Case No: CL-2014-000815

Neutral Citation Number: [2016] EWHC 311 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 February 2016

Before :

MR JUSTICE PHILLIPS

Between :

(1) AFRICAN EXPORT-IMPORT BANK
(2) DIAMOND BANK PLC
(3) SKYE BANK PLC

Claimants

and

(1) SHEBAH EXPLORATION & PRODUCTION COMPANY LIMITED
(2) ALLENNE LIMITED
(3) DR AMBROSIE BRYANT CHUKWUELOKA ORJIAKO

Defendants

(Transcript of the Handed Down Judgment of
WordWave International Limited
Trading as DTI
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Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Tom Smith QC (instructed by **Baker & McKenzie LLP**) for the **Claimants**
Richard Gillis QC (instructed by **Winston & Strawn LLP**) for the **Defendants**

Hearing dates: 22 July and 28 September 2015

Judgment
As Approved by the Court

Mr Justice Phillips :

1. The claimants apply for summary judgment against the defendants under CPR 24.2 for sums outstanding under a syndicated loan facility agreement ('the Facility Agreement') totalling over US$144.2m[1], together with interest on those sums. The main issue is whether it is arguable that, in entering the Facility Agreement, the parties were contracting on the claimants' written standard terms of business so as to engage section 3 of the Unfair Contract Terms Act 1977 ('UCTA').

2. The claimants are the Lenders under the Facility Agreement, the first defendant ('Shebah') is the Borrower and the second defendant ('Allenne') is the Guarantor. When first executed on 1 July 2011, the Facility Agreement provided for a US dollar term loan of US$100m. On 11 May 2012 it was amended and restated, at which point the loan was increased to US$150m, each of the claimants' commitment being US$50m.

3. Shebah is a Nigerian company engaged in oil exploration and production. The purpose of the loan was (i) to discharge certain of Shebah's existing borrowing and (ii) to provide Shebah with working capital, including funding for a work-over programme to stimulate production at oil wells in the Ukpokiti oil field, part of an offshore oil block in Nigeria in which Shebah is interested, being entitled to 80% of the revenue.

4. The third defendant ('Dr Orjiako'), the President of Shebah, is a personal guarantor of the liabilities of Shebah and Allenne pursuant to a Deed of Guarantee and Indemnity dated 1 July 2011 ('the Personal Guarantee'), amended and restated on 11 May 2012. Neither Dr Orjiako nor Allenne disputes that, if and to the extent that Shebah is liable to the claimants, they are correspondingly liable as guarantors of that liability.

5. The defendants do not deny that the claimants advanced US$150m to Shebah pursuant to the Facility Agreement, nor do they dispute that, apart from paying one instalment of US$6,111,111.11 in June 2012, Shebah has failed to meet any further repayment instalments, despite the claimants agreeing to the deferral of several instalments. The claimants have accelerated repayment of the entire debt under clause 24.7 of the Facility Agreement and have made demand on Allenne and Dr Orjiako[2].

6. Indeed, in previous proceedings commenced by the claimants in this court on 11 March 2014, the defendants agreed (albeit without admission of liability) that, in exchange for the claimants discontinuing the proceedings, Shebah would repay all sums outstanding under the Facility Agreement in two tranches: US$49,999,999.86 (with accrued interest under the terms of the Facility Agreement) by 30 April 2014 and the balance of the loans and interest by 1 July 2014[3] ('the Discontinuance Agreement'). In the event, Shebah failed to pay any part of the sum due on 30 April 2014. The claimants were therefore entitled, under the terms of the Discontinuance Agreement, to commence fresh proceedings in respect of their claims. These proceedings were commenced on 2 June 2014, repeating the claims previously made

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[1] Comprising outstanding principal of US$143,888,888.89 and management fees of US$400,000.

[2] The defendants do, however, contend that the claimants cannot rely on the accelerations and the demands in these proceedings: see paragraphs [40-47] below.

[3] The defendants also agreed to pay the claimants' costs of US$295,834.27 within 14 days, but in the event only paid US$110,801.10.

and adding a claim against Shebah in respect of the US$49,999,999.86 due under the Discontinuance Agreement[4]. The present application for summary judgment was issued on 27 June 2014. The claimants seek judgment for the sums due under the Facility Agreement, not those due under the Discontinuance Agreement.

7. Even in these proceedings the defendants have agreed to make payments to the claimants of sums due under the Facility Agreement (and have partially honoured one such promise). On 3 October 2014, the day this application for summary judgment was originally due to be heard, Shebah agreed to pay US$50m to the claimants by 2 December 2014 in exchange for the claimants agreeing to the adjournment of the application for not less than 60 days to permit the defendants time to seek alternative finance. In the event, no payment was made. The application was thereafter re-listed for 19 December 2014 and 15 April 2015, and on each occasion was adjourned by consent to allow the defendants time to attempt to refinance the debt. The adjournment of the hearing listed for 15 April 2015 was agreed by the claimants on terms that the defendants would pay US$20,579,239.24 towards outstanding interest by 30 April 2015. In the event, the defendants paid US$10m less than the agreed sum. Attempts to refinance the loan have been unsuccessful.

8. Notwithstanding their previous stance, the defendants now contend that no sums whatsoever are due to the claimants. The defendants assert that they have arguable defences to the claim (set out in a draft Defence and Counterclaim), contending as follows:

   i) that Shebah has a counterclaim against the first claimant ('Afrexim') for damages for alleged breaches of Afrexim's obligations as Arranger of the Facility Agreement. It is alleged that Afrexim, in breach of implied duties of care and skill, arranged both the original loan and the re-stated loan in a 'dilatory' fashion, causing Shebah to incur wasted expenditure and to lose revenue from the oil wells. The defendants claim that Shebah is entitled to set-off those damages, said to total US$137.1m, against the sums claimed by Afrexim in these proceedings;

   ii) that Shebah has a counterclaim against the second claimant ('Diamond'), in respect of a previous loan to Shebah which was re-financed by the original loan pursuant to the Facility Agreement. Shebah asserts that Diamond breached an agreement that the previous loan would be 'capped' at US$60m, resulting in Diamond wrongly retaining US$10.8m from the sums advanced to Shebah under the Facility Agreement and causing Shebah consequential losses of at least US$20.4m. Again, the defendants claim that Shebah is entitled to set-off those sums against the sums claimed by Diamond in these proceedings;

   iii) that the claimants, in commencing these proceedings, acted in breach of an alleged agreement, said to have been made on 16 May 2014, not to commence proceedings pending the conclusion of negotiations to refinance the debt with Zenith Bank. The defendants assert that the appropriate remedy for that breach is that these proceedings be stayed for 6 months. Alternatively, Shebah counterclaims damages on the basis that pursuit of these proceedings will

[4] This was also a claim against all the defendants in respect of the unpaid costs.

cause the loss of Shebah's business, including its licence, resulting in damages estimated at US$830m.

iv) that the claimants' purported acceleration of the loan as of 16 October 2013 was ineffective, so that the only sums immediately due and owing (subject to the alleged defences referred to above) are quarterly repayment instalments which remained unpaid at the date proceedings were commenced. The defendants acknowledge that the claimants have subsequently served an effective notice of acceleration and valid demands on Allenne and Dr Orjiako, but contend that the causes of action arising from such service cannot be pursued in these proceedings as they post-date the issue of the claim form.

v) that certain default interest charges and hedging fees have been wrongly included in the sums claimed, in particular a hedging fee of US$150,000. The claimants, however, have confirmed that they have excluded the charges referred to and that they will not pursue summary judgment for the hedging fee. Therefore no issue remains between the parties in relation to this minor aspect of the alleged defence.

Whether the defendants have an arguable right to set-off any counterclaims

9. The immediate answer to the defendants' claim to set-off the alleged counterclaims referred to above is that both the Facility Agreement and the Personal Guarantee (both being governed by English law) contain standard provisions expressly excluding any right of set-off:

Clause 32.6 of the Facility Agreement provides:

> "*All payments to be made by an Obligor under the Finance documents shall be calculated and made without (and free and clear of any deduction for) set-off or counterclaim*."

Clause 9.1 of the Personal Guarantee provides:

> "*All sums payable by the Personal Guarantor under this Deed shall be paid in full to the Security Trustee in the currency in which the Guaranteed Obligations are payable:*
>
> *(a) without any set-off, condition or counterclaim whatsoever; and*
>
> *(b) free and clear of any deductions or withholdings whatsoever except as may be required by law or regulation which is binding on the Personal Guarantor*."

10. The defendants accept that, as a matter of contract, the above provisions are effective to exclude any right to set-off their counterclaims. It is common ground that any such rights (both at law and in equity) can be excluded by agreement (see *HSBC v Kloeckner & Co AG* [1990] 2 QB 514, *Coca-Cola Financial Corp v Finsat International Ltd* [1998] QB 43 CA and *Newcastle Buildings Society v Mills* [2009] 2

BCLC 137) and that such agreement also precludes the grant of a stay of execution of judgment pending a counterclaim (see *Continental Illinois National Bank & Trust Company of Chicago v Papanicolaou* [1986] 2 Lloyd's Rep 441 CA).

11. The defendants' contention is that they have an arguable case that the Facility Agreement constitutes the claimants' written standard terms of business within the meaning of section 3 of UCTA, with the result that the claimants cannot rely on the clauses referred to above except in so far as the claimants can show that those terms satisfy the requirement of reasonableness under section 11 of UCTA[5]. Section 3 provides:

> "*(1) This section applies between contracting parties where one of them deals as a consumer or on the other's written standard terms of business.*
>
> *(2) As against that party, the other cannot by reference to any other contract term –*
>
> *(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or*
>
> *(b) claim to be entitled (i) to render a contractual performance substantially different from that which was reasonably expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,*
>
> *except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfied the requirement of reasonableness*."

12. The claimants accept that, if section 3 of UCTA is indeed engaged, the issues that would then arise (including the question of reasonableness) would be matters for trial. They contend, however, that the defendants have not demonstrated an arguable case that the Facility Agreement constituted the claimants' written standard terms of business.

(a) The facts relating to the provenance of the Facilities Agreement

13. Afrexim is an international multilateral bank with its headquarters in Cairo, Egypt. Diamond and the third claimant ('Skye') are banks incorporated in Nigeria.

14. There is no evidence that any of the claimants has its own written standard terms for syndicated lending. On the contrary, the claimants' solicitor, Anjuli Sangeeta Patel, expressly confirmed in her second witness statement that none of the claimants has standard terms for this type of business. She further confirmed that, as a syndicate of Nigerian and international banks, they do not have any forms common to them all and that the documentation for such a transaction is negotiated and agreed on a transaction by transaction basis.

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[5] The defendants do not assert that UCTA applies to the Personal Guarantee.

15. Indeed, it is common ground that the Facility Agreement is based on the form of syndicated facility agreement recommended by the Loan Market Association ('the LMA') as a starting point for negotiation. The LMA's User Guide confirms that the form was developed by a working party consisting not only of representations of the LMA but also representatives of the Association of Corporate Treasurers and of major City Law firms, the objective being to balance the interests of borrowers and lenders. The User Guide further emphasises that it is impossible to use the form without amendments and additions.

16. The final version of the original Facility Agreement was produced following negotiations between the parties and their respective solicitors, Clifford Chance LLP for the claimants, and Winston & Strawn LLP for the defendants. In particular:

i) The initial draft was sent by Afrexim to Shebah on 1 April 2011;

ii) On 13 May 2011 Winston & Strawn sent a 'redline' re-draft (heavily marked with their proposed revisions) to Afrexim, copied to their client, Shebah. Winston & Strawn stated that although they had had input from Shebah, the draft remained subject to further comments or amendments from Shebah;

iii) On 16 May 2011 Winston & Strawn referred in an email to the fact that they were discussing the draft with Clifford Chance the following day;

iv) On 24 May 2011 Afrexim sent a revised draft to Shebah and Winston & Strawn, the covering email referring to the fact that one change which was not incorporated in the draft was that a floating rate of interest would be retained, but that there would be a side-letter setting a ceiling at 10% as per the parties' last call.

v) On 25 May 2011 Winston & Strawn referred in an email to the fact that the account structure for the facility (which had been added by them in the 13 May draft) has been "agreed commercially". Winston & Strawn added that a further revised draft of the Facility Agreement would be circulated once they had Shebah's further instructions.

vi) Although the details are not in evidence, there must have been further discussions leading to the final version of the original Facility Agreement, executed on 1 July 2011.

(b) The relevant legal principles

17. The expression "*deals on the other's written terms of business*" is not defined or explained in UCTA.

18. In Hadley Design Associates v City of Westminster [2003] EWHC 1717 (TCC) HHJ Judge Seymour QC stated as follows:

> "*78. The concept underlying the provisions of Unfair Contract Terms Act 1977 s.3, in my judgment, is that there should exist a stock of written, no doubt usually, at any rate, printed, contract conditions which was simply drawn from as a matter of routine*

and intended to be adopted or imposed without consideration or negotiation specific to the individual case in which they were to be used. That seems to me to be the force of the words "written" and "standard" in the expression "written standard terms of business". In other words, it is not enough to bring a case within Unfair Contract Terms Act 1977 s.3 that a party has established terms of business which it prefers to adopt, as, for example, a form of draft contract maintained on a computer, or established requirements as to what contracts into which it entered should contain, as for example, provision for arbitration in the event of disputes. Something more is needed, and on principle that something more, in my judgment, is that the relevant terms should exist in written form prior to the possibility of the making of the relevant agreement arising, thus being "written", and they should be intended to be adopted more or less automatically in all transactions of a particular type without any significant opportunity for negotiation, thus being "standard".

19. Edwards-Stuart J agreed with the above passage in *Yuanda (UK) Co Lt v WW Gear Construction Ltd* [2011] Bus LR 360, further stating:

> "*21. ... The conditions have to be standard in that they are terms which the company in question uses for all, or nearly all, of its contracts of a particular type without alteration (apart from blanks which have to be completed showing the price, name of the other contracting party and so on). One encounters such terms on a regular basis – whether when buying goods over the internet or by mail order or when buying a ticket for travel by air or rail.*
>
> *22. In my view, it is the essence of such terms that they are not varied from transaction to transaction …*"

20. It seems, however, that a party may be held to have contracted on its written standard terms for the purposes of section 3 of UCTA where it has adopted a third party's written terms as its own. *Chitty on Contracts* 31st Ed para 14-072 states that "… *it would seem probable that 'standard terms of business' would embrace the standard terms of a third party, e.g. a trade association, incorporated into the contract by reference or by course or dealing*".

21. In *British Fermentation Products Ltd v Compare Reavell Ltd* [1998] TCC 577 the defendants supplied an allegedly defective compressor pursuant to contract subject to the Institution of Mechanical Engineers Model Form of General Conditions of Contract. HHJ Bowsher QC did not lay down any general principles as to when or whether UCTA applies in the generality of cases where use is made of Model Forms rafted by an outside body, but held that if UCTA does ever apply to such Model Forms:

> "*… it does seem to me that one essential for the application of the Act to such forms would be proof that the Model Form is*

invariably or at least usually used by the party in question. It must be shown that either by practice or by express statement a contracting party has adopted a Model Form as his standard terms of business. For example, an architect might say, "My standard terms of business are on the terms of the RIBA Form of Engagement". Without such proof, it could not be said that the Form is, in the words of the Act, "the other's" standard terms of business. I leave open the question what would be the position where there is such proof, and whether such proof either alone or with other features would make section 3 of the Act applicable."

22. It is also recognised that written terms may remain "standard" terms even though there was some negotiation between the parties as to the terms and amendments agreed prior to the contract. It is clear, of course, that negotiations as to specific terms such as quantity and price will not prevent general conditions being regarded as standard (see *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654 per Judge Thayne Forbes QC at 671-672). But even some negotiation and amendment of standard conditions will not prevent them remaining within section 3 of UCTA if that process leaves the terms "effectively untouched": see *St Albans City Council v ICL Ltd* [1996] 4 All ER 481 CA at 490-491. *Chitty on Contracts* (above) para 14-072 states that, where amendments have been agreed, it is a matter of fact whether one party can be said to have dealt on those standard terms.

(c) The defendants' contentions as to the applicability of s 3 of UCTA

23. Mr Gillis QC, counsel for the defendants, accepted that, in order to succeed at trial on this issue, the defendants would have to establish that the claimants have habitually entered into syndicated loans on the basis of the LMA form and that in all cases (including the present case) they refuse to negotiate so that those terms are effectively untouched when each contract is entered.

24. Mr Gillis also accepted that he could not demonstrate, on the materials presently available, that the claimants have habitually contracted on the LMA form and always refuse to negotiate. He contended, however, that there was a realistic prospect that disclosure by the claimants would provide support for and assist in proving that case and that there was sufficient evidential basis to justify allowing the case to proceed to the stage of disclosure. In particular, he submitted (i) that it could be inferred from the fact that the claimants had used the LMA form in the present case that they habitually do so and (ii) that it could be seen that all substantive changes suggested by the defendants' solicitors in this case had been rejected by the claimants, all accepted alterations being clerical or designed to tailor the draft to the facts of the transaction (from which, it was submitted, an inference can be drawn that the claimants always refuse to negotiate substantive aspects). Mr Gillis emphasised the principle that, in considering a summary judgment application, the court must bear in mind the evidence that can reasonably be expected to be available at trial: see *FG Wilson (Engineering) Ltd v John Holt &Co (Liverpool) Ltd* [2012] EWHC 2477 (Comm) per Popplewell J at para 20(5)-(7).

(d) My findings as to whether it is arguable that section 3 of UCTA applies

25. In my judgment there is no merit in the defendants' contentions on this issue for the following reasons:

i) There is simply no basis for inferring that the claimants, or any of them, habitually put forward the LMA form (or a tailored version of it) as a basis for their syndicated loan transactions. Indeed, there is no evidence as to how the LMA form came to be chosen as the starting point in the case of the instant transaction. The most likely scenario is that it was chosen or selected by the claimants' lawyers (English solicitors in the present case) and that they will have adapted it to reflect the specifics of the transaction. It is impossible to draw any inferences as to what starting points may have been taken in other transactions, involving other permutations of lenders and other lawyers. The same or other lawyers may have provided their own templates for other transactions, not necessarily governed by English law. This is confirmed by the express evidence of the claimants' solicitor to the effect that documentation for the claimants' syndicated lending is negotiated and agreed on a transaction by transaction basis. Mr Gillis criticises that evidence on the grounds that Ms Patel does not state what enquiries were made and of whom, but I consider that it is straightforward evidence, given on the basis of her client's instructions, which comes as no surprise. The defendants have demonstrated no basis for doubting or going behind that evidence.

ii) There is even less basis for inferring, even it could be shown that the claimants habitually proffer the LMA form, that the claimants always refuse to negotiate the terms it contains. The likely permutations of lenders and borrowers and their respective bargaining strengths and the range of lawyers and their respective skills, are far too great to permit such a conclusion.

iii) In any event, I do not accept that the evidence demonstrates that the claimants refused to negotiate in the present case, or that the version of the LMA form they put forward remained 'effectively untouched'. It is noticeable that, despite filing voluminous evidence on behalf of their clients in opposition to this application (at very considerable cost), Winston & Strawn have not themselves given any evidence as to the negotiations, let alone suggested that the claimants refused to negotiate on any substantive aspect of the LMA form. Further, although it is true that the claimants reversed many of Winston & Strawn's proposed changes, not all were rejected:

a) at Winston & Strawn's request, the Material Adverse Effect clause was revised so as to apply only to changes in the business of the Borrower (Shebah) and not also to those in the business of any Obligor (a definition which includes Allenne), a substantive change to the standard wording of the LMA form which could have important consequences;

b) again at Winston & Strawn's request, the proposed requirement that the Lenders' Engineer certify the Proved Reserves (of oil) on a monthly basis was changed to provide for certification by an Independent Engineer on an annual basis;

c) Winston & Strawn inserted a section dealing with Project Accounts, setting out the manner in which revenue from the oil wells would be collected and disbursed. This section, which is of considerable commercial significance, appears to have been the subject of substantial commercial negotiation. Winston & Strawn's proposed drafting appears to have been accepted.

26. I am therefore satisfied that the defendants do not have a realistic prospect of establishing at trial that the Facilities Agreement is on the claimants' written standard terms of business. The suggestion that disclosure might alter the position is a classic example of hoping that something may turn up, in this case a forlorn hope given the evidence that there was in fact a degree of real negotiation of the final terms.

27. I would add the following. In circumstances where commercial parties, represented by solicitors, have utilised a 'neutral' industry model form as the basis for a complex and detailed financial contract, executed after the usual process of negotiation, including revising a travelling draft, it will require cogent evidence to raise even an arguable case that the resulting contract is made on the written standard terms of one of those parties. I recognise that it might, in theory, be possible to demonstrate that one party to such negotiations has used the industry standard form as the basis for a set of terms it treats as its own and that it will not in reality countenance substantive changes, but that would be an uncommercial and highly unlikely approach. Parties such as the defendants in this case cannot expect to avoid summary enforcement of the terms of the contracts they have entered by asserting, on the basis of little more than speculation, that their counterparty was engaged in such conduct.

28. It follows that Shebah's counterclaims against Afrexim and Diamond (and the defendants' counterclaim for damages against the claimants based on the alleged agreement of 16 May 2014) cannot provide the defendants with an arguable defence to the claim.

29. The claimants submit that the alleged counterclaims do not in any event have any merit. In view of my conclusion above that the no set-off provisions are not subject to a test of reasonableness but apply with full contractual force, it is unnecessary to consider further the counterclaims against Afrexim and Diamond for the purposes of this application. If Shebah wishes to pursue those counterclaims, it must do so in separate proceedings. The counterclaim based on the alleged 16 May 2014 agreement not to commence proceedings is considered in detail below.

<u>The alleged 16 May 2014 agreement not to bring proceedings</u>

30. It is necessary to give separate consideration to the alleged agreement of 16 May 2014 because it is not relied upon purely as a counterclaim (which does not provide an arguable defence for the reasons explained above), but also as a ground for seeking a stay of the proceedings.

31. Pursuant to the terms of the Discontinuance Agreement, Shebah was due to pay the claimants just under US$50m by 30 April 2014. Shortly before the due date Shebah contacted the claimants, seeking an extension of time on the basis that they were close to refinancing the outstanding loans with Zenith Bank Ltd ('Zenith'). The claimants refused such an extension.

32. On 9 May 2014 Zenith issued a term sheet, offering Shebah a term loan of US$120m, US$50m of which was to be used to pay the claimants, the balance being for working capital. The offer was conditional on the claimants agreeing to re-structure their remaining debt, permit a moratorium on repayments of principal for 9 months and agree to share their existing security with Zenith on a *pari-passu* basis. Shebah forwarded the offer to the claimants on 12 May 2014.

33. On 16 May 2014 Dr Orjiako met Dr Oramah, the Executive Vice President of Afrexim, in London. Dr Orjiako's evidence is that:

> "*During the meeting, Dr Oramah and I agreed that the Zenith offer would be acceptable to the Claimants if certain amendments were made. As litigation would no longer be necessary if the proposal was acceptable to all parties, the clear understanding was that, if agreement was reached, litigation would not be pursued. Dr Oramah then dictated to me an email to be sent to ... Zenith, setting out the amendments they required. I sent two emails that day as a result of that meeting …*"

34. In an email to Zenith at 16.35 on 16 May 2014 Dr Orjiako stated his understanding from his meeting with Dr Oramah that it would be acceptable for the claimants to participate in a new facility of US$220m, of which the claimants would commit US$100m and Zenith US$120m (of which US$50m would be used to repay sums due to the claimants).

35. However, on the very same day, 16 May 2014, Afrexim (as Facility Agent on behalf of the claimants) wrote informing Shebah that the Lenders, having reviewed the Zenith offer dated 9 May 2014 and the conditions therein, had concluded that the proposal was unacceptable. The letter further stated that legal proceedings would be commenced without further notice. Thereafter these proceedings were indeed commenced on 2 June 2014.

36. The defendants nevertheless contend that an agreement was reached at the meeting on 16 May 2014 that "*Zenith's proposal would be acceptable to the Claimants if certain amendments were made to it*" (draft Defence paragraph 76) and that it was an implied term of that agreement "*that the Claimants would not commence litigation if Zenith was willing to agree the amendments required by the Claimants within a reasonable period*" (draft Defence paragraph 78). The defendants' case is that the agreement was made after the claimants' letter of 16 May 2014 had been drafted and superseded it. They further contend that the agreement bound each of the claimants, as representatives of Diamond and Skye were spoken to subsequently and confirmed their consent.

37. In my judgment, however, it is impossible to regard the discussions described by Dr Orjiako, relating to proposals as to substantial loan facilities to be syndicated between multiple lenders and involving complex dealings with security, as giving rise to a binding agreement of any nature, let alone an agreement of the vague nature proposed by the defendants (that proposals "*would be acceptable if certain amendments were made*"). Mr Gillis accepted that the discussions as to the facilities to be provided must be treated as being subject to contract. Further, it is plain on Dr Orjiako's own

evidence that there would only have been agreement in principle had Zenith accepted the claimants' amended proposals, a condition which the defendants cannot demonstrate was satisfied. It follows that I do not consider that it is arguable that the claimants entered a binding agreement as alleged by the defendants. As there was no agreement, no question of an implied term arises (the implication of any such term, itself extremely vague, being difficult to justify in any event).

38. Further, it is clear that the parties themselves did not consider that a binding agreement had been made, let alone one which prevented the claimants from commencing proceedings. Neither did Zenith accept the amended terms forwarded by Dr Orjiako:

i) On 20 May 2014 Zenith responded to the proposal that the facility be increased to US$220m by simply re-sending its term sheet dated 9 May 2014. In other words, Zenith did not make any amendments at all to its original offer, let alone accept the claimants' alleged revisions;

ii) On 21 May Dr Orjiako forwarded Zenith's response to Afrexim. Far from asserting an agreement binding the claimants, he requested the Lenders "*to kindly give the Zenith offer consideration towards final resolution of this matter*" and "*not to go back to court … as we have an imminent resolution*."

iii) When these proceedings were commenced on 2 June 2014 the defendants made no complaint and did not seek an injunction to restrain the claimants pursuing them. Instead they filed an acknowledgement of service and agreed directions for the service of evidence for this application. The point was raised for the first time in Dr Orjiako's evidence.

39. I therefore conclude that it is not arguable that the claimants bound themselves not to commence these proceedings.

Whether the claimants can rely on their acceleration notices and letters of demand

40. Clause 24.17(b) of the Facility Agreement provides as follows:

> "*On and at any time after the occurrence of an Event of Default the Facility Agent may, and shall if so directed by the Majority Lenders, by notice to the Borrower:*
>
> ...
>
> *(b) declare that all or part of the Loans, together with accrued interest, and all other amounts accrued or outstanding under the Finance Documents be immediately due and payable, at which time they shall become immediately due and payable ...*"

41. On 6 September 2013 Afrexim, as Facility Agent, gave notice to Shebah in the following terms:

> "*3. NOTICE OF ACCELERATION*

> *Notice is hereby given in terms of clause 24.17 of the Facilities Agreement that if all sums due under the Facility are not paid, and all other Events of Default not remedied by at the latest one month after the instalment due on 16 September 2013, the entire Loan, together with accrued interest, and all other amounts accrued or outstanding under the Finance Documents shall be immediately due and payable, and we shall commence legal proceedings for recovery of the Loan with no further reference to yourselves*."

42. The claimants assert that the notice took effect, so that the loans were accelerated, on 16 October 2013, without the need for any further notice. The defendants, on the other hand, dispute that the notice of 6 September 2013 was effective to accelerate the loans as it was expressed to take effect at a future date.

43. Clause 24.17 permits the Lenders to declare that the loans "*be immediately due and payable*" in certain circumstances, making it clear that the loans shall become immediately due and payable at the moment such declaration is made. In my judgment the clause cannot be read so as to permit the claimants to give notice that the loans will become due and payable at a future date of their choosing. There is nothing to prevent the Lenders giving informal notice that they will exercise their right to accelerate on a future date, but the declaration itself, to fall within the clause, must be that the loans are immediately due and payable. I do not accept the claimants' contention that such a construction is 'uncommercial': the right of a lender to make loans immediately due and payable is commonplace and easy to exercise. To read the provisions as permitting the Lenders to give notice of a future acceleration, conditional on future events (as in this case), would give rise to uncertainty and potential issues. It would be an uncommercial reading of a standard and well-understood clause.

44. It follows that the claimants did not validly accelerate the loans prior to the commencement of these proceedings, with the effect that only unpaid instalments (with interest thereon) were properly the subject of the claim.

45. The claimants did, however, serve a valid notice of acceleration dated 2 October 2014, declaring the loans to be immediately due and payable, and further demands were made on Allenne and Dr Orjiako on 15 April 2015. The Particulars of Claim have been amended by consent to plead both that notice and those demands and to add an alternative case (including reduced interest) based upon them.

46. The defendants contend that the claimants cannot rely on the valid notice (and the subsequent demands) in these proceedings because they (and the causes of action to which they give rise) post-date the issue of the claim. However, the fact that a cause of action post-dates the issue of proceedings is no longer an absolute bar to an amendment to add it to the claim where the claim would otherwise fail: see *White Book* Vol 1 note 17.3.5. It may be for that reason that the defendants consented to the relevant amendments. But in any event, having consented to the amendments, the defendants cannot now object to the claim being determined on the basis of the currently pleaded case.

47. I therefore conclude that, whilst the claimants' purported acceleration of the loans on 16 October 2013 was ineffective, the defendants do not have a defence to the claimants' alternative case, based upon the acceleration notice dated 2 October 2014 and subsequent demands dated 14 April 2015 and 27 July 2015.

Conclusion

48. For the reasons set out above, the claimants are entitled to summary judgment against all three defendants for (i) the principal outstanding under the Facility Agreement of US$143,888,888.89, subject to giving credit for the sum paid during the course of this application and the sums conceded in respect of default charges and hedging fees; (ii) the management fees claimed; and (iii) interest calculated on the alternative basis that the loan was accelerated on 2 October 2014.