Neutral Citation Number: [2024] EWCA Civ 628

Case No: CA-2023-001004
CA-2023-001005

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
CHRISTOPHER HANCOCK KC (SITTING AS A DEPUTY HIGH COURT JUDGE)
[2023] EWHC 663 (Comm)
[2023] EWHC 1071 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2024

Before:

LORD JUSTICE MALES
LORD JUSTICE SNOWDEN
and
LADY JUSTICE FALK

- -

Between:

CELESTIAL AVIATION SERVICES LIMITED	**Claimant/ Respondent**
- and –	
UNICREDIT BANK GMBH, LONDON BRANCH (FORMERLY UNICREDIT BANK AG, LONDON BRANCH)	**Defendant/ Appellant**

And Between:

(1) CONSTITUTION AIRCRAFT LEASING (IRELAND) 3 LIMITED **(2) CONSTITUTION AIRCRAFT LEASING (IRELAND) 5 LIMITED**	**Claimants/ Respondents**
- and –	
UNICREDIT BANK GMBH, LONDON BRANCH (FORMERLY UNICREDIT BANK AG, LONDON BRANCH)	**Defendant/ Appellant**

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David Quest KC, Rachel Barnes KC and James Sheehan KC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant**
Fred Hobson KC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Celestial Respondent**
Akhil Shah KC and Leonora Sagan (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP)** for the **Constitution Respondents**

Hearing dates: 14 and 15 May

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 11 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This is an appeal by UniCredit Bank GmbH, formerly UniCredit Bank AG ("UniCredit"), a German bank acting through its London branch, against decisions of Christopher Hancock KC sitting as a Deputy High Court judge (the "judge"). The judge decided that UniCredit's obligations as confirming bank under certain standby letters of credit ("LCs") issued by the Russian bank Sberbank Povolzhsky Head Office ("Sberbank") in connection with civilian aircraft leasing transactions were not affected by sanctions imposed by the United Kingdom and United States in response to the invasion of Ukraine in February 2022.

2. The judge's orders were made in two Part 8 claims against UniCredit which were tried together and which raise materially identical issues. The Claimants (and Respondents in the appeal) are, in the first claim, Celestial Aviation Services Ltd ("Celestial") and, in the second, Constitution Aircraft Leasing (Ireland) 3 Ltd and Constitution Aircraft Leasing (Ireland) 5 Ltd (together, "Constitution").

3. Celestial and Constitution are Irish-incorporated entities. Celestial is a member of the AerCap aircraft leasing group and provides services related to that activity. The Constitution claimants act directly as aircraft lessors. The Celestial LCs were issued in connection with leases by AerCap subsidiaries to AirBridge Cargo Airlines LLC ("AAL") (as to two aircraft) and JSC Aurora Airlines ("Aurora") (as to three aircraft), and the Constitution LCs were issued in connection with leases of two aircraft to AAL. The leases were entered into between 2005 and 2014. Both AAL and Aurora are Russian airlines.

4. There are a total of twelve LCs in issue. Each of them is denominated in US dollars, governed by English Law and incorporates the Uniform Customs and Practice for Documentary Credits, 2007 Revision, International Chamber of Commerce Publication no. 600 (the "UCP"). Celestial is the beneficiary of seven of the LCs and Constitution are between them the beneficiaries of the other five. The LCs were issued between 2017 and 2020.

5. The leases were terminated for default during March 2022, although most of the aircraft have not been recovered. Around the time of the terminations Celestial and Constitution made conforming demands for payment on the LCs. UniCredit's position was that it was unable to make payment because of the effect of sanctions. Celestial and Constitution issued proceedings in March and April 2022 respectively, claiming the amount owed in debt (or alternatively in damages), interest, a declaration in relation to the sanctions position and costs. The principal amount claimed was approximately US $45.8m for Celestial and $23.5m for Constitution.

6. In the meantime, UniCredit applied for licences from the relevant authorities. Licences were received from the Bundesbank in respect of EU sanctions and were subsequently obtained from the UK authorities. Following this, in October and November 2022, the principal amounts due under the LCs were settled, in three cases by payments made in US dollars and in the other cases by payments made in sterling with the agreement of the parties. An application for a licence in respect of US sanctions remains outstanding.

7. The Part 8 claims were heard by the judge at a two day hearing in September 2022, so before any of the principal amounts had been paid. By the time the trial judgment was handed down in March 2023 (the "March judgment") the financial dispute between the parties was confined to interest and the costs of the dispute.

The issues

8. The issues raised by UniCredit's appeal are fourfold:

   (1) whether payment under the LCs by UniCredit would have been "in connection with" an arrangement the object or effect of which is the supply of aircraft to or for use in Russia, or to a Russian person, and so prohibited by reg. 28(3) of the Russia (Sanctions) (EU Exit) Regulations 2019, SI 2019/855 (the "UK Regulations");

   (2) if that prohibition did not apply, whether UniCredit nonetheless has a defence under s.44 of the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"), on the basis that its belief that it was complying with the UK Regulations was reasonable;

   (3) whether the question of illegality under the US sanctions regime was engaged under the *Ralli Bros* principle (*Ralli Bros v Compañia Naviera Sota y Aznar* [1920] 2 KB 287) on the basis that effecting payment in US dollars required the involvement of a correspondent bank in the United States; and

   (4) if the US sanctions regime was engaged, whether payment in accordance with the demands would have been illegal under that regime.

9. The judge concluded in his March judgment that reg. 28(3) of the UK Regulations was not engaged. (He reached the same conclusions in respect of regs. 11 and 13 of the UK Regulations, in respect of which there is no appeal.) He further decided that UniCredit could and should have avoided any issue with US sanctions, by paying in cash if necessary, and that in any event it had not established that either of the relevant US sanctions provisions would have been engaged if payment had been made timeously. In a further judgment handed down in May 2023 following a hearing on consequential matters (the "May judgment") the judge also decided that UniCredit could not rely on s.44 SAMLA, holding that it had established the necessary subjective belief but that its belief was not a reasonable one.

10. Celestial and Constitution have filed Respondent's Notices which raise the following additional arguments:

   (1) an argument that there was no "arrangement" within reg. 28(3) since there was no prohibition on the supply of aircraft when they were supplied;

   (2) as regards s.44 SAMLA, arguments that a) the judge should not have accepted that UniCredit had established the necessary subjective belief, and b) even if s.44 applied, it did not extend to statutory interest and costs;

   (3) in respect of US law, arguments that it was irrelevant because a) no act of performance was required in the United States, b) payment could have been made in sterling or euros, or c) the payment obligations accrued before any prohibition came into effect, and in any event the relevant provisions did not prevent the

payments and, further, UniCredit could not rely on US law because it had failed to take reasonable steps to obtain a licence.

11. At first sight a decision in UniCredit's favour on reg. 28(3) would render it unnecessary to deal with the other issues. However, that is not entirely correct. The UK licence process completed on 13 October 2022 but payment was only made promptly thereafter, on 14 October, in respect of three of Celestial's LCs (the ones paid in dollars: see above). The remaining four Celestial LCs were paid around six weeks later on 25 November 2022. Constitution was paid under its LCs on 21 November 2022. The reason for the delay into November was UniCredit's position under the US sanctions regime. The claim for interest extends to that six week period.

12. Mr Quest KC, Ms Barnes KC and Mr Sheehan KC appeared for UniCredit. Mr Quest made submissions on reg. 28, s.44 SAMLA and the *Ralli Bros* issue. Ms Barnes made submissions on the position under US law. Mr Hobson KC appeared for Celestial and Mr Shah KC and Ms Sagan for Constitution. Mr Hobson made submissions on reg. 28 and s.44 SAMLA, and Mr Shah made submissions on the *Ralli Bros* issue and the position under US law, with each of them adopting the submissions of the other.

SAMLA

13. The primary legislation governing the UK sanctions regime is contained in SAMLA. The UK Regulations are made pursuant to SAMLA, the main regulation power being conferred by s.1 of that Act. SAMLA also confers power to create criminal offences for breach of sanctions.

14. The preamble to SAMLA records that it is:

> "An Act to make provision enabling sanctions to be imposed where appropriate for the purposes of compliance with United Nations obligations or other international obligations or for the purposes of furthering the prevention of terrorism or for the purposes of national security or international peace and security or for the purposes of furthering foreign policy objectives…"

15. Section 1(3) of SAMLA requires regulations made under s.1 to state the purpose of the regulations, which must be one of the purposes specified. Leaving to one side compliance with UN and other international obligations, the purposes specified in s.1(2) include that the relevant Minister considers that carrying out the purpose would be in the interests of national security or international peace and security, or would further a foreign policy objective or promote the resolution of armed conflicts, or achieve human rights related objectives.

16. As originally in force, s.2 of SAMLA imposed additional requirements in respect of purposes specified in s.1(2), to the effect that the Minister had concluded that there were good reasons to pursue the particular purpose and that the imposition of sanctions was a reasonable course of action. Under s.2(4) the Minister was also required to lay a report before Parliament that covered those points as well as explaining why the purposes of the regulations fell within s.1(2).

17. Section 43 requires the Minister making regulations under s.1 to "issue guidance about any prohibitions and requirements imposed by the regulations".

18. Section 44 of SAMLA provides:

> "**44 Protection for acts done for purposes of compliance**
> (1) This section applies to an act done in the reasonable belief that the act is in compliance with—
> (a) regulations under section 1...
> (2) A person is not liable to any civil proceedings to which that person would, in the absence of this section, have been liable in respect of the act.
> (3) In this section "act" includes an omission."

The UK Regulations

19. The UK Regulations were first introduced in 2019 to replace the EU sanctions regime that had previously applied, but they have been the subject of significant changes. In particular, substantial changes were made with effect from 1 March 2022, shortly following the invasion of Ukraine on 24 February, by The Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2022, SI 2022/195. Further changes have been made thereafter, including with effect from 8 March 2022, but references below are to the version of the regulations that took effect on 1 March 2022, without regard to later changes.

20. Reg. 4 addresses the purpose of the regulations, as required by s.1(3) of SAMLA. It provides that the purpose of the regulations is to encourage Russia to "cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine". As at 1 March 2022 this language was unchanged from the original version of the regulations.

21. The report under s.2(4) of SAMLA (produced when the UK Regulations were first introduced in 2019) reflected this, saying at para. 8:

> "Sanctions are intended to increase pressure on Russia to achieve the outcome of Russia ceasing actions which are destabilising Ukraine, or undermining Ukrainian sovereignty... The UK has…been clear that we need to hold Russia to account for its actions in Ukraine, and to encourage a change in Russian behaviour towards Ukraine…"

UniCredit also relies on the following statement in para. 13 of the report about trade sanctions:

> "The trade measures in the Regulations are targeted and provide for the trade sanctions to be subject to a licensing framework that will be overseen by the Department for International Trade. The power to grant licences under this regime supports the reasonableness of imposing these sanctions measures, as it will mitigate any unintended negative consequences."

22. Reg. 28 forms part of Chapter 2 of Part 5 of the UK Regulations. Part 5 concerns trade, and Chapter 2 is entitled "Restricted goods, restricted technology and related activities". When the UK Regulations were first introduced Chapter 2 covered "military goods" and

"military technology". One of the changes made with effect from 1 March 2022 was to amend Chapter 2 to apply it to a much broader range of "restricted goods" and "restricted technology", defined in reg. 21 as amended. As in force on 1 March 2022, "restricted goods" included "critical-industry goods", which in turn included aircraft: reg. 21 and Schedule 2A. (The concept of restricted goods has since been expanded further but continues to include aircraft.)

23. Chapter 2 sanctions a range of activities in respect of restricted goods, including their export or supply to, or their making available for use in, or to a person connected with, Russia (regs. 22, 24 and 25). Reg. 28 deals with funding arrangements.

24. Reg. 28 provides:

> "**Financial services and funds relating to restricted goods and restricted technology**
> 28. (1) A person must not directly or indirectly provide, to a person connected with Russia, financial services in pursuance of or in connection with an arrangement whose object or effect is—
> (a) the export of restricted goods,
> (b) the direct or indirect supply or delivery of restricted goods,
> (c) directly or indirectly making restricted goods or restricted technology available to a person,
> (d) the transfer of restricted technology, or
> (e) the direct or indirect provision of technical assistance relating to restricted goods or restricted technology.
>
> (2) A person must not directly or indirectly make funds available to a person connected with Russia in pursuance of or in connection with an arrangement mentioned in paragraph (1).
>
> (3) A person must not directly or indirectly provide financial services or funds in pursuance of or in connection with an arrangement whose object or effect is—
> (a) the export of restricted goods to, or for use in, Russia;
> (b) the direct or indirect supply or delivery of restricted goods to a place in Russia;
> (c) directly or indirectly making restricted goods or restricted technology available—
> (i) to a person connected with Russia, or
> (ii) for use in Russia;
> (d) the transfer of restricted technology—
> (i) to a person connected with Russia, or
> (ii) to a place in Russia; or
> (e) the direct or indirect provision of technical assistance relating to restricted goods or restricted technology—
> (i) to a person connected with Russia, or
> (ii) for use in Russia.
> …
>
> (6) Paragraphs (1) to (3) are subject to Part 7 (Exceptions and licences).

> (7) A person who contravenes a prohibition in any of paragraphs (1) to (3) commits an offence, but—
>
> (a) it is a defence for a person charged with an offence of contravening paragraph (1) or (2) ("P") to show that P did not know and had no reasonable cause to suspect that the person was connected with Russia;
>
> (b) it is a defence for a person charged with the offence of contravening paragraph (3) to show that the person did not know and had no reasonable cause to suspect that the financial services or funds (as the case may be) were provided in pursuance of or in connection with an arrangement mentioned in that paragraph."

25. Reg. 28(3) can therefore apply to a person who supplies financial services or funds "in pursuance of or in connection with" an arrangement the "object or effect" of which is (among other things) the supply of any goods falling within the definition of restricted goods to Russia or their making available for use in Russia. UniCredit relies on reg. 28(3)(c), and in particular sub-para. (ii) (making restricted goods available for use in Russia). "Funds" are broadly defined in s.60(1) SAMLA to mean "financial assets and benefits of every kind", a definition which is followed by a non-exhaustive list which includes cash, payment instruments and letters of credit. "Arrangement" is also broadly defined in reg. 2 and includes "any agreement, understanding, scheme, transaction or series of transactions, whether or not legally enforceable". Under reg. 80(2), an offence under Part 5 is punishable on conviction on indictment by a prison sentence of up to 10 years. Substantial civil penalties may also be imposed on a strict liability basis, pursuant to s.146 of the Policing and Crime Act 2017 as amended by the Economic Crime (Transparency and Enforcement Act) 2022.

26. It is also relevant to note the position of Sberbank under the UK Regulations. As the judge recorded at [65] of his March judgment, Sberbank was designated for the purpose of asset freezing measures under regs. 11 to 15 with effect from 6 April 2022. Those regulations form part of Part 3, which concerns finance. In outline they prohibit dealings in funds or economic resources owned, held or controlled by a designated person, or making funds or economic resources available to or for the benefit of such a person. As already mentioned, no appeal is brought against the judge's conclusion that regs. 11 and 13 were not engaged in respect of the claims by Celestial and Constitution against UniCredit.

27. Reg. 28(6) cross-refers to the licensing provisions in Part 7. UniCredit applied to the Office of Financial Sanctions Implementation (OFSI) and the Export Control Joint Unit (ECJU) on 24 March 2022, and again to OFSI under regs. 11 and 13 on 11 April 2022 (March judgment at [32]). ECJU granted a licence on 22 September 2022, subject to a licence also being given by OFSI. OFSI granted a licence on 13 October 2022.

The terms of the LCs and the demands

28. It will suffice to refer to the terms of one of the LCs, issued on the application of AAL in favour of Celestial on 21 August 2017 in the amount of $3,600,000 and confirmed by UniCredit on 23 August 2017, as an example.

29. The material part of UniCredit's confirmation to Celestial read:

> "The above Issuing Bank has opened [an] Irrevocable Transferable Standby Letter Of Credit in your favour, a copy of which is enclosed. This copy forms an integral part of the Irrevocable Transferable Standby Letter Of Credit.
>
> We herewith confirm this Irrevocable Transferable Standby Letter Of Credit and undertake to honour drawings under the above mentioned Irrevocable Transferable Standby Letter Of Credit up to and not exceeding the amount of USD 3,600,000.00 provided that the documents are presented in strict conformity with the terms and conditions of this Irrevocable Transferable Standby Letter Of Credit.…
>
> This Irrevocable Transferable Standby Letter Of Credit is subject to Uniform Customs and Practice for Documentary Credits (2007 Revision International Chamber of Commerce Publication no.600."

30. The enclosed Swift message from Sberbank to UniCredit recorded the issue by Sberbank of its letter of credit "on the following conditions" and requested that UniCredit added its confirmation. The terms provided that it was an "irrevocable transferable standby letter of credit" and that it was "provided in connection with the lease of one Boeing 747-400ERF aircraft with serial number 35420" to the applicant AAL under a lease agreement dated 21 December 2005 (as amended), but:

> "This standby letter of credit however creates primary obligations on us and is independent from the lease."

31. It went on:

> "On the instructions of the applicant and for its account, we, Sberbank … hereby establish this irrevocable transferable standby letter of credit to authorise the beneficiary as lease manager of the aircraft to draw on [UniCredit London branch] (the 'confirming bank') an amount or amounts not exceeding a total of US dollars 3,600,000-00 … by signed written demand certificate in the following format (with the bracketed sections and the blanks completed):
>
> Quote.
> On behalf of (insert the name of the current beneficiary), the undersigned hereby draws upon irrevocable transferable standby letter of credit no. 105911705406b dated 21.08.2017 issued by Sberbank and confirmed by [UniCredit London branch], due to [AAL] having failed to comply with its obligations under an aircraft specific lease agreement, dated December 21, 2005 (as amended modified or novated from time to time) made in respect of one Boeing 747-400ERF aircraft with serial number 35420, and instructs you to transfer USD ..... (say: United States Dollars .....) to (insert appropriate bank details) immediately.
> Unquote.
>
> Drawings under this standby letter of credit will be honoured upon receipt of such a demand certificate by mail, courier service or by hand at the counters of the confirming bank and the confirming bank will make payment to beneficiary's account specified in the demand certificate, value date no later

> than close of business on the 4 (fourth) succeeding Russia/London /USA business day following receipt of the demand certificate. If any drawing hereunder does not conform with these terms, confirming bank shall promptly notify you of that, state the reason(s) why and hold the document(s) presented at your disposal (or return them to you if you so request).
> …
> This standby letter of credit constitutes an obligation to make payment against strictly complying documents."

32. The document then confirmed that it was issued subject to the UCP and was otherwise governed by English law. After requesting UniCredit to add its confirmation and dealing with commission it continued:

> "We shall remit the proceeds value 2 (second) Russia/London/USA business day following the date of our receipt of yr authenticated Swift message confirming that credit complying documents were presented to yr counters by the beneficiary."

33. Demands were made in the terms required by the LCs. Each demand identified a US dollar account. Four of the accounts were in London and eight were in Dublin. The demands which specified a Dublin account also identified a correspondent account in the US through which payment was to be made.

The judge's decisions

Reg. 28(3)

34. The judge concluded in his March judgment that he preferred the Claimants' submissions that reg. 28(3) was not engaged. Those submissions relied principally on principles of purposive interpretation and on the principle of autonomy reflected in article 4(a) of the UCP, under which an LC is treated as a separate transaction from the contract on which it is based, and a bank's obligations are not affected by claims or defences arising from the applicant's relationship with either the issuing bank or the beneficiary. In contrast, UniCredit focused more on the ordinary meaning of the words used, an argument that the words "in connection with" would be redundant on the Claimants' approach and the significance of the licensing regime.

35. Having concluded at [85] and [94] that he preferred the Claimants' focus on purposive interpretation and their contention that the autonomy principle supported their position, the judge noted that the Claimants accepted that there was both a provision of funds and that (until termination) the leases were an "arrangement" within reg. 28(3), being an arrangement the object or effect of which was the supply of restricted goods to or for use in Russia, or to a Russian person ([107] and [108]). The focus was therefore on whether payment would be "in pursuance of or in connection with" the supply of aircraft under the leases ([109]).

36. The judge's reasons were shortly expressed and bear setting out in full:

> "126. I have come to the clear conclusion that UniCredit was not relieved of the obligation to make payment to the Claimants under the various Letters of

credit by reason of Regulation 28. I reach this conclusion for the following reasons.

(1) I accept the Claimants' contention that the starting point is to identify the purpose of the regulation. Here that purpose is clear. Plainly, the intention of the legislature was to ensure that financial assistance was not provided to Russian parties in relation to, *inter alia*, the supply of aircraft.

(2) That regulation, as would normally be expected, operated prospectively and not retrospectively. It therefore looked to the time at which financial assistance was provided to the relevant party. Here, the issuance of a letter of credit to enable the supply of aircraft to a Russian party after the date on which the Regulation came into force would plainly come within the prohibition, as both parties accepted.

(3) That is not, however, this case. Here, the aircraft had been supplied long before the prohibition came into effect, at a time when it was perfectly lawful to make such a supply. Likewise, the provision by UniCredit of financial services to the Russian lessees was made when they issued the Letters of credit which served as a mechanism for the satisfaction of the payment obligations of the lessees; and again, at the time of the provision of the services, that provision was perfectly lawful.

(4) All that remained to be done, as at the time that the prohibition in Regulation 28 came into effect, was for the obligation undertaken long before to be fulfilled. The fulfilment of that obligation benefitted the Claimants. Although this fulfilment may also have had the collateral result of discharging the independent obligations of the lessees and Sberbank towards the Claimants, that was a wholly collateral matter. Moreover, because UniCredit remained able to claim against Sberbank, Sberbank were not benefitted; and nor were the lessees, since they remained liable to Sberbank.

(5) Finally, in this regard, I do regard the autonomy principle as of importance. The claim on the Letters of credit was a claim by the Claimants against UniCredit, pursuant to an obligation which had been undertaken by UniCredit wholly independently from any of the other elements of the transaction. Whilst a letter of credit transaction involves various interconnected strands, those strands all involve independent contractual obligations.

127. I also accept the Claimants' submission that it is important to take a step back in this regard and ask whether the fulfilment of an independent obligation owed by a German bank to Irish companies can be said to be intended to benefit the Russian entities who happen to be involved in other elements of the overall transaction. In my judgment, the answer to this question is quite clear – it cannot.

128. Nor, lastly, do I accept UniCredit's submission that the Regulation should be read broadly on the basis that any vagaries that such a reading might lead to can be assuaged by the use of the licensing system. Indeed, the extracts from the guidance relied on by UniCredit seem to me to militate against such an approach. Those extracts suggest that the licencing authorities may take the view that prohibited transactions may nonetheless be licenced if they are thought to be "consistent with the aims of the

> sanctions"; but that in turn indicates that a licence may be granted in relation to transactions even though they are prohibited on a proper reading of the sanctions, not that the sanctions should be regarded as all embracing, subject only to the licencing regime."

Section 44 SAMLA

37. As already mentioned, s.44 SAMLA was addressed in the May judgment.

38. The judge noted that he needed to decide both whether UniCredit subjectively believed that reg. 28 prevented payment under the LCs and whether that belief was objectively reasonable. On the first point he concluded that UniCredit had established, "albeit not very clearly", that it had the requisite belief (May judgment at [12]). On the second point the judge concluded at [16] that he preferred the Claimants' submissions. Those submissions were summarised in the preceding paragraph, the principal ones being that UniCredit must have been familiar with the principle of autonomy, that its apparent concern had been cash flow in respect of a non-availability of funds from Sberbank, and that it was unreasonable to conclude that reg. 28 was in effect retrospective and that it covered a payment by a German entity to an Irish entity. The judge added:

> "In particular, in my judgment, what should have been clear was that the obligation to pay the Claimants, which was a wholly independent obligation owed to the Claimants and not in any way dependent on receipt of funds from Sberbank, was unaffected by Regulation 28."

39. UniCredit's rival submissions are set out at [13] and [14] but were not expressly addressed by the judge. The judge also did not address the parties' submissions on the scope of s.44, and in particular whether it could apply to interest or costs.

US sanctions

40. In his March judgment the judge considered the judgment of Staughton J in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728 ("*Libyan Bank*") and concluded that the question of illegality under the US sanctions regime was not engaged because payment could have been made in cash rather than through a correspondent bank. His reasons were as follows:

> "174. In my judgment, [*Libyan Bank*] is authority for the proposition that where a dollar payment is required under the contract, then the customer is entitled to demand such payment in cash. That is so whether or not performance of the obligation by tender of cash involves an unlikely situation. I would reject the argument that the terms of the letter of credit preclude an obligation to pay in cash. Clearly the Letters of credit anticipate that payment will be made through a correspondent bank. However, that does not mean that the bank is entitled to insist on making payment in this way, despite the fact that such a payment cannot in fact be made or lawfully made.
>
> 175. UniCredit's further argument is that [*Libyan Bank*] turned on the fact that a demand was made for payment in cash, whereas here no such demand was made, at least at the outset. In my judgment, this is to confuse the trigger for the obligation (the demand) with the manner in which that obligation (to

> make payment) may have to be fulfilled. It may be that the demand made upon UniCredit assumed that payment would be made through a correspondent bank. However, that did not mean that UniCredit could not choose to perform in any other way, including via the tender of cash. Where the fundamental obligation is to make payment, and where it is possible to make such payment, then the bank must do so."

41. The judge went on to give obiter consideration to the US law evidence relating to "CAPTA" sanctions in respect of Constitution, having previously concluded at [152] that there was no relevant prohibition as regards Celestial when the payment obligations arose. He did not consider evidence relating to "Blocking" sanctions on the basis that they only applied from 13 April 2022. He concluded at [186] and [188] that he was "not satisfied" that UniCredit had established that the provisions of CAPTA applied so as to prohibit performance. He distinguished the case principally relied upon by UniCredit, which was an enforcement decision of the Office of Foreign Assets Control ("OFAC"). In contrast, questions of law were ultimately for the US courts.

Interest and costs

42. Interest and costs were addressed in the May judgment. The judge awarded interest under s.35A Senior Courts Act 1981 (the "1981 Act") up to the date of payment of the LCs at the US Prime rate, applying *Lonestar Communications Corp LLC v Kaye* [2023] EWHC 732 (Comm) at [3] to [17] and rejecting the Claimants' arguments for a 2% uplift on that rate in circumstances where they had not adduced any evidence to show that they were required to pay a higher rate on their US dollar borrowings.

43. As to costs, the judge rejected an application for indemnity costs and ordered UniCredit to pay costs on the standard basis, with payments on account.

Regulation 28(3)(c)

The parties' submissions in summary

44. Mr Quest submitted that the judge failed to give effect to the ordinary and literal meaning of the words used in their context. The LCs were plainly "in connection with" the leases. A causal connection was not required. The judge had also interpreted the purpose of reg. 28 unduly narrowly and been influenced by broader questions of policy which were matters for the licensing authorities. He impermissibly introduced a judicial carveout for pre-existing obligations and also wrongly concluded that the autonomy principle assisted the Claimants' case.

45. Mr Hobson relied on the fact that when the aircraft were supplied and the LCs were issued the activities were perfectly lawful. The obvious purpose of the change made on 1 March 2022 was to prevent further aircraft going to Russia, including by preventing financing arrangements that facilitated a prohibited supply of that kind. It was axiomatic that the aim was to have an adverse impact on Russia, and to do so prospectively. In this case there was never a prohibited supply and no such impact. He emphasised the importance of identifying the purpose of the legislation, relying on the judgment of Lord Briggs and Lord Leggatt in *Rossendale Borough Council v Hurstwood Properties* [2021] UKSC 16, [2022] AC 690 at [10], where they referred to the "numerous authoritative statements in modern case law which emphasise the central importance in interpreting

any legislation of identifying its purpose" and cited a statement of Lord Mance in *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1WLR 1546 at [10], where he said that "the notion of words having a natural meaning" was "not always very helpful", certainly before identifying the legislative purpose and scheme.

46. Unlike the position before the judge, Celestial and Constitution did not accept that there was a relevant "arrangement". Mr Hobson's primary argument was that the definition of "arrangement" meant that the focus was on the entry into the relevant lease. That was the relevant "agreement" within that definition. When the leases were entered into in this case there was no concept of restricted goods. While Mr Hobson accepted that weight should not be attached to the label, the term "restricted goods" described the scope of goods covered by the prohibition. Effectively, if the items included in the definition of restricted goods were read directly into reg. 28(3), it was implicit that they should be read as applying prospectively rather than to goods the subject of earlier arrangements.

47. Mr Hobson accepted that the logical consequence of his primary argument was that an aircraft lease agreement entered into in February 2022 under which the aircraft was to be delivered during March would not be caught by the prohibition. His alternative argument accepted that the relevant "arrangement" encompassed both the lease agreement and the factual supply of the aircraft pursuant to it, but not the ongoing availability of the aircraft to the lessee as the lease ran its course.

48. Mr Hobson further submitted that the words "in pursuance of or in connection with" connoted some type of causal nexus between the financing and supply, whereas here there was just the discharge of an autonomous payment obligation, which by its nature was not connected with the underlying lease contract, despite being triggered by an asserted default. In any event, the leases had in fact all been terminated before the demands under the LCs became payable so there was no longer an arrangement in place. It could not therefore be said that funds were provided in connection with an arrangement whose object or effect "is" making restricted goods available.

Discussion

49. I have concluded that UniCredit has the better of the arguments on reg. 28(3)(c).

50. I accept that identifying the purpose of the legislation is of central importance. However, it is critical to identify that purpose with care, and not to overlook the fundamental point that statutory construction remains an exercise of identifying the meaning of the words used in their statutory context. As explained in *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. at 11.1, in conducting statutory interpretation the primary indication of legislative intention is the words used, read in their context and having regard to the purpose of the provisions. The same approach applies to delegated legislation, with the additional consideration that it must be read in the light of the enabling Act: *Bennion* at 3.17. Obviously, references to Parliamentary intention may need to be modified where delegated legislation is concerned to refer to the (objectively ascertained) intention of the relevant rule maker.

51. In *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [29] Lord Hodge provided a reminder of the basic principles:

> "The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'"

52. The judge's approach did not properly engage with the words used, and in my view he also erred in the assessment of purpose.

53. The purpose of the UK Regulations is set out in reg. 4, as confirmed by the report made under s.2(4) of SAMLA: see [20] and [21] above. Stated shortly, it is to put pressure on Russia. That pressure obviously intensified as from 1 March 2022. However, it does not follow that the judge's conclusions about the aim of reg. 28 are justified.

54. It is important to read reg. 28(3)(c) in context. As already explained, Chapter 2 of Part 5 sanctions a range of activities in respect of restricted goods and technology, including their export or supply to, or making available in, Russia. Reg. 28 (set out at [24] above) deals with funding arrangements. Paragraphs (1) and (2) of reg. 28 deal with financial services and funds provided "to a person connected with Russia" in pursuance of or in connection with specified arrangements relating to restricted goods and technology. Paragraph (3) is not so limited: it can apply to financial services and funds provided to a person who is not connected with Russia. That is obviously an intentional extension. Instead, the connection with Russia is in the description of the arrangements, the list of which is similar to the list in reg. 28(1) but also incorporates reference to Russia or a person connected with Russia. Specifically, reg. 28(3)(c) provides:

> "(3) A person must not directly or indirectly provide financial services or funds in pursuance of or in connection with an arrangement whose object or effect is—
> …
> (c) directly or indirectly making restricted goods or restricted technology available—
> (i) to a person connected with Russia, or
> (ii) for use in Russia…"

55. The words "in connection with" are broad. As Rix LJ said in *Campbell v Conoco (UK) Ltd* [2002] EWCA Civ 704, [2003] 1 All ER (Comm) 35 at [19] "the words 'in connection

with' … are widely regarded as being as wide a connecting link as one can commonly come across". Their use in conjunction with "in pursuance of" indicates a clear intention to cast the net more broadly than financial services or funds provided under or in accordance with the terms of the relevant arrangements (which would be covered by the natural sense of "in pursuance of"). I would also agree with UniCredit that the words "in connection with" do not require any form of legal dependence, for example by reference to principles of causation. Rather, the question is one of factual connection.

56. As Mr Hobson rightly accepted, the term "restricted goods" is simply a definition which cannot by itself have the effect that reg. 28 applies only to arrangements concerning goods which are "restricted" when the arrangement was made. Instead, the correct approach is to read the contents of the defined term into reg. 28. Relevantly, therefore, for our purposes reg. 28(3) can be read as if "restricted goods" was substituted by the word "aircraft".

57. The next, and important, point is that the amendments to reg. 28 included nothing that limited their effect to arrangements entered into on or after 1 March 2022 or provided any other form of grace period. In contrast, the equivalent changes to the EU sanctions regime provided a grace period permitting performance of existing contracts until 28 March 2022 (Council Regulation (EU) No 833/2014, Article 3c(5)). While there is no similar legislative exclusion in the UK, it is notable that section 3.3 of the guidance on Russian sanctions issued under s.43 of SAMLA states that a licence may be granted for the provision of financial services or funds relating to aviation goods if the Secretary of State is satisfied that it is "necessary for the execution of obligations arising from contracts concluded before 8 March 2022…provided that the activity is completed before 28 March 2022". (The relevance of 8 March appears to be that it was a date when further extensions to the UK Regulations were made.) In other words, a licence would be more likely to be granted in respect of such a contract provided the activity was completed by 28 March – the same date as that chosen by the EU for its legislative grace period.

58. While the original provision of the LCs was not caught by reg. 28(3) at the time of their issue, making a payment under them is obviously the provision of "funds", and (unlike reg. 28(1) and (2)) it does not matter that the payee is unconnected with Russia. It is enough that the funds are provided in connection with a relevant arrangement. Subject to a point to which I will return, it is also not in dispute that the object or effect of the arrangements comprising the leases was to make aircraft available either to persons connected with Russia or for use in Russia. Further, with an ongoing arrangement such as a lease there is a continued "making available" during the currency of the lease. This was not a one off supply when the aircraft were delivered, as Mr Hobson effectively sought to argue. I further note that, if anything turns on it (which I do not think it does), none of the leases were in fact terminated before the aircraft became "restricted goods" on 1 March 2022.

59. In my view it is also straightforwardly the case that payment under the LCs would be "in connection with" the leases. That is obviously the case in fact. The LCs provided security for performance of the lessees' obligations under the leases, and it can readily be inferred that the leases required either the LCs or some other acceptable security to be in place. That factual connection is reflected not only in the terms of the letters of credit issued by Sberbank, which expressly stated that they were provided "in connection with" the leases, but also in the terms of the demand, which explicitly required a default under the relevant

lease to be asserted (see [31] above). Moreover, payment under the LCs would have the effect of discharging obligations under the leases.

60. I also agree with UniCredit about the autonomy principle. That is an important principle, reflected in Article 4(a) of the UCP:

> "A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.
> A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank."

61. However, it is important to understand what the scope of the principle is. Obligations under letters of credit are autonomous in the sense that they do not depend on whether the beneficiary has a claim on the underlying contract financed by the credit, or (for a confirming bank) on the position of the issuing bank. So in this case, for example, payment under the LCs depended on an asserted default under the leases and not on whether there was in fact a relevant default. But that does not mean that the factual reality of a connection with the leases can be ignored. That connection undoubtedly exists, and indeed is recognised in the reference in Article 4(a) to the "contract on which [the letter of credit] may be based". The LCs were issued only because of, and no doubt in amounts determined by reference to, the leases and they were triggered by an assertion of default under them.

62. The point to which I said I would return is this. Reg. 28(3) uses the present tense in describing the arrangement (an arrangement "whose object or effect is…"). That leads to a possible argument, adopted by Mr Hobson when suggested by the court, that there needs to be a temporal coincidence between the provision of funds and the existence of the relevant arrangement. This leaves scope for one of Mr Hobson's fallback arguments, which was that all the leases had in fact been terminated by the time the demands under the LCs became due for payment.

63. I have concluded that this argument cannot be right. The most straightforward answer is that the words used are just a descriptor of the type of arrangements to which reg. 28(3) applies, whenever those arrangements exist. Further, even if it is a stretch of the language to say that the effect of particular arrangements "is" making aircraft etc. available when those arrangements have already been terminated, it is no stretch to say that that is their object. The object of the leases is unchanged by their termination: it is and always has been the making available of aircraft for use in Russia or to a person connected with Russia.

64. If the argument were correct it would also leave significant gaps in the UK Regulations. On the face of it, parties could simply wait until an export or supply of goods was completed (whether done in breach of sanctions or by a supplier who is not caught by them) before supplying funds, without being caught by reg. 28. That cannot have been intended. It is also worth bearing in mind the similar language used in reg. 28(1), which applies to funds supplied to Russian-connected parties, where it is perhaps even more

obvious that it would not have been intended that the prohibition should be capable of being sidestepped in that manner. The provisions should be interpreted consistently.

65. Further, if the argument were right it would also cause real practical difficulties. For example, a funder such as UniCredit would typically have no first-hand knowledge of whether a lease has been terminated, or whether (for example) it contained an option for the lessee to acquire the aircraft on a termination. In this case the LCs were payable in the event of a default, but all that was required was an assertion of default rather than proof that either default or termination had occurred.

66. It follows that I do not accept any of the alternative ways in which Mr Hobson put the case on reg. 28. The purpose of the amended reg. 28 is not simply to prevent further aircraft going to Russia by preventing financing arrangements that facilitate that, albeit it undoubtedly does achieve that. Rather, it is a relatively blunt instrument that is intended to cast the net sufficiently wide to ensure that all objectionable arrangements are caught, such that the overall purpose of putting pressure on Russia is achieved. That approach obviously risks catching arrangements that may not be seen to be within the overall mischief. But the solution that the UK government has adopted for that is to provide for exceptions, both via the licensing regime, which as the report under s.2(4) of SAMLA stated is intended to "mitigate any unintended negative consequences" ([21] above), and by further legislative exceptions contained in Part 7 of the UK Regulations. The important role of the licensing regime is well illustrated by the choice to address pre-existing contracts by guidance as to the availability of licences, rather than any form of grace period ([57] above). There is no support in the statutory language for reading reg. 28 as capturing only future supplies of goods where those goods fall within it for the first time on 1 March 2022.

67. Accordingly, I would allow ground (1) of the appeal and reject the argument raised in the Respondent's Notices that there was no relevant "arrangement".

Section 44 SAMLA

68. The conclusion on reg. 28 means that, if my Lords agree, it is not strictly necessary to address s.44 of SAMLA. This is because it is not in dispute that if UniCredit succeeds in its appeal on reg. 28(3) then its payment obligation under the LCs was suspended until the UK licence process was completed: see Michael Green J's judgment in *Fortenova Grupa DD v LLC Shushary Holding* [2023] EWHC 1165 (Ch) at [51]-[52], referring to *NV Ledeboter v Hibbert* [1947] KB 964. It is common ground that in those circumstances statutory interest should also not accrue for that period.

69. However, I will address s.44 because it was both fully argued and raises points of significance which have not previously been considered by this court. But I will deal with the factual elements relatively shortly.

Reasonable belief

70. I have no doubt that the judge's conclusion that UniCredit had the requisite subjective belief should not be disturbed on appeal. I am satisfied that there was evidence on which he could legitimately base that conclusion. It is also noteworthy that the Claimants did not positively argue at trial that UniCredit did not have that belief. The point was sufficiently covered in witness statements provided by UniCredit executives and by Ms

Davina Given, a partner at RPC, and is also consistent with the documentary evidence. There was no cross-examination (this being a Part 8 claim) and no attempt to do so.

71. In particular, Ms Given stated that UniCredit "believed" that the lease arrangements fell within reg. 28(3) and that payment under the LCs from 1 March 2022 would be a provision of funds in connection with them, and further that UniCredit had concluded that this was unaffected by the termination of the leases. Her evidence explicitly took account of the fact that UniCredit's views were formed following consultation with, among others, senior management. This is important because the individual team leader whose evidence the Claimants maintained did not establish the requisite belief was clearly not the decision maker. The decision not to pay was made by more senior management, who evidently accepted the advice of the compliance team that the sanctions regime applied.

72. As to whether the belief held was reasonable, it clearly was. I reject the suggestion that UniCredit needed to "show its workings", and the suggestion that its view was unreasonable because its real reason for not paying was a concern about its cashflow. The latter point is really a further challenge to whether UniCredit had a genuine belief that the sanctions regime applied, which I have already addressed. The former is wrong in principle. Having established a subjective belief that non-payment under the LCs was in compliance with the UK Regulations, the question whether that belief was reasonable is an objective one.

73. As indicated above, I have concluded that UniCredit's belief about reg. 28(3) was correct. But even if I had reached a different view I would still have disagreed with the judge about whether UniCredit's belief was a reasonable one. UniCredit was required to form a view about new legislation at short notice. There is no doubt that the literal words appear to catch payments under the LCs. That is why Celestial and Constitution have focused so much on purposive interpretation. It is important to avoid viewing the position with the benefit of hindsight, having heard argument from well-prepared leading Counsel and with the benefit of judicial consideration that might ultimately appear to make clear what was in fact not at all clear at the relevant time.

74. Accordingly, I would agree with UniCredit's ground (2). UniCredit had the requisite reasonable belief, and accordingly could have relied on s.44 until it received licences from ECJU and OFSI. However, that leaves what I consider is a more difficult point about the scope of s.44, and specifically whether it applies to interest and costs.

Scope of s.44: "liable to any civil proceedings" and "in respect of"

75. By way of recap, s.44(2) provides:

> "(2) A person is not liable to any civil proceedings to which that person would, in the absence of this section, have been liable in respect of the act."

Under s.44(3) an act includes an omission.

76. The Explanatory Notes to s.44 state:

> "This section ensures that a person who may have been liable to civil proceedings as a result of compliance with the regulations contained within

> the Act is not liable if they reasonably believe that they were acting in compliance with regulations in place at the time. It aims to protect people from any adverse results generated by compliance (for example, a breach of a contract to supply goods that are prohibited from export by sanctions)."

77. While the gist is clear enough, the wording of this note does not reflect the fact that s.44 is in point where something is done or not done in the reasonable belief that sanctions are engaged, even if they are not in fact engaged. If sanctions are actually engaged then it is much less likely that the protection of s.44 would be required. Indeed, that is illustrated by the fact that it is not in dispute in this case that if UniCredit succeeds in its appeal on reg. 28(3) then it will not be required to pay interest for any period before the grant of the ECJU and OFSI licences: see above.

78. UniCredit relied on *Ex parte Waldron* [1986] 1 QB 824, where the Court of Appeal considered the effect of s.139 of the Mental Health Act 1893. That provided:

> "(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act ... unless the act was done in bad faith or without reasonable care.
>
> (2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court;. ..."

79. In that case Ms Waldron sought judicial review of a decision to admit her to hospital compulsorily. The Court of Appeal's decision was that "civil proceedings" did not cover judicial review and further that a respondent in such proceedings was not "liable to" them. The decision is not therefore of direct application. In the course of his judgment, however (at p.845), Ackner LJ accepted a submission that the purpose of the section was to "bar proceedings in limine", and that this was achieved by s.139(1) but made "doubly sure" by s.139(2). However, s.139 was limited to private law proceedings and did not extend to an application for judicial review (see also Glidewell LJ's judgment at p.852).

80. The context of s.139 is obviously very different to that of SAMLA. Further, the actual decision in *Ex parte Waldron* was that public law proceedings were not precluded. In addition, there is no equivalent of s.139(2) here, a provision which made it clear that civil proceedings could not be initiated at all without leave of the court.

81. Mr Quest submitted that, by analogy with *Ex parte Waldron*, it would have been open to Celestial and Constitution to bring a claim that was limited to seeking a declaration about the application or otherwise of reg. 28. He also accepted that the issue of whether s.44 of SAMLA itself applied would be justiciable in a similar manner. These concessions are understandable, because without them UniCredit's case would amount to it having a complete immunity from suit for so long as it held a reasonable belief, or perhaps even asserted that it did so. That would require clear words, because it would prevent access to justice: see *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869 at [76]-[77].

82. However, Mr Quest maintained that for so long as UniCredit did hold a reasonable belief within s.44(1) it could not be subject to a claim for a financial remedy, whether in debt

or damages, and including interest and costs. If the matter was not resolved earlier, most obviously through the grant of a licence, that reasonable belief would fall away only when the court determined that reg. 28 did not apply in proceedings for a declaration. Only then would Celestial and Constitution be able to initiate a claim for non-payment.

83. One difficulty with this submission is the need to distinguish between proceedings seeking a declaration and proceedings to recover a debt or damages. Both are civil proceedings, and both would inevitably name UniCredit as the defendant (even if it remained neutral, as Mr Quest suggested it could in proceedings for a declaration). In contrast, in *Ex parte Waldron* judicial review proceedings were held not to be civil proceedings at all.

84. I can see the argument that being "liable" in civil proceedings appears to indicate some form of financial exposure and that there is no equivalent in s.44 to the broader bar in s.139(2), but as Ackner LJ pointed out in *Ex parte Waldron* the words are "liable to" not "liable in".

85. More significantly, UniCredit's position leads to a result which is both procedurally awkward and counterintuitive. The notion that a creditor might have to instigate two sets of proceedings, the first (at its own cost) for a declaration that payment of a debt does not breach sanctions and the second (possibly by that stage outside a limitation period) for payment of the debt itself, is a surprising one that suggests a need for clear words to have that effect.

86. I have concluded that the answer to the conundrum lies in focusing on precisely what s.44(2) applies to, namely civil proceedings to which a person "would, in the absence of this section, have been liable in respect of the act". The "act" here is an omission, being a failure to pay under the LCs.

87. The evident purpose of s.44 is to ensure that a person is not pressurised into doing something that risks breaching sanctions by a fear of being exposed to civil claims. The section is concerned to protect against a liability which is created as a result of something done (or not done) in the reasonable belief that it is in compliance with a sanctions regulation. It is not concerned to protect against pre-existing liabilities.

88. The most obvious example of proceedings to which s.44 would apply is proceedings seeking compensation for loss that has been caused by action taken, or not taken, in the reasonable belief that it was in compliance with regulations made under s.1 of SAMLA. For example, a seller may be concerned that a failure to deliver goods could expose it to claims from the buyer for loss of profit and/or to recover amounts for which the buyer becomes liable to its own customers. Section 44 would protect the seller from a claim for damages, provided that the belief that the supply would be sanctioned was a reasonable one.

89. It is far less apparent that s.44 should protect a debtor from an action to recover a debt which is otherwise lawfully due but which has not been paid in the reasonable belief that its payment would be in breach of sanctions. Absent sanctions, the debtor would expect to have to pay that sum in the normal course. Exposure to a claim to recover it is not a new financial exposure which might pressurise payment. It is a pre-existing liability. The mischief at which s.44 is aimed (as confirmed by the Explanatory Notes) is not present.

90. The wording of s.44 also supports an interpretation that would allow proceedings to recover a debt. This is because a claim for debt is just that: it seeks payment of the debt. While the inevitable trigger for the claim is that the debtor has not paid, the action is not an action for the non-payment as such (which is the relevant omission for s.44 purposes) and can therefore be said not to be "in respect of" it. Rather, it seeks recovery of an amount which is owed irrespective of any action or inaction in purported compliance with sanctions.

Interest

91. As already explained, the judge awarded interest at the US Prime rate under s.35A of the 1981 Act. This provision confers a statutory discretion in the following terms:

> "(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—
>
> (a) in the case of any sum paid before judgment, the date of the payment; and
>
> (b) in the case of the sum for which judgment is given, the date of the judgment."

92. As can be seen, s.35A provides a form of supplementary relief on a claim to recover a debt or damages at the discretion of the court, up to the date of payment or judgment if later. (It is of course separate from the interest that runs from the date of judgment, currently at 8%, under s.17 of the Judgments Act 1838.)

93. It is notable that a claim for interest on a debt under s.35A is not independent of the claim for the underlying debt. Rather, the court's power to award interest arises in proceedings "for the recovery of a debt". On the basis that proceedings for recovery of the debt itself are not barred by s.44 (as to which see above) it logically follows that a claim which is no more than an adjunct of that, and has no independent foundation, should also not be barred. Effectively, it is an aspect of the single claim for a debt. I do not consider that it makes any difference that, as with other claims for interest, it is required to be pleaded under the court's rules (CPR 16.4). The court's power under s.35A arises only on a claim for the debt.

94. This conclusion is consistent with the aim of an award of interest being to achieve *restitutio in integrum*. Without it, not only would the creditor be worse off but the debtor would obtain an unwarranted windfall. As with the principal amount of the debt, an entitlement to interest that would deprive a debtor of a windfall is not obviously within the mischief sought to be addressed by s.44.

95. I would therefore conclude that s.44 does not prevent an award of interest under s.35A of the 1981 Act on a claim for debt.

96. I should add that it does not follow that all claims for interest would be in the same category. In particular, a claim for interest at a default rate provided for in a contract

would give rise to different issues. A claim for default interest is much closer both to the mischief at which s.44 is aimed and the language, because the claim is for an amount due as a result of ("in respect of") the failure to pay.

97. Turning back to s.35A, there was some discussion in oral argument about whether exposure to an award under that provision could have the effect of exerting the sort of pressure that is intended to be alleviated by s.44 of SAMLA, bearing in mind that the usual focus in commercial cases is on the claimant's cost of borrowing, which may be higher than the defendant's cost of borrowing.

98. I do not consider that this point affects the analysis. The non-application of s.44 to awards of statutory interest on claims for debt is consistent with the language as well as the mischief sought to be addressed by s.44. Moreover, it will be obvious to both parties that the court has a discretion not only as to whether to award interest but as to the rate. A debtor could reasonably expect the court to take all the circumstances into account, including the sanctions context, in deciding what award to make.

Costs

99. It follows from my conclusion that UniCredit was not immune from an action to recover debt that it would also not be immune from any associated costs exposure. As with interest under s.35A of the 1981 Act, that is no more than an aspect of a claim for recovery of debt.

100. It is also worth noting that, even if s.44 was engaged in any respect, it could only protect UniCredit in respect of acts or omissions in the reasonable belief that they were in compliance with regulations under s.1 of SAMLA. It provides no protection in relation to US sanctions.

Conclusion

101. Accordingly, if I had held that reg. 28(3) did not apply, I would have held that SAMLA s.44 did not protect UniCredit against an award of interest and costs, albeit for different reasons from those given by the judge.

The *Ralli Bros* issue

102. The consequence of the conclusion that reg. 28(3) was engaged is that issues (3) and (4) in the appeal and issue (3) in the Respondent's Notices, which relate to the US sanctions position, are of less significance. Costs aside, their relevance to the parties is limited to interest on nine of the LCs for the approximate six week period between the date that the UK licence process was completed in October 2022 and the dates on which they were settled in sterling during November 2022 (see [11] above).

103. As I will explain, I have concluded that even if the *Ralli Bros* principle is engaged so that US sanctions are potentially relevant, UniCredit is precluded from relying on them because it did not make reasonable efforts to obtain a licence from the US authorities. In those circumstances, it is not necessary to deal with the other issues.

104. I do however wish to make some observations about the application of the *Ralli Bros* principle, given the judge's conclusion that payment could have been made in cash and the arguments that it could have been tendered in sterling or euros.

105. The *Ralli Bros* principle is well-established. It is a limited exception to the general principle that the enforceability of a contract governed by English law is determined without reference to illegality under any other law. The exception applies where contractual performance necessarily requires an act to be done in a place where it would be unlawful to carry it out: see for example *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm), [2017] 2 CLC 735 at [79] per Leggatt J and *Banco San Juan Internacional Inc v Petróleos De Venezuela S.A.* [2020] EWHC 2937 (Comm), [2021] 2 All ER (Comm) 590 ("*Banco San Juan*") at [62], [77] and [79] per Cockerill J.

106. A distinction has been drawn in the case law between situations where performance is illegal in the jurisdiction where performance must take place, where the principle applies, and cases where the illegality relates to a preparatory step to performance, or "equipping to perform": *Banco San Juan* at [80]-[83], where the illegality does not excuse non-performance. Further, it is not in dispute that a party will not be excused if performance would be legal if a licence was obtained, unless that party shows that they either made reasonable efforts to obtain a licence or that any such efforts would have been in vain because a licence would have been refused. This last point is discussed further below.

107. The judge concluded at [158] of his March judgment that the place of performance was London or Dublin, according to the location of the bank account specified in the relevant demand. As already explained the judge then relied on the *Libyan Bank* case to conclude that payment could have been made in cash in those locations. Celestial and Constitution argue in the alternative that payment could have been made by a bank transfer, but in sterling or euros. They rely on Rule 256(2) in *Dicey* (*Dicey, Morris and Collins on the Conflict of Laws*, 16th ed.) at 37R-050, to the effect that a sum of money expressed in a foreign currency that is payable in England may be paid either in units of the money of account or in sterling, translated at the prevailing market rate. (The parties agree that it should be assumed for these purposes that there is an equivalent rule under Irish law that would permit payment in euros in Dublin.)

108. I would not wish to endorse either the judge's decision that cash could be paid, or the alternative argument that payment could be made in a different currency. Quite apart from the fact that no demand for payment in cash or in a different currency was actually made, neither proposition appears to engage with the terms of the contracts.

109. *Libyan Bank* concerned a demand made by the plaintiff for payment on a US dollar bank account in London in circumstances where the plaintiff had become subject to US sanctions which would have prevented steps being taken in the United States to effect payment. The terms of the demand requested a banker's draft but expressly stated that payment in cash would be accepted in the alternative. Staughton J considered the nature of a bank's obligation and concluded both that it encompassed meeting a demand at the branch at which the account was kept, and that the relevant means of doing so were either by delivery of cash or by some form of account transfer (pp.749 and 750). He then considered in some detail various means by which a transfer might be made and their potential implications. However, his decision was based on the plaintiff's "fundamental right" to demand cash and the fact that there was no express or implied contractual term to contrary effect (p.764). Alternatively and obiter, applying what was then Rule 210 in *Dicey*, the defendant bank had the option to pay in sterling in circumstances where there was no express or implied term that prevented it (p.766).

110. *Dicey* (16th ed.) recognises at 37-053 that the ability to tender payment in sterling is "primarily a rule of construction" (citing *Heisler v Anglo-Dai Ltd* [1954] 1 WLR 1273, 1278 (CA)). It also recognises at 37-056 and 37-057 that the parties may agree to exclude the option to pay in sterling where money is payable in England, and that the parties may exclude the creditor's right to demand payment in cash. Each of those points must be right.

111. In this case the terms of the LCs expressly require that:

> "… documents are presented in strict conformity with the terms and conditions of this Irrevocable Transferable Standby Letter Of Credit" (see [29] above).

112. This reflects the principle of "strict compliance", under which documents presented under a documentary credit must comply strictly with the terms and conditions of the credit: see *Brindle & Cox, Law of Bank Payments*, 5th ed. at 7-010. Only then is the beneficiary entitled to be paid, and furthermore it is only in that situation that a confirming bank will be entitled to be reimbursed by the issuing bank, a point reflected in the obligation to make payment against "strictly complying documents" in Sberbank's own letters of credit (see [31] above, final sentence) and the requirement that Sberbank receives from UniCredit an "authenticated Swift message confirming that credit complying documents were presented…by the beneficiary" ([32] above). As Viscount Cave said in *Equitable Trust Company of New York v Dawson Partners Ltd* (1926) 27 Lloyd's Rep. 49, 52:

> "There is no room for documents which are almost the same, or which will do just as well."

113. The provisions of the UCP reflect this principle. Article 2 defines a "complying presentation" as "a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice" and a confirmation as "a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation". Article 8 requires a confirming bank to "honour" a complying presentation and Article 7(c) requires an issuing bank to reimburse the amount of a complying presentation. The same points are reiterated in Article 15. It is also worth noting that Article 10(a) prevents a credit being amended without the agreement of each of the issuing bank, confirming bank and beneficiary.

114. Each of the LCs expressly required that demand would be for a) the transfer, b) of US dollars, and c) to a specified bank account. "Transfer" does not naturally connote payment in cash. Further, the LCs refer to, and only to, a US dollar amount. A demand for payment in cash or in sterling or euros could therefore not be a conforming demand. That may explain why no such demand was ever made in this case, but more relevantly for present purposes there must at least be a strong argument that payment in those forms was simply not permitted by the contract. The terms of the contract appear to preclude both payment in cash and payment in a currency other than US dollars. In my view, therefore, the judge was wrong to apply the *Libyan Bank* case as he did, without reference to the terms of the contract and without taking account of the fact that in *Libyan Bank* payment in cash was both contractually permitted and in fact demanded.

115. The Supreme Court decision in *RTI Ltd v MUR Shipping BV* [2024] UKSC 18 ("*MUR Shipping*") was handed down during the hearing of the appeal, and we permitted the parties to make brief written submissions following the hearing as to its potential relevance. *MUR Shipping* related to whether a party was required by a proviso to a force majeure clause to accept an offer of non-contractual performance, namely payment in euros. The Supreme Court decided that on the facts of the case there was no requirement to accept that offer. It was common ground in the Supreme Court that the contract in question required payment in US dollars, so the case is not of direct relevance. However, UniCredit seeks to rely on statements underlining the principle of freedom of contract, the importance of the chosen currency and the importance of contractual certainty. Celestial and Constitution maintain that *MUR Shipping* is of limited relevance and is readily distinguishable.

116. I agree that *MUR Shipping* is of limited relevance, but to the extent that it is relevant it serves to re-emphasise the power of contracting parties to agree terms of their choice, including as to the manner of performance: see for example at [45] where MUR's right to be paid in US dollars was described as a valuable right which would require clear words for it to forego.

117. If it is correct that settlement otherwise than by a US dollar transfer to the specified account is precluded, then the *Ralli Bros* principle could be engaged if the act of performance, in this case effecting payment in US dollars to the specified account, would have required the involvement of a correspondent bank in the United States, as UniCredit contend, in what is more than a preparatory step. As to that (and leaving to one side the fact that the demands for payment in Dublin expressly refer to a correspondent bank), we do not have any findings of fact by the judge. He mentions the point in summarising UniCredit's arguments, referring at [164(4)] to "unchallenged evidence" that payment in accordance with the demands required a correspondent bank and to the point having underpinned Staughton J's decision in *Libyan Bank*, but does not resolve it by any factual finding. On appeal, Celestial and Constitution challenged the evidence, which formed part of Ms Given's witness statement, as insufficient to establish that a correspondent bank is actually required, on the basis that it refers to what was "routinely" done and UniCredit not being aware of any "practicable alternative".

118. Given that the judge made no finding, the available evidence is on any basis less than definitive and it is unnecessary to do so in order to resolve the appeal, I do not consider it appropriate to comment further on this point, other than to observe in passing that in *MUR Shipping* it appears to have been common ground that a US intermediary bank would have been required to process a US dollar transfer (see at [9]).

US sanctions: reasonable efforts

119. As already mentioned, I have concluded that UniCredit is precluded from relying on US sanctions because it did not make reasonable efforts to obtain a licence from the US authorities. In those circumstances it would be disproportionate also to consider UniCredit's challenges to the judge's factual conclusions on the expert evidence about US law.

120. It was not disputed that a principle exists to the effect that a party seeking to rely on the *Ralli Bros* doctrine may be precluded from doing so if they could have done something

to avoid illegality in the place of performance. This point was not addressed by the judge (judgment at [189]) but is relied on in the Respondent's Notices.

121. Celestial and Constitution say that, even if US sanctions were otherwise relevant and in fact applied, UniCredit did not make reasonable efforts to obtain a licence from OFAC and is not therefore entitled to rely on their application as a defence. UniCredit does not dispute that the appropriate test is one of "reasonable efforts" to obtain a licence (or that a licence would have been refused if reasonable efforts had been made), and that the burden is on it to establish that the test is satisfied. However, it maintains that it has done so on the facts.

122. The principle was discussed by Cockerill J in *Banco San Juan* in the context of OFAC licences. She summarised it as follows at [90]:

> "[The Claimant] directed my attention to a number of authorities where licences have been in issue. On their face these appear to show that (absent contrary agreement) where a supervening prohibition may be lawfully circumvented by obtaining a licence, a party is not excused from performance of a contractual obligation affected by that prohibition unless and until they make reasonable efforts to apply for and are refused a licence, or prove that, even had such efforts been made, a licence would actually have been refused. It does not suffice for the non-performing party to show that it reasonably believed a licence would have been refused had such efforts been made: see *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223 at 253 per Kerr J; and G.H. Treitel, *Frustration and Force Majeure* (3rd ed.) at paragraphs 8-051 and 8-054."

123. Cockerill J went on at [96]-[97] to consider *J W Taylor & Co v Landauer & Co* [1940] 4 All ER 335, where sellers were not excused from a contract to sell butter beans due to an intervening prohibition in respect of which a licence could have been obtained. She concluded that the fact that this and other cases related to the sale of goods was not a distinguishing factor and rationalised the principle by reference to the requirement to equip to perform. Cockerill J then considered *Libyan Investment Authority v Maud* [2016] EWCA Civ 788, where Mr Maud had sought to rely on sanctions to avoid payment under a guarantee and the issue arose as to who should have applied for a licence. In that case Article 12(2) of the relevant regulations placed the burden on the LIA but Moore-Bick LJ observed at [25] (obiter) that the question was otherwise to be determined by reference to the terms of the contract:

> "If a person has promised to perform a certain obligation, whether it be to pay money or deliver goods, and fails to do so, the burden is on him to show that he was prevented from doing so by some cause for which he is not responsible. In this case, therefore, but for article 12(2), it would have been for Mr. Maud to show that the imposition of sanctions prevented him from performing his obligation and in order to do so he would have had to show that he could not have obtained the necessary licence from the Treasury. That was not a burden that he ever attempted to discharge."

124. Applying this to the facts of this case, UniCredit was therefore right to accept that the burden lay on it.

125. Celestial and Constitution maintain that UniCredit did not make reasonable efforts to obtain an OFAC licence because it chose to frame the application – which they also maintain was a belated one – as one for receipt of funds from Sberbank rather than what it should have focused on, being the performance actually required under the LCs. By the time the application was made on 29 April 2022 Sberbank had become a designated entity, meaning that it had been added to OFAC's Specially Designated Nationals and Blocked Persons list (the "SDN" list).

126. I would not readily be inclined to accept the Claimants' submission that the application to OFAC was unduly delayed. Bearing in mind the material developments in sanctions regimes both in Europe and the United States, the need to address their impact on commercial transactions and deal with such matters as the proceedings brought by the Claimants, as well as applying for licences from European authorities, the delay in applying to OFAC does not strike me as unreasonable. Given the lack of any substantive response I would also observe that it appears to be immaterial.

127. However, the Claimants' complaints about the terms on which the application were made have real substance. The bundles included the version of the application made on behalf of UniCredit by Sherman & Sterling in respect of four of the LCs held by Celestial. It is headed "Application for Specific License to Authorize Processing of Sberbank USD Payments (AerCap – AirBridge Lease Winddown)". The introductory paragraph reads:

> "On behalf of our client, UniCredit Bank AG, London Branch (herein "*UniCredit*"), we respectfully request a specific license authorizing Wells Fargo Bank, N.A., and any other U.S. persons as required, to engage in all activities necessary and ordinarily incident to process four US-Dollar payments from PJSC Sberbank of Russia ("*Sberbank*") to UniCredit via its U.S. correspondent account. The payments are owed to UniCredit as confirming bank on four letters of credit issued by Sberbank in 2017 for the benefit of an Irish aircraft leasing company, which has recently terminated its underlying lease agreement with a Russian lessee. UniCredit seeks authorization to receive payments so that, pending any requisite U.K. and/or EU regulatory approvals, it can forward the funds to the non-sanctioned beneficiary pursuant to the LCs."

128. The letter went on to provide further details. I accept that the licence requested extended both to 1) transfers from Sberbank and 2) transfers to AerCap from UniCredit and that there are other statements in the letter which distinguish the two. In particular, in addition to a comment in the description of the background stating that UniCredit "is obliged to pay AerCap the LC amounts upon demand and is entitled to reimbursement, with fees, from Sberbank", there are statements under the heading "Supporting Rationale" which refer to UniCredit's obligation to pay regardless of whether Sberbank did and to the harm to UniCredit, and benefit to Sberbank, if UniCredit could not be reimbursed by Sberbank.

129. However, the overall focus is very much on processing receipts from Sberbank. In addition to that being apparent from the heading and introductory paragraph, the preface to the formal request refers to U.S. financial institutions being prohibited from "processing future payments by Sberbank, whether directly or indirectly, which are owed to UniCredit on the LCs", and the final substantive paragraph of the application states:

> "For these reasons, we respectfully suggest that OFAC's policy objectives and the broader equities would be served by approving the requested license and permitting UniCredit to receive and forward to AerCap the payments owed by Sberbank."

130. The letter goes much further than explaining the transaction and Sberbank's involvement in it, as would undoubtedly be required to provide OFAC with a full picture. It frames the application in a way that links payment under the LCs to payment by Sberbank. While that is commercially understandable, I do not consider that it amounts to reasonable efforts to obtain a licence to pay Celestial and Constitution the amounts due from UniCredit under the LCs.

Conclusion

131. In conclusion I would allow the appeal in part. I would reverse the judge's conclusion that reg. 28(3) of the UK Regulations did not prevent payment under the LCs. To the extent that US sanctions remain relevant in the light of that decision, I would decide that they do not assist UniCredit for a different reason to that given by the judge, namely that UniCredit has not established that it made reasonable efforts to obtain a licence from OFAC.

Lord Justice Snowden:

132. I agree.

Lord Justice Males:

133. I also agree.