



Neutral Citation Number: [2018] EWCA Civ 14

Case No: A3/2017/0039

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Honourable Mrs Justice Carr
[2016] EWHC 2892 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2018

Before :

LADY JUSTICE GLOSTER,
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE PATTEN
and
LORD BRIGGS OF WESTBOURNE

Between :

FIRST ABU DHABI BANK PJSC
(formerly NATIONAL BANK OF ABU DHABI PJSC)
- and -
BP OIL INTERNATIONAL LIMITED

Claimant/
Respondent

Defendant/
Appellant

Mr Rhodri Davies QC and Mr Nicholas Sloboda (instructed by **Slaughter and May**) for the
Claimant/Respondent
Mr Bankim Thanki QC and Mr Christopher Lewis QC (instructed by **Addleshaw Goddard**
LLP) for the **Defendant/Appellant**

Hearing dates : 27 July 2017

Approved Judgment

Lady Justice Gloster:

Introduction

1. This case raises short points of construction in relation to a receivables financing contract between the appellant, BP Oil International Limited (“BPOI”), and the respondent, First Abu Dhabi Bank PJSC, formerly National Bank of Abu Dhabi PJSC (“NBAD”).
2. Pursuant to an agreement in the form of a Purchase Letter dated 3 September 2014 (“the Purchase Letter”), as between BPOI and NBAD, NBAD purchased from BPOI (using the defined terms in the Purchase Letter) the Discount Percent (95%) of the Receivable. The Receivable represented an obligation owed by Société Anonyme Marocaine de L’Industrie de Raffinage (“SAMIR”) to pay BPOI in respect of a delivery of crude oil. The Purchase Letter represented a form of non-recourse receivables financing under which BPOI transferred almost all the credit risk of SAMIR failing to make payment to NBAD and received a cash advance in respect of the Receivable well in advance of the date that the underlying invoice was due for payment by SAMIR.
3. On 4 March 2016 NBAD issued proceedings in the Commercial Court for compensation for breach of warranty and representation. NBAD alleged that a clause in the underlying contract between BPOI and SAMIR (“the SAMIR Agreement”) which limits both parties’ ability to assign their respective rights and obligations thereunder had the effect that a representation and warranty made by BPOI in the Purchase Letter was false; and that NBAD was therefore entitled to the sum of US\$68,881,854.62 (plus interest) from BPOI.
4. Following a one day trial within the pilot Shorter Trials Scheme, which took place on 7 November 2016, Carr J (“the judge”) delivered a judgment dated 18 November 2016¹, in which she determined the issues of construction in NBAD’s favour and made an order that BPOI was to pay NBAD the sum of US\$68,881,854.62 together with interest and costs.
5. The appeal was heard by this court on 27 July 2017 and, on the same date, we allowed the appeal in BPOI’s favour, with reasons to be given in a subsequent judgment. This judgment sets out those reasons.
6. On the appeal, as below, Mr Bankim Thanki QC and Mr Christopher Lewis QC appeared on behalf of BPOI and Mr Rhodri Davies QC and Mr Nicholas Sloboda appeared on behalf of NBAD.

Background facts

7. On 9 December 2013 BPOI and SAMIR entered into the SAMIR Agreement for the Sale and Purchase of Crude Oil which was expressly subject to English law. Under the SAMIR Agreement the parties agreed to enter into a series of sales and purchases in accordance with the terms and conditions set out therein. Payment was due some two months after delivery. By clause 14, BPOI’s General Terms and Conditions for

¹ Available on BAILII at [2016] EWHC 2892 (Comm)

Sales and Purchases of Crude Oil (2007 edition) ("BPOI's General Terms and Conditions") were incorporated. Section 34 of BPOI's General Terms and Conditions ("section 34") provided:

"Section 34 – Limitation on Assignment

Neither of the parties to the Agreement shall without the previous consent in writing of the other party (which shall not be unreasonably withheld or delayed) assign the Agreement or any rights or obligations hereunder. In the event of an assignment in accordance with the terms of this Section, the assignor shall nevertheless remain responsible for the proper performance of the Agreement. Any assignment not made in accordance with the terms of this Section shall be void."

8. One individual transaction which took place under the umbrella of the SAMIR Agreement was the sale by BPOI to SAMIR of 100,000 metric tonnes of Russian Export Blend crude oil (plus or minus 10% Seller's operational tolerance) at a price of Brent plus US\$0.45 per US barrel pursuant to an addendum to the SAMIR Agreement which was treated as dated 16 January 2014 ("the Contract"). The Contract expressly provided that it was:

"Further to the contract dated 9 December 2013 [the SAMIR Agreement], we wish to add the following mutually agreed commitment"

and that "All other terms and conditions [i.e. of the SAMIR Agreement] to remain unchanged".

9. The invoice was to be based on the bill of lading quantity. The bill of lading was dated 5 August 2014 and showed a quantity of 99,937.054 metric tonnes (net in vac), equating to 722,205 US barrels, as reflected in BPOI's invoice dated 29 August 2014, showing an invoice value of US\$72,507,215.39.
10. On 12 August 2014 BPOI and NBAD entered into a Payment Guarantee Agreement (no. TF141015) ("the Guarantee") in relation to the Contract. By clause 2 of the Guarantee, which was again expressly subject to English law, NBAD agreed to guarantee payment by SAMIR to BPOI under the Contract in an amount of 95% of the Estimated Cargo Value² (which was US\$75 million) or the full final invoice value, subject to a maximum liability of US\$75 million. In exchange for that guarantee, BPOI paid a commission fee of 4.5% p.a., payable for the number of days between the Discharge Date and the earliest of a) the date payment in full was received by BPOI from SAMIR; b) the date a Demand was made under the Guarantee; and c) the Expiry Date (which was 29th January 2015, unless extended).
11. Clause 3.1 of the Guarantee provided that NBAD's obligations were subject to the provision by BPOI inter alia of "a certified copy of the original Contract".
12. BPOI also gave certain undertakings under the Guarantee. These included:

² All capitalised terms are defined or used terms in the Guarantee.

"6.1 Following the receipt by BPOI from [NBAD] of any payment under this guarantee, and without limiting [NBAD]'s rights as guarantor at law, BPOI undertakes:

(a) to promptly pay to [NBAD] a proportion of any amounts subsequently recovered from [SAMIR] under the Contract which proportion shall be equal to the proportion of the Payment as against the Shortfall;

(b) to promptly pay to [NBAD], a proportion of any interest for late payment recovered from [SAMIR] which proportion shall be equal to the proportion of the Payment as against the Shortfall;

(c) where possible under any applicable laws and the Contract, to promptly assign (at its own expense) to [NBAD], following a request from [NBAD], all [BPOI]'s rights under the Contract to the extent of any payment made by [NBAD] to [BPOI] under Clause 5 and not subsequently paid under Clause 6.1(a) or Clause 6.1(b) and to do all things reasonably necessary to achieve such assignment; and

(d) if assignment under Clause 6.1(c) is not possible or effective for any reason, that [NBAD] shall be subrogated to [BPOI]'s rights in respect of the Delivery under the Contract and [BPOI]'s rights in respect to the payment undertaking up to the amount paid by [NBAD] and to take legal proceedings against [SAMIR] under the Contract/payment undertaking to the extent of any such payment made by [NBAD] under Clause 3 [sic] and not subsequently paid under Clause 6.1(a) or Clause 6.1(b), upon [NBAD] agreeing to meet its proportionate share of [BPOI]'s reasonable instructions received by [BPOI] from [NBAD].³

.....

6.3 BPOI hereby undertakes not to pledge, assign or transfer to any other person any of its rights in respect of the Delivery. BPOI confirms as at the Effective Date that its rights in relation to the Delivery are not subject to any prior lien, charge or encumbrance."

13. Annexed to the Guarantee was the Form of Demand which BPOI was to use in the event of a claim under clause 5.2 of the Guarantee. This again provided for provision to NBAD of "the contractual documents evidencing the Contract" and made provision for a possible assignment (in accordance with clause 6.1(c)) of the Guarantee, as follows:

³ All bolded text is my emphasis.

"In consideration of you [NBAD] agreeing to pay the amount demanded to us [BPOI] in accordance with the Agreement, and to the extent legally possible, including for the avoidance of doubt any contractual restriction on assignment in the Contract, we hereby assign to you up to an amount equal to [NBAD's] Share of our rights and interest in relation to the Delivery under:

- (i) the Contract;
- (ii) our invoice to [SAMIR] in respect of the Delivery under the Contract;
- (iii) the bill of lading or the inspector's report or the vessel nomination or a letter of indemnity to [SAMIR] under [the] Contract; and
- (iv) if a Verdict has been issued and a copy is available, the Verdict in our favour."

The pro forma demand also provided as follows:

"In connection with the assignment set out above, we also attach a duly executed notice of assignment to the Buyer."

14. On 3 September 2014 BPOI and NBAD entered into the Purchase Letter. As at that date the Guarantee was still in force and although the Purchase Letter expressly stated that it cancelled and replaced the Guarantee, it was not expressed to do so until such date as NBAD had made its payment of the Discounted Value⁴. Thus the two instruments were both in force on 3 September 2014 until payment was made by NBAD. The Purchase Letter was on BPOI's headed writing paper and expressly stated to be: "In full cancellation and replacement of the [Guarantee]". So far as material it provided as follows:

"We, [BPOI], hereby request [NBAD] (the 'Bank') to purchase from [BPOI] on a non-recourse basis, a proportion of a receivable evidenced by [BPOI]'s commercial invoice (the 'Invoice') addressed to [SAMIR] (the 'Buyer'), in a form satisfactory to the Bank. The Invoice relates to a sale and delivery by [BPOI] of Goods as defined below (the 'Delivery') under a contract dated 16 January 2014 and entered into between the Buyer and [BPOI] (the 'contract'), and represents a legally valid and binding obligation on the Buyer to pay USD72,507,215.39 (the 'Invoice Value') to [BPOI] on the Repayment Date as defined below (the 'Receivable')."

Subject to the terms of this Purchase Letter (including, without limitation, the conditions set out in Clause 1 below), **the Bank**

⁴ All capitalised terms are as defined in the Purchase Letter.

hereby agrees to purchase the Receivable up to an amount of and thereafter to pay to [BPOI] the Discounted Value as calculated in accordance with Clause 1 below. The Discount Percent of the Invoice shall not exceed 95% of the Invoice Value. The obligations of the Bank under [the Guarantee] shall be terminated and reduced to zero on the Discount Date following the Bank's payment of the Discounted Value (as defined below).

.....

Discount Percent 95%

Discount Date 4 September 2014

Invoice Due Date 15 October 2014

Assumed Due Date 13 January 2015

Assumed Repayment Date 15 January 2015

.....

We further agree with you as follows:

1. [NBAD] hereby agrees that provided that [NBAD] has received (in satisfactory form to it) a copy of this Purchase Letter duly signed by [BPOI]... a certified true copy of the Invoice and a certified true copy of the Contract, in each case no later than one business day prior to the Discount Date...it will purchase the Discount Percent of the Receivable..., on a without recourse basis, by paying to [BPOI] the Discounted Value ...on the Discount Date [The clause then set out the arithmetical formula for calculation of the Discounted Value.].....
2.
3. [BPOI] shall, within two business days, pay to [NBAD] all payments received from the Buyer in connection with the Invoice up to the maximum amount of the Discount Percent of the Invoice Value. In case of partial payment from the Buyer under the Invoice, [BPOI] shall pass onto [NBAD] within two Business Days of receipt the Discount Percent of such partial payment. In the event that payment from the Buyer is not received on the Repayment Date, [BPOI] shall, for a maximum of 5 business days, reimburse to [NBAD] on demand [NBAD]'s cost of funds on the unpaid amount for the period between the Repayment Date and the date of receipt of payment at [NBAD]'s counter of the full amount of the Discount Percent of the Invoice Value. [BPOI] furthermore undertakes to make all reasonable efforts to

support the settlement of [NBAD]'s debt by the Buyer and to pass to [NBAD] the Discount Percent of any amounts recovered by [BPOI], net of reasonably incurred costs, and in particular agrees:

(i) to pass onto [NBAD] within two Business Days of receipt the Discount Percent of any amounts subsequently recovered by it from the Buyer, which sums shall be received and held by [BPOI] as trustee on behalf of [NBAD];

(ii) to pass onto [NBAD] within two Business Days of receipt the Discount Percent of any interest on any late payment recovered by it from the Buyer, which sums shall be received and held by [BPOI] as trustee on behalf of [NBAD];

(iii) where an assignment under sub-clause 3(iv) below is not able to take place, that [NBAD] will be subrogated as at the date of receipt of payment from [NBAD], if legally possible, to [BPOI]'s rights, title, interest and claims against the Buyer under the Invoice to the extent of any payment made by [NBAD] and not paid under (i) and (ii) above;

(iv) that [BPOI] will assign as at the date of receipt of payment from [NBAD] under paragraph 2 above, if legally possible under applicable laws and the Contract, to [NBAD], its rights, title, interest and claims against the Buyer in respect of the Discount Percent of the Receivable and the rights and benefits of the relevant transaction arising from the Contract to the extent of any payment made by [NBAD] and not paid under (i) and (ii) above, or, where, if not legally possible or effective for any reason, to take legal proceedings against the Buyer under the Contract to the extent of any payment made by [NBAD] and not paid under (i) and (ii) above. The Discount Percent of any reasonable costs, or out of pocket expenses incurred by [BPOI] in these proceedings shall at [BPOI]'s request be promptly reimbursed by [NBAD] and the Discount Percent of any amounts recovered by [BPOI] shall be passed promptly to [NBAD] (except in so far as the same are damages accruing to [BPOI]) in addition to the amount due plus interest and in addition to any recovery of costs incurred in connection with the proceedings;

(v) that by selling the Receivable hereunder it has assigned the Discount Percent of the Receivable in

equity irrevocably to [NBAD] subject to the terms hereof (such assignment shall be deemed to take effect immediately following payment by [NBAD] of the Discounted Value), and that [NBAD] has beneficial ownership of any such amounts paid by the Buyer and of the debts in respect of which such amounts are paid, and accordingly [NBAD] shall have a right of recourse to [BPOI] to the extent of the Discount Percent of any amount received (whether in respect of principal, interest, fees or otherwise) by [BPOI] from the Buyer relating to the Receivable sold and purchased hereunder and not paid by it to [NBAD];

(vi) to hold on trust for [NBAD] the proceeds of the Discount Percent of the Receivable; and

(vii) if any assignment in connection with this Purchase Letter is invalid or unenforceable for any reason, [NBAD] shall instead be entitled to a funded sub-participation in the rights to receive payment in respect of the Discount Percent of the Invoice on terms equivalent to those of this Purchase Letter.

4. If any default or failure in the payment of all or part of the Discount Percent of the Invoice Value occurs as a result of any justified deduction or withholding by the Buyer from such discounted Receivable by reason of a valid claim against [BPOI], [BPOI] shall promptly pay to [NBAD] an amount equal to the Discount Percentage of the amount deducted [or] against an assignment by [NBAD] to [BPOI] of all the right, title and interest of [NBAD] in a corresponding amount of the Discount Percent of the Invoice Value.
5. BPOI represents and warrants to [NBAD] that, as at the date hereof, and to the best of BPOI's knowledge there are no commercial or other kind of dispute, judicial, arbitral or administrative proceedings existing or threatened between BPOI and [SAMIR]. **BPOI further represents and warrants to [NBAD] that at the date of [the Purchase Letter] [3rd September 2014] and at the Discount Date [4 September 2014]:**
 - (a) BPOI has not previously sold, assigned, transferred or granted any lien or security interest over its interest or rights in relation to the portion of the Receivable purchased under this Agreement to any other person or entity;

(b) BPOI is not prohibited by any security, loan or other agreement, to which it is a party, from disposing of the Receivable evidenced by the Invoice as contemplated herein and such sale does not conflict with any agreement binding on [BPOI];

.....

(e) except as otherwise required hereunder, BPOI has not created and shall not create or purport to create or permit to subsist any encumbrance over or in respect of the discounted Receivable or any sums due thereunder;

.....

7. It is hereby agreed that [NBAD] shall have no recourse to BPOI in connection with the purchase of the Discount Percent of the Receivable save in the following situations, **in which BPOI will reimburse [NBAD] in an amount up to the unpaid amount of the Discount Percent of the Invoice Value together with interests thereon for the period from the Repayment Date to the date of repurchase by BPOI at a rate (based on a year of 360 days for the actual number of days elapsed) equal to [NBAD]'s cost of funds plus a margin of 4.6%:**

(a) BPOI breaches the representations made in Clause 5 of this Purchase Letter or any material representation or warranty under the Contract;

(b) BPOI breaches its undertakings under Clause 6 of this Purchase Letter;

(c) BPOI fails to perform any of its material obligations under the Contract and such breach by BPOI is not legally justified and the Buyer's failure to pay is legally justified, or

In any event where non-payment of the Receivable occurs and [NBAD] has no recourse to BPOI under the terms of this Purchase Letter, BPOI will use all reasonable endeavours to help [NBAD] to recover its claim against the Buyer."

It was common ground that this contractual right to reimbursement in the event of a breach of clause 5 of the Purchase Letter was Draconian in the sense that the quantum of the reimbursement was not determined by reference to the loss which NBAD had actually suffered as a result of the breach of the relevant warranty, but enabled it to reclaim the entirety of the sums which it had paid in respect of the Discount Percent and to retain the premium which it had received.

15. In addition, clause 17 provided for the Purchase Letter to be governed by English Law and for the English Courts to have exclusive jurisdiction.
16. It was common ground that, as at 3 and 4 September 2014, BPOI had not requested or obtained SAMIR's consent to assignment pursuant to Section 34 of the BPOI General Terms and Conditions. On the Discount Date of 4 September 2014, NBAD made payment to BPOI of US\$67,662,173.54 pursuant to the terms of the Purchase Letter and on that date the Guarantee ceased to be of effect. Thus, NBAD received a premium of US\$1,219,681.08, being the difference between the amount paid and the Discount Percent (95%) of the Invoice Value (US\$72,507,215.39), namely US\$68,881,854.62: see the judgment at [17]. (The result of the judgment is that NBAD has retained this premium and been repaid the full amount advanced under the Purchase Letter plus contractual interest.)
17. There followed six agreed extensions (and consequential amendments, including to the rate in clause 7) of the Purchase Letter. One of the effects of those extensions was to extend the Assumed Repayment Date, leading to the payment by BPOI to NBAD of further sums in respect of the Rate and Margin (as defined in the Purchase Letter), totalling US\$3,037,404.53 (so that the total premium retained by NBAD is c.US\$4.25m).
18. Prior to the judgment NBAD had not received any payment in respect of the Receivable (other than the above premiums). In late November 2015 SAMIR took steps to file for insolvency protection in Morocco; and NBAD then contacted BPOI to discuss assignment under the Purchase Letter. BPOI replied by its e-mail dated 2 December 2015, which recorded that BPOI needed to obtain SAMIR's consent to the assignment and that, once it had been confirmed that that was the best option (noting that there were still ongoing discussions between BPOI and NBAD as to the best course of action), BPOI would seek SAMIR's consent. However, NBAD did not request that BPOI obtain SAMIR's consent to the assignment (and has still not done so), but instead issued these proceedings in the Commercial Court.

The judgment

19. The judge held that, by reason of Section 34 of BPOI's General Terms and Conditions in the Contract, the representation and warranty made by BPOI at clause 5(b) of the Purchase Letter was false as at 3 and 4 September 2014; see [54] and [56] of the judgment. She reached that finding because she held that the Purchase Letter provided (in clause 3(v)) for equitable assignment by BPOI of its chose in action against SAMIR, and that, because such assignment was not possible without SAMIR's consent, BPOI was "prohibited" by an "other agreement" "from disposing of the Receivable" "as contemplated in the Purchase Letter"; and that such sale "conflicted" with the Contract as "any agreement binding on BPOI".

The parties' submissions

20. BPOI's case, presented by Mr Thanki, in broad summary was that there had been no breach of the representation and warranty in clause 5(b) of the Purchase Letter that BPOI was not prohibited by any security, loan or other agreement, to which it was a party, from *disposing of the Receivable* evidenced by the Invoice as contemplated in the Purchase Letter. That was because it was necessary to determine what (in relation

to the *disposal* of the Receivable) was contemplated by the Purchase Letter. His submission was that disposal should be construed as including all methods of transferring the benefit of the Receivable that were contemplated, so that, as long as the economic benefit of the Receivable could be transferred in one of the ways contemplated, that was sufficient. It was clause 3, which set out in detail BPOI's obligations in respect of the disposal of the Receivable, which determined the construction of clause 5(b) - and not the other way around, as argued by NBAD. The parties clearly contemplated that assignment of the debt, both legal and equitable, might not be possible and, contrary to the judge's view, clause 3(iv), which recognised that assignment might not be possible, was not limited to legal assignments.

21. Mr Davies, on behalf of NBAD, supported the judgment, and the judge's construction of the Purchase Letter, basically for the reasons given by the judge.

Issues

22. In my judgment, the court has to decide the following issues:

- i) What, on its true construction, was BPOI contractually prohibited from doing under section 34 of BPOI's General Terms and Conditions?
- ii) What, as a matter of law, was the effect of such a restriction on BPOI's ability *to dispose of* the Receivable?
- iii) In the circumstances and as a matter of construction of the Purchase Letter, as at the relevant date (namely as at the date of the Purchase Letter and of the Discount Date) was BPOI in breach of the representation and warranty contained in clause 5 (b), namely:

“BPOI is not prohibited by any security, loan or other agreement, to which it is a party, from disposing of the Receivable evidenced by the Invoice as contemplated herein and such sale does not conflict with any agreement binding on [BPOI]”?

Analysis and determination

Issue I: What, on its true construction, was BPOI contractually prohibited from doing under section 34 of BPOI's General Terms and Conditions?

23. It will be recalled that the relevant prohibition in section 34 is as follows:

Neither of the parties to the Agreement shall without the previous consent in writing of the other party (which shall not be unreasonably withheld or delayed) assign the Agreement or any rights or obligations hereunder. In the event of an assignment in accordance with the terms of this Section, the assignor shall nevertheless remain responsible for the proper performance of the Agreement. Any assignment not made in accordance with the terms of this Section shall be void."

24. It appears to be settled law, at least at the level of this Court, that such a restriction, *as a matter of construction*, imposed a contractual obligation upon BPOI, in favour of SAMIR, not to assign (whether at law or in equity) the former's existing or future rights under the SAMIR Agreement, whether to performance or to the fruits of the contract, even after the debtor, SAMIR, had performed its obligations thereunder, without prior consent. As a matter of language, BPOI, as creditor, was therefore contractually prohibited, *vis-a-vis SAMIR*, from effecting a legal or an equitable assignment of the Discount Percent of the Receivable without prior consent. So much was effectively common ground between the parties.⁵
25. However, such wording did not impose any *contractual* restriction on BPOI, *vis-a-vis SAMIR*, from agreeing with NBAD that it would:
- i) within two business days, pay to NBAD all payments received from SAMIR in connection with the Invoice up to the maximum amount of the Discount Percent of the Invoice Value etc. (as per paragraph 3 of the Purchase Letter);
 - ii) pass onto NBAD within two Business Days of receipt the Discount Percent of any amounts subsequently recovered by it from the Buyer, and to receive and hold such sums as trustee on behalf of NBAD (as per paragraph 3(i) of the Purchase Letter);
 - iii) pass onto NBAD within two Business Days of receipt the Discount Percent of any interest on any late payment recovered by it from SAMIR, and to receive and hold such sums as trustee on behalf of NBAD (as per paragraph 3(ii) of the Purchase Letter);
 - iv) where an assignment was not able to take place, to subrogate NBAD to BPOI's rights, title, interest and claims against SAMIR under the Invoice to the extent of any payment made by NBAD and not paid under any previous head (as per paragraph 3(iii) of the Purchase Letter);
 - v) hold the proceeds of the Discount Percent of the Receivable on trust for NBAD (as per paragraph 3(vi) of the Purchase Letter);
 - vi) grant NBAD a funded sub-participation in respect of the rights to receive payment of the Discount Percent of the Receivable (as per paragraph 3(vii) of the Purchase Letter).
26. That was because, as a matter of construction, the prohibition on assignment in section 34 could not be construed as:
- i) preventing the disposal to NBAD of any amounts actually received by BPOI from SAMIR, since they would not be "rights under" the SAMIR Agreement;

⁵ That proposition was based on the Court of Appeal's decisions in: *R v Chester and North Wales Legal Aid Area Office (No.12) ex parte Floods of Queensferry Ltd* [1998] 1 WLR 1496, in particular, per Millett LJ at 1501G; and *Barbados Trust v. Bank of Zambia* [2007] 1 Lloyd's Rep 495, [34], per Waller LJ). However, BPOI reserved and continues to reserve its position as to the correctness of this decision should this case proceed further than the Court of Appeal.

- ii) preventing the creation of any trust over the proceeds of the Receivable, or indeed over the Receivable itself (i.e. the actual debt owed by SAMIR, although in this case no trust was declared over the actual debt); see e.g. *Barbados Trust Company Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 2 All ER (Comm) 445 at [47], [111-117] and cases there cited; *Re Turcan* (1888) 40 Ch D 5; and per Professor Sir Roy Goode, *Contractual prohibitions against assignment* [2009] LMCLQ 300, at 309⁶;
- iii) preventing the creation of any rights of subrogation or sub- participation. It was common ground in this case that a non-assignment clause would not invalidate any rights of subrogation; see *Barbados Trust Company Ltd* at [117]; and that any claim brought pursuant to the subrogation right would have to be brought by and in the name of BPOI; see *Esso Petroleum Co Ltd v Hall Russell & Co Ltd, The Esso Bernicia* [1989] AC 643, 663. It was likewise common ground that a funded sub-participation would not constitute any breach of an assignment provision since it would result in a (non-recourse) debtor-creditor relationship as between BPOI and NBAD without giving the participant (NBAD) any interest in the underlying debt owed by SAMIR; see *Lloyds TSB Bank plc v Clarke* [2002] UKPC 27, [2003] 1 LRC 590 at [15]-[17]).

Issue II: What, as a matter of law, was the effect of such a restriction on BPOI's ability to dispose of the Receivable?

27. Mr Thanki did not seek to contend before us that, *as a matter of law*, the prohibition against equitable assignment as contained in section 34, could not have the effect - so far as the contractual relations between BPOI and NBAD were concerned - to prevent there having been a valid equitable assignment of, or at least a valid contract to assign (treated in equity as an equitable assignment), the Discount Percent of the Receivable to NBAD. Such an argument would be based on the analysis that, while section 34 could operate to prevent any demand, action or claim by the assignee, NBAD, directly against the debtor, SAMIR, it would constitute a restraint on BPOI's powers of alienation of its own property, and therefore be contrary to public policy, if its contract with SAMIR purported to declare such an assignment void and prevent it from assigning in equity a percentage of BPOI's contract rights in the Receivable. It would derive support from the illuminating analysis in Professor Sir Roy Goode's article, *Contractual prohibitions against assignment* supra, in particular at page 305, where he said:

“

(ii) Ownership of the contract right prior to performance

If the position as to the fruits of performance is clear, there has been more doubt about ownership of the contract right itself when performance has not yet been given. The first point to make is that an assignment of a contract right in breach of a no-assignment clause takes effect only in equity. That is because a statutory (or legal) assignment requires notice of assignment to

⁶ I acknowledge my gratitude to Professor Sir Roy Goode for the clear exposition of the relevant law in this article.

be given to the debtor²⁰ and this is a requirement that cannot be satisfied where, because of the prohibition against assignment, no effective notice can be given.

The second point, though one which became apparent only in the light of more recent case law,²¹ is that the absence of legitimate grounds for the debtor to seek to negate a transfer of ownership of the contract right from assignor to assignee applies as much before performance of the contract as it does to the fruits of performance. The debtor is entitled to say that he will not give performance to an assignee, but what legitimate interest can he have in saying that not even equitable ownership can be transferred, with the result that, where an assignor who has been paid for the contract right becomes insolvent, the intended assignee is merely an unsecured creditor? It has been objected that this allows the assignor to transfer title to the right to performance without transferring the actual right to performance, and that such a result is inadmissible as a matter of personal property law

“because, unlike tangibles where title and possession can be vested in different people, the nature of contractual rights as choses in action does not allow a transfer of title without a transfer of the actual right to performance”.²²

This is certainly true of legal title to a contract right but it is not true of equitable ownership, the essence of which is that beneficial entitlement is in one person and the right to enforce performance is in the other, the legal owner of the debt. In commercial life, non-notification financing, where no notice of assignment is given to the debtor, the assignor is left to collect in the assigned debts and the assignment takes effect only in equity, is commonplace. Examples are invoice discounting, block discounting and, on a more massive scale, securitisation. Also common are express trusts of debts and other contract rights. It has never been suggested that the division between beneficial ownership and the right to enforce renders these arrangements ineffective.

So, whether we are looking at the fruits of performance or at the right to performance, a no-assignment clause is valid only so far as it operates as a matter of contract, conditioning the duty to perform, not as a restraint on alienation. The distinction between the two was well brought out in the judgment of Untermyer J in *Sacks v. Neptune Meter Co.*²³

“But where the subject-matter is a chose in action neither public policy nor consistency requires that it be enforceable against the promisor except in accordance with the terms on which the promise is made. The limitation is not so much

imposed on the obligee's right of alienation as on the obligor's duty to perform.”

Once this principle is grasped, apparent conundrums such as whether a non-assignable contract is a species of property and whether the common law rule against restraints on alienation applies fall away. The reason why the common law rule barring restraints against alienation does not apply to a valid no-assignment clause is not that contract rights do not constitute property (they clearly do in the relations between assignor and assignee), but that the clause is almost invariably intended to operate only as a contractual provision absolving the debtor from any duty to the assignee, not as an invalidation of the transfer. It is established that such a clause, as opposed to one seeking to invalidate the transfer of the contract right from assignor to assignee as a matter of property, is not contrary to public policy.²⁴ **If, however, it purports to render a transfer void, whether of the fruits of performance or of beneficial ownership of the contract right itself, it invades the field of property law and is of no effect, both on the ground of repugnancy and on the ground of public policy.**²⁵

20. Law of Property Act 1925, s 136.

21. See *infra*, Part IIIB.

22. Tolhurst (*supra* fn 15), [6.83].

23. (1932) 144 Misc 70; 258 NYS 254, 262. See to similar effect *Portugese-American Bank of San Francisco v. Welles* (1916) 242 US 7, 11 (Holmes J). *Sacks v. Neptune Motor Co* was cited with approval in the decision of the Federal Court of Australia (Full Court) in *Devefi Pty Ltd v. Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225, 235. In the latter case the question was whether the assignor of a copyright licence had the right to make the assignment, and the principles discussed above did not have to be considered.

24. *Linden v. Lenesta* [1994] 1 AC 85, 106–107 (Lord Browne-Wilkinson). However, the effect of a no-assignment clause may be overridden by statute. See, eg, *Co-Operative Group (CWS) Ltd v. Stansell Ltd* [2006] 2 BCLC 599 (transfer by a registered industrial or provident society of its engagements to another registered society pursuant to the Industrial and Provident Societies Act 1965, s 51).

25. **There is a passage in Lord Browne-Wilkinson's speech in *Linden v. Lenesta* [1994] 1 AC 85, 108 which might be thought to suggest that the contract rights never passed to the assignee at all, even as between assignor and assignee; see the principle stated in similar terms in *New Zealand Payroll Software Systems v. Advanced Management Systems Ltd* [2003] 3 NZLR 1, [27–28] (Anderson J). **But it is clear that in both cases the issue was whether the assignment was effective against the debtor and it was held that, because of the prohibition of assignment, the debtor was under no obligation to recognize the title of the assignee. The distinction between effects as against the debtor and effects as against third parties was well brought out many years ago by B Allcock, "Restrictions on the Assignment of Contractual Rights" [1983] CLJ 328.****

”

28. Professor Goode's reference to "later law" is a reference to *Barbados Trust v. Bank of Zambia supra*. Speaking for myself, and if this Court were not constrained by

authority, I can see strong arguments in favour of Professor Goode's proposition⁷ that "it is necessary to keep in mind the central principle: bars to assignment or other dealing are relevant only to the relationship with the debtor, not to the relationship between the parties to the dealing in question"; and that, accordingly, it is not competent for the debtor to exclude by contract the proprietary effects of an assignment as between assignor and assignee, or the creation of a trust as between trustee and beneficiary; and that "all he can do is to insist that he will not recognise the title of the beneficiary or the ability of the beneficiary to bring proceedings in his own right."

29. However, although we were referred to this article, perhaps unsurprisingly, Mr Thanki did not seek to persuade this Court to allow the appeal based on what is logically the first building block of a full analysis (before one considers the construction of the purchase letter) – namely the argument that, as a matter of law, section 34 could not take effect so as to invalidate an equitable assignment, as between BPOI and NBAD. Such an argument would inevitably involve consideration of the House of Lords' decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, and the cases there cited, and, in particular, the passage in the speech of Lord Browne-Wilkinson at 108, where he concluded:

"Therefore the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights. I regard the law as being satisfactorily settled in that sense. If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition viz. to ensure that the original parties to the contract are not brought into direct contractual relations with third parties."

30. Whether or not the decision in *Linden Gardens Trust Ltd*, which is binding on us, can be characterised, or distinguished, in the way Professor Goode suggests, as a case where the issue was whether the assignment was effective against the debtor and whether it was under any obligation to recognize the title of the assignee, was not put in play before us. Accordingly, and with a considerable degree of intellectual disappointment, I move to consider the construction arguments on the assumption that any purported equitable assignment without SAMIR's prior consent was ineffective to amount to an equitable assignment of BPOI's contractual rights under the contract to the debt represented by the Discount Percent of the Receivable (although not the proceeds once received by BPOI). Again, so much was effectively common ground between the parties.⁸

Issue III: In the circumstances, and as a matter of construction of the Purchase Letter, was BPOI in breach of the representation and warranty contained in clause 5 (b)?

31. There was no dispute about the relevant principles of construction. The latest word on the subject is to be found in [8] – [15] of the Supreme Court's judgment in *Wood v*

⁷ See page 315 of his article.

⁸ Likewise, I understood BPOI to reserve its position as to the effect of a breach of a non-assignment provision, if this case proceeds further than the Court of Appeal.

Capita Insurance Services Ltd [2017] UKSC 24, [2017] 2 WLR 1095 at [8] - [15] and [27], where Lord Hodge confirmed the importance of considering the overall scheme of a contract when construing its individual clauses, as previously emphasised by the Supreme Court in *Re Sigma Finance Corp* [2009] UKSC 2, (per Lord Mance at [12] and Lord Collins at [35]). *Wood* demonstrates that construction is essentially a unitary exercise which should be neither uncompromisingly literal nor unswervingly contextualised. As has been frequently repeated, the task of construction is to see what reasonable parties in the position of the parties, with their background knowledge, would have understood the relevant wording to have meant.

32. Contrary to the conclusion reached by Carr J, I have no doubt that, on the proper construction of the Purchase Letter in its context, BPOI was not in breach of the representation and warranty contained in clause 5 (b) of the Purchase Letter. In summary, BPOI was not prohibited by any security, loan or other agreement, to which it was a party, from “*disposing of the Receivable evidenced by the Invoice as contemplated herein*” (i.e. in the manner contemplated in the Purchase Letter).
33. The steps in my analysis may be summarised as follows.
34. The first point to make is that, as at the date of the Purchase Letter – 3 September 2014 – the Guarantee was still in force. It remained in force for a day and was terminated only on the Discount Date – 4 September 2014 – following the Bank’s payment of the of the Discounted Value. As already mentioned, the Guarantee expressly contemplated, and made distinct provision for, the possibility that there might be a contractual prohibition against, or restriction on, the assignment of rights under the Contract; see clause 6.1 of the Guarantee and the annexed Form of Demand. Thus, the possibility that there was a contractual restriction against assignment, and that an alternative means of transferring the economic benefit of the Discount Percent of the Receivable might be necessary, was not only appreciated by both parties but was also part of the factual matrix against which the Purchase Letter fell to be construed. As Mr Thanki submitted, it would be surprising – in the absence of clear wording to that effect – if the parties intended that the position should be different under the terms of the Purchase Letter and that NBAD should be able to require repayment, whilst retaining its premium, in the event that an assignment (whether legal or equitable) were not possible. Of course, the point only goes so far, but to my mind it is a factor supporting BPOI’s construction.
35. The second point is that the primary means contemplated by the Purchase Letter of transferring the economic benefit of the Discount Percent of the Receivable is the immediate payment by BPOI to NBAD (within two Business days) of the Discount Percent of any amounts actually received by BPOI from SAMIR, whether on the due date or thereafter, together with the imposition of a trust over sums received in BPOI’s hands; see the main body of clause 3 and clauses 3(i) and (ii). It is only *to the extent that* sums have not been received or paid over that the assignment takes effect. Again, this is a factor which informs the construction of clause 5. Contrary to the judge’s view, as expressed at [44] to [45], I do not consider that, in the context of the Purchase Letter, sale or disposal is limited to assignment. As I have pointed out, the Purchase Letter clearly envisages other methods of disposing of the economic value of the Discount Percent of the Receivable.

36. Third, contrary to the judge’s view (see e.g. the judgment at [40]), I see absolutely no good, or logical, reason why, in context, and against the background of the Guarantee, the obligation on BPOI in clause 3(iv) to

“assign if legally possible under applicable laws and the Contract, to [NBAD], its rights, title, interest and claims against the Buyer in respect of the Discount Percent of the Receivable and the rights and benefits of the relevant transaction arising from the Contract to the extent of any payment made by [NBAD] and not paid under (i) and (ii) above”,

subject to the carve-out that

“where, if [an assignment was] not legally possible or effective for any reason, to take legal proceedings against the Buyer under the Contract to the extent of any payment made by [NBAD] and not paid under (i) and (ii) above”,

should be restricted or confined to a *legal assignment*.

37. In respect of this point, I largely agree with Mr Thanki’s submissions. The reasons which in my view support his analysis are as follows:

- i) First, there is no suggestion in the language used in clause 3(iv) (or indeed clause 3(iii)) that its express provisions are limited to legal assignment. No distinction is drawn between legal and equitable assignment. The judge appears to have disregarded the critical point that the Court should pay appropriate regard to the actual words used and should be slow to reject the natural meaning of a provision: see *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [17] and [20]. In my judgment, the express language, and natural meaning, of clause 3(iv) are apt to encompass both legal and equitable assignment.
- ii) Second, it was common ground that Section 34 of BPOI’s General Terms and Conditions as a matter of construction precluded both legal and equitable assignment⁹. That common ground was based on the Court of Appeal’s decision in *R v Chester and North Wales Legal Aid Area Office (No.12) ex parte Floods of Queensferry Ltd* [1998] 1 WLR 1496. There is no reason to construe clause 3(iv) (which also uses the simple term “assign”) any differently. In circumstances where (as was common ground) NBAD had had a contractual right to call for the Contract and the SAMIR Agreement under both the prior Guarantee and the Purchase Letter (albeit one that it did not exercise) and, accordingly, the factual matrix included the feature that both parties could (if they had chosen) have had actual knowledge of the terms of the non-assignment provision, there is, in my view, no reason to construe the two words in any different sense.
- iii) Third, as I have said there is no logical, or good commercial, reason to exclude equitable assignments from the ambit of clause 3 (iv) or indeed clause 3(iii).

⁹ Subject to the reservation of BPOI’s right to argue to the contrary if the case went further.

Indeed, whatever NBAD's lawyers drafting the Purchase Letter might have thought was the law governing the validity of any assignment of the Discount Percent of the Receivable¹⁰, or whatever they may have mistakenly believed about the possibility of a *legal assignment* of part of a debt (see the judgment at [42]), the well-established rule is that, as a matter of English law, part of a debt (such as the Discount Percent of the Receivable) could not have been the subject of a legal assignment, but could only have been the subject of an equitable assignment: see *Williams v Atlantic Assurance Company Ltd* [1933] 1 KB 81, 100. Therefore, if there was going to be any sort of assignment under the Purchase Letter of the Discount Percent of the Receivable – at least under English law – it would have had to have been by way of an equitable assignment. So it would have made no sense whatsoever to have restricted the scope of the carve out to legal assignments, which, as a matter of English law, could not have been contemplated as a possibility. I cannot therefore agree with the judge's view at [42] that, effectively, the correct legal position was irrelevant to the question of construction, on the basis that NBAD could not be assumed to know the law. As Mr Thanki pointed out, it is a recognised principle of construction that a contract should be construed on the basis that the law (at least clear law) is known: *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch), [2012] 2 All ER (Comm) 480 at [73]-[74]; *Barden v Commodities Research Unit International (Holdings) Ltd* [2013] EWHC 1633 (Ch) at [41]-[43]; and *Lewison*, *The Interpretation of Contracts* (6th ed.) at paragraph 4.06.

- iv) Fourth, that conclusion is supported by the terms and function of clause 3(iii) of the Purchase letter. Clause 3(iii) provides for subrogation as an alternative to assignment. I accept Mr Thanki's submission that it would be a very odd reading of the Purchase Letter for this alternative to apply *only* where legal assignment was not possible, but where equitable assignment was, or might be, possible – which is the effect of the judge's construction. I cannot agree with her conclusion at [41] that this point was merely “a type of nuance” to which she declined to give any weight. In order to construe the words “assign” and “assignment”, it is necessary to look at the totality of the scheme envisaged by the Purchase Letter as to how NBAD is to enjoy, and exercise, its rights in relation to the economic benefit of the Discount Percent of the Receivable. A right of subrogation is inconsistent with the notion of an equitable assignment. A right of subrogation, whether arising as a matter of law, or by contract, merely gives the holder an entitlement to stand in the shoes of the original creditor (here BPOI) and to sue or enforce the latter's claim in its name. In contrast, an equitable assignment gives a proprietary interest in the debt to the assignee. Nor can I agree with the judge's point at [41], that subrogation would still give some benefit in terms of control over proceedings in the original creditor's name. As the decision of this court in *Three Rivers District Council v Governor and Company of the Bank of England* [1996] QB 292, 307H-308B makes clear, who is the claimant is a mere procedural matter. In equity, the equitable assignee is the owner and controller of the chose and is entitled to sue on the chose for its recovery in his own name. As a matter of procedural practice, however, he is required to join the assignor as claimant if

¹⁰ In fact, the Contract and the SAMIR Agreement were subject to English law, although that would not necessarily have governed the validity of any assignment of the Receivable.

he consents, or as a defendant, if he does not. Thus, whatever perceived advantage may be afforded by a right of subrogation is nebulous in the extreme – and, as I have said, subrogation is in any event inconsistent with the notion that the equitable assignee is owner of the chose.

- v) Fifth, I should say for completeness that, although the point was raised below at the permission to appeal stage, Mr Davies did not seek seriously to argue before us that the words “if legally possible under applicable laws and the Contract” in clause 3(iv) supported the submission that only a legal assignment was within the scope of clause 3(iv). That was a wise approach. “Legally” in that context was clearly not referring to the concept of legal assignment.
- vi) Sixth, the judge’s view that the carve out in clause 3(iv) was limited to a situation where a legal assignment was not possible, appears in large part to be based upon the premise that clause 3(v) expressly contains an agreement on the part of BPOI that it had assigned the Discount Percent of the Receivable in equity: see the opening words of [40]. But, in my view, that argument is circular. First, it begs the question what is meant by the words “subject to the terms hereof”; and second it takes no account of the fact that when the draftsman wanted to refer to an equitable assignment (as opposed to any sort of assignment), he was perfectly able to do so by use of the words “assigned in equity” – which itself suggests that the use of the single word “assign” in clause 3(iv) can denote both an assignment at law and in equity.
38. For the above reasons, I accept BPOI’s submission that that the judge’s construction of clause 3(iv) was wrong and that the phrases “if legally possible under applicable laws and the Contract” and “where, if not legally possible or effective for any reason” have to be construed as contemplating that neither legal or equitable assignment might be possible. The judge said that her ultimate conclusion did not turn on the proper construction of clause 3(iv); see [43]. But I agree with Mr Thanki that it clearly strongly influenced that conclusion.
39. The fourth step in the analysis leading to my conclusion that BPOI was not in breach of the representation and warranty contained in clause 5(b) of the Purchase Letter Based is the effect of clause 3(v). The judge appears to have thought that BPOI’s agreement that it had assigned the Discount Percent of the Receivable in equity irrevocably to [NBAD] as evidenced by this clause was critical: see e.g. [41] and [49]. Whilst I do not accept Mr Thanki’s submission that this clause was merely addressing the fruits of the Receivable (because the clause also refers to “the debts”), I *do* accept his argument that this clause (which sets out the property law consequences of what BPOI has agreed to) is clearly *subject to* the carve outs or provisos contained in clauses 3(iii), (iv) and (vii). In other words, if an equitable assignment is “not able to take place”¹¹, not “legally possible under applicable laws and the Contract”¹² or “is invalid or unenforceable for any reason”¹³ other remedies are afforded to NBAD by the relevant clauses. That conclusion as to the construction of clause 3(v) is based on the words “subject to the terms hereof” contained in that clause. They are critical and the judge’s conclusion gives them no weight. She appears to have relied on the use of

¹¹ Clause 3(iii).

¹² Clause 3(iv).

¹³ Clause 3(vii).

the word “irrevocably”, but, in the context of assignment, that simply means an absolute assignment as opposed to one by way of security, and does not detract from the critical phrase “subject to the terms hereof”.

40. Thus, in my judgment, when one comes to construe the warranty in clause 5(b), one is doing so in the commercial context of the Purchase Letter as I have construed it above. In particular, therefore, one has to take into account the following:
- i) that the primary mechanism contemplated in the Purchase Letter for transferring or disposing of the economic benefit of the Discount Percent of the Receivable to NBAD is by BPOI paying over to NBAD the relevant amount out of the sums which it has received from SAMIR, within two business days of receipt, with a trust imposed on the receipts in the meantime;
 - ii) that only to the extent that sums are not received from SAMIR and/or not paid over to NBAD by BPOI, are BPOI’s rights, title, interest and claims against SAMIR in respect of the Discount Percent of the Receivable equitably assigned to NBAD;
 - iii) that the Purchase Letter expressly contemplates that either or both of a legal assignment or an equitable assignment of the Discount Percent of the Receivable might “not [be] able to take place”, not be “legally possible under applicable laws and the Contract” or may be “invalid or unenforceable for any reason”, in which case alternative remedies and rights are given to NBAD;
 - iv) that the agreement contained in clause 3(v) of the Purchase Letter that BPOI had “assigned the Discount Percent of the Receivable in equity irrevocably” to NBAD was “subject to the terms hereof” – i.e. that it might not be possible.
41. I turn then to consider the construction of clause 5(b) of the Purchase Letter against that background. In my judgment, there was no breach of the warranty in clause 5(b) and the judge was wrong so to conclude. First, I have much sympathy with BPOI’s argument that the words “or other agreement” should be construed as *not including* the Contract (i.e. either the umbrella SAMIR Agreement between SAMIR and BPOI or the Contract itself), either on the grounds of the application of the *noscitur a sociis* rule of construction or on the more obvious ground that the Contract was a defined term which could – and should – have been mentioned in this clause – in the way that it was in clause 3(iv), if it was meant to have been a relevant agreement. But second, and more importantly, and irrespective of the previous point, the phrase “from disposing of the Receivable evidenced by the Invoice as contemplated herein” in my judgment envisages a restriction preventing the disposal or sale of BPOI’s entitlement to receive the Invoice Value on the Repayment Date in the manner contemplated in the Purchase Letter. And once one appreciates that the Purchase Letter itself contemplates that equitable assignment may not be possible, and that the Letter provides for other means of transferring the economic benefit of the Discount Percent of the Receivable in that event, and in the event that SAMIR does not pay BPOI the Invoice Value on the Invoice Due Date, there is no way in which one can logically conclude that BPOI is prohibited from “disposing” of the Receivable evidenced by the Invoice “as contemplated herein”. In other words, there is no basis for construing the words “disposing” or “sale” as referring exclusively to equitable assignment, as the judge appears to have done. In short, the commercial reality is that the provisions of

Section 34 (even on the assumption that they are a prohibition in a relevant agreement) do not prohibit the disposal of the Receivable, or the Discount Percent of the Receivable, in the manner contemplated in the Purchase Letter and accordingly, there was no breach of the warranty contained in clause 5(b).

Disposition

42. For the above reasons, I allowed the appeal.

Lord Justice Patten:

43. I agree.

Lord Briggs of Westbourne:

44. I also agree.