Neutral Citation Number: [2023] EWHC 857 (Comm)

Claim No: CC-2022-LDS-000012

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
CIRCUIT COMMERCIAL COURT (KBD)

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG.

Date: 26/04/2023

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

PD TEESPORT LIMITED	**Claimant**
- and -	
P&O NORTH SEA FERRIES LIMITED	**Defendant**

- -
- -

Kajetan Wandowicz (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Claimant**
Celine Honey (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing date: 12 April 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE KLEIN

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 a.m. on 26 April 2023.

HH Judge Klein:

1. This is the judgment following the hearing of an application for summary judgment, made by notice dated 15 November 2022, by the claimant, PD Teesport Ltd., against the defendant, P&O North Sea Ferries Ltd., on the whole of the claim.

2. Kajetan Wandowicz of counsel represented the claimant on the application and Celine Honey of counsel represented the defendant. I am grateful to both of them for their very helpful skeleton arguments and for their clear and focused oral submissions.

The dispute

3. In this section of the judgment, I summarise the pleaded dispute between the parties. Although only a summary, for the purpose of considering whether the defendant has a real prospect of successfully defending the claim, what I set out is sufficiently accurate.

4. The claimant is the operator of Teesport, a sea port in Teesside. The defendant is a well-known sea ferry operator. The defendant has transported freight, vehicles and passengers for many years between Teesport and, principally, Zeebrugge in Belgium and Rotterdam in Holland.

5. The dispute relates to an agreement between the parties, dated 1 March 2021, but which operated retrospectively from 1 January 2021, by which, in return for permitting the defendant to use Teesport and for providing it with services, the claimant was to be paid a fee ("the Agreement"). The following were express terms of the Agreement:

> "…9.5 [The defendant] shall make payment of each invoice no later than 30 days from the date of the invoice.
>
> …9.8 If [the defendant] fails to pay by the due date any amount which is properly payable under this Agreement:
>
> …9.8.2 …[it] shall pay [the claimant] interest on the overdue amount at a rate equal to four per cent. per annum above the base rate of Barclays Bank PLC as at the due date accruing on a daily basis from the due date for payment until payment is made, after as well as before judgment [("clause 9.8.2")].
>
> 9.9 In the event of a bona fide dispute regarding any invoice or other request for payment, [the defendant] shall immediately notify [the claimant] thereof in writing and the parties shall attempt promptly and in good faith to resolve any dispute regarding amounts owed. Disputed portions of payments shall be set aside until resolved, but undisputed amounts shall be paid on the due date. In the event that disputed portions are agreed by [the parties] or otherwise determined in accordance with this Agreement as being payable, [the defendant] shall pay [the claimant] interest on such amounts at a rate equal to two per cent. per annum above the base rate of Barclays Bank PLC

as at the due date accruing on a daily basis from the due date for payment until payment is made, after as well as before judgment [("clause 9.9")].

…*Minimum Volume Guarantee*

11.1 Subject to clause 12.3, [the defendant] guarantees to import or export via a Vessel at the Terminal [(that is, Teesport)]:

11.1.1 during the first Contract Year [(2021)], a minimum of one hundred and twenty thousand (120,000) Units;…

("the Minimum Volume Guarantee").

11.2 …if in any Contract Year the number of Units imported or exported by [the defendant] via a Vessel at the Terminal is less than the Minimum Volume Guarantee, [the defendant] shall pay [the claimant] a shortfall payment of £44.54 ("the Shortfall Payment") for each Unit by which [the defendant] is short of the Minimum Volume Guarantee...

11.3 If [the defendant] can demonstrate to [the claimant's] reasonable satisfaction that it is impossible for [the defendant] to achieve the Minimum Volume Guarantee in the first Contract Year solely due to economic factors resulting from the UK's exit from the European Union, the parties shall attend a meeting to discuss and propose strategies for [the defendant] to achieve the Minimum Volume Guarantee and reasonably consider any amendment to the Minimum Volume Guarantee for the first Contract Year [("clause 11.3")].

Force Majeure

12.1 If the performance of this Agreement or any obligations hereunder by or of either party to this Agreement is impeded, hindered or prevented by Force Majeure then the party affected shall not be deemed in breach of this Agreement, provided that:

12.1.1 the suspension of performance is of no greater scope than is required by the Force Majeure event;

12.1.2 the non-performing party gives the innocent party prompt notice describing the circumstances of the Force Majeure event including the nature of the occurrence and its expected duration and continues to furnish regular reports during the period of the Force Majeure event;

12.1.3 the non-performing party uses all reasonable endeavours to remedy as soon as possible its inability to perform and to mitigate the effects of the circumstance of Force Majeure.

> 12.2 If a Force Majeure event shall continue for 60 days the innocent party shall be entitled by 14 days' notice in writing served on the non-performing party to terminate this Agreement.
>
> 12.3 If a Force Majeure event affecting [the claimant] prevents [the defendant] from importing or exporting Units via a Vessel at [Teesport]:
>
> 12.3.1 the relevant number of affected Units shall be deducted from the Minimum Volume Guarantee for the Contract Year in which the Force Majeure event occurs (but such reduction to the Minimum Volume Guarantee shall not affect the calculation of the Minimum Volume Guarantee for subsequent Contract Years, which shall be calculated without reference to the Force Majeure deduction);... [("clause 12.3")]"

6. The defendant did not meet the Minimum Volume Guarantee in 2021. The claimant contends that the defendant only imported or exported ("transported") 99,550 units, and the defendant accepts that it did not transport any more than that number, so that the defendant fell short of the Minimum Volume Guarantee by 20,450 units ("the shortfall units"). But for any defence to the claim, the defendant therefore became liable to make a Shortfall Payment in the principal sum of £910,843. The claimant invoiced the defendant the Shortfall Payment on 31 January 2022 and, the claimant contends, the invoice became due for payment on 2 March 2022. The defendant admits that the claimant invoiced it the Shortfall Payment on 31 January 2022 and apparently admits that, but for any defence to the claim, the invoice became due for payment on 2 March 2022. The defendant has not paid the invoice. So, the claimant began the claim, to recover the Shortfall Payment. The claimant also claims interest, under clause 9.8.2, at the rate of 4% pa above the Barclays Bank base rate from 2 March 2022.

7. There is a dispute between the parties about whether the rate of any contractual interest payable by the defendant in this case should be 4% pa, as the claimant contends, or 2% pa above the Barclays Bank base rate, as the defendant contends relying on clause 9.9. This was one of the disputes which the claimant sought to have resolved as part of the summary judgment application. On instructions, however, Mr Wandowicz accepted at the hearing that that dispute (the rate of interest payable) is one which should go forward to trial and is not suitable for summary determination.

8. By its Defence, the defendant contends that the Agreement is "a long-term relational contract to which good faith obligations apply", which the claimant disputes.

9. More significantly, the defendant contends that that it is not liable to pay any Shortfall Payment for two reasons.

10. First, it contends that, in breach of clause 11.3, the claimant failed "(in good faith) to meet and reasonably consider amendments to" the Minimum Volume Guarantee (see paragraph 8(5) in particular of the Defence). In her oral submissions, Ms Honey explained that the good faith obligation the defendant contends the claimant breached was an express obligation found in clause 11.3 or clause 9.9 or an obligation implied

because, the defendant contends, the Agreement is a relational contract. (She also argued, at one point in her oral submissions, that a good faith obligation was implied on conventional grounds; for example, to give business efficacy to the Agreement. As that is a case which is wholly unpleaded, and which is otherwise wholly unsupported by any evidence, Ms Honey was right not to pursue the argument). The defendant contends that, because of the claimant's breach of clause 11.3, the defendant is not liable to make any Shortfall Payment and, in particular, is not liable to pay the principal sum claimed.

11. Secondly, the defendant contends that:

    i) its customers cancelled, changed, or reduced their orders because of the Covid-19 pandemic, which reduced the number of units it transported;

    ii) social distancing measures in place because of the Covid-19 pandemic limited the number of self-drive vehicles which it could carry on any sailing, which reduced the number of units it transported;

    iii) its customers were unable to adapt to post-Brexit transition arrangements in time to allow it to transport sufficient units to meet the Minimum Volume Guarantee.

    It contends that, therefore, clause 12.3 has been engaged, because a force majeure event prevented it from transporting the shortfall units, and, in consequence, no Shortfall Payment is due.

12. This is a convenient point to consider this second defence to the claim ("the clause 12.3 defence") a little further.

13. Whilst pandemics, and Covid-19 pandemic events, are expressly provided, in the Agreement, to be force majeure events, the UK's exit from the EU (Brexit) is not. However, "circumstances beyond a party's reasonable control" are expressed to be force majeure events and, without deciding the point, most favourably to the defendant I assume that Brexit is a force majeure event for the purposes of clause 12.3.

14. More significantly, clause 12.3 is clear that it is not enough, for it to operate, that a force majeure event prevents the defendant from transporting units. Rather, clause 12.3 provides that, for it to operate, a force majeure event "affecting [the claimant]" must prevent the defendant from transporting units.

15. The Defence notably omits any plea that any force majeure event, whether related to the Covid-19 pandemic, Brexit, or otherwise, affected the claimant. Ms Honey sought to make good this omission in her skeleton argument and, even more so, in her oral submissions. By the end of the hearing, the defendant's case, as I understood it, was as follows:

    i) the Covid-19 pandemic and Brexit affected the claimant. Ms Honey put forward two bases for this assertion. First, she relied on what I explain is a bald assertion in the evidence filed on the defendant's behalf that goes no further than that the Covid-19 pandemic and Brexit affected the claimant.

Secondly, she said that it was notorious that the Covid-19 pandemic and Brexit affected freight shipping in the UK, so that I should take judicial notice of those facts which, she argued, supported the assertion;

ii) in any event, properly construed, clause 12.3 operated if a force majeure event (such as Covid-19 pandemic or Brexit) was capable of affecting the claimant (see paragraph 76 of her skeleton argument). It was unreal to suppose, Ms Honey effectively argued, that Covid-19 or Brexit were not capable of affecting the claimant;

iii) because Covid-19 and Brexit affected, or were capable of affecting, the claimant, and because they prevented the defendant from transporting units, clause 12.3 is engaged. I was unsure by the conclusion of the hearing whether it is the defendant's case that, for clause 12.3 to operate, it is not necessary for the Covid-19 pandemic or Brexit event which affected, or may have affected, the claimant to have been the cause of the impossibility complained of by the defendant. On reflection, that must be the defendant's case. To put it another way, the defendant's case must be that, so long as, for example, the claimant was affected, or may have been affected, by a Brexit event, if a wholly unrelated Brexit event made it impossible for the defendant to meet the Minimum Volume Guarantee, clause 12.3 can operate. I have reached this conclusion because none of the force majeure events the defendant has actually pleaded relate to anything the claimant did, or did not, do, or anything which happened, or did not happen, at Teesport. Two of the three force majeure events the defendant relies on relate to the conduct of its own customers.

16. Most favourably to the defendant, in determining the summary judgment application I will ignore the omission in the Defence and proceed on the basis that, in the context of the clause 12.3 defence, the defendant is advancing a case that a force majeure event (a Covid-19 pandemic or Brexit event) did affect, or was capable of affecting, the claimant.

17. The defendant also contends (thirdly) that no interest is payable before judgment on any principal sum it is found liable to pay the claimant ("the clause 9.9 defence"). It contends that, on the proper construction of clause 9.9 (or by implication), where there is a bona fide payment dispute, and assuming that the defendant has immediately notified the claimant in writing about the dispute, clause 9.9 changes, or otherwise fixes, the due date for payment as, for present purposes, the date any judgment is entered against the defendant.

The witness evidence

18. As I have said, there is no dispute that the defendant did not satisfy the Minimum Volume Guarantee in 2021.

19. It is apparently not disputed that, on 12 January 2022, the claimant emailed the defendant inviting it to agree the number of units transported by the defendant in 2021, in order for the claimant to calculate the Shortfall Payment.

20. On 13 January 2022, the defendant wrote to the claimant, saying:

> "In the spirit of clause 11.3 we would like to invite [the claimant] to a meeting in the coming days so that we can open a dialogue on the MVG for 2021 and see if any strategies can be mutually developed around the MVG as well as a healthy discussion on what an acceptable MVG adjustment could look like."

21. It is apparently not disputed that a meeting took place between the claimant and the defendant on 26 January 2022.

22. Andrew Oxby, the claimant's strategic development director, says in his first witness statement, at paragraph 22, that, even though the defendant's 13 January 2022 letter did not demonstrate to the claimant's reasonable satisfaction that it had been impossible for the defendant to achieve the Minimum Volume Guarantee solely due to Brexit (or at all) in 2021, nevertheless, the claimant did meet the defendant on 26 January 2022 "in good faith", but that the parties did not reach agreement about a reduction in the Minimum Volume Guarantee. He also refers to a detailed email he sent to the defendant on 4 February 2022 ("the 4 February email"), which contained analysis about the defendant's ability to meet the Minimum Volume Guarantee, in which he said:

> "…having considered the meeting further, as detailed in the remainder of this email, our position remains that [the defendant has] not at any time demonstrated to our reasonable satisfaction that the failure to achieve the MVG in the Period is solely due to economic factors resulting from Brexit."

23. As he explains in paragraph 23 of his witness statement, in the 4 February email he set out a "variety of self-inflicted difficulties which had plagued [the defendant] during the [2021] year." As he says, he argued in the 4 February email that:

> "…on the basis [of what he said in the email] it is clear that any volume shortfall during the Period was entirely self-inflicted being solely due to an extremely poor systems implementation and inadequate engagement and communication with staff, service providers and customers, all of which were entirely avoidable. The diversion of cargo to other unaffected port operations, was a direct result of the P&O systems issues and the resulting frustration of your longstanding customers."

24. Indeed, in the 4 February email, he sought to demonstrate that, save for the defendant's operations, "the general outlook for volumes at [Teesport] during 2021 was favourable, with all [the claimant's] Lolo customers achieving a higher throughput volume in 2021 in comparison to 2020…[The defendant] was the only exception to this." He added that "freight Roro more widely also performed well, with Stena Line reporting a 28% increase in volumes during 2021" and he wrote of "buoyant freight volumes across UK ports, both Lolo and Roro". He added:

> "We know from UKMPG meetings post 1st January 2021 that there was limited Brexit related disruption across UK ports, with only P&O routes mentioned as "struggling" due to

> systems issues. No Government Agency systems issues were reported post Brexit, and there were no unexpected changes to any processes or legislation which would have been indicative of wider UK port related problems. Further, there were no inventory linked issues reported by MCP Destin8, and no issues with our TOS, Nevis."

25. Amelia Mitchell, the defendant's head of legal services, in her responsive witness statement, does not dispute that the claimant did not agree to any amendment to the Minimum Volume Guarantee (pointing out that there were many meetings between the parties during the relevant (2021) year about the impact of Brexit on the Minimum Volume Guarantee). Instead, she makes the bald assertion, unsupported elsewhere in her witness statement, that the claimant failed to reasonably consider an amendment to the Minimum Volume Guarantee; an assertion which is as baldly pleaded. For example, Ms Mitchell says as follows:

> "5…(a)…I do not believe that [the claimant] ever properly engaged in considering proposals to reduce the MVG.
>
> …8 …I understand that [the claimant] would be required not to act capriciously and to agree to reasonable proposals [regarding a reduction of the MVG]. In the circumstances, they did not do so."

(In fact, she does not refer to any instance when, nor is there apparently any evidence that, the defendant put forward any proposals for a reduction in the Minimum Volume Guarantee).

26. Further, on a fair reading of Ms Mitchell's witness statement, she justifies the defendant's contention that its transport arrangements were impacted by Brexit solely on the basis that Brexit caused a "notorious" disruption to shipping (see paragraph 9 of her statement).

27. Although Ms Mitchell also suggests that further documents "may…come to light" and that the defendant's case "may also be supported" by witness statements, that suggestion, which is speculative in any event and not particularised any further, appears to relate to the in-year meetings to which I have just referred. It does not appear to relate to any decision by the claimant from 13 January 2022 not to consider an amendment to the Minimum Volume Guarantee (or any related conduct).

28. In his first witness statement, Mr Oxby adds, at paragraph 29(b):

> "I can confirm that [the claimant] was ready and willing to service any volume of traffic well in excess of the MVG, and I note that [the defendant] does not suggest otherwise."

29. In response, Ms Mitchell says no more than, Covid-19 and Brexit "clearly affected…[the claimant]" (see paragraph 19 of her witness statement), and she does not explain why. Nor does she rely on any evidence in support of this bald assertion, or suggest that any evidence in support of it may be forthcoming.

The proper approach to the determination of summary judgment applications

30. The proper approach to the determination of the application is apparently not in dispute.

31. Both parties referred me to, and relied on, the decision of Lewison J in *Easyair Ltd. v. Opal Telecom Ltd.* [2019] EWHC 339 (Ch) and, in particular, the part of the judge's judgment set out in note 24.2.3 of the 2023 White Book, 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 3;
>
> 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."

Although, in this summary, the judge said that the court is not required to take, at face value, what a claimant says, the same is undoubtedly true of any respondent's evidence, including that of a defendant, as appears not to be in dispute.

32. Further, as the editors of the White Book explain at note 24.2.4:

> "In *ED&F Man Liquid Products Ltd. v. Patel* [2003] EWCA Civ 472, it was said that under r.24.2 the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. The existence of this burden is indicated by para.2(3) of Practice Direction 24; the applicant must: (a) identify concisely any point of law or provision in a document on which they rely; and/or (b) state that the application is made because the applicant believes that, on the evidence, the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial. The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial.
>
> If an applicant for summary judgment adduces credible evidence in support of the application, the respondent then comes under an evidential burden to prove some real prospect of success or other reason for having a trial: *Sainsbury's Supermarkets Ltd. v. Condek Holdings Ltd. (formerly Condek Ltd.)* [2014] EWHC 2016 (TCC) at [13]. A respondent to a summary judgment application who claims that further evidence will be available at trial must serve evidence substantiating that claim*: Korea National Insurance Corpn. v.*

> *Allianz Global Corporate & Specialty AG (formerly Allianz Marine & Aviation Vershicherungs AG)* [2007] EWCA Civ 1066; [2007] 2 CLC 748:
>
> > "It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be, already within its possession, as is the case here …" ([14] per Moore-Bick LJ)."

33. In reaching my decision, I have borne in mind these principles of course, as well as the parties' submissions and all the evidence I was asked to pre-read or to which I was otherwise referred. Counsels' submissions ranged over a broad territory. I do not need to consider all their submissions in this judgment, because I have concluded that, save on the interest point conceded by the claimant, the defendant does not have a real prospect of successfully defending the claim for the reasons I set out.

The proper approach to documentary construction

34. Before explaining why I have concluded that, save on the interest point conceded by the claimant, the defendant does not have a real prospect of successfully defending the claim, I should say something about documentary construction, because the parties are in dispute about the proper construction of the Agreement.

35. There is no dispute between the parties about the proper approach to documentary construction. Ms Honey referred, in her skeleton argument, to what Popplewell J said in *The Ocean Neptune* [2018] EWHC 163 (Comm) at [8], as follows:

> > "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with

> business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

Clause 11.3

36. As I understood Ms Honey's submissions, the meeting(s) contemplated by clause 11.3 were to serve two purposes, on the proper construction of the clause. One purpose was to discuss and propose strategies for the defendant to achieve the Minimum Volume Guarantee in future years (2022 and beyond). This purpose is not relevant to the dispute. A second purpose was to allow the parties to reasonably consider any amendment to the Minimum Volume Guarantee for 2021.

37. The defendant relies on its contention that the Agreement is a relational contract as a springboard for its contention that the parties were required to attend the meeting "in good faith" and, seemingly, to reasonably consider "in good faith" any amendment to the Minimum Volume Guarantee for 2021.

38. A person cannot "attend" a meeting in good, or bad, faith. Whether or not they attend a meeting is a matter of fact. Any good faith obligation can only relate to their conduct at (and, perhaps, before or after) the meeting. In the context of a defence based on clause 11.3, the only conduct of the claimant on which the defendant can, and seemingly does, rely, is the claimant's conduct in considering any amendment to the Minimum Volume Guarantee for 2021.

39. The Defence does not plead the content of the good faith obligation on which the defendant relies. Nor does it particularise how the claimant is said to have breached any good faith obligation in its consideration of any amendment to the Minimum Volume Guarantee. This is a significant omission because, apart from a core honesty obligation, a good faith obligation can be conditioned by its context (see, by analogy, *Re Compound Photonics Group Ltd.* [2022] EWCA Civ 1371, a case to which the parties did not refer me) and I do not understand the defendant to allege (and it certainly has not pleaded) that the claimant has been dishonest. Ms Mitchell's witness statement hardly provides any more clarity.

40. As it happens, I do not think it matters whether or not the claimant had to consider any amendment to the Minimum Volume Guarantee in good faith, so that it does not matter whether or not the Agreement is a relational contract.

41. As presented at the hearing, the defendant's case is that the claimant has been in breach of clause 11.3 because, throughout the 26 January 2022 meeting in particular, the claimant always had a closed mind to the possibility of any amendment to the Minimum Volume Guarantee. In support of this case, Ms Honey made the following submissions. She argued, first, that, because the 26 January 2022 meeting took place, the claimant must have been reasonably satisfied beforehand that it was impossible for the defendant to meet the Minimum Volume Guarantee in 2021. She argued, secondly, that it ought to be inferred that, in refusing to agree a reduction in the Minimum Volume Guarantee, the claimant acted unreasonably and in bad faith. In support of her second point she relied on (i) her first point, (ii) the bald assertions in Ms Mitchell's witness statement to the effect that, in refusing to agree a reduction in the Minimum Volume Guarantee, the claimant acted unreasonably and in bad faith and (iii) the 4 February email.

42. For the reasons I explain below, I have concluded that the defendant does not have a real prospect of establishing that the claimant in fact always had a closed mind to the possibility of any amendment to the Minimum Volume Guarantee, particularly at the 26 January 2022 meeting, so that it does not matter whether or not the claimant had to consider any amendment in good faith. Nor does it matter whether or not the Agreement is a relational contract.

The 4 February email

43. As a result of the way the defendant's case was presented at the hearing, the 4 February email has become very significant. The claimant contends that it corroborates its case that it did consider amendment to the Minimum Volume Guarantee with an open mind, whilst the defendant contends that it corroborates its case that the claimant always had a closed mind to the possibility of any amendment.

44. Ms Mitchell does not suggest that there is any material which may be available to contextualise the 4 February email. Even if she had, there is no substantiation for such a suggestion.

45. I have concluded that the 4 February email corroborates the claimant's case that it did consider amendment of the Minimum Volume Guarantee with an open mind.

46. It is right that, in the email, Mr Oxby says "our position remains that [the defendant has] not at any time demonstrated to our reasonable satisfaction that the failure to achieve the MVG in the Period is solely due to economic factors resulting from Brexit" (emphasis added), but (i) strictly what Mr Oxby said does not relate to the exercise of considering any amendment to the Minimum Volume Guarantee, but to whether the claimant was obliged to attend a meeting and (ii) Mr Oxby writes in the present tense, reflecting the claimant's position as at 4 February 2022, and not obviously the claimant's position say throughout the 26 January 2022 meeting.

47. More significantly, and most consistently with the claimant's case, the email shows that the claimant (and Mr Oxby, in particular) comprehensively considered the cause

of the defendant's failure to achieve the Minimum Volume Guarantee and, in doing so, considered not only empirical evidence but also what was discussed at the 26 January 2022 meeting. Further, the email provides what appears to be an entirely reasonable justification for the claimant not agreeing any reduction to the Minimum Volume Guarantee. (In case the defendant intended to suggest that the claimant had a closed mind after the 26 January 2022 meeting, and, in particular, after the 4 February email, I should add that the defendant did not put in evidence any material which shows that it responded to the 4 February email and did not suggest that such material may be available).

Clause 12.3

48. There is a dispute between the parties about the proper construction of clause 12.3. No-one has suggested that there may be any material which was not available at the hearing which may contextualise clause 12.3. I am satisfied that construing clause 12.3 is a straightforward exercise.

49. By the end of the hearing, it appears to me now, as I have said, that the defendant's construction of clause 12.3 was as follows. For clause 12.3 to operate, two pre-conditions have to be satisfied; namely (i) that a force majeure event (such as a Covid-19 pandemic event or a Brexit event) must have affected, or must have been capable of affecting, the claimant and (ii) a force majeure event in the same category (such as the Covid-19 pandemic or Brexit) must have prevented the defendant from transporting units.

50. I reject the defendant's construction of clause 12.3. Rather, I have concluded that, for clause 12.3 to operate, (i) the claimant must have been affected by a force majeure event ("the first pre-condition") which (ii) must have been the cause of the defendant's inability to transport units ("the second pre-condition").

51. The language of the clause itself does not support the defendant's case that the first pre-condition is satisfied if the force majeure event was merely capable of affecting the claimant. The clause speaks of a force majeure event "affecting" the claimant. The language of the clause also supports a causative link between the force majeure event affecting the claimant and the defendant's inability to transport units. The clause speaks of the force majeure event affecting the claimant "preventing" the defendant from importing or exporting.

52. There are two contextual points which reinforce my conclusion.

53. First, clause 12.1 of the Agreement gives relief to an affected party (in this scenario, the defendant) for force majeure whether or not the force majeure event affects the other party and whether or not any force majeure event affecting the other party has also affected the affected party (the defendant). On the defendant's construction of clause 12.3, it would hardly cover any ground not covered by clause 12.1 of the Agreement.

54. Secondly, and more significantly, so long as the first pre-condition and the second pre-condition are satisfied, under clause 12.3, the defendant benefits from a reduction in the number of shortfall units. It makes sound commercial sense for the defendant to get relief from having to make a Shortfall Payment in circumstances, and for clause

12.3 to be directed to circumstances, where the defendant cannot transport units because a force majeure event has affected the claimant's performance of its side of the bargain.

Clause 9.9

55. Clause 9.5 of the Agreement ("clause 9.5") provides that the due date for payment of an invoice is 30 days from the date of that invoice.

56. As I have explained, by the clause 9.9 defence the defendant contends that, so long as two pre-conditions are satisfied (which I must assume have been satisfied), in the circumstances which have happened unless and until the claim has been determined and judgment entered for the claimant, no Shortfall Payment has been due for payment, so that no pre-judgment contractual interest is payable. The defendant contends that this is so on the proper construction of clause 9.9 or because an adjustment to the due date for payment is implied, on conventional grounds, into clause 9.9. This is disputed by the claimant. No-one has suggested that there may be any material which was not available at the hearing which may contextualise clause 9.9. I am satisfied that construing it, and considering whether any provision is to be implied into it, is a straightforward exercise.

57. I reject the defendant's case based on construction, for the following reasons:

i) the clause requires that undisputed amounts be paid on "the due date". That is a date which is not expressed to be fixed in accordance with a formula in clause 9.9 and can only refer to the date specified by clause 9.5. It is not immediately apparent why the same concept, the due date for payment, should be different for undisputed and disputed amounts;

ii) the clause does not expressly specify the due date for payment of disputed amounts. Nor does it expressly provide that the due date for payment of disputed amounts is adjusted to a date other than the date specified by clause 9.5;

iii) all the clause says is that disputed amounts are to be set aside. Just because amounts may be set aside unless and until the parties agree, or a court determines, that they must be paid – in which circumstances, the defendant's entitlement to set aside the amounts can be seen, retrospectively, as a temporary indulgence – it does not follow that, once agreement has been reached or the court makes a determination, those amounts have not always been due for payment in accordance with clause 9.5;

iv) the defendant's construction of clause 9.9 is inconsistent with the express words of the clause which require interest to be paid "from the due date for payment until payment, after as well as before judgment" (emphasis added);

v) the defendant's construction of clause 9.9 is not obviously commercial. If the parties agree, or a court determines, that the claimant has always been entitled to what has been a disputed amount, there is no good commercial reason why the claimant should not be compensated, by an interest payment, for being

kept out of its money, even when the defendant has bona fide disputed payment.

58. The Defence does not explain the basis for the defendant's plea that an adjustment of the due date for payment is implied into clause 9.9 and Ms Honey did not contend at the hearing that such an adjustment should be implied. She was right not to do so. Clause 9.9 operates perfectly well when the due date for payment of disputed amounts is 30 days from the date of an invoice and there are no obvious grounds why that date should be adjusted to reduce the interest payable by the defendant when the parties have agreed, or a court has concluded, that sums hitherto bona fide disputed have always been payable. There is therefore no basis for implying any adjustment into clause 9.9.

Conclusion and disposal

59. I have concluded that the defendant's defence relying on clause 11.3 ("the clause 11.3 defence") does not have a real prospect of success. It does not carry any degree of conviction and there is no substance to the factual assertions made in support of it.

60. On a fair reading of Mr Oxby's witness statement and, on my construction of the 4 February email, there is credible evidence in support of the claimant's case that it considered amendment to the Minimum Volume Guarantee with an open mind, in good faith and reasonably. The defendant has therefore had the evidential burden of establishing a real prospect that the clause 11.3 defence will be successful. As I have indicated, it seeks to discharge that burden by relying on three matters; one of which, its construction of the 4 February email, I have already rejected.

61. The first remaining matter is the inference it has invited me to draw that, because the 26 January 2022 meeting took place, the claimant must have been reasonably satisfied beforehand that it was impossible for the defendant to meet the Minimum Volume Guarantee in 2021.

62. The burden is on the defendant to satisfy me that that inference is one that has a real prospect of being drawn. However, Mr Oxby explains in his first witness statement that the 13 January 2022 letter did not satisfy the claimant, reasonably or at all, that Brexit made it impossible for the defendant to achieve the Minimum Volume Guarantee. Having considered the contents of the 13 January 2022 letter, I am satisfied that there is real force in that contention. There is no material to gainsay it. Nor has any credible case been advanced that there is likely, or reasonably expected, to be any material to gainsay it. It follows that there is no sufficient basis for drawing the inference the defendant has invited me to draw.

63. The second remaining matter is Ms Mitchell's bald assertions, in effect, that the claimant always had a closed mind to the possibility of any amendment to the Minimum Volume Guarantee. As I have said, I am doubtful that the defendant contends that there may be material which might support those assertions but, even if the defendant does contend that, that is not enough to give the contention any weight, as the authorities make clear; particularly in this case, where (i) the defendant is a substantial business, (ii) the summary judgment application has been outstanding for many months and (iii) any further material that apparently may exist has been in the defendant's possession.

64. In these circumstances, I have concluded that the defendant has not discharged the evidential burden and that the clause 11.3 defence does not carry any degree of conviction, has no substance and does not have a real prospect of success.

65. I have also concluded that the clause 12.3 defence does not have a real prospect of success, for the following reasons.

66. Because of the limited plea in the Defence relating to the clause 12.3 defence which I have already referred to, the defendant does not plead that any force majeure event which affected the claimant was the cause of the defendant's inability to transport units, and it is not possible to discern any causative link between any force majeure event which may have affected the claimant and the circumstances on which the defendant relies in the Defence as giving rise to the clause 12.3 defence, and Ms Mitchell's very limited evidence does not make good these omissions. The defendant pleads, for example, that its customers were unable to adapt to post-Brexit transition arrangements and, further, that that inability made transporting units impossible. There is no material which identifies (let alone substantiates) the particular arrangements the defendant's customers were unable to adapt to (save, perhaps, for an oblique reference, in paragraph 16(c) of Ms Mitchell's witness statement, to "systems" developed by the defendant and customs regulations). Nor, more importantly, is there any material which even hints at the Brexit events which the defendant alleges affected the claimant or how those particular events resulted in the defendant's customers being unable to adapt to post-Brexit transition arrangements. A legitimate question to ask is: how can any Brexit event affecting the claimant have resulted in the defendant's customers being unable to adapt to customs regulations for example? To this, the defendant does not offer an answer and none of the available material suggests an answer or that there may be an answer which supports a successful clause 12.3 defence. In the circumstances, the defendant has no prospect of succeeding on the clause 12.3 defence.

67. In any event, Mr Oxby says, in effect, that neither the Covid-19 pandemic nor Brexit affected the claimant, a contention which is supported by the 4 February email. There has therefore been an evidential burden on the defendant to show that there is a real prospect that that is not so. The defendant has not met that burden. As I have said, Ms Mitchell counters Mr Oxby's claim with no more than an assertion that the Covid-19 pandemic and Brexit affected the claimant. She does not suggest that there may be material which may support that assertion and, in any event, does not substantiate any such suggestion.

68. In her oral submissions, Ms Honey argued that the impact of the Covid-19 pandemic and Brexit are notorious and that I can take judicial notice of those impacts, from which, she argued, I can infer that the Covid-19 pandemic and Brexit affected the claimant.

69. Halsbury's Laws, Vol.12, Civil Procedure, sets out the circumstances in which a judge may take judicial notice of a fact:

> "707. Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for

> his own information from sources to which it is proper for him to refer.
>
> …716. The court takes judicial notice of matters with which persons of ordinary intelligence are acquainted, whether in human affairs, including the way in which business is carried on, or human nature, or in relation to natural phenomena.
>
> In order to equip himself to take judicial notice of a fact, the judge may consult appropriate sources, or he may hear evidence. He may also act upon his general knowledge of local affairs, but it has generally been held that he may not import into a case his own private knowledge of particular facts…"

70. I have no doubt that I can take judicial notice of the fact that both the Covid-19 pandemic and Brexit have, at times, had an impact on individual travel, from time to time severely restricting movement, particularly in the case of the Covid-19 pandemic. I know nothing, though, about how either matter impacted the operation of freight ports in 2021 and what evidence is available, in particular the evidence of Mr Oxby, suggests that neither matter affected the operation of freight ports at that time, at least significantly.

71. As I have said, for these reasons I have concluded that the clause 12.3 defence does not have a real prospect of success.

72. I have already explained why I have rejected the defendant's construction of clause 9.9. The clause 9.9 defence is therefore bound to fail.

73. For the reasons I have given, the defendant does not have a real prospect of successfully defending the claim (save on the rate of interest payable on the Shortfall Payment). Its case is unpleaded in part (in relation to the clause 12.3 defence) and only became apparent, in part, during the course of the hearing, and, in any event, (i) there is no material which supports its case, (ii) it does not contend that there is likely (or reasonably expected) to be material which supports its case and (iii) it has adduced no evidence which supports any contention that there is likely (or reasonably expected) to be material which supports its case. The claim was begun on 8 August 2022. As I have said, the summary judgment application was made on 15 November 2022, the defendant is a substantial business and the further material which Ms Mitchell has suggested may be available has been in the defendant's possession. Taking a step back, I am afraid that I have come to the clear conclusion that this is a case where the defendant's case has been advanced simply in the hope that something will turn up.

74. Although Ms Honey said, in paragraph 53 of her skeleton argument, that "there needs to be a further factual investigation to establish the position and that is a compelling reason for the case to proceed to trial even if it were…assumed against [the defendant] that they did not have a reasonable prospect of successfully defending the claim", I am afraid I did not understand why when I read her skeleton argument and, despite me pressing Ms Honey on this issue at the hearing, I continue not to understand why. If the defendant's case does not have a real prospect of success, it must follow logically that there is no need for any factual investigation and, if Ms

Honey meant that there needs to be a factual investigation because something may turn up to support the defendant's case even though (it is to be assumed) that the defendant does not now have a real prospect of success, the authorities show not merely that that is not a compelling reason for the dispute to proceed to trial, but that it is no reason at all. Ms Honey did say in her oral submissions that, whether or not an agreement is a relational contract is a developing area of the law, which is a compelling reason for the proceedings to go to trial. I have decided that, even if the Agreement is a relational contract, the defendant's case does not have a real prospect of success. In these circumstances, I do not accept that whether or not the Agreement is a relational contract is a compelling reason for the proceedings to go to trial.

75. In the circumstances, there must be judgment for the claimant in the principal sum of £910,843, together with interest at the rate of 2% pa above the Barclays Bank base rate from 2 March 2022.

76. I will hear further from counsel on all costs and consequential matters.