favour, they are still unable to establish that the Charters are frustrated. The Claimant relies heavily on the decision of Foxton J. (as he then was) in *Salam Air Saoc v Latam*

Airlines Group Sa [2020] EWHC 2414 (Comm) at [47] to [55]. *Salam Air* was concerned with a 'dry' lease of three aircraft. The application was by the lessee, an Omani airline, to restrain the lessor from making demands under three standby letters of credit which secured the payment of rent under the leases. The leases (which were governed by English law) were for a period of 6 years and also contained what the Judge described at [51] as a "*high or hellwater"* provision that the lessee's obligation to pay the rent was "absolute and unconditional irrespective of any contingency whatever".

109. In the interests of economy, I do not replicate the entire passage relied on by the Claimants in their Skeleton Argument but at [48] the Judge said:
"*A 6 year 'dry' aircraft lease is a challenging context in which to establish frustration. The lessor assumed very limited obligations under such a contract – essentially only that of ensuring quiet possession of the Aircraft – in return for the income stream represented by the rent, with the lessee assuming the commercial risks and rewards of operating the aircraft. From the lessor's perspective, it matters not whether the lessee uses the aircraft at all, how frequently or with what level of occupancy. Latam was at the material times still able to perform its obligation to provide SalamAir with quiet possession of the Aircraft, and SalamAir to perform its obligation to pay the rent"*.

110. The Claimants submit that if one substitutes "10 year bareboat charter" for "6 year dry lease", and clause 38.10 here for the equivalent clause in those leases, there is simply no prospect of the Defendants establishing frustration at trial.

111. One of the cases cited in *Salam* is the decision of Teare J. in *ACG Acquisition XX LLC v Olympia Airlines SA* [2012] EWHC 1070 (Comm) at [53] to which concerned an argument that an aircraft lease had been frustrated because the aircraft could no longer be operated due to the revocation of its airworthiness certificate. The leases there were for six years. The relevant clause there included the words "irrespective of any contingency whatever" and the Judge held that it was not possible to imply any words of limitation into them. He had little difficulty in dismissing the argument that the lease was frustrated.

112. The Claimants also referred me to similar conclusions having been reached by Julia Dias QC (as she then was) in *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Limited* [2021] EWHC 1117 (Comm) at [56] to [67], an application for summary judgment in respect of amounts outstanding under three aircraft leases, each with a term of 10 years, and to the decision of Jacobs J. in *Iris Helicopter Leasing Limited v*

Elitaliana SRL, Point Holding SPA [2021] EWHC 2459 (Comm) at [21] to [44], an application for summary judgment, in relation to a six-year lease of a helicopter.

113. The Defendants were unable to cite any authority for the proposition that a long term charter, such as the ones in this case, were frustrated at the very moment the supervening event was imposed. In the *Sea Angel* case itself a very long period of delay in relation to a very short contract was found not to frustrate it and that case, amongst others, is authority for the "wait and see" principle.

114. Going back to the multi-factorial approach that is urged upon me in the *Sea Angel*, it seems to me that the whilst the sanctions affected Pola Logistics' performance of the charter, it did not radically alter the performance thereunder, at least not as at August 2022, when there were at least five years left to run. The proper application of the *Banco San Juan* and *Celestial Aviation* cases means the Defendants have no real prospect of arguing that the effect of the sanctions was more than suspensory of Pola Logistics obligation to pay. Ultimately, the court is required to balance the application of the doctrine of frustration against the fairness of the overall result. I am satisfied that the outcome here is the right one, especially bearing in mind the nature of the Charters.

115. Moreover, since I have concluded that clause 38.10 of the Charters does allocate risk of loss of use to Pola Logistics, it is common ground that there is no room for the frustration doctrine to apply.

116. As to supervening illegality, although both parties have addressed me at length as to the true meaning and effect of the EU sanctions and US sanctions, and in particular whether the latter had the effect of frustrating or being only suspensory, I agree with the Defendant that this is largely rendered otiose by the concession by the Claimant that the factual premise underlying it cannot be determined on this Application and, I would add, by my conclusion that the obligation to pay hire is suspended not frustrated.

117. The proper question is whether, at the date of the sanctions in August 2022, reasonable business people, in the context of these Charters, would have expected the effect of the sanctions to be for an inordinate period of time such as to radically alter the bargain. In my view, the Defendants have no real prospect of establishing that. Again, I refer to the length of the charters and to the fact that, as I have found, this is a "wait and see" case. In this regard, it seems to me that the passage which was relied on by the Defendants in the decision of Butcher J. in *Aercap Ireland Limited v AIG Europe SA and others* [2025] EWHC 1430 (Comm) at [621] does not in fact assist them on

whether the sanctions were, as they submitted, prospectively endless. It was a comment on the strength or otherwise of the evidence in that case.

118. Moreover, it is common ground now that if the Claimant is correct on the true construction of the Deeds, as I have found it to be, then this issue is academic.

The Application of Termination Issue

119. The issue is whether the Defendants have any real prospect of establishing that the Charters were lawfully terminated on 1 September 2022 by service of the Pola Logistics Notices of Termination. As I have already noted, the Pola Logistics Notices of Termination relied only on a breach of clause 42 of the Charters and most of the argument was directed to that provision. The Defendant amended to add three further breaches of the Charters: a breach of clause 40.2(d), a breach of clause 42 and a breach of clause 10(1). In oral submissions, Mr Berry KC accepted that clause 10(a)(i) did not add much to the argument on clause 42 and the argument on clause 40.2(d) was not in the end pursued. As I have already noted, the Claimant accepts that the main factual premise of this argument, cannot be determined one way or another on this application.

120. There are therefore three aspects to this: (i) the proper construction of clause 42 and whether it is necessary to imply any limitations into it; (ii) whether properly so construed the Defendants make out a good arguable case on breach by the Claimant and (iii) was the breach (clearly or arguably) repudiatory.

121. The Defendants had argued that, properly construed, clause 42, constitutes an absolute guarantee by the Claimant against *any and every* disturbance of Pola Logistics' peaceful use, possession or enjoyment of the Vessels howsoever caused. That was fiercely denied by the Claimant which said that it was commercially absurd and would place the Claimant in breach in the event of the Vessels being, say, hijacked by pirates. The Claimants instead drew an analogy with section 7 of the Supply of Goods and Services Act 1982 and section 12(2)(b) of the Sale of Goods Act 1979 and submitted that clause 42 was not a guarantee by the seller against every disturbance that might occur. By the time of the hearing before me, there was a measure of agreement that the Court was unlikely to be assisted by reference to the caselaw on sales of goods.

122. In Naqvi 3, the Defendants argued for a more restricted position, which is that clause 42 applies to disturbances or interferences in any way attributable to the Claimant or to their related entities. I was told by Mr Thomas KC that, in their original Skeleton Argument for the hearing in November (which I have not seen), the Defendants

reformulated their construction of the clause to reflect that such disturbance or interference should be "directly or indirectly". This was in order to meet the point that the Claimant says sanctions were imposed by the Russian state and not, without a significant stretch to the concept of corporate personality, the Claimant or its associates. Perhaps because of that, by the time of the Skeleton Argument before me, the Defendants reverted to saying that it was not necessary to imply any limit into clause 42.

123. The Defendants' position was tempered in their oral submissions in two ways, in that Mr Berry KC accepted that clause 42 has to be construed in the context and in light of the allocation of contractual risk in other provisions in the Charters, especially clauses 39 and 41. Clause 39 contains a series of express indemnities for losses that may be suffered by the Claimant. Clause 41 contains a series of express, positive covenants on the part of Pola Logistics including at 41.1(j) a covenant to comply with its obligations at all times under the Charter. Thus, the Defendants submitted that the fact that ample and contractually detailed limitations are provided in clauses 39 and 41 makes it even more impossible to imply any further limitation in clause 42.

124. The burden is on the Defendants to show that they have a real prospect of establishing that the Claimant was in breach of clause 42 of the Charter, on the construction they now place on clause 42, when read together with the other provisions in the Charters which deal with the allocation or risk. In particular, it is clear that save in respect of the case of "Owner's Default" in clause 28(b) of the Charters, as I have found the Charters do allocate the entire risk of the unavailability of the Vessels or the inability to use them to Pola Logistics.

125. In my judgment, despite having ample opportunity to do so in various formulations which I have outlined they have been unable to do so because clause 42 does not extend the warranty to matters, the risk of which has been assumed under the Charters. The Defendants' argument does not begin to engage with how that clause sits with the allocation or risk in the hell and highwater provision in clause 38.10.

126. It is not then necessary for me to go on to consider whether the Defendants have an arguable case that any such breach is capable of being repudiatory. For completeness, it seems to me that the Claimant is in any event right to submit that the effect of amending the standard BARECON form of clause 28(b) of the Charters, was specifically to remove any common law right to terminate for breach and to replace it with an indemnity. The Defendants advanced two arguments in reply: the first was to

suggest that clause 28(b) was different from the common law right; the second was to say that it was unsafe to rely on deletions when construing the clause. In my judgment, there is nothing in these points and they have no real prospect of success.

127. Finally, my conclusion on the true meaning and effect of the Joint Guarantees in any event pre-supposes that the Defendants have an arguable case that the Charters were terminated for breach.

Conclusion

128. I have concluded, for the reasons stated, that that the Defendants have no real prospect of establishing their underlying case on frustration or termination of the Charters and that they have no real prospect of saying that they are not liable under the terms, properly construed, of the Joint Guarantees.

129. I have also to consider whether, in line with the requirements of CPR Part 24, there is any other compelling reason why the case or issue should be disposed of at trial. It was submitted on behalf of the Defendants that one such factor may be that additional or better evidence might be available at trial as to the endlessness of the sanctions. It does seem to me that this is a case where the prospect of them being able to do so, is remote or speculative bearing in mind the steps that they have already taken including in adducing the evidence of Naqvi 3 and Brown Cripps 1 and 2. I am satisfied that there is no compelling reason why this case should be disposed of at trial.

130. I invite the parties to reflect my draft judgment in the terms of an order.