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Case No: CL-2018-000176

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

SCIPION ACTIVE TRADING FUND	**Claimant**
- and –	
VALLIS GROUP LIMITED (formerly VALLIS COMMODITIES LIMITED)	**Defendant**

- -
- -

Michael Collett QC and Malcolm Jarvis (instructed by **Preston Turnbull LLP**) for the **Claimant**
David Edwards QC and Nichola Warrender (instructed by **DWF Law LLP**) for the **Defendant**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 3 April 2020 at 10:30 am.

Mr Justice Henshaw:

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(A) INTRODUCTION

1. The Claimant ("***Scipion***") makes what it describes as a precautionary application to amend its Reply, pursuant to liberty to apply granted during oral submissions in reply at the trial before me from 20 January to 4 February 2020.

2. The application arose from a number of developments during the recent course of the case, which I describe in section B below. At the end of oral closing submissions on the case as it then stood on 4 February 2020, I adjourned the trial in order to allow the Claimant to put forward, and the Defendant ("***Vallis***") to respond to, a properly formulated draft amended Reply. Following circulation of that document on 7 February 2020 along with supporting evidence and a skeleton argument, the parties agreed and I approved a timetable for service of further evidence and skeleton arguments. It was also agreed that, despite the application being contested, I should deal with it on the papers.

3. As a result of that process, the application for permission is supported by the first and second witness statements of Mr Andrew Preston, a partner in the Claimant's solicitors Preston Turnbull LLP, and opposed by the fourth witness statement of Mr Jonathan Moss, a partner in the Defendant's solicitors DWF Law LLP. Each party has also filed a skeleton argument, and Scipion has filed a further skeleton argument in reply.

(B) BACKGROUND

4. Scipion sues Vallis for the alleged loss of about 1,900 MT of copper scrap from a production and storage facility at Skhirat, Morocco ***("the Site")*** that was held as security for a loan made to Mac Z Group SARL ***("Mac Z")***. Vallis was the collateral

manager of the copper stock at the Site pursuant to a collateral management agreement dated 18 July 2016 between Scipion, Mac Z and Vallis ***("the CMA")***.

5. Pursuant to a facility agreement dated 18 July 2016 ***("the Facility")***, Scipion provided an uncommitted revolving copper borrowing base facility to Mac Z in the aggregate amount of US$ 10 million. The purpose of the Facility was to finance the purchase by Mac Z of copper stock (defined as ***"Goods***") for processing into copper products ***("Products")*** for sale to third-party buyers. Mac Z was required to ensure that the Borrowing Base Value (defined in clause 1.1 as the value of Goods, Products, and Goods being processed ***("Work in Progress")***, plus any amounts standing to the credit of Mac Z) was equal to or greater than 125% of the outstanding advances made by Scipion to Mac Z under the Facility. In short, Mac Z had to ensure that the value of Goods and Products held as security (plus sums standing to the credit of Mac Z) was at least 25% greater than the sums advanced under the Facility.

6. The CMA included the following key provisions:

> "[Appointment]
>
> 2.1 SCIPION hereby appoints [Vallis] as its agent for the purposes of receiving and taking into [Vallis]'s custody the Goods and Products, at the [Site], for and on behalf of SCIPION with the intent and understanding that such appointment shall be for the purposes of, amongst other things, creating a pledge, or charge (as the case may be) over the Goods and Products in favour of SCIPION…[Vallis] agrees to act as follows:
>
> (a) to control and supervise the Goods and Products solely and exclusively in accordance with SCIPION's written instructions;
>
> (b) to receive, store and hold the Goods and Products in the [Site] at all times subject to the sole authority and direction of SCIPION subject to the limited agency created in favour of [Vallis] by SCIPION and;
>
> (c) to carry out the services detailed in this Agreement (including the services detailed in Appendix I).
>
> 2.2 [Mac Z] acknowledges and confirms that the Goods and Products shall be held in the name of SCIPION for the account of [Mac Z] until the end of the Security Period and until such time, [Mac Z] have no equitable or proprietary rights or interests in such Goods and Products, and such Goods and Products are held for and on behalf of SCIPION and to SCIPION's order…
>
> 2.3 …[Mac Z] and [Vallis] undertake at all times to immediately notify SCIPION should they know of any circumstance that may lead to the attachment, seizure, distress, detention, arrest or other interference whatsoever of or with any Goods and/or Products in the [Site]

> "[Services]
>
> 3.1 [Vallis] undertakes to use all due care and skill in the provision and performance of its services…
>
> [Release of Goods and Products]
>
> 6.1 [Vallis] shall not release or allow the release of any Goods from the [Site] unless it has received prior written instructions from SCIPION to release the Goods for further processing into Products in the [Site] in the format prescribed in Appendix VI….
>
> [Indemnity]
>
> 7.1(b) [Vallis] shall indemnify SCIPION and keep SCIPION fully indemnified against all losses, damages, liabilities, costs (including all legal costs on a solicitors-and-clients' basis) and/or expenses of any nature whatsoever, howsoever incurred or sustained by SCIPION arising out of or in connection with any default by [Vallis] in either failing to provide the services in conformity with the provisions of [the CMA]…
>
> [Liability of loss, damage and deterioration]
>
> 8.1 [Vallis] shall exercise all due care and skill in storing, supervising and caring for the Goods and Products and be responsible to SCIPION for the safe custody of the Goods and Products…"

7. There were various amendments and addenda to the CMA which are not relevant for present purposes.

8. At the same time as entering into the Facility and the CMA, Scipion entered into a number of other agreements to secure performance of Mac Z's obligations. These included a Pledge over Goods and Products Agreement ***("the Pledge")***, in which Mac Z purported to grant Scipion a pledge over the Goods, Work in Progress and the Products at the Site to secure full repayment and performance by Mac Z under the Facility. The Pledge provided that Scipion entrusted custody of the said Goods, Work in Progress and Products to Vallis. The validity of the Pledge is in issue and was the subject of Moroccan law expert evidence. The security documents also included a pledge of certain collection accounts, an assignment of Mac Z's rights under contracts for the sale of Products between Mac Z and third party buyers, a corporate guarantee from Mac Z's Moroccan parent company, Mac Z SA (now in liquidation), and a personal guarantee by the managing director of Mac Z, Mr Lamdouar, of its obligations under the Facility.

9. On various dates in 2016 and 2017, Scipion advanced sums totalling around US$ 10 million to Mac Z under the Facility.

10. However, on 9 October 2017 Vallis's acting supervisor at the Site reported a discrepancy between the amount of scrap copper recorded in Vallis's daily report to Scipion (1,970.556 MT) and what he could see visually at the Site. In due course a report by Vallis's auditor dated 10 November 2017 noted Goods apparently missing from the Site estimated at 1,899.114 tonnes with a value of US$11,324,118.

11. Scipion's case, in brief, was and is that there was a physical loss of about 1,900 MT from the Site (or, at least, that Vallis was precluded from denying this) which was caused by Vallis's lack of care in breach of the CMA. Alternatively, if there was merely a paper loss (i.e. the records inflated the amount of copper stock by 1,900 MT), then Vallis breached its management duties under the CMA, which caused Scipion to make advances to Mac Z that it would not otherwise have made.

12. Scipion claims that:

> "By reason of the Defendant's breaches of the Agreement, the balance due to the Claimant by the Borrower and/or Guarantor under the Facility, as detailed in paragraph 32(a), has been left unsecured and the Claimant has lost the benefit of the Pledge over the Goods and Products to secure performance of the Facility by the Borrower and/or Guarantor." (Re-Amended Particulars of Claim § 32(b))

13. Further or alternatively, Scipion claims for:

> "the loss of the chance to secure performance of the Facility by [Mac Z] and/or Guarantor pursuant to the Pledge of the Goods and Products held by the Defendant under the Agreement" (Re-Amended Particulars of Claim § 33)

14. Scipion also alleges that Vallis's late notification of the loss of the copper scrap meant it lost the opportunity to take more immediate steps to investigate and/or mitigate the loss and/or to protect its rights.

15. Until after the first week of trial, Vallis did not admit any loss of the goods (whether a physical or paper loss) and contended that Scipion had failed to discharge its burden of proof, drawing attention to apparent uncertainties in Scipion's case. It disputed Scipion's construction of the CMA and, in any event, relied on its systems and procedures to deny any breach of duty. Further, Vallis disputed causation and loss, in particular based on the alleged invalidity of the Pledge and failure to mitigate.

16. However, the position changed after the first week of trial, when Vallis's solicitors wrote to Scipion's solicitors on 27 January 2020 setting out admissions by Vallis to the effect (broadly) that there had been a physical loss of 1,899.114 MT of copper scrap which had been delivered into Vallis's possession at the Site, and that that physical loss was caused by a breach by Vallis of specified provisions of the CMA as pleaded in Scipion's Re-Amended Particulars of Claim.

17. All other issues remained in contention, including the validity of the Pledge and questions relating to mitigation.

18. It is necessary now to set out in more detail the course of events with a direct or indirect bearing on the issue of the validity of the Pledge, starting with the parties' original statements of case, because it is that issue which has ultimately given rise to the present application for permission to amend.

19. The 'brief details of claim' in Scipion's Claim Form alleged that a large quantity of the Goods had disappeared without Mac Z having paid for them, that Vallis had breached duties under the CMA and as Scipion's agent and fiduciary, and that Scipion claimed damages including the value of the lost goods.

20. Scipion's original Particulars of Claim included pleas that:

    i) the Facility was secured by way of pledge (or charge) over the Goods and Products in favour of Scipion dated 18th July 2016;

    ii) Vallis had been appointed under the CMA as collateral manager to receive, take into custody, control and hold the Goods and Products at the Site for the purposes of the pledge (or charge);

    iii) under clause 2.1 Vallis agreed to act for and on behalf of Scipion to control and supervise the Goods solely and exclusively in accordance with Scipion's instructions; to receive store and hold the Goods and Products at the Site at all times subject to Scipion's sole authority and direction and subject to the agency created in favour of Vallis by Scipion; and to carry out the services detailed in the CMA including a list of services set out in Appendix 1 to the CMA;

    iv) Vallis was required by clause 6 of the CMA not to release or allow the release of the Goods without Scipion's prior written instructions;

    v) clause 8 of the CMA required Vallis to exercise all due care and skill in storing, supervising and caring for the Goods and Products and to be responsible to Scipion for their safe custody;

    vi) by reason of Vallis's breaches of the CMA, the balance due from Mac Z under the Facility had been left unsecured and Scipion had lost the benefit of the Pledge: see § 32(b) quoted in § 12 above;

    vii) *"In the premises"* Scipion had suffered loss and damages in the sums specified: see § 32(d); and

    viii) Scipion had alternatively lost the chance to secure Mac Z's performance pursuant to the Pledge: see § 33 quoted in §13 above;

21. Vallis's evidence is that when it pleaded its original Defence it did not have a copy of the Pledge. Its original Defence included the following key points:

> "At the time of the relevant events, it is denied that there was any pledge (or charge) over any of the Goods and Products which has been duly registered in Morocco in favour of the Lender and/or the Defendant otherwise makes no admissions as to whether the Facility was in fact secured by way of pledge or

> (charge) as is alleged by the Claimant in these proceedings". (Defence § 5(7)
>
> "Insofar as any balance due has been left unsecured, in circumstances where the Claimant had not duly registered any such pledge over any Goods and/or Products at the Site in Morocco, it is denied that cause of any loss of security and/or benefit of the pledge was any breach by the Defendant of the CMA." (Defence § 54(3)(c))

22. Vallis's Defence also included:

    i) a statement that it was Vallis' primary case that the Goods and Products were required to be the subject of a pledge (or charge) that was validly executed and duly registered and that, since that was not the case, none of the Goods and Products formed part of the Borrowing Base under the Facility at the time of the relevant events;

    ii) an averment that Vallis was appointed for the purpose of receiving and taking into its custody only Goods and Products which "*were to be*" pledged (or charged);

    iii) a non-admission as to whether Scipion had suffered any loss or damage as alleged by Scipion in paragraphs 32 to 35 of the Particulars of Claim;

    iv) a denial that the calculation of loss and damage pleaded in Particulars of Claim paragraph 32(d) was a proper calculation of any loss and/or damage suffered as a result of the breaches of the CMA; and

    v) a general denial of the claim for loss of a chance, and a specific denial based on the lack of registration of any pledge.

23. In its original Reply, Scipion pleaded *inter alia* that:

> "As to paragraph 5(7), and as the Defendant is aware (since it assisted in the remittance of funds to pay the registration fee), the pledge was registered in the relevant public registry on or about 30 October 2017. Therefore if the reference to 'the time of the relevant events' is a reference to the time of the Loss of Goods, it is admitted that the pledge was not registered in the relevant public registry at that time but it is denied, if such be alleged, that there was no valid pledge (or charge) over any of the Goods and Products at that (or any other material) time." (Reply § 6)

and repeated that plea in response to § 54(3)(c) of Vallis's Defence.

24. Scipion also denied that the Goods and Products were not pledged in its favour prior to the registration of the pledge (Reply § 8). Separately, Scipion specifically pleaded a contractual estoppel to the effect that CMA clause 9.3 precluded Vallis from disputing

the existence or extent of any loss and/or any amount claimed unless it had notified Scipion of the grounds for such dispute within 5 business days of any claim.

25. At the CMC on 1 August 2018 Popplewell J gave permission for expert evidence to be served sequentially on "*whether as a matter of Moroccan law there was a valid pledge (or charge) over the Goods and Products at the Site (Issue 20)*". The reference to Issue 20 was to the List of Issues:

> "20. Was the Facility secured by way of pledge (or charge) prior to the registration of it in the public registry on or about 30 October 2017 and, if not, were any sums advanced under the Facility a breach of a condition precedent and/or did the Goods and Products at the Site form part of the Borrowing Base under the Facility?"

26. That formulation is consistent with the view that what was in substance in issue between the parties at that stage was whether the pledge was invalid *because* it had not been registered at the date of the loss.

27. Moroccan law expert evidence was served as follows:

    i) first report of Mr Hajji (Scipion's expert) served on 17 May 2019;

    ii) first report of Ms Fassi-Fihri (Vallis's expert) served on 19 June 2019;

    iii) Joint Memorandum completed on 19 July 2019; and

    iv) supplemental reports by Mr Hajji and Ms Fassi-Fihri served on 19 August 2019.

28. The Moroccan law experts considered not merely what the effect of late registration was on the validity of the Pledge, but also the anterior question of whether there was a valid pledge at all, with Ms Fassi-Fihri positively opining that there was not.

29. Vallis did not at this stage amend its Defence to plead a case to that effect, though it points out that Scipion must have been on notice from the contents of the experts' reports, by mid August 2019 at the latest, that Vallis was likely to do so in the future.

30. On 16 September 2019, Scipion's then solicitors Clyde & Co served draft amended Particulars of Claim. Vallis indicated on 25 September that it consented to the amendments provided Vallis could serve any amended Defence within 14 days. A consent order was signed accordingly.

31. However, on 2 October 2019 Scipion's solicitors indicated that the Amended Particulars of Claim had not yet been filed because Scipion wished to make a slight amendment to the date of valuation, and would be seeking Vallis's agreement to a further consent order in due course.

32. A Pre Trial Review took place on 4 October 2019, at which Vallis formally reserved its position pending receipt of the revised form of Amended Particulars of Claim. Vallis on 14 October asked when that document would be served, and on 9 December requested that it be served by 5pm on 10 December in view of the trial start date of 20 January.

33. On 11 December 2019 Scipion served a further witness statement relating to quantum, and draft Amended Particulars of Claim (a) to plead that the CMA constituted a bailment of the Goods and Products to Vallis on the terms of the CMA, (b) to update the credit given by Scipion in the light of further sales of the Goods that remained following the loss and (c) to add two claims for consequential loss. Scipion explained that there had been delays in obtaining evidence in relation to the updated quantum of its claim.

34. There were then discussions about the terms of a further proposed consent order, as part of which Vallis explained that it envisaged amendments to its Defence which *"if not purely consequential, are required to bring the case in line with evidence already served".* Scipion replied that it would consent to Vallis's proposed wording for the consent order, and that it expected Vallis's amendments would be either consequential or to bring its case in line with evidence already served, *"on the understanding that any such amendments will not jeopardise the date fixed for trial",* reserving Scipion's position if Vallis served an Amended Defence that put the trial date at risk.

35. By consent order dated 18 December 2019 permission was given to Scipion to serve its Amended Particulars of Claim, which was deemed to have occurred on 11 December 2019, and for Vallis to serve an Amended Defence by 8 January 2020. The latter date appears to have been an error, the agreed date for the Amended Defence having in fact been 27 December 2019.

36. In any event, on 27 December 2019 Vallis served its Amended Defence, making consequential amendments to the Defence and a number of non-consequential amendments. One of the consequential amendments was to admit that the CMA constituted a bailment of the Goods and Products to Vallis on the terms of the CMA (save insofar as the Goods and Products were not in fact received into Vallis's custody and control at the Site). Vallis's non-consequential amendments included:

    i) a new §5(7A) denying, for the first time, that there was a valid and enforceable pledge on the basis of (i) the absence of a list of products published in connection with Article 378 of the Moroccan Code of Commerce, (ii) non-compliance with requirements of Article 379 of the Code of Commerce and (iii) general principles of Moroccan law; and

    ii) amending Defence §54(3)(c) to rely on the denial and plea of Moroccan law added at §5(7A) as a further reason (in addition to non-registration of the Pledge) for denying that "*the cause of any loss of security created by any pledge and/or benefit of the pledge was any breach by the Defendant of the CMA*".

37. These amendments were made nine working days before Scipion's written opening for trial was due. Scipion did not seek an adjournment of the trial or permission to make consequential amendments. However, in its written opening dated 9 January 2020 it stated:

> "Vallis's Moroccan law expert does, however, cite other reasons (now adopted by Vallis in its Amended Defence §5(7A)) for contending that the pledge is not valid as a matter of Moroccan law. But the validity of the Pledge, as a matter of Moroccan law, is irrelevant. That is because the Goods and Products held by

> Vallis to Scipion's order were at all times, and remain, available to Scipion to secure sums outstanding under the Facility *pursuant to the terms of the CMA* (and clause 2.2 thereof in particular), a tri-partite agreement to which Mac Z is a party.* Moreover, at all times since October 2017, Scipion has exercised control, and a right of disposal, of the remaining Goods and Products the majority of which have been sold to Mac Z (who have never challenged Scipion's rights over those Goods). The validity of the Pledge as a matter of Moroccan law is thus a red herring."

The footnote to this paragraph read:

> "The CMA gave rise to a pledge under English law: see, for example, *Official Assignee of Madras v Mercantile Bank of India* [1935] AC 53 at 58-59. It is an implied term of an English law pledge that the pledgee has the right to sell the pledged assets on default by the pledgor, and to retain such of the proceeds as covers the secured obligation: Beale & others, *The Law of Security and Title-Based Financing* (3rd Ed.) para 5.09."

38. Vallis in its written opening dated 10 January 2020 declined to address this point on the basis that Scipion had not pleaded the existence of, or any case relying on, an English law pledge.

39. On 20 January 2020 Scipion served Re-Amended Particulars of Claim updating the position on quantum and a detailed interest calculation, but did not make any amendment arising from the issue about the validity of the Pledge.

40. At trial, Scipion alluded briefly in oral opening to the points made in its skeleton argument quoted in § 37 above. Vallis in its oral opening adhered to its position that those points had not been pleaded, nor had permission to amend been sought, and so the points were not open to Scipion. The Moroccan law experts were cross-examined about the validity of the Pledge.

41. In its written closing dated 3 February 2020 (exchanged with Vallis's of the same date), Scipion made submissions to the effect that the Pledge was valid under Moroccan law. In addition, Scipion in substance advanced the arguments for which it now seeks permission to amend, in the following paragraphs which I quote in full as a convenient way of setting out Scipion's proposed case:

> "69. As a matter of English law, Vallis cannot say that Scipion is not entitled to substantive damages on the grounds that it had no security interest in the Goods because the Pledge was invalid under Moroccan law.
>
> 70. The measure of loss recoverable by a pledgee who has been deprived of the pledged goods is the full value of the goods at the date of the wrongful seizure, not merely the value of the pledgee's security interest in the goods: *Swire v. Leach* (1865)

18 CB (NS) 479 …, approved by Lord Collins MR in *The Winkfield* [1902] P 42 at 57 ….

71. This measure of loss reflects the general principle that a possessory interest in goods is sufficient to claim substantive damages for loss or damage to the goods, and the correlative principle that it is irrelevant that the claimant may have to account to a third party for some or all of the damages recovered: see *The Winkfield* at 54; *The Jag Shakti* [1986] 1 AC 337 at 345 …; *The Sanix Ace* [1987] 1 Lloyd's Rep. 465 at 468-469...

72. Moreover, by reason of the relationship of bailment between them on the terms of the CMA, Vallis is precluded from denying that Scipion had sufficient interest in the Goods to recover the damages claimed. In *The Winson* [1982] AC 939 at 959 …, Lord Diplock said that it "*follows from the existence of the legal relationship of bailor and bailee as a matter of general principle of the law of bailment, which may also be described as hornbook law, that as between [the bailors and the bailees] the latter as bailees were estopped from denying the title to the goods of the former as their bailor …*".

73. That general principle of the law of bailment is reinforced in the present case by the specific terms of the CMA. By Recital (A) to the CMA … it was "*hereby agreed by the Parties that the requisite security in favour of SCIPION over the Goods shall be created by the delivery of the Goods into the custody of VCL who shall hold the Goods as an agent of SCIPION for the purposes of creating the requisite security in favour of SCIPION*" and by clause 2.2 of the CMA … "*MZG acknowledges and confirms that the Goods and Products shall be held in the name of SCIPION for the account of MZG until the end of the Security Period and until such time, MZG have no equitable or proprietary rights or interests in such Goods and Products* ..." (emphasis added). Those provisions amounted to an agreement that the basis for the transaction covered by the CMA was that Scipion (and not Vallis) had all equitable and proprietary rights in the Goods, which would include such security rights as would be conferred by a valid Art.378 pledge under Moroccan law. Vallis is therefore precluded from denying Scipion's claim to damages on the basis that Scipion did not in fact have such rights: see the discussion of "*contractual estoppel*" in *Credit Suisse International v. Stichting Vestia Group* [2014] EWHC 3103 (Comm) at [301]-[310] ...

74. It will not have escaped the Court's notice that there would be highly unpalatable consequences if Vallis could escape liability to Scipion on the grounds of the invalidity of the Pledge. If the Goods were lost without wrongdoing on the part of Mac Z, and Mac Z were to claim against Vallis for their loss, Vallis would be able to defend Mac Z's claim on the basis that under

> the CMA (and particularly clause 2.2) Mac Z had no possessory, equitable or proprietary rights to the Goods. The result would be that, even though Vallis's admitted breach of the CMA caused the loss of almost 1,900 MT of scrap copper, Vallis would not be liable to pay substantive compensation to anyone. In the words of Hobhouse J in *The Sanix Ace* at 471, "*This reduces their argument to absurdity"*.
>
> 75. Scipion has measured its loss by reference to the value of the benefit which it would otherwise have had by reason of Vallis holding the Goods to its order as security for Mac Z's indebtedness under the Facility, which limits its claim to the sums to which Scipion is entitled under the Facility (and avoids the possibility of Scipion recovering from Vallis any excess over and above the sums outstanding under the Facility, for which excess it is common ground Scipion would have to account to Mac Z). However, as Vallis itself correctly observed at para.140 of its opening skeleton, the applicable measure of loss is a matter of law for the Court. The fact that Scipion has framed its claim by reference to the Facility debt secured on the Goods to avoid an over-recovery does not mean that it is necessary for Scipion to establish the validity of the Pledge under Moroccan law to recover the sums claimed."

(C) THE APPLICATION TO AMEND

42. The application to amend was made during oral closing argument on 4 February 2020, in the course of which the following occurred:

    i) Counsel for Vallis submitted that the three arguments quoted above from Scipion's written closing were new and unpleaded cases and that it was not open to Scipion to advance them.

    ii) Counsel for Scipion made submissions in response, broadly to the effect that none of these three arguments was required to be pleaded or required amendments to the Scipion's existing pleaded case.

    iii) I permitted counsel for Vallis to reply on that point.

    iv) Counsel for Scipion then offered to apply to amend, whilst maintaining that it was unnecessary to do so.

    v) The following exchange took place with counsel for Scipion:

    > "MR JUSTICE HENSHAW: At the moment, I can see quite a lot of force in the point that it would need to be pleaded on the basis that it would be a positive case which is different from the case which is currently put in the amended particulars of claim or the reply.

> MR COLLETT: Well, my Lord, positive case - - where it says positive case in the Commercial Court guide, in my submission that is dealing with facts, not points of law. You don't have to plead a positive case that is based on a point of law. That is a fundamental principle that applies in all divisions and applies to the Commercial Court as well.
>
> MR JUSTICE HENSHAW: Well, whether you regard it as a point of law, effectively the argument is you have reached an agreement in the contract, the effect of which is to preclude you from advancing a particular defence. So on one view it might be characterised as a point of law. On another view it is an argument as to the transaction."

vi) Counsel for Scipion then orally applied for permission to amend:

> "MR COLLETT: Yes, well, my Lord, I apply for permission to amend, and since we would need to produce a very short amendment, I cannot hand you up a draft now. And I would propose that we then take it from there. But there are no good grounds to refuse the amendment. It is really a question of if my learned friend wants to have an opportunity to make legal submissions in response which he has not made so far."

vii) There was then a discussion as to how that application to amend would in due course be supported by a draft statement of case and evidence/written submissions in support, considered by Vallis and the application be progressed thereafter. At the conclusion of oral submission on the case as it stood, I formally adjourned the trial for those steps to be taken.

There then followed the steps I outline in §§ 2 and 3 above.

43. The substantive amendment which Scipion now seeks to make is the expansion of § 40 of its Reply as follows:

> "As to paragraph 54(3)(c) paragraph 6 above is repeated. <u>Further and in any event, the Claimant does not need to establish the validity and/or enforceability of the Pledge Agreement in order to recover damages for the loss of the Goods calculated as set out in paragraph 32(f) of the Re-Amended Particulars of Claim. The Claimant's possessory rights as bailor of the Goods against the Defendant as bailee entitle the Claimant to such damages. Further or alternatively, by reason of the bailment relationship between the Defendant and the Claimant, the Defendant cannot assert that the Claimant had insufficient interest in the Goods to claim such damages. Further or in the further alternative, by reason of Recital (C) and/or clause 2.2 of the Agreement, the Defendant cannot assert that the Claimant had insufficient interest in the Goods to claim such damages. The Claimant otherwise joins issue with this paragraph.</u>"

(D) WHETHER PERMISSION TO AMEND IS NEEDED

44. As a preliminary matter, Vallis submits that Scipion is no longer entitled to argue that permission is unnecessary, because (a) the court effectively ruled on that point in the exchanges referred to in § 42 above, and/or (b) by making its oral application to amend Scipion abandoned any argument that permission to amend was not required. Vallis says Scipion is therefore barred from advancing the argument by principles of *res judicata*, estoppel or abuse of process.

45. I do not accept those submissions. My indication to Scipion's counsel was no more than that; and on a fair reading of the transcript, I consider that Scipion (as in my view it was entitled to) preserved its right to argue that the application was precautionary only.

46. Scipion submits that it is not necessary for it to amend in order to advance this case, or at least that it was reasonable for Scipion to have taken that view, because:

    i) parties are obliged to plead material facts (CPR 16.4(1)(a)) but merely *permitted* to plead points of law (PD16 § 13.3(1): *"a party may refer in his statement of case to any point of law on which his claim or defence, as the case may be, is based"*;

    ii) the practice of pleading law or argument in the Commercial Court has been deprecated: see, e.g., the statements in the *Report and Recommendations of the Commercial Court Long Trials Working Party* (December 2007) §§ 45, 46 and 53 to the effect that only material facts should be pleaded, not background facts, evidence, law or argument; and

    iii) the requirement in § C1.1(f) of the Commercial Court Guide to plead a positive case rather than a simple denial was not intended to abrogate those fundamental principles of pleading. Subparagraphs C.1.1(e) and (f) of the Guide state:

    > "(e) Particular care should be taken to set out only those factual allegations which are necessary to enable the other party to know what case it has to meet. Evidence should not be included.
    >
    > (f) A party wishing to advance a positive case should set that case out in the document; a simple denial is not sufficient."

47. Vallis contends that permission to amend is required, for a number of reasons.

48. <u>First</u>, Vallis says that (contrary to Scipion's submission) it is not currently common ground on the statements of case that there was a relationship of bailment between Scipion and Vallis. Paragraph 5 of Scipion's Amended Particulars of Claim alleges:

    > "The Claimant entered into a collateral management agreement with the Borrower and the Defendant dated 13 July 2016 ("the **Agreement**") pursuant to which the Defendant was appointed collateral manager and agent of the Claimant to *inter alia* receive, take into custody, control and hold the Goods and Products at the Borrower's production and storage facility at

> Skhirat, Morocco (the **"Site")** for the purposes of the Pledge over Goods and Products … referred to in paragraph 4 above. In the premises, and for the avoidance of doubt, the Agreement constituted a bailment of the Goods and Products to the Defendant on the terms of the Agreement."

49. In § 12 of its Defence, Vallis admitted this allegation *"save that ... [t]here was no bailment on terms of any Goods and Products insofar as the same were not in fact received into the Defendant's custody and control at the Site."*

50. Vallis argues that it was not thereby admitting a relationship of bailment with the Claimant, as opposed to with Mac Z. However, as Scipion points out, Vallis in both its written and oral openings at trial proceeded on the basis that there was a bailment relationship between Scipion and Vallis. In its written opening Vallis expressly accepted, by reference to the allegation and admission quoted above, that because the CMA was a contract for the bailment of the Goods and Products to Vallis, it followed that if Scipion established a physical loss of Goods, then Vallis had the legal burden of proving that it took reasonable care of the Goods or that any failure to do so did not contribute to the loss (citing *Volcafe Ltd v Compania Sud America de Vaporesa SA* [2019] AC 358 at §§ 8-10). That proposition necessarily involved treating the admission in Vallis's Defence as an admission that it was bailee for Scipion. Similarly, in oral opening Vallis said *"It is accepted, and it is the law, that it is for Scipion as bailor to prove the quantity of goods that were delivered to Vallis under the terms of its bailment"* (Day 1 pp 83-84). That reflects what is in my view the fair reading of the statements of case.

51. Secondly, Vallis contends that in order to bring a claim in bailment, Scipion would have had to plead material facts that are not pleaded in its current statements of case, including that (a) Scipion held a possessory (as opposed to a security) interest in the Goods lost; (b) that a bailment relationship existed as between Vallis and Scipion (i.e. not between Vallis and Mac Z), and (c) the fact that Scipion is now relying on that bailment relationship so as to preclude or estop Vallis from asserting that Scipion had insufficient interest in the Goods lost to claim substantial damages.

52. As part of this, Vallis alleges (citing passages from *Palmer on Bailment* (3rd ed.) chapter 43 that Scipion would have to plead the terms on which Vallis as contractual bailee is alleged to have assumed possession, and *"the bailor's interest in the goods; ... the essential feature of the relationship between the bailor and bailee, viz the latter's possession of goods to which the bailor has a superior title [and] ... (as far as possible) the circumstances in which the bailee assumed possession"* (citing *Palmer* §§ 43-018 and 019). Similarly, *Palmer* § 43-020 indicates that even if the terms 'bailor' and 'bailee' are not used, a claim in bailment should use words making clear that the defendant took possession of the goods on certain terms which the claimant now seeks to enforce, e.g. by saying the defendant was 'entrusted' with or took 'custody of the goods'.

53. However, I consider that insofar as the matters referred to in the two preceding paragraphs above are matters of pure fact, as opposed to legal conclusions or arguments, they were in substance pleaded by Scipion's allegations relating to the terms of the CMA summarised in § 20 above. As Scipion says, the propositions on which it seeks to rely for the first two portions of its proposed amendment rely on legal incidents of

the bailment relationship that is common ground on the existing pleadings (correctly construed). Further, Vallis's admission in Amended Defence §12 implicitly includes an admission that Scipion had possessory rights in respect of the Goods (since there would otherwise be no bailment between Vallis, as bailee, and Scipion, as bailor). In any event, Scipion's constructive possession of the Goods on the terms of the CMA is already pleaded as part of the matters summarised in § 20 above.

54. Thirdly, Vallis says Scipion needs to amend because its existing case on causation is premised on the validity of the Pledge. In my view Vallis is correct on this point. Both of the existing pleas in Particulars of Claim §§ 32(b) and 33, quoted in §§ 12 and 13 above, are premised on Vallis's breach causing Scipion to be "*unsecured*" and losing the benefit of the Pledge. (Scipion has a separate claim that Vallis's late notification of the loss of the copper scrap meant Scipion lost the opportunity to take more immediate steps to investigate and/or mitigate the loss and/or to protect its rights, but that claim is not material for present purposes.)

55. Moreover, the whole of § 32 of Scipion's existing Particulars of Claim is founded on the allegation in § 32(b). Most materially, the loss and damage plea now to be found in § 32(f) arises "*In the premises*", i.e. by reason of the foregoing subparagraphs, of which §32(b) contains the only allegation of causation. I do not accept Scipion's point that no amendment is needed because the measure of loss is a matter for the court: Scipion's current pleading makes a case on causation based squarely on loss of security.

56. As a result, in order to advance a claim that is not dependent on having become unsecured, as Scipion now seeks to do, it is in my view necessary for Scipion to amend.

57. Fourthly, as regards the plea of what might loosely be called 'contractual estoppel' set out in the final sentence of the proposed Amended Reply § 40, Vallis says Scipion needs to plead as material facts the facts (a) that the CMA contained Recital (C) and clause 2.2 and (b) that Scipion is relying on these terms being included in the CMA so as to preclude or estop Vallis from asserting that Scipion had insufficient interest in the Goods lost to claim substantial damages. The generic wording in Scipion's Particulars of Claim that it will refer to the terms of the CMA for *"its full terms and effect"* is insufficient. I am not sure that points (a) and (b) are correctly to be characterised as unpleaded material facts, but I consider Vallis to be correct on its general point by reason of its fifth contention, to which I now come.

58. Fifthly, Vallis makes the point that it is essential to the conduct of a fair trial that each side should know in advance what case the other is making, and it is the function of a statement of case to give that advance notice: see e.g.

i) *McPhilemy v Times Newspapers Ltd* [1999] 2 All ER 775 per Lord Woolf:-

> "Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. That is true both under the old rules and the new rules…." (emphasis added).

ii) *Three Rivers DC v Bank of England (No.3)* [2001] 2 All ER 513 at 185, per Lord Millett:

> "the function of pleadings is to give the party opposite sufficient notice of the case which is being made against him."

iii) Commercial Court Guide § C1.1(e) and (f) quoted in § 46 above.

59. Whether or not new material facts are strictly involved, Scipion's existing statements of case did not in my view give Vallis fair notice that Scipion would advance either (a) a claim in bailment for damages recoverable independently of any loss resulting from loss of security (in particular the security provided by the Pledge) or (b) an argument that Vallis was precluded by the terms of the CMA from denying the validity of the Pledge. Further, (a) at least is properly to be regarded as a 'positive case' within paragraph C.1.1 of the Commercial Court Guide, and is distinct from Scipion's existing case on causation.

60. For these reasons, I consider that permission to amend is required.

(E) WHETHER PERMISSION TO AMEND SHOULD BE GRANTED

(1) Principles

61. An appropriate starting point for the principles to be applied on contested applications to amend is *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735, in which the claimant applied to amend to introduce what the trial judge described as "*a completely new case*" on the first day of a trial that had already been adjourned once (§§ 18-23, 28). Reversing the trial judge's decision to allow the amendment, Lloyd LJ (with whom Elias and Patten LJJ agreed) said at § 72:

> "As the court said [in *Worldwide Corporation Ltd v GPT Ltd* [1998] CA Transcript No. 1835], it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

62. In *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 the Court of Appeal upheld a challenge to a refusal to permit re-amendments to particulars of claim on the grounds (amongst other things) that they were too late notwithstanding that no trial date had yet been fixed. Briggs LJ (with whom Christopher Clarke LJ and Sharp LJ agreed) said this on subject of 'lateness' of amendments:-

> "33. I consider that the judge was entitled to approach the relevance of lateness in this way. Lateness is not an absolute but a relative concept. As Mr. Randall put it, a tightly focussed, properly explained and fully particularised short amendment in August may not be too late, whereas a lengthy ill-defined, unfocussed and unexplained amendment proffered in the previous March may be too late. It all depends upon a careful review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of its consequences in terms of work wasted and consequential work to be done. A fair reading of the judgment as a whole shows that this is how the judge took lateness into account. When dealing with specific matters sought to be introduced he never said merely that it was 'too late' but rather that the manner of pleading it, or the lack of satisfactory explanation for it not having been pleaded earlier meant that it was being introduced at too late a stage: see for example paragraphs 83, 118, and 124 of the judgment.
>
> 34. Lateness, used in this way, is a factor of almost infinitely variable weight, when striking the necessary balance in determining whether or not to permit amendments……"
>
> …
>
> "42. The judge's main reason for refusing permission to amend upon proportionality grounds was, as I have sought to explain, mainly based on his apprehensions about the further, duplicative and otherwise unnecessary work to which they would expose the defendants and the knock-on consequences in terms of increasing the weight, cost and duration of the trial and of further case management ahead of it. Mr Parker submitted that the judge was not entitled to reach that conclusion without a detailed analysis of the extra work which would be required: Ground 4. I emphatically disagree…..A judge is, in my view, perfectly entitled to apply both his general and particular experience to these questions without spelling out, in analytical detail, the reasons for his conclusions about the increased cost and burden, both to the parties and the court, threatened by a substantial proposed re-amendment….."

63. I agree with Vallis that this reference to proportionality supports the view that the court should have regard to all the matters mentioned in CPR rule 1.1(2) so as to deal with the case "*justly and at proportionate cost"* in accordance with the overriding objective:

> "(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
>
> (a) ensuring that the parties are on an equal footing;

> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate—
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly;
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with rules, practice directions and orders."

64. In *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) the claimant applied two weeks before trial to amend the particulars of claim. It was conceded that the unamended claim was unsustainable and that the proposed amendments "*wholly change the nature of the case*" (§ 32). The lateness of the application led to the trial date being vacated. Carr J considered a number of authorities (including *Swain-Mason* and *Hague Plant*) and summarised the relevant principles as follows:

> "Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> (a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> (b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> (c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause

> the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> (d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> (e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> (f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> (g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so." (§ 38)

65. In *CIP Properties (AIPT) v Galliford Try Infrastructure Limited* [2015] EWHC 1345 (TCC) permission was sought for extensive amendments to the claimant's case that would necessitate the adjournment of a trial date that Coulson J concluded it was imperative to maintain (see §§ 11 and 13). Coulson J provided the following further summary of the relevant principles:-

> "In summary, therefore, I consider that the right approach to amendments is as follows:
>
> (a) The lateness by which an amendment is produced is a relative concept (*Hague Plant*). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (*Swain-Mason*), even if the application is made some months before the trial is due to start.

> Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (*Brown*[1]).
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (*Brown*; *Wani*[2]). In essence, there must be a good reason for the delay *(Brown).*
>
> (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (*Swain Mason; Hague Plant; Wani*).
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (*Worldwide*), to the disruption of and additional pressure on their lawyers in the run-up to trial (*Bourke*[3]), and the duplication of cost and effort (*Hague Plant*) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (*Swain Mason*).
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (*Swain-Mason*). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (*Archlane*[4]). (§ 19)[5]

66. The most recent authoritative statement is in *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268 at [41] per Vos C (with whom Sharp and Hamblen LLJ agreed):

> "The principles relating to the grant of permission to amend are set out in *Swain-Mason* and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraphs 36-38 of her judgment. In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late

1 *Brown v Innovatorone Plc* [2011] EWHC 3221 (Comm) at [14] (Hamblen J)
2 *Wani LLP v Royal Bank of Scotland Plc* [2015] EWHC 1181 (Ch) (Henderson J)
3 *Bourke v Fayre* [2015] EWHC 277 (Ch) (Nugee J)
4 *Archlane Ltd v Johnson Controls Ltd* [2012] 5 WLUK 335 (TCC) (Edwards-Stuart)
5 This summary was endorsed and applied in *Apache Beryl Ltd v Marathon Oil UK LLC* [2017] EWHC 2462 (Comm) at §§ 6-10 (Sir Jeremy Cooke) and *Vilca v Xstrata Limited, Compania Minera Antapaccay S.A.* [2017] EWHC 2096 (QB) at § 29 (Stuart-Smith J).

> amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal."

67. As regards the concept of lateness Stuart-Smith J observed in *Vilca v Xstrata Limited, Compania Minera Antapaccay S.A.* [2017] EWHC 2096 (QB) at § 26:

> "As will be seen below, the term 'very late amendment' has subsequently become almost a term of art, meaning an application made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. I shall adopt that meaning. Elsewhere it has been said that 'lateness' is a relative concept. I agree, and would add that the natural elasticity of language and its use in the authorities shows that an amendment may be regarded as 'late' either because it could have been brought forward earlier or because it is brought forward at a time that is liable to disrupt the efficient conduct of the proceedings or both. The infinite variety of circumstances in which amendments may be brought forward means that there is a broad spectrum of potential impacts if an amendment is allowed, which is not dependent solely on chronological timing, and which may fall anywhere between the negligible and the devastating. In this broader post- CPR approach to amendments, the Court is not limited to considering the effect on the parties and whether any potential prejudice may be satisfactorily compensated in costs, though there is no reason why those may not be relevant considerations in appropriate cases. The Court will also have regard to the impact on the administration of justice in terms of potential disruption to the case in which the amendment is brought forward and in terms of the wider interests of the Court, other litigation and other litigants."

Vallis notes that Stuart-Smith J also made the following observations about the relevance of previous decisions, with which I respectfully agree:

> "Equally, both sides recognise that the circumstances in which amendments may be put forward are infinitely variable and that each contested application for permission to amend will require an exercise of the Court's discretion that takes into account the particular facts of the case in hand. There are many authorities directly on the issue of amending before or during trial. To the extent that they provide statements of principle, they are useful for those who come after; and I shall refer to those that were cited to me that appear most useful for that reason. Otherwise, previous decisions are essentially illustrations of exercises of the Court's discretion in different circumstances that may be illustrative but are otherwise seldom compelling." (§ 22)

(2) Application

(a) Reasons for timing of application to amend

68. Scipion's explanation for the timing of its application to amend is, in essence, that (a) the need to amend arose from Vallis's new case on the validity of the Pledge under Moroccan law, which was not pleaded until 27 December 2019, and (b) Scipion took the view that the propositions it wished to advance in response to that new case (over and above taking issue with Vallis on the applicable Moroccan law) were propositions of law based on facts which were common ground, and which therefore did not require an amendment to its statements of case.

69. Whilst in principle Scipion could have advanced the case which it now seeks to advance right from the outset of the litigation, Vallis does not suggest that it would have been unreasonable for Scipion to do so only following and in reaction to Vallis's new case (developed in its expert evidence) as to the invalidity of the Pledge. In other words, it is not suggested that Scipion ought to have put forward its proposed alternative case prior to service of the Moroccan law experts' supplementary reports on 19 August 2019. Rather, Vallis makes the point that Scipion *"could have chosen to protectively plead the alternative claims when it became aware of the disputed Moroccan law expert evidence".*

70. The main area of contention in terms of timing is thus whether Scipion should have sought to plead its proposed alternative case either:

    i) some time shortly after 19 August 2019, or

    ii) some time shortly after Vallis's Amended Defence was served on 27 December 2019,

    rather than only in the course of closing submissions at trial in early February 2020.

71. In the ordinary course, one might have expected Vallis itself to amend its case to reflect its expert's position on the validity of the Pledge at some stage during the weeks following 19 August 2019. As Scipion points out, Vallis was under an independent obligation to plead its new case on Moroccan law (see e.g. Dicey, Morris & Collins, *The Conflict of Laws* (15th Ed) at 9-003), and Commercial Court Guide § C1.3(f): *"Any principle of foreign law or foreign legislative provision upon which a party's case is based must be clearly identified and the basis of its application explained*"). In the absence of any opposition to applications to amend, the result might have been an amendment by Vallis in (say) September or October and a responsive amendment by Scipion some time before the end of term.

72. As it was, Vallis chose, with Scipion's acquiescence, to defer amending to reflect its new case on Moroccan law until after receipt of Scipion's proposed amendments in respect of unrelated matters. Scipion in turn did not get round to serving those proposed amendments until the beginning of December. The overall result was that Vallis's new case was not pleaded until shortly before Scipion's written opening for trial was due. The better route would have been for Vallis to amend on the Moroccan law issues, and for Scipion to respond, reasonably promptly after completion of the expert evidence and without awaiting draft amendments on other issues. To that extent both parties bear

some responsibility for the fact that Vallis's Moroccan law amendment was made so close to the date for trial.

73. Against that background, however, it would not have been unreasonable for Scipion then to take the position that it would not make any consequential amendments until after receipt of Vallis's amended case; and nor was it entirely unreasonable to take the view that, having already pleaded the bailment relationship and the key terms of the CMA, it need not plead points of law or argument as distinct from new material facts.

74. However, as I have concluded above, Scipion would nevertheless in my view have been wrong to take the view that it could advance the arguments it now seeks to advance without giving Vallis notice of them in pleaded form. Given that those arguments did not appear in Scipion's written or oral opening but only in its closing, one possible inference is that Scipion's thinking on these issues developed during the course of the trial, and that it was in fact only by the stage of closings that Scipion's own approach crystallised. At any rate, viewing the matter objectively, it appears to me that following conclusion of the expert evidence Scipion ought:

    i) during the period from August 2019 to 27 December 2019 to have formulated any responsive case it wished to advance in response to the expected amendment of Vallis's case, so that it was ready to respond with any consequential amendment soon after service of Vallis's Amended Defence; and

    ii) (arguably) to have proceeded more expeditiously than that, and put forward any new alternative case before December and without waiting for Vallis's anticipated new plea on Moroccan law.

75. However, (ii) above might fairly be criticised as a counsel of perfection, and I note that Vallis in its skeleton argument for the present application goes only thus far: *"It is (at least) questionable in this case whether it was sensible for Scipion to adopt a "wait and see" litigation strategy, particularly after Scipion knew there was a dispute between the Moroccan law experts"*.

76. As a result, the main focus should be on Scipion's failure to advance its proposed new case in pleaded form following service of Vallis's Amended Defence on 27 December 2019. As Vallis says, Scipion – legally advised throughout – was already in possession of all relevant facts and evidence enabling it to make the proposed amendments (which are themselves brief) within a short space of time of receipt of the Amended Defence, and the proposed amendments could and should have been made before skeleton arguments were due to be served and before the trial commenced (or at least by 20 January when Scipion made minor, unrelated amendments to its case). For the reasons already outlined, I do not find wholly satisfactory the explanation that Scipion did not do so because its alternative case was based purely on propositions of law.

77. Nonetheless, the proposed amendment is put forward in response to an amendment made by Vallis at a relatively late stage of the proceedings, and I do not read the authorities cited earlier as meaning that a failure to provide a satisfactory explanation (in the sense of being accepted by the court as sufficient) for each and every part of any delay in seeking permission to amend is necessarily fatal to any application to amend. Such a rule would be liable to create injustice: to take an extreme example, an amendment that could properly have been made by date x but which is in fact put

forward on date x plus 1, the additional delay being insufficiently explained, ought not *per se* automatically to be ruled out. It must all depend on the consequences (if any) of the insufficiently explained period of delay, and the circumstances as a whole. In any event, the present case is not one of unexplained lateness, but rather one where there is a certain limited period of delay for which I do not find the explanation entirely satisfactory. It is therefore appropriate in my judgment to go on to consider the circumstances as a whole before deciding whether to grant or refuse permission to amend.

(b) Lateness of the application

78. Scipion accepts that its amendment application is made late, though it submits that it is not a *"very late"* amendment in the sense used in the case law summarised above. It will not result in the trial date being lost, and (Scipion says) will merely require Vallis to respond substantively to points of law. In effect, it will require a short prolongation of the trial.

79. Vallis argues that, coming after oral closing submissions, the present amendment application ought to be equated with a 'very late' application, and that the only reason why it did not result in the trial date being lost or any earlier adjournment is because Scipion chose not to advance its proposed new alternative case (or apply to amend) any earlier than in its written closings. However, I do not accept the logic of those submissions. It is true that the application is in chronological terms very late. It did not, though, result in the trial date being lost; and the possibility that it would have done so, had it been made earlier, does not appear to me a reason to equate it to an amendment that *does* result in loss of a trial date. Had the amendment been put forward in, say, mid January, then it might or might not have resulted in the trial date being lost. That would likely have depended on the exact implications in terms of evidence, or whether it would in fact have led Vallis to apply to join Mac Z as Vallis now postulates. But on the footing that Scipion could not fairly have been subject to serious criticism had it promulgated its amendment in mid January, the resulting hypothetical loss of trial date has no obvious bearing in circumstances where the trial has in fact now taken place (other than any resumed hearing resulting from the amendment should permission be granted).

(c) Prejudice to Scipion

80. If permission to amend is refused, and the court determines (contrary to Scipion's case) that the pledge is invalid under Moroccan law, there is a risk that Scipion's claim for damages will fail. That would *prima facie* be an unjust result in circumstances where it is common ground that there was a physical loss of 1,899 MT copper scrap caused by Vallis's breaches of the CMA, and where Scipion's proposed amendments could provide a good answer in law to Vallis's case on Moroccan law. I do not accept Vallis's suggestion that the prejudice to Scipion is limited because Scipion can continue to pursue Mac Z and its director: the evidence indicates that there is no reason to believe Mac Z has assets against which to enforce, and that seeking to enforce the personal guarantee of Mr Lamdouar would be unlikely to achieve anything.

(d) Prejudice to Vallis

81. Vallis suggests, first, that had Scipion amended earlier then there are a number of specific steps it could have taken which are now no longer open to it. In particular, it says:

i) Had Scipion amended its case at any time before the end of trial then Vallis could have applied to join Mac Z as a party to the litigation and/or advanced a different and/or positive case to that which it did at trial (by positively asserting that it was released to Mac Z, as the true owner) and/or investigated the possibility of and/or defended the claims upon the right and title and by the authority of the true owner of the copper scrap, which again, would be Mac Z.

ii) Had Vallis known that Scipion was advancing a claim for damages other than on the basis of its security interests created by the pledge, then Vallis would have investigated whether there was a more favourable governing law (i.e. Moroccan law) and as necessary pleaded and proved that a different governing law applied to the bailment and/or the possessory rights which are relevant to the claims now sought to be advanced by Scipion.

iii) Vallis was able to defend the claim as currently pleaded by Scipion without undertaking any of these steps, not least because of the integral part the pledge had to play in Scipion successfully bringing its claim. None of them was required to enable Vallis to defend the claim it originally faced.

iv) But none of these steps is now open to Vallis since Scipion is applying to make these amendments only at the conclusion of the trial, after the evidence is closed and closing submissions have been made.

v) Even if the court were now to adjourn for sufficient time to enable Vallis to investigate and take any appropriate steps, this also will cause Vallis substantial prejudice. Vallis is no longer at the Site, nor indeed has any presence in Morocco. It would therefore require time and effort on Vallis's part to engage with Mac Z and as necessary, to seek Moroccan law advice. Thereafter there would be the need for Vallis to plead in response and to adduce whatever factual and expert evidence on the governing law point that it could. All of this disruption to Vallis, the court, other litigants and Court users cannot be adequately compensated by an order for costs in Vallis' favour.

82. However, the following two factors in my view lessen the force of those objections.

83. First, it is questionable whether any of the substantive points Vallis puts forward would require factual investigation or the joinder of Mac Z:

i) As to governing law, since the bailment was on the terms of the CMA, Scipion's claim is very likely to be governed by English law (i.e. the law chosen by the parties) pursuant to Article 3 of Regulation 593/2008 on the law applicable to contractual relations (Rome I): *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 811 (Comm) at § 74-81, concluding that a bailment on terms should be classified as contractual for these purposes). The contractual preclusion arising under Recital

(C) and clause 2.2 of the CMA is likewise governed by English law as the law chosen by the parties.

ii) It is not clear precisely what argument Vallis might seek to deploy that would require Mac Z to be joined, albeit it is not possible to be certain about this before having heard the substantive arguments. Vallis in its skeleton argument refers to the examples of eviction by title paramount and defence by authority of Mac Z as the owner of the lost Goods. Those principles, however, appear relevant in cases where (unlike here) the bailee retains possession of the goods or at least their proceeds and the issue is to whom they must be delivered. Even if Mac Z did have to be joined for a reason arising from Scipion's proposed alternative case based on bailment, it seems likely this would be for a limited purpose.

iii) Vallis also refers to the possibility of proving that Mac Z took delivery of the lost Goods, but it is not explained how that would provide a defence to Vallis as against Scipion. It might provide a means of recourse to Vallis should Scipion succeed in its claim, but there is no reason to consider that avenue would be any less open to Vallis now than it would have been had Scipion amended in say January 2020 (or late 2019).

84. Secondly, point (iii) above is of more general application. Such steps and investigations as Vallis might realistically take in response to Scipion's proposed new claim, including any question of joining Mac Z as a party, are no less available than they would have been following an amendment by Scipion in January 2020 (or even in autumn 2019). In formal terms, the trial has not concluded, and in practice if the court can be persuaded that Vallis should in fairness have time to investigate particular matters, then it would make provision accordingly.

85. Vallis will also incur further cost if permission to amend is granted, will have to deal with the issues in a piecemeal fashion, and it will take longer to achieve finality in the litigation. These factors weigh against permitting the amendment. On the other hand, there is some force in Scipion's point that Vallis's complaint about being 'mucked around' lacks force in circumstances where for 27 months Vallis denied (or put Scipion to proof of) almost every constituent element of Scipion's claim, including whether there had been any physical loss of 1,899 MT of copper scrap, and adduced expert evidence in support of a positive case that it had not acted negligently; but then on Day 5 of a two-week trial conceded liability (following Vallis's managing director's evidence that he personally believed there had been a physical loss of the Goods).

86. Vallis makes the point that it was *"entitled to conduct this litigation to date based on the risks it faced on the case as advanced by Scipion. It cannot be assumed that Vallis would have conducted it in precisely the same way had Scipion advanced the case which it now wishes to adopt by way of amendment at any earlier point in time"*. That is correct in principle. On the other hand, any relevant change in approach to the litigation would need to be one that Vallis would have made since whatever stage in January 2020 Scipion might reasonably be expected to have put forward its amended case: and Vallis's evidence does not specify any difference this would have made. It does not say, for example, that had Scipion at that stage advanced its proposed alternative case then Vallis would have refrained from admitting liability at the end of the first week of trial. (Had Vallis's evidence said so, it would then have been necessary to consider

what, if any, disadvantage that might have caused to Vallis compared to the likely outcome on questions of breach had Vallis's admission not been made.)

87. Vallis further submits that the proposed amendment, if successful, would mean that the time and money spent on evidence of Moroccan law would have been wasted. However, that would be a consequence of the lateness of the amendment only if, had Scipion made the proposed amendment earlier, Vallis would have conceded the point thus rendering the Moroccan law issues irrelevant. There is no reason to believe that would have been the case.

(e) Prejudice to the court and other court users

88. A prolongation of the trial process, in the way which Scipion's amendment would necessitate, would cause further disruption to Vallis, the court and other court users, and that is an important factor to take into account. It is mitigated by the fact that an earlier amendment would still have necessitated the issues being addressed, at a commensurately longer trial.

(f) Strength and clarity of the proposed amended case

89. Vallis accepts that if the proposed amendments had been properly pleaded then Scipion will probably be able to satisfy the court that they have sufficient prospects of success to meet the threshold for an application to amend; but says the proposed amendments in paragraph 40 of the draft Amended Reply are not properly pleaded because:

    i) they advance an alternative and inconsistent case to that already based on the pledge in Scipion's existing pleaded case, and the proposed amendments properly ought to be made to the Re-Amended Particulars of Claim and not merely by way of amendment to the Reply;

    ii) there is in any event insufficient clarity as regards the alleged causation and loss and damage, and this affects each of the proposed new positive alternative cases contained in paragraph 40 of the draft Amended Reply; and

    iii) as currently drafted, the proposed amended case suffers from the same problems as Scipion's existing pleaded case, because the pledge still remains an integral part of the pleaded causation loss and damage. Scipion still does not advance any properly pleaded claim for loss and damage caused to it by reason of it holding anything other than a security interest in the Goods.

90. In my view, the proposed alternative case is sufficiently pleaded. The first two new points, based on bailment, advance a case that Scipion is entitled to damages by reason of the loss of the Goods independently of the need to demonstrate the validity of the Pledge, thus standing in substance as an alternative causation case to that currently pleaded. The third new point is that Vallis is contractually precluded from denying the validity of the Pledge, such that the existing causation plea continues to apply.

(g) Other considerations

91. I do not consider that, as Vallis suggests, the practical consequences of allowing the amendment (including, on Vallis's case, any potential difficulties in investigating and

involving Mac Z) would place Vallis on an unequal footing with Scipion. Scipion's amendment, albeit put forward later by a matter of weeks than it arguably should have been, is ultimately responsive to Vallis's amended case on the validity of the Pledge.

92. A further consideration is whether allowing the amendment would be consistent with principles of proportionality in all the circumstances, including the amount at stake. The amount at stake, though not large by Commercial Court standards, is still a significant sum of money. Bearing in mind that Vallis's amended case on Moroccan law has the potential to be fatal to Scipion's claim, I do not consider that it would be disproportionate to grant permission to amend.

(F) CONCLUSIONS

93. Weighing up all these various considerations, I have come to the conclusion that I should grant permission to amend. Subject only to the question of whether the application should have been made at some stage in January rather than during closing submissions, I consider there to be good reasons for the point having arisen at an advanced stage of the proceedings. The prejudice to Vallis and to other court users from the amendment having, to that degree, been put forward late is limited for the reasons set out above, and in my judgment is outweighed by the prejudice to Scipion if it is not allowed to advance the discrete but potentially important propositions set out in its draft Amended Reply, which are in essence propositions of law.

94. I shall hear submissions from the parties on the appropriate directions to be made in light of this ruling.

95. I am grateful to the parties' counsel and solicitors for their clear and helpful evidence and written submissions on this application.