Neutral Citation Number: [2025] EWHC 442 (Comm)

Case No: CL-2018-000506

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

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

Date: 27th February 2025

Before :

LIONEL PERSEY KC
SITTTING AS A JUDGE OF THE HIGH COURT

- -

Between :

IDBI BANK LIMITED	**Claimant**
- and -	
(1) AXCEL SUNSHINE LIMITED	**Defendants**
(1) (2) SIVA INDUSTRIES AND HOLDINGS LIMITED	

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- -

Nigel Tozzi KC and **Adam Temple** (instructed by **TLT LLP**) for the **Claimant**
The **Second Defendant** was not represented at trial and did not appear

Hearing dates: 12 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27th February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Lionel Persey KC :

Introduction

1. The Claimant, IDBI Bank Limited ("**the Bank**"), is an Indian bank which, at the relevant times, operated outside India via a branch in the Dubai International Financial Centre (**"the DIFC"**).

2. The First Defendant, Axcel Sunshine Limited ("**Axcel**"), is a company incorporated and registered in the British Virgin Islands. It borrowed money (initially USD 67 million) from the Bank's DIFC branch under a Credit Facilities Agreement dated 26 March 2014 ("**CFA**").

3. The Second Defendant, Siva Industries And Holdings Limited ("**Siva**"), is a company incorporated and registered in India. It provided a "Letter of Comfort" dated 26 March 2014 ("**LoC**") addressed to the Bank's DIFC branch, which the Bank relies upon as a legally binding contract of guarantee and/or indemnity.

4. The USD 67 million borrowed by Axcel was transferred to Siva, which used the funds to discharge previous liabilities owed by Siva group companies to the Bank, which Siva had guaranteed. Axcel has defaulted on and failed to repay the CFA. The outstanding liability under the CFA now stands at c. USD 143.7 million (the **"Outstanding Sum**"). The Bank seeks to recover the Outstanding Sum from Siva as surety.

5. Siva resists the Bank's case on, predominantly, two bases:
   (1) First, it says (1) that the Bank had represented that the LoC was only a paper exercise and would never be used by or relied upon by the Bank; and (2) that the Bank wanted the LoC as 'an optic' only and as a procedural requirement to 'save face' within the Bank and to ensure that a Non Performing Asset (i.e. a loan it had previously given to a company called WinWind OY, a subsidiary of Siva) was disposed of.
   (2) Secondly, it says that the Court should not enforce the LoC as its performance would contravene Indian law. Siva relies upon the Foreign Exchange Management (Guarantees) Regulations 2000 (the "**FEMA Regulations**"), Reg 3 which state:

> **"… Prohibition.** Save as otherwise provided in these regulations, or with the general or special permission of the Reserve Bank, no person resident in India shall give a guarantee or surety in respect of, or undertake a transaction, by whatever name called, which has the effect of guaranteeing, a debt, obligation or other liability owed by a person resident in India to, or incurred by, a person resident outside India …"

6. The Bank contends Siva's defence is wrong both on the facts and the law. It says that even if Siva were able to make good these arguments (which it cannot), it nevertheless remains liable under one or more of the Bank's secondary cases, for breach of warranty, misrepresentation and unjust enrichment.

7. By an email dated 28 October 2024, Siva's former solicitors, Aliant Law, served a Notice of Change indicating that Siva would be representing itself. On 30 October

2024, Siva indicated that it would not be attending the trial and that its expert would not be giving evidence.

8. The Bank seeks a judgment on the merits rather than an order under CPR 39.3.

9. The Bank has been represented in this matter by Mr Nigel Tozzi KC and Mr Adam Temple. Their written and oral submissions were thorough, fair and measured and they drew my attention to and dealt with all of the points that Siva could have made on the basis of the pleadings.

The witnesses

10. Both of the "live" witnesses gave their evidence remotely, from India. The Bank had one factual witness who gave live evidence, Mr Biju George K. Mr George was part of the 'dealing team' involved in the lending to Axcel in 2014. I found him to be a compelling witness whose evidence was in accordance with the contemporary documents. The Bank also filed a witness statement of Mr Sandeep Krishna Nikam, Deputy General Manager in the Non-Performing Asset Management Group at the Bank, under cover of a hearsay notice. He gave evidence as to the current indebtedness of Axcel, and therefore the value of the claim against Siva, after taking into account the limited recoveries that the Bank has to date made.

11. Expert evidence as to Indian law was given on behalf of the Bank and Siva: The Bank called Mr Kevic Setalvad, a Senior Advocate in India and former Additional Solicitor General of India. I found him to be an excellent witness. Siva filed a report from Justice Sanjay Kishan Kaul, a former Judge of the Supreme Court of India. The experts filed a Joint Memorandum but did not file any reports in reply. In their Skeleton Argument the Bank asked me to disregard Justice Kaul's report and the comments attributed to him in the Joint Memorandum. In his oral argument on behalf of the Bank, Mr Tozzi KC did not maintain this position and was content to address Justice Kaul's evidence on its merits. I consider that he was right to do so. I will deal with the expert evidence below.

The facts

12. Prior to the loan to Axcel, various Siva group companies had obtained lending facilities from the Bank which Siva had guaranteed. By a guarantee dated 22 December 2010, Siva guaranteed borrowing by a Finnish company, WinWind OY ("**Winwind**") of the USD equivalent of EUR 52 million (the **"WinWind Guarantee"**). By guarantees dated 4 March 2010 and 17 March 2011, Siva guaranteed the borrowing of an Indian company, Planet Pickles Private Limited (the "**Planet Pickles**" and the "**Planet Pickles Guarantee**"). And by guarantees 4 March 2010 and 17 March 2011, Siva guaranteed the borrowing of another Indian company, Sterling Agro Product Processing Limited ("**Sterling Agro**" and the **"Sterling Agro Guarantee"**).

13. On 7 February 2014, the Bank issued and served proceedings in the Commercial Court in England against Siva to enforce the WinWind Guarantee. It also demanded payment from Siva under the Planet Pickles Guarantee and the Sterling Agro Guarantee, by letters dated 8 February 2014.

14. There is a dispute about which of Siva and the Bank first contacted the other about additional lending to enable the repayment of the earlier borrowing. Siva's Defence alleges that the Bank did so; Mr George recalls that it was Siva that did so. Mr

George's recollection is consistent with the documentary record. On 10 February 2014 Siva contacted the Bank to arrange a meeting with the Bank's Mr Raghavan between 13 and 15 February, to discuss '*various business opportunities [Siva] is exploring and also various facilities [Siva] availed from IDBI Bank*'. It seems to me from this that the Bank's pursuit of the earlier guarantees triggered an attempt by Siva to forestall further enforcement by the Bank.

15. On 20 February 2014, a meeting took place between Mr Srinivasan (Chief Executive Officer of Siva), Mr Bafna (Chief Financial Officer of Siva), Mr Rego (Deputy Managing Director of the Bank), and Mr Kumar (Executive Director of the Bank). Mr George was told by Mr Rego that the Bank had agreed in principle to consider granting a further loan to resolve WinWind's liabilities.

16. Axcel was identified as the intended borrower, with the Bank commencing 'know your customer' ("**KYC**") checks on 21 February 2014. A letter of that same date from Axcel (though in fact only signed and forwarded to the Bank on 25 February 2014) sought to borrow USD 86 million from the Bank, offering a pledge of shares in Tata Teleservices Limited ("**TTSL**") as security.

17. The position was described as follows, in an internal Bank 'Status note' authored by Mr George and dated 22 February 2014

> "… The promoters have now agreed for a structure wherein they would be availing a facility against pledge of Tata Teleservices Limited's (TTSL) shares, currently valued at Rs.106/share… through one of its associate companies. The proceeds of this proposed loan would be utilized for closing WWO a/c …
> … The facility, if approved, would be operated through IDBI's DIFC Branch, Dubai, with the entire facility being appropriated against the ~~overdues~~ outstanding of WWO (~ $ 65 mn.) and also towards settling the outstandings in two of the other group companies (to the extent of $1.11 mn). The balance would be purely for interest servicing …
> Corporate Guarantee of Siva Industries & Holdings Ltd. would also be stipulated …"

18. This was reflected in a proposal for sanction to the Bank's Credit Committee, co-authored by Mr George dated 24 February 2014. That proposal explained that the primary security for the facility was the TTSL shares. With further security over the assets of Sterling Agro, and a corporate guarantee from Siva, the security was calculated at 1.17 times the intended USD 83 m facility. The same proposal noted that Axcel was a company that held investments (including in TTSL) and that, because it had no regular cash flow, interest would be serviced through the facility.

19. On 26 February 2014, the Credit Committee (the second highest sanctioning authority in the Bank) recommended the transaction to the Executive Committee (the Bank's highest sanctioning authority). This led to a further recommendation memorandum of the same date. The transaction (still including a requirement for a guarantee from Siva) was approved by the Executive Committee on 28 February 2014.

20. On 5 March 2014, the Bank sent Axcel a letter (the "**Letter of Intent**") agreeing, in principle, to the requested borrowing. By way of security the letter required a

pledge of the TTSL shares, a first charge over Sterling Agro's assets, and a guarantee from Siva. This was stated to be a condition precedent for the transaction.

21. That led to a number of discussions involving personnel from the Bank and Siva, as Siva was reluctant to provide a guarantee. Siva has disclosed various internal emails passing between Mr Srinivasan and Mr Chinnakannan Sivasankaran which are relied on by Siva as recording the discussions in the period from 7 to 15 March 2014. These internal emails were not seen by Bank personnel at the time. What was said by Mr Srinivasan internally in the emails regarding the discussions which took place is unsupported by any statement from him, or any other witness evidence.

22. The emails refer to a number of options said to have been discussed between the parties; however, even on their own terms, I am satisfied that is clear that no agreement had been reached as to the way forward as at 15 March 2014.

23. According to the Siva emails, the first time a letter of comfort was discussed was on the morning of 15 March 2014. In an email sent at 11.03am Mr Srinivasan told Mr Sivasankaran:

> "… We are still struggling to close the terms. IDBI is asking for a comfort letter from SIHL to IDBI that SIHL shall make sure that Axcel sunshine will make the payments under the loan agreement. A comfort letter is not enforceable and is [an] inferior substitute for a fresh guarantee. This together with the continuation of existing guarantee is the solution suggested …"

24. I agree with Bank's submission that Mr Srinivasan's claim that a '*comfort letter is not enforceable and is [an] inferior substitute for a fresh guarantee*' may have been his own personal view, or that it may have been what he wanted Mr Sivasankaran to believe so that he could secure an agreement with the Bank. Importantly, however, it is not attributed to anything said by a Bank employee.

25. In any event, the suggestion that a letter of comfort was an inferior substitute for a guarantee was contradicted by Mr Srinivasan in his email to Mr Kumar of the Bank, at 1.15pm on 15 March 2014 (the "**1.15pm email**") at which he pushed back on the Bank's request for a LoC from Siva. The reasons he gave for objecting to giving a LoC were that:

> "… We have been advised that a comfort letter is still a guarantee and would be still seen as violating extant Regulations and enforceability could become a dispute in itself …"

26. Twelve minutes later, at 1.27 pm, Mr Srinivasan emailed Mr George and Mr Gupta at the Bank to say that Mr Srinivasan had spoken to Mr Kumar, who had '*kindly consented to check internally within IDBI and revert with a solution*'.

27. I should here note Siva's key factual allegation from its Defence at §7(g):

> "… By subsequent oral discussions undertaken on or around 15 March 2014, the Lender via its agent made it expressly clear that even were a notional comfort letter to be executed, it would only be a paper exercise and would never be used by or relied upon by the Lender because it would be a breach of FEMA Regulations. The CEO recites the conversations with the Lender and confirms that the Lender wanted the Letter of

> Comfort as 'an optic' only and as a procedural requirement to 'save face' within the bank and to ensure that the NPA was disposed of …"

28. It is not clear who is alleged to have said this, nor precisely when. The high-water mark for Siva would appear to be an internal email from Mr Srinivasan to Mr Sivasankaran at 4.40pm on 15 March 2014 (the "**4.40pm email**") in which he says:

> "… Viney Kumar and other team members have come back after discussions with IDBI internal team and legal team and the bottom line requirement from them is one of the following:
> 1. Comfort letter from SIHL + Optical continuation of existing guarantee for some more time say max 6 months; OR
> 2. Optical continuation of existing guarantee for some more time + seek time for six months for getting RBI approval for SIHL to provide guarantee. After three months, submit a fresh request that RBI approval will not be forthcoming and IDBI will drop the guarantee. Also provide the 5% additional shares that we offered now as an additional comfort factor.
> I think it would be good if you could speak to Raghavan on a call and persuade him to remove fresh Guarantee totally. If he is not agreeing to that we may have to agree to one of the options given above.
> In the event we are willing to go for a compromise and help them save face, between the two alternatives, I would suggest we give a comfort letter as per format acceptable to us …"

29. It is not clear to me what Mr Srinivasan meant by the '*optical continuation of existing guarantee*', given that repayment of the WinWind debt would discharge the WinWind guarantee. It is, however, notable that Mr Srinivasan did not suggest that it was the Bank that had said that the comfort letter required from Siva was to be '*optical*'. The other option, according to the 4.40pm email, included seeking RBI approval for a guarantee from Siva, which might be dropped as a requirement if RBI approval was not forthcoming, plus the provision of additional shares by way of security. Mr Sivasankaran responded that evening to say that he would speak with Mr Kumar the following Monday (i.e., 17 March 2014), but there is no evidence of any such discussion.

30. The 4.40pm email would appear to be the basis for Siva's case that the Bank agreed not to enforce the LoC. It does not in my view support the allegation: First, there is no suggestion in the email that the LoC would not be enforced or that it was to be just a paper exercise. Secondly, although the word 'optical' was used by Mr Srinivasan, that was in the context of the existing guarantee.

31. On 18 March 2014, Axcel responded to the Bank's Letter of Intent dated 5 March 2014. In reference to the requirement in the Letter of Intent for a corporate guarantee, Axcel stated that Siva had refused to provide one, and sought a waiver of the obligation.

32. On 21 March 2014, the dealing team at the Bank (including Mr George) updated their memorandum to the Executive Committee, noting that:

> "… Though the company requested for waiver of the stipulation of corporate guarantee of SIHL, on protracted negotiations, the company has agreed to procure a Letter of Comfort from SIHL in the manner and format acceptable to IDBI …

> IDBI has sought opinion from and English law counsel (TLT) …
> … the English counsel is of the opinion that the letter of comfort would be binding when entered into by the parties to it. …"

33. On the same day Siva, represented by Mr Arunkumar Peringattu, provided Mr George with marked-up changes to a draft LoC. It is noteworthy that even at this early stage clause 7 of the draft LoC stated that '*This Letter of Comfort is irrevocable and constitutes legal and binding obligation(s) upon us…*" Mr Peringattu's covering email referred to obtaining the opinion of S J Law on the terms of the LoC. However, the following day he emailed the draft LoC to Wise & Worth, a law firm based in Chennai, India, stating:

> "… Attached is the draft of a Letter of Comfort which SIHL intends to execute guaranteeing the debt of an unrelated and non resident entity viz. Axcel Sunshine Limited.
> Axcel Sunshine Limited is registered in BVI and the facility is being extended by IDBI, Dubai.
> IDBI is insisting for the proposed Letter of comfort is in lieu of corporate guarantee.
> We seek you opinion to confirm if the proposed Letter of Comfort is in violation of FEMA and/or any other Regulation. Look forward to receiving an early response from you …"

34. These instructions to Wise & Worth show that Siva were not relying on any alleged representation that the LoC '*would never be used by or relied upon by the [Bank] because it would be a breach of FEMA Regulations*'. Instead, I find that Siva intended that the LoC would (a) guarantee the debt of Axcel; and (b) comply with FEMA.

35. Further, according to Minutes dated 22 March 2014, the board of Siva resolved to issue the LoC to the Bank, noting that:

> "… one of the terms and conditions in the … Letter of Intent are that the Medium Term Loan Facility shall be **secured** by Letter of Comfort issued by the Company in favour of IDBI Bank …" [my emphasis]

36. That same resolution approved the terms of the draft LoC which, as noted above, included the language of irrevocable legal and binding obligations. The meeting minutes do not include any suggestion that Siva's board was told, or believed, that the LoC would not be enforceable or otherwise relied upon by the Bank.

37. On 23 March 2014, Wise & Worth emailed a revised draft LoC to Mr Peringattu. Siva has not disclosed any advice received from Wise & Worth as to the legality of the LoC but the provision of a revised draft indicated to the Bank that Wise & Worth did not consider any legal issues to arise. Wise & Worth's only amendment to the draft LoC was the inclusion of the underlined text below, in clause 3(c):

> "… In the event that the Borrower has insufficient funds to meet any such obligations, we shall provide assistance to the Borrower, subject to necessary statutory approvals, to enable it to fulfill its obligations towards IDBI Bank ..."

38. On 25 March 2014, Mr Peringattu sent Mr George a copy of the LoC '*which was agreed to and finalised by Wise & Worth*'. At 12.01pm the same day, Mr George

emailed Mr Peringattu (and other representatives of Siva) seeking to add Siva as a party to the CFA, or alternatively the addition of a further clause to the draft LoC:

> "… We have noted the contents of the Facility Agreement dated----March 2014, made between Axcel Sunshine Limited & IDBI Bank Ltd for USD 83 mn and confirms that it approves with our arrangements.
> We confirm being bound by the obligations there in as if we are a party thereto. …"

39. Mr Peringattu responded to this in an email reply to Mr George on 25 March 2014 at 12.49pm, stating that:

> "… As all of us aware, we are concerned with the Indian Law and not with the English Law in issuing a Corporate Guarantee. We have agreed to the Letter of Comfort after much persuasion from your side.
> The modification sought by you to the draft of Letter of Comfort may violate the provisions of FEMA and we request you to close the LoC, the way modified and suggested by Wise & Worth …"

40. In the event, the executed LoC contained some of the language proposed by Mr George, but not the sentence which said '*We confirm being bound by the obligations there in as if we are a party thereto.*'

41. Also on 25 March 2014, the Bank's Executive Committee approved the lending with the security of the LoC. This was reflected in an updated Letter of Intent sent by the Bank's Dubai branch to Axcel, on the same date.

42. On 26 March 2014, Axcel and the Bank executed the CFA. The following provisions are of particular relevance to the issues that I need to decide:
    (1) Axcel was entitled to utilise a loan facility of USD 83 million, repayable with interest in a single instalment on 26 May 2016: clause 8.1;
    (2) In Section 7 - Guarantee, clause 19 '*Guarantee and Indemnity*' states '*Not applicable*';
    (3) In Section 8 – Representations, Undertakings and Events of Default, clause 24.1 states that the obligations under the CFA '*shall be secured by the Security Documents in the form and manner satisfactory to the Lender by … (iii) Letter of Comfort of Siva Industries and Holdings Limited … in the form and manner agreeable to IDBI*';
    (4) Repayment was to be '*made to such an account in Dubai with such bank as the Lender specifies*': clause 26.2.

43. Siva executed the LoC on the same day**.**

44. Siva's denial that it '*constitutes a contract in writing … as alleged or at all*' is not supported by the terms of the LoC. Although the LoC is in the form of a letter addressed by Siva to the Bank's Dubai branch it is in my judgment clearly a contract both in its form and in its content. I refer in particular to the following provisions :

- Clause 2: "… We recognize that this Letter of Comfort is one of the documents based on which IDBI Bank has placed reliance and agreed to lend and advance the said Facility to the Borrower…"
  Clause 3: "… In consideration of the above, we do hereby irrevocably and unconditionally agree, confirm and undertake to IDBI Bank, its successors and assigns that

> (a) we shall ensure that the Borrower shall duly and punctually observe and perform all its obligations under and shall comply with all the terms and conditions of the Finance Documents
> …
> (c) we shall ensure repayment/payment by the Borrower of the said Facility together with interest, further interest, liquidated damages, fees, costs, charges, expenses and other monies… In the event that the Borrower has insufficient funds to meet any such obligations, we shall provide assistance to the Borrower, subject to necessary statutory approvals, to enable it to fulfill its obligations towards IDBI Bank. …"

- Clause 4: "… We hereby agree and acknowledge that this Letter of Comfort shall not be prejudiced …(iii) by the illegality, invalidity, or unenforceability … of any provisions of this Letter of Comfort …"
- Clause 6: "… This Letter of Comfort is irrevocable and constitutes legal and binding obligation(s) upon us, our successors and permitted assigns, and shall continue to be in full force and effect until such time as the said Facility is repaid …"
- Clause 7: "… We represent, warrant, and confirm: … (ii) that we have obtained all … authorizations and taken all other actions required by law to facilitate due execution of this Letter of Comfort …"
- Clause 8 provides for English law as the governing law, and the Courts of England as the exclusive jurisdiction for claims brought by the Bank against Siva.
- Clause 10: "… *We recognise that it is on the faith of this Letter of Comfort that IDBI Bank has agreed to lend and advance the said facility to the Borrower* …"
- Clause 11: "… We shall keep you indemnified against any loss or damage caused or suffered by you on account of disbursement of the said Facility to the Borrower by you, placing reliance on this Letter of Comfort and subsequent non-observance or non-adherence thereto by us …"

45. On 26 March 2014 Axcel agreed to the pledge of the TTSL shares to the Security Trustee.

46. Also on 26 March 2014, Axcel drew down USD 67 million of the CFA. I find that Axcel transferred the same to Siva through various intermediate recipients, via bank accounts opened by those recipients at the Bank's Dubai branch. Siva explained these transfers to the Bank as the discharge of various inter-group debts.

47. On 4 February 2015, the WinWind debt having been discharged, the Bank's claim against Siva under the WinWind guarantee was discontinued.

48. As recorded in the Bank's letters to Axcel dated 19 February 2015, 29 April 2015 and 14 October 2015, the Bank did not receive the agreed security over property owned by Sterling Agro.

49. On 26 May 2016, the CFA fell due for repayment with interest (interest to 30 September 2015 having been met by further disbursements under the CFA). Axcel did not make any repayment, and the Bank invoked the LoC against Siva by a letter dated 10 September 2017. The Bank commenced this action on 25 July 2018.

50. On 26 September 2018, the Bank obtained judgment against Axcel for USD 87,318,203.95. Since then, the Bank has recovered CAD 3,394,874.02 via its enforcement action in Canada. Including accrued interest, the outstanding sum due under the CFA stood at USD 143,753,753.22 as at 30 September 2024.

51. Siva make reference in §7(j) of their Defence to investigations into both Siva and the Bank. It is correct that the loan has been investigated, including by auditors appointed by the Bank itself. None of those investigations have suggested that the LoC was 'optical' or not intended to be enforced, and the CFA has not been found to be 'illegal'.

52. These proceedings were stayed between 27 February 2020 and 19 April 2023, due to Siva entering an insolvency process in India. This process was held under the adjudication of the National Company Law Tribunal. Siva has now exited that process, on terms which preserved the current claim on the following basis:

> "… All the issues related to Letter of Comfort (LoC) should be out of the purview of the proposed settlement… The legal validity and enforceability of the Letter of Comfort claim will be decided by UK Courts and the Indian Courts. In case, the Indian Courts rule that the Letter of Comfort claim is valid and payable by SIHL, SIHL will pay the amount within 24 months from date of such court order …"

53. The insolvency process in India explains the delay in these proceedings. Justice Kaul 's report refers to this insolvency process and suggests that the effect of the settlement was to vest jurisdiction in the Indian Courts to decide the validity of the LoC in accordance with Indian law. Mr Setalvad does not agree. This is not a point taken by Siva in its Defence, and is not an issue for which this Court has given permission to the parties to adduce expert evidence. I cannot in any event accept Justice Kaul's suggestion. The carve-out referred to in paragraph 52 above in any event anticipates an English judgment that may be enforced via the Indian Courts.

The Issues

54. The Parties agreed the following List of Issues before Siva declined to participate any further in these proceedings:

LIST OF ISSUES

A. Negotiation of the Letter of Comfort

1. Did IDBI agree that Siva would not require any guarantee or indemnity in respect of the Credit Facilities Agreement?

2. Did IDBI represent that any 'notional comfort letter' would be only a paper exercise, which IDBI would never rely upon?

B. Effect and Validity of the Letter of Comfort

3. On its face, does the Letter of Comfort constitute a legal and binding contract of (i) guarantee; and/or (ii) indemnity in respect of the Credit Facilities Agreement?

4. By clause 7 of the Letter of Comfort, did Siva represent and warrant that it has obtained all internal and external authorisations required by law to provide the Letter of Comfort?

5. Is the validity of the Letter of Comfort or any part of it affected by any pre-contractual agreement or representation by IDBI as referred to in Issues 1 and 2 above?

6. As a matter of Indian law, under Regulation 3 of the Foreign Exchange Management (Guarantees) Regulations 2000 and/or as a matter of Indian public policy:

6.1 Would performance of the Letter of Comfort be unlawful?

6.2 Is the Letter of Comfort an illegal and unenforceable document?

7. Is the English court prevented from enforcing compliance with the Letter of Comfort at common law or under Article 3(3) or Article 9(3) of the Rome I Regulation?

C. Effect of Siva's failure to obtain approval of the Letter of Comfort

8. Did Siva act in breach of warranty by failing to obtain necessary statutory approvals?

9. Did Siva misrepresent that it had obtained necessary statutory approvals? Was IDBI thereby induced to enter into the Credit Facilities Agreement and the Letter of Comfort?

D. Subrogation/Unjust Enrichment

10. If the Letter of Comfort is not binding or enforceable, is IDBI entitled to be subrogated to claims that it had under previous guarantees provided by Siva, in respect of company debts discharged by sums advanced under the Credit Facilities Agreement?

11. Alternatively, is IDBI entitled to restitutionary damages and/or disgorgement to reflect the extent to which Siva has been unjustly enriched?

E. Debt/damages

12. To what sum, including any interest, is IDBI entitled as against Siva under:

12.1 the Letter of Comfort;

12.2 its claim for breach of warranty;

12.3 its claim for damages for misrepresentation; and/or

12.4 its claim in subrogation/unjust enrichment?

55. I will deal with these issues in the order set out above. It should be noted that Issues 1 to 7 deal with the Bank's primary case. If I find in favour of the Bank then it is strictly unnecessary for me to consider issues 8 to 11 and Issues 12.2 to 12.4.

The Bank's primary case

Issues 1 and 2

56. In summary I find that:

(1) The answer to Issue 1 is 'No'. It is clear from the facts that I have summarised above, that although initially Siva would not agree to provide a 'guarantee', the Bank required a LoC *in a form and manner that was agreeable to the Bank*, and that Siva agreed to provide such a document. In doing so Siva intended that the CFA '*shall be secured by Letter of Comfort issued by the Company in favour of IDBI Bank*' and that it should have the effect of '*guaranteeing the debt of … Axcel Sunshine Limited*'. That, in my judgment, is the clear meaning and effect of clauses 3(a) and 3(c) of the LoC.

The emails relied on by Siva do not refer to any reluctance or refusal by it to provide an indemnity; it is expressly covered by clause 11 of the LoC and was in every draft exchanged prior to execution. Furthermore, Siva sought its own independent legal advice.

(2) The answer to Issue 2 is also 'No': There is no evidence that such statements were made by the Bank, and the parties' negotiations over the wording of the LoC and the involvement of Wise & Worth for Siva, and TLT for the Bank, demonstrate that it was by no means a purely paper exercise.

57. I have set the relevant facts out above. The parties' belief in the binding nature of the LoC is clear. Their meaning and effect are discussed further below. It was expressly recorded in the LoC (at clause 6) that its contents were legal and binding, and all the relevant provisions are cast as express obligations.

58. Siva alleges at §7(g) of its Defence that on or around 15 March 2014 the Bank represented that the LoC would be a paper exercise and that it would never be used by or relied upon by the Bank.

59. This is a serious allegation. It suggests that Siva and Bank personnel agreed to spend time and money drafting the LoC for no purpose, in order to create the false impression of security. This amounts to an allegation that the LoC was a sham contract, intended to give the appearance of creating legal rights and obligations different from those which the parties intended to create. I accept the Bank's submission that this is tantamount to an allegation of dishonest conduct by the personnel of both Siva and the Bank, in that those personnel set out to procure the disbursement of tens of millions of dollars without sufficient security.

60. Siva has no witness to testify to what was said in the various meetings, and the contemporaneous documents do not support the claim that the LoC was a purely paper exercise. Nor does Siva even indicate which individual is said to have made the alleged representation. According to Siva's own internal emails the requirement for a letter of comfort was stated to be the Bank's '*bottom line*'. Moreover, no further internal emails have been disclosed by Siva after 15 March 2014. The LoC was not executed until 26 March 2014. During that period (1) Mr Peringattu corresponded with Mr George about the terms of the LoC and sought legal advice as to the enforceability of the LoC from Wise & Worth; (2) The Bank sought advice from English lawyers, TLT, as to whether the LoC would be binding (see paragraph 32 above); (3) The Siva Board approved the execution of the LoC in terms that I find were consistent only with an intention to create a legally binding obligation on Siva; and (4) The Executive Committee of the Bank agreed modified terms for the provision of facilities to Axcel in reliance on the execution of a LoC in terms which it regarded as acceptable.

61. None of the contemporaneous documents leading up to the execution of the LoC on 26 March 2014 support the claim that it was a sham. I reject the suggestion that it is.

62. Furthermore, even if a Bank employee were found to have suggested the LoC as a sham document, or to have represented that the Bank would not rely upon it, the Bank would not be bound by such statements. This is because I am satisfied that the employee would have had no actual or ostensible authority so to act.

(1) As to actual authority, as Mr George explains in his Witness Statement at §8 and §44, and as I would in any event expect, approval for the CFA had to be given by the Bank's Executive Committee, and individuals were not authorised to make any changes to the commercial terms thus sanctioned. Commercial terms could not be agreed orally outside of the formal sanctioning process.

(2) As to ostensible authority I do not agree that an employee had ostensible authority to make the alleged statements. The test for ostensible authority requires Siva to show *inter alia* that the Bank represented that the Bank employee had authority to make the alleged statements, and that Siva relied on that representation: *Freeman & Lockyer v Buckhurst Park Properties (Magnal) Ltd* [1964] 2 QB 480 at 506. The putative agent's own representation cannot give rise to ostensible authority: *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd (The Raffaella)* [1985] 2 Lloyd's Rep 36 at 41. No level of seniority could give rise to ostensible authority to enter into a sham transaction. In any event, reliance on ostensible authority has to be reasonable: *Bowstead & Reynolds on Agency* (23rd ed, 2024) at paras 8-047 to 8-049; *Stavrinides v Bank of Cyprus* [2019] EWHC 1328 (Ch) at [108]-[121]. Further, a party cannot rely on the apparent authority of an agent if it failed to make the inquiries that a reasonable party would have made: *Philipp v Barclays Bank* [2023] UKSC 25; [2024] AC 346 at [89]. Siva does not come close to showing that it would have been reasonable for it to rely on the Bank's unidentified employee as having ostensible authority to agree a sham transaction.

63. Siva further alleges a misrepresentation entitling it to rescind the contract. The short answer to this is, as I have found above: there was no misrepresentation.

64. However, even if there were some relevant representation, Siva's misrepresentation case is misconceived.

(1) First, the Bank accepted that a contract entered into by a principal through an agent will be subject to the same defences as if the principal had personally made the contract in the same circumstances: see *Bowstead & Reynolds on Agency* Art 79. However, in the present case, the LoC was not entered into by an (unnamed) agent on behalf of the Bank. It was entered into by the Bank, following approval by the Bank's Executive Committee to accept the LoC, and in accordance with the modified terms of the offer sent to Axcel on 25 March 2014. As *Bowstead & Reynolds* at para 8-096 makes clear, questions of authority remain relevant. It suggests that a principal may find it difficult to deny the agent's apparent authority if the contract was entirely negotiated by the agent, but that is not alleged in this case. It is not suggested that the Executive Committee of the Bank was aware of the alleged representation.

(2) Secondly, Siva does not explain how any alleged representation made on or about 15 March 2014 was a continuing representation as at 26 March 2014. Between 15 and 26 March 2014 the parties negotiated the terms of the LoC, including wording which expressly stated that it was legal and binding. After agreeing, or largely agreeing, the contents of the LoC, the Bank issued its updated Letter of Intent, listing the LoC as part of the Security upon which the credit facility would be advanced.

(3) Thirdly, Siva has adduced no evidence of reliance on the alleged representation. On the contrary, its board resolved to enter into the LoC

(paragraphs 35 and 36 above), and there is no evidence that the board discussed or relied on the alleged representation.

(4) Fourthly, rescission is not available to Siva. In order to rescind, the parties must be placed in the position in which they would have been had there been no contract. Where the guarantor has derived a benefit from the transaction, this must be restored: *O'Donovan and Phillips, The Modern Contract of Guarantee* (4th ed, 2020), para 4-044; *Dunbar Bank v Nadeem* [1997] 2 All ER 253. Axcel received USD 67 million under the CFA, as a result of Siva entering into the LoC, which sum was then transferred to Siva. As Siva does not offer to, and on its own stated position cannot, provide restitution, it is not entitled to rescind. Put another way, Siva cannot continue to take the benefit of the LoC (in that it enjoyed and enjoys the fruits of the CFA, which depended on the LoC as security) whilst denying its liability under it: *Cartwright, Misrepresentation, Mistake and Non-Disclosure* (6th ed, 2019) para 10-10.

65. Siva also seeks to rely on the alleged representation as an estoppel, preventing the Bank from relying on the LoC. Applying the ingredients of estoppel by representation (as summarised in *Estoppel by Conduct and Election* (Keane, 3rd ed, 2023) para 1-006), Siva would need to show:

(1) A statement or other conduct that constituted a representation of fact, communicated to the representee: as I have found above, there was no such representation.

(2) The representee's justifiable belief in its truth: for the same reasons set out above in relation to authority, Siva cannot reasonably have believed that the Bank's employee was truthfully setting out the Bank's position, that it would enter into a sham LoC.

(3) An attempt by the representor to contradict his representation: if the alleged representation was made by the Bank, then the Bank accepts that this action would be contrary to the representation.

(4) Prejudice to the representee as a result of its alteration of position if contradiction of the representation were permitted. This has two elements. First, Siva is required to prove that it relied upon the alleged representation: *Kelly v Fraser* [2012] UKPC 25; [2013] 1 AC 450 at [18]. It cannot do so. Secondly, Siva must show detrimental reliance. This requires a comparison of Siva's position before and after it entered into the transaction, and the prejudice must be material (see *Keane* paras 5-016 and 5-017). In this case, Siva is not in a materially worse position if the LoC is enforced when compared with the position where the LoC had not been entered into: Siva received (via Axcel) USD 67 million which it was able to use to discharge its liability to the Bank under the WinWind and other guarantees; had Siva not executed the LoC, the Bank would not have advanced funds to Axcel, and Siva would have remained liable to the Bank under the WinWind and other guarantees.

66. I have no hesitation in deciding issues 1 and 2 in favour of the Bank. I find Siva's pleaded case to be both contrary to the evidence and unfounded in law.

Issue 3

67. Issue 3 is whether, on its face, the LoC constitutes a legal and binding contract of (i) guarantee; and/or (ii) indemnity in respect of the CFA. For the reasons set out

below, I find that the answer to Issue 3 is that the LoC contains a guarantee (in clause 3) and an indemnity (in clause 11).

68. Pursuant to clause 8, the LoC is an English law contract and accordingly is to be construed under English law. The label 'letter of comfort' is not determinative of its substantive content. Maurice Kay LJ explained, in *Associated British Ports v Ferryways* [2009] EWCA Civ 189; [2009] 1 CLC 350 at [24]:

> "…I regard a letter of comfort, properly so called, as one that does not give rise to contractual liability. The label used by the parties is not necessarily determinative. It is a matter of construction of the document as a whole …"

This dictum drew on the decision of the Court of Appeal in *Kleinwort Benson v Malaysia Mining Corporation* [1989] 1 WLR 379 (CA) at 390E-F. There Ralph Gibson LJ held that the court's focus when construing a 'comfort letter' should be on the language used. He said this

> "… The central question in this case, in my judgment, is that considered in *Esso Petroleum Co. Ltd. v. Mardon* [1976] Q.B. 801 … That question is whether the words of paragraph 3, considered in their context, are to be treated as a warranty or contractual promise. Paragraph 3 contains no express words of promise. Paragraph 3 is in its terms a statement of present fact and not a promise as to future conduct …"

69. It is therefore important to consider the wording of the LoC. Here, it uses promissory language and it has all of the hallmarks of a document that the Parties intended to be legally binding and enforceable. In *Associated British Ports* at [9], Kay LJ commented that:

> "… It is abundantly clear in the present case, not least from the terms as to choice of law, exclusive jurisdiction and the service of process, that the Letter Agreement created and was intended to create legal rights and obligations …"

I consider that this observation applies equally in the case before me. It is noteworthy that clause 6 provides that '*This Letter of Comfort is irrevocable and constitutes legal and binding obligation(s)*'.

70. I turn now to consider whether the LoC is a contract of guarantee and/or indemnity. This depends on its objective construction. As Henderson J put it, in *Dragonfly Consultancy v HMRC* [2008] EWHC 2113 (Ch) at [53]:

> "… [S]tatements by the parties disavowing any intention to create [a particular legal relationship] cannot prevail over the true legal effect of the agreement between them. … In the majority of cases … such statements will be of little, if any, assistance in characterising the relationship between the parties …"

71. Clause 3 of the LoC is set out in above. It is cast in terms of obligation: "we *hereby irrevocably and unconditionally agree, confirm and undertake to IDBI Bank …*" It is promissory in nature, and cannot be construed as simply providing non-obligatory comfort: '*we shall ensure …*' and '*we shall provide …*' It provides for a classic 'see to it obligation' which is characteristic of a guarantee: *Andrews and Millett Law of Guarantees* (7th ed, 2015), para 1-004.

72. Beyond a bare denial that clause 3 amounts to a guarantee, Siva's Defence does not engage with the construction of the clause. Siva simply says that the clause

rendered performance '*subject to necessary statutory approvals*' and suggests that these were impossible to obtain. As to this, Siva does not identify the statutory approvals on which it relies, although this may be an oblique reference to regulation 3 of the FEMA Regulations, which I will consider below. Siva does not explain why it is said that any necessary approvals were or would have been impossible to obtain. Siva elides the separate promises set out in clauses 3(a) and 3(c). Statutory approvals are referred to only in the final sentence of clause 3(c). Clause 3(a) is not subject to approval and is a guarantee in its own right, which Siva has failed to fulfil.

73. The Bank drew my attention to the fact that Siva might have sought to rely on clause 19 of the CFA which under the heading '***Guarantor:*** *Guarantee and Indemnity*' says '*Not applicable*'. The Bank submits that any such reliance would be misplaced. I agree. The proper construction of clause 19 of the CFA is simply that the CFA does not itself contain a guarantee or indemnity. The Bank does not, indeed, suggest that it does. It does not affect the construction of the LoC. Moreover, clause 24.1 of the CFA provides for the Facility, payment and other obligations of the Obligors (which include Axcel) to be secured by, *inter alia*, the LoC.

74. Further, and in any event, if clauses 3(a) and 3(c) are said not to operate as a guarantee, what are they? They contain legal and binding promises made by Siva to the Bank to ensure that Axcel would perform its obligations under the CFA, to ensure that the Bank was repaid, and to provide assistance to Axcel to enable it to repay the Bank. I agree with the Bank's submission that however clause 3 is characterised, Siva clearly breached it.

75. I turn now to consider Clause 11 of the LoC. Siva's Defence at §16 contains a bare denial that the clause amounts to an indemnity. Once again, it may be that Siva could have sought to rely on clause 19 of the CFA. I consider that it would be wrong to do so for the reasons that I have set out in paragraph 73 above.

76. Clause 11 states expressly that Siva will keep the Bank indemnified against any loss or damage caused by the disbursement of the CFA to Axcel. I find that this is a clear promise of indemnity. There is no other possible meaning. The Bank paid out an initial USD 67 million to Axcel, followed by further disbursements, which Axcel has not repaid. As a result the Bank has suffered loss and damage for which it is entitled to be indemnified by Siva.

77. Siva's Defence at §16 denies that the Bank placed '*any or any real reliance on the Letter of Comfort*'. That is not borne out by the evidence. Provision of the LoC by Siva was a condition precedent of the Bank's modified offer to Axcel; provision of the LoC was an express requirement of clause 24.1 of the CFA; Mr George required Siva to provide a board resolution authorising Siva to provide the LoC; and, finally, Clause 2 of the LoC itself records Siva's recognition of the Bank's reliance on the LoC. In short, the Bank would not have disbursed sums under the CFA but for the LoC.

Issue 4

78. Issue 4 is whether, by clause 7 of the LoC, Siva represented and warranted that it had obtained all internal and external authorisations required by law to provide the LoC. Clause 7 provides that:

> "…We represent, warrant, and confirm: … (ii) that we have obtained all … authorizations and taken all other actions required by law to facilitate due execution of this Letter of Comfort …"

79. This language could not be clearer. In my judgment Siva did indeed clearly represent and warrant that it had obtained all authorisations required by law to provide the LoC. This would necessarily include both internal and external authorisations.

Issue 5

80. Issue 5 is whether the validity of the LoC or any part of it is affected by any pre-contractual agreement or representation by the Bank as are referred to in Issues 1 and 2.

81. For the reasons that I have already given above, I am satisfied that there was no relevant pre-contractual agreement or representation, and that Siva cannot rescind the LoC by reference to any representation, if made.

Issue 6

82. Issue 6 is whether:

> "… As a matter of Indian law, under Regulation 3 of the Foreign Exchange Management (Guarantees) Regulations 2000 and/or as a matter of Indian public policy:
> 6.1 Would performance of the Letter of Comfort be unlawful?
> 6.2 Is the Letter of Comfort an illegal and unenforceable document? …"

I have set out Regulation 3 of the FEMA Regulations in paragraph 5(2) above.

83. For the reasons set out below, my answer to both questions raised by Issue 6 is 'No'.

84. In his expert report Mr Setalvad considers at §§12.1-12.13 whether, as a matter of Indian law, the LoC comes within the ambit of Regulation 3 on the basis that it is a guarantee, or has the effect of guaranteeing the obligations of Axcel. He concludes that it does. At §§13.1-13.16 of his report Mr Setalvad next considers whether, as a matter of Indian law, the LoC would be illegal under Reg 3 and/or as a matter of public policy for want of RBI permission, and whether its performance would be unlawful. At §§13.14-15 he says:

> "… 13.14 In my considered opinion, the Letter of Comfort is not void, illegal or invalid under FEMA and/or the public policy of India merely because prior RBI permission was not obtained by Siva at the time the Letter of Comfort was executed. Siva can request the RBI for ex post facto permission. As per Indian law, there is no time limit within which ex post facto permission from the RBI may be obtained …
>
> … 13.15 In the present case, if a decree is passed in favour of IDBI on the basis of the Letter of Comfort, such a decree would be recognized and enforceable in India …"

85. Mr Setalvad cites a number of cases in support of his conclusion:

(1) *Life Insurance Corporation of India v Escorts* [1986 1 SCC 264], in which the Supreme Court of India noted the absence of the word 'previous' or 'prior' (in earlier legislation) as indicating that permission can be ex post facto.

(2) *Videocon Industries v Intesa Sanpaolo Spa* [2014 SCC Online Bom 1276], in which the Bombay High Court rejected an argument that a guarantee was null and void *ab initio*, again because *ex post facto* permission was permissible.

(3) *Ultrabulk v Jagatramka* [2017] EWHC 2792 (Comm); [2018] 1 Lloyd's Rep 384 and also in India [2023 SCC Online Guj 3152], where the Indian Court confirmed and enforced Teare J's judgment. In the English judgment at [9] Teare J concluded, with the benefit of expert evidence, that the FEMA Regulations do not require RBI permission prior to entering a guarantee. That ruling was considered and affirmed by the Gujarat High Court where it was held that the judgment was executable in India. At §11(m) of the Indian judgment the High Court of Gujarat emphasised text from the *Videocon* case, which suggested that a party seeking to avoid a guarantee by reference to its own failure to obtain RBI permission raises a 'dishonest defence'. Permission to appeal from this decision was refused by the Supreme Court of India

(4) *SRM Exploration v N&S&N Consultants SRO* [2012 129 DRJ 113 (DB)], which concluded that a guarantee entered into without permission is not void '*even if in violation*' of the FEMA Regulations.

(5) *Karia v Prysmian Cave E Sistemi SRL* [2020 11 SCC 1], in which the Supreme Court of India enforced an arbitration award, confirming that transactions that violate FEMA '*cannot be held to be void*' or '*no effect in law*'.

(6) *POL India Projects v Aurelia Reederei Eugen Friederich* [2015 SCC Online Bom 1109], which reached similar conclusions to those in *Karia* that a foreign award could be enforced even if prior permission were not obtained.

(7) *Cruz City 1 Mauritius v Unitech* [2017 SCC Online Del 7810], in which another foreign award was enforced despite the lack of prior RBI permission for a guarantee.

(8) *SJJ Marine v Pisces Exim India* [Bombay High Court at Goa – Company Petition No. 10 of 2013, Order dated 26th February 2014], in which the Bombay High Court held that a guarantor cannot rely on its failure to obtain permission to avoid its contractual obligations. In *SJJ Marine*, the High Court of Bombay used similar language to that quoted in *Ultrabulk*, to suggest that:

> "… it is not only an act lacking in bona fides but a dishonest act to claim that the respondent company neither applied for RBI permission nor made payment and was discharged from its liability from making payment altogether …"

86. Justice Kaul states in his report that the LoC is "*unlawful under the Indian Law since it has the effect of guaranteeing a foreign lending transaction*". He mentions two of the cases referred to in the previous paragraph in his report but does not consider the repeated decisions of the Indian courts that have held that a guarantor cannot rely on its own failure to apply for permission as a reason for avoiding liability under a guarantee. This omission is one of the, if not the, main reasons for my not being able to accept the evidence of Justice Kaul. It does not, with all due respect, seem to me that he has considered all of the relevant facts and all of the relevant law. I am satisfied that Mr Setalvad has given his opinion after taking into account all relevant matters. I am wholly persuaded that he is correct in the conclusions that he reaches at §§13.14-13.15 of his Report.

87. My attention has also been drawn to the provisions of the *Civil Evidence Act 1972*, s 4(2). This provides that where a reported or recorded finding or decision as to foreign law has been made by the English High Court, the law of that country, territory or part with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved. The Claimant asserts that Indian law should therefore be taken to be in accordance with the *Ultrabulk* decision of Teare J. I am satisfied that Indian law is in accordance with the decision in *Ultrabulk* for the reasons given above based upon the evidence as to Indian law that I have considered. It does not, therefore seem to me that the Claimant needs to rely on s.4 of the *CEA 1972*.

88. At §§14.1-14.10 of his report, Mr Setalvad explains that indemnities are not caught by the FEMA Regulations which, he says, are limited to guarantees. He notes that guarantees involve three parties, namely a debtor, a creditor and a guarantor, whereas indemnities only involve two parties. He cites Indian case law and statutes that draw this distinction between guarantees and indemnities.

89. Mr Setalvad further notes at §§14.7-14.9 of his report that, even if Reg 3 was capable of applying to indemnities, the indemnity is between Siva (an Indian company) and the Bank (a resident in India for these purposes, even when acting via its Dubai branch). Accordingly, for the purposes of clause 11 of the LoC there is no debt owed by or to a person resident outside India.

90. I regard this short point to be a complete answer to any defence based on the FEMA Regulations in respect of the indemnity. The FEMA Regulations do not apply to an indemnity.

91. Notwithstanding the matters of Indian law that I have considered above, I should note that the place for performance of the LoC is not, or not necessarily, India.

92. The LoC is addressed to the Bank's Dubai branch, and it was the Dubai branch that dispersed the loan monies. By clause 26.2 of the CFA, Axcel's obligation was to repay the loan '*to such account in Dubai with such bank as the Lender specifies*' **{B124/705}**. Clause 3(a) of the LoC required Siva to '*ensure that the Borrower shall… observe and perform its obligations*'. This, therefore, imposed a duty to ensure repayment by a BVI company into a bank account in Dubai.[1] Under the guarantee in clause 3 of the LoC, it is that obligation which Siva failed to perform, and the place of that performance would not, therefore, have been in India.

93. The same is true for the indemnity in clause 11. The general rule is that as a primary obligor Siva would need 'seek out the creditor' (i.e., the Bank) to make payment: *Commercial Marine Piling Ltd v Pierse Contracting Ltd* [2009] EWHC 2241 (TCC); [2009] 2 CLC 433, per Ramsey J. This is judged at the time of contracting: see *Charles Duval & Co Ltd v Gans* [1904] 2 KB 685; *Dicey, Morris & Collins on the Conflict of Laws* (16th ed, 2022) §11-166. At that time the Bank was operating via its branch in the DIFC. Although the Bank has now closed its DIFC branch,

[1] In fact, the Bank has now closed its Dubai branch, but that does not affect the wording of the CFA.

that does not affect the proper construction of the LoC as to the place for performance.

94. Finally, Siva pleads at §14(k) to (m) of its Defence that, under English common law principles, the Court will not enforce the Letter of Comfort as '*the obligations arising out of the Letter of Comfort would fall to be performed in India*' and '*performance of that contract is forbidden by the law of the place where it must be performed*'. Siva thereby raises a defence based on *Ralli Bros v Compania Naviera Sotay Aznar* [1920] 2 KB 287.

95. The rule in *Ralli Bros* was recently summarised in *Celestial Aviation Services v Unicredit Bank* [2024] EWCA Civ 628 at [105]-[106] and [120], per Falk LJ:

> "… 105. The Ralli Bros principle is well-established. It is a limited exception to the general principle that the enforceability of a contract governed by English law is determined without reference to illegality under any other law. The exception applies where contractual performance necessarily requires an act to be done in a place where it would be unlawful to carry it out…
> 106. A distinction has been drawn in the case law between situations where performance is illegal in the jurisdiction where performance must take place, where the principle applies, and cases where the illegality relates to a preparatory step to performance, or "equipping to perform": Banco San Juan at [80]-[83], where the illegality does not excuse non-performance. Further, it is not in dispute that a party will not be excused if performance would be legal if a licence was obtained, unless that party shows that they either made reasonable efforts to obtain a licence or that any such efforts would have been in vain because a licence would have been refused …
>
> … [120] It was not disputed that a principle exists to the effect that a party seeking to rely on the Ralli Bros doctrine may be precluded from doing so if they could have done something to avoid illegality in the place of performance …"

96. Whilst this was common ground before the Court of Appeal, at [122], Falk LJ proceeded to quote with apparent approval Cockerill J in *Banco San Juan v Petroleos de Venezuela* [2020] EWHC 2937 (Comm) at [90]:

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

97. In *Celestial Aviation Services* Falk LJ summarised Cockerill J's judgment in *Banco San Juan* as follows

> "… 123. Cockerill J went on at [96]-[97] to consider *J W Taylor & Co v Landauer & Co* [1940] 4 All ER 335, where sellers were not excused from a contract to sell butter beans due to an intervening prohibition in respect of which a licence could have been obtained. She concluded that the fact that this and other cases related to the sale of goods was not a distinguishing factor and rationalised the principle by reference to the requirement to equip to perform. Cockerill J then considered *Libyan Investment Authority v Maud* [2016] EWCA Civ 788, where Mr Maud had sought to rely on sanctions to avoid payment under a guarantee and the issue arose as to who should have applied for a licence. In that case Article 12(2) of the relevant regulations placed the burden on the LIA but Moore-Bick LJ observed at [25] (obiter) that the question was otherwise to be determined by reference to the terms of the contract:
>
> > "If a person has promised to perform a certain obligation, whether it be to pay money or deliver goods, and fails to do so, the burden is on him to show that he was prevented from doing so by some cause for which he is not responsible. In this case, therefore, but for article 12(2), it would have been for Mr. Maud to show that the imposition of sanctions prevented him from performing his obligation and in order to do so he would have had to show that he could not have obtained the necessary licence from the Treasury. That was not a burden that he ever attempted to discharge."
>
> 124. Applying this to the facts of this case, UniCredit was therefore right to accept that the burden lay on it.'

98. Accordingly, whilst it was common ground in *Celestial Aviation*, Falk LJ confirmed the conclusion from earlier authorities that a party who can apply for a licence to allow payment under a guarantee must do so, or prove that such an application would have been in vain. Similar reasoning was given by the Privy Council in its recent decision in *Katra Holdings v Standard Chartered Bank (Mauritius)* [2024] UKPC 8.

99. For the reasons that I have given above, I am satisfied that the principle in *Ralli Bros* does not apply to this case. The LoC does not necessarily lead to performance in India which would be illegal. The LoC is not void or unenforceable as a matter of Indian law, because the FEMA Regulations do not require prior approval of guarantees by the RBI. Accordingly, this is a 'licensing' case in which Siva cannot show that it has attempted to obtain RBI approval or that RBI approval would necessarily be refused. The indemnity in clause 11 of the LoC is not prohibited by the FEMA Regulations at all. Siva is not required to pay the Bank in India. Rather it is required to, or at least entitled to, pay the Bank in Dubai. In my judgment, an Indian court would enforce the LoC – it has in fact enforced an English Court's judgment in the *Ultrabulk* case on very similar facts.

100. I should finally mention that at §7(i) of its Defence Siva pleads that the general legality and/or enforcement of letters of comfort has been prohibited by the RBI since March 2018. Siva adduced no evidence to support this assertion. The assertion is thought to refer to a circular of the RBI, dated 13 March 2018. As is clear from the terms of the circular, the relevant discontinuance of letters of comfort

related only to '*Trade Credits for imports into India by AD Category –I banks*'. That does not apply to the LoC. Further, and in any event, I am satisfied that the circular did not have retrospective effect.

Issue 7

101. It will be recalled that Issue 7 is:

> Is the English court prevented from enforcing compliance with the Letter of Comfort at common law or under Article 3(3) or Article 9(3) of the Rome I Regulation?

102. I am satisfied that neither article of Rome I applies in this case.

Article 3(3)

103. Rome I Regulation, Article 3(3), states:

> "… Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement ..."

104. A predecessor provision in similar terms was considered in *Banco Santander Totta v Companhia Carris de Fero de Lisboa* [2016] EWCA Civ 1267; [2017] 1 WLR 1323. It was there held that for Art 3(3) to apply, all elements of a claim needed to be within the other country. It did not apply to a contract between two Portuguese companies because other related contracts were with a Spanish company: see also *Dicey, Morris & Collins* at §32-228.

105. In the present case there are elements with connections to the BVI and Dubai, such that Art 3(3) does not apply. Thus, for example, the CFA was entered into by the Bank's Dubai branch office, the LoC was addressed to the Bank's Dubai branch office, Axcel was incorporated in the British Virgin Islands, Axcel was required to repay its loan to an account in Dubai, and the facilities under the CFA were used by Siva to repay the debt owed by WinWind (a Finnish company), and thereby to discharge the WinWind Guarantee and Facility (both contracts being governed by English law). The same discharge was used by Siva to obtain the discontinuance of the WinWind Proceedings (before the English court).

106. Further, and in any event, I am satisfied that the application of regulation 3 of the FEMA Regulations would not have the effect, as a matter of Indian law, of preventing the Bank from enforcing the LoC.

Art 9(3)

107. Art 9(3) of the Rome I Regulation provides as follows:

> "… 1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
> …

> 3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application ..."

108. I am satisfied that Article 9(3) also does not apply in this case. It is only applicable where the obligations '*have to be*' performed in a country where performance would be unlawful. As I have already observed above, performance under clause 3 ought to have taken place in Dubai, not India. Had performance been required to take place in India, the FEMA Regulations are not regarded by India as crucial to safeguarding its public interests. Mr Setalvad at §§13.11-13.12 of his report referred in this regard to *Karia v Prysmian Cavi E Sistemi*, where the Indian Supreme Court confirmed that rectifiable breaches under FEMA '*can never be held to be a violation of the fundamental policy of Indian law*', and in the particular context of the FEMA Regulations, the Bombay High Court came to the same conclusion in *POL India Projects v Aurelia Reederei Eugen Friederich*.

109. Moreover, even if Article 9(3) were applicable, this Court has a discretion as to whether it should 'give effect' to the relevant legal provisions. In circumstances where the Indian Courts would enforce the guarantee and/or a judgment of this Court, I am satisfied that there is no basis for giving Siva relief under Art 9(3).

The Bank's Alternative Claims

110. Issues 8 to 11 which are considered below only arise if the Court is against the Bank on its primary case, as summarised above. I therefore deal with them relatively briefly in circumstances where I have found that the Bank is entitled to judgment on its primary case.

Issues 8 & 9

111. Issues 8 and 9 are as follows:

> '*8. Did Siva act in breach of warranty by failing to obtain necessary statutory approvals?*
> *9. Did Siva misrepresent that it had obtained necessary statutory approvals? Was IDBI thereby induced to enter into the Credit Facilities Agreement and the Letter of Comfort?*'

These Issues are both based on clause 7 of the LoC which I have set out above. I have already considered the meaning and effect of clause 7 when dealing with Issue 4.

Breach of warranty

112. It is implicit from Siva's Defence that it has not obtained authorisation from the RBI under Regulation 3 of the FEMA Regulations.

113. As set out in Mr Setalvad's Report at §13.18, Siva cannot rely on its own failure to seek permission. A defence based on a failure to obtain permission which was required pursuant to FEMA Regulations was rejected in *Videocon v Intesa Sanpaolo* at [41], *POL India Projects v Aurelia Reederei Eugen Friederich* at [155]; and *Ultrabulk*. These were all cases in which no provision equivalent to clause 7 of the LoC was mentioned by the court. In the present case the LoC

expressly placed responsibility for obtaining all relevant authorizations on Siva. Its failure to do so amounts, in my judgment, to a breach of warranty.

Misrepresentation

114. I am satisfied that Siva represented to the Bank that it had obtained all authorizations required by law. The Bank had been sent the email from Mr Peringattu in which he sought legal advice from Wise & Worth to ensure that the LoC did not contravene the FEMA Regulation and the revised draft of the LoC which had been modified by Wise & Worth contained clause 7. The Bank could in my view reasonably conclude from this that Siva was happy to make the representation in clause 7, and that further authorizations were not required.

115. Section 2(1) of the Misrepresentation Act 1967 provides as follows:

> "… Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true ..."

116. It is for Siva to prove that it had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true. Siva has adduced no evidence as to what it believed at the time - any advice given to it by Wise & Worth in response to Mr Peringattu's email has not been disclosed.

117. The other elements of the alternative claim in misrepresentation are also present. The representation was made by Siva to the Bank in clause 7 itself. The Bank entered into the LoC on the basis that Siva did have all necessary authorisations. But for the execution of the LoC, the Bank would not have advanced the loan monies to Axcel.

118. As *Cartwright, Misrepresentation, Mistake and Non-Disclosure* states at 7-36, the most natural reading of s.2(1) is that the recoverable loss is that which is suffered as a result of entering into the relevant contract.

Issues 10 & 11

119. Issues 10 and 11 are concerned with the Bank's further alternative cases, and are as follows:

> 10. If the Letter of Comfort is not binding or enforceable, is IDBI entitled to be subrogated to claims that it had under previous guarantees provided by Siva, in respect of company debts discharged by sums advanced under the Credit Facilities Agreement?
> 11. Alternatively, is IDBI entitled to restitutionary damages and/or disgorgement to reflect the extent to which Siva has been unjustly enriched?'

120. The Bank submits that if it is unable to rely on the LoC, Siva will have been enriched at the Bank's expense as the sums paid under the CFA were used to discharge Siva's liabilities to the Bank under the WinWind and other guarantees.

121. Lord Burrows held in *Samsoondar v Capital Insurance* [2020] UKPC 33; [2021] 2 All ER 1105 at [18], there are three central elements to a claim for unjust enrichment:

> "… that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust. If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence …"

I will deal with each of these elements in turn.

Was Siva enriched?

122. I am satisfied that Siva was enriched - the disbursement of funds by the Bank under the CFA enriched Siva by virtue of the discharge of its liability for the debts of WinWind, Planet Pickles and Sterling Agro. As Siva had guaranteed each of those debts, the discharge of the debts thereby reduced Siva's obligations. Before that disbursement, Siva was liable to the Bank under the WinWind and other guarantees for the following sums that were then discharged following the CFA: WinWind's indebtedness: USD 64.68m; Planet Pickles indebtedness: INR 2.375 crore (c. USD 395,833); and Sterling Agro's indebtedness: INR 4.305 crore (c. USD 717,500). Interest was also accruing to those debts. After the disbursement, those debts and the concurrent guarantee obligations were wiped clean.

123. Siva's Defence at §20H.1 contains a bare denial that the discharge of the debts above enriched Siva. That is clearly both incorrect and, also, insufficient.

Enrichment at the Bank's expense?

124. I am satisfied that Siva was enriched at the Bank's expense. Although it was Axcel which received the payment from the Bank under the CFA, it was Siva that was directly enriched, since the payment was used to discharge its debts: the enrichment was not the payment which Axcel received, but the discharge which Siva received. That outcome was itself part of a set of related transactions, operating in a co-ordinated way, forming a single scheme or transaction: the payment from the Bank to Axcel was immediately passed through various associate companies to Siva. Siva then paid that money to the Bank to discharge its liabilities under the guarantees which it had given for the debts of WinWind, Planet Pickles and Sterling Agro, resulting in Siva's enrichment.

Was the enrichment unjust?

125. The Bank relies on two aspects of unjustness. First, its mistaken belief in the legal efficacy of the LoC. Secondly, the failure of the basis upon which the Bank disbursed monies to discharge the WinWind and other debts.

126. As to mistake, the editors of *Goff & Jones on Unjust Enrichment* (10th ed, 2022) explains at §9-01 that '*the starting point is now that any causative mistake of fact or law, spontaneous or induced, can qualify*'. It is clear from *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 that a mistake of law suffices.

127. Following Wise & Worth's involvement, and the advice which it had received from TLT, the Bank was under the impression that the LoC was enforceable. If it is not, however, then there was a valid mistake. A failure to confer expected legal rights on a party can amount to a failure of basis triggering subrogation: see *Goff & Jones* (above) at §13-20. Reliance on an ineffective contract is sufficient to give rise to a claim for unjust enrichment: *DD Growth Premium 2X Fund v RMF Market*

Neutral Strategies [2017] UKPC 36; [2018] Bus LR 1595 at [60], per Lords Sumption and Briggs.

128. In the present case, the package of securities for which the Bank contracted included the LoC. If the LoC is unenforceable, then the basis upon which the Bank paid out money has lost a crucial component. The absence of that component would leave Siva substantially enriched, and the Bank out of pocket.

129. I find that the Bank has established its claim of unjust enrichment. Had it been necessary for me to do so I would also have found that
    (1) The Bank would have been entitled to resurrect the previously discharged guarantee by way of subrogation: see, *Swynson v Lowick Rose* [2017] UKSC 32; [2018] AC 313 at [26] and [30]. This is a typical remedy where a lender's money has been used to repay an earlier lender; and
    (2) Even if there were no entitlement to subrogation, the Bank would remain entitled to its personal claim, in order to reverse Siva's unjust enrichment.

Issue 12

130. Issue 12 deals with quantum, the value of the Bank's claim under its primary case and each of its secondary cases, as follows:

> "… To what sum, including any interest, is IDBI entitled as against Siva under:
> 12.1 the Letter of Comfort;
> 12.2 its claim for breach of warranty;
> 12.3 its claim for damages for misrepresentation; and/or
> 12.4 its claim in subrogation/unjust enrichment? …"

131. Under the Bank's primary claim under the LoC, I find that it is entitled to recover from Siva the debt that is currently owed by Axcel, in the sum of USD 143,669,753.22. This has been addressed in the witness statement of Mr Nikam, whose evidence I accept.

132. The Bank would also have been entitled to recover the same sum for breach of the warranty in clause 7: if the Bank is not entitled to rely on the guarantees and indemnity in the LoC then that would have been caused by Siva's failure to obtain the permission of RBI.

133. The assessment of losses caused by misrepresentation would fall to be assessed on a different basis. Here, the Bank is entitled to the losses caused by entering into the LoC and, as a result, disbursing monies under the CFA and losing its alternative claims on Siva under the WinWind and other guarantees. The Bank should, therefore, be entitled to be put back into the position as if those guarantees were in place, meaning that it is entitled to the principal sums paid out under the CFA, plus interest as follows:
    (1) Under the WinWind guarantee, the Bank would be entitled to the interest that would have been payable by WinWind for which Siva would have been liable, capped at the rate payable under the CFA. Interest under the WinWind facility was charged at a variety of rates, whereas the CFA carried margin of 4% over LIBOR until it was in default, and 6% thereafter.
    (2) Under the Planet Pickles and Sterling Agro guarantees, the Bank sought simple interest calculated at LIBOR plus 2%.

134. There is a small sum which was not used to discharge the WinWind and other guarantees, on which the Bank is entitled to interest under section 35A of the Senior Courts Act 1981

135. The Bank's subrogated rights under the discharged WinWind, Planet Pickles and Sterling Agro guarantees cannot exceed the rights that existed under those guarantees. Nor, the Bank accepts, can its rights exceed those it anticipated under the LoC. Under its subrogation claim, the Bank would also have been entitled to interest on the same basis as under the misrepresentation claim, above.

Conclusion

136. I find that the Bank is entitled to the sums that it has claimed under the LOC. The Bank advised me that it was seeking interest at the CFA rate of LIBOR + 6% up until 30 September 2024 and the statutory rate from 30 September 2024. This seems to me to be justified and I invite it to prepare a draft order reflecting this.