

JERSEY / JUDGMENT

Incat v Luba [2008] JRC 140 (21 August 2008)

[2008] JRC 140

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judgment

the commissioner: 1. The plaintiff companies ("the Incat group") claim between them the sum of US\$8,558,442, with interest, arising out of plant and services provided by them to the defendant company ("Luba") at the deep water port of Luba on the Island of Bioko, Equatorial Guinea, West Africa.

Background

2. In or about early 2000, John Keith Haden MBE ("Mr Haden") who is the chairman, managing director and beneficial owner of 75% of the shares in the Incat group, identified an opportunity to develop a deep water facility on the Island of Bioko, Equatorial Guinea. He negotiated for Luba, which was then part of the Incat group, a 25 year concession from the government of Equatorial Guinea for the exclusive use of the port, primarily to be used as an offshore supply base for deep water oilrigs. 3. Whilst it was clear that Luba would need substantial monies from an external source in order to finance the development and operation of the port, it was Mr Haden's intention that Luba would use the in-house resources of the Incat group to assist with the construction and development of the port and that invoices would be raised by the Incat group against Luba to cover the cost of such assistance, which would be paid by Luba in due course. 4. Bank funding was obtained from two local banks and subsequently from Amarada Hess, which established a facility at the port, but by 2006 Luba was in financial difficulties and Mr Haden was under pressure from the government to find a buyer for Luba, as he was unable to procure funding to develop the port. 5. Lonrho Africa plc ("Lonrho") became interested as a potential purchaser of Luba in February 2006. In its view Luba was in a perilous position and at risk of losing its concession. From information provided by Luba's management, Lonrho estimated that some US\$100,000,000 was required to pay off creditors, purchase the shareholders' shares and capitalise the development of the project sufficiently to meet the government's development requirements. After discussions with Barclays Capital (as proposed project finance advisers), Lonrho considered that the project could withstand a bank debt component of some US\$50,000,000 to US\$60,000,000. 6. Lonrho made an offer for the shares in Luba by letter dated 19 th March 2006. As part of that offer it proposed, subject to due

diligence, that the inter company debts due by Luba to the Incat group then listed at US\$8 million (which we will refer to as the "Incat debt") and Luba's other trade creditors would be paid as to 75% on the proposed bank loan being drawn down, with the remainder being repaid from the next 10% of cash flow after the senior debt is serviced. The directors of Luba accepted this offer in principle on 22 nd March 2006. 7. Lonrho instructed DLA Piper UK LLP in London and Mourant du Feu & Jeune in Jersey to act for it in the purchase and Mr Haden instructed BoisBois in Jersey to act in the sale. In view of Luba's position there was considerable pressure to complete expeditiously. In the course of its due diligence Lonrho became concerned as to the validity of material elements of the Incat debt and determined that it should be fully reviewed. The mechanism for this and for the deferment of the Incat debt was dealt with by a letter from the Incat group to Luba ("the offer letter") drafted by DLA Piper to be executed at the same time as the purchase agreement which, following negotiations, was in the following form:- "INCAT GROUP OF COMPANIES 29 Hill Street St Helier Jersey Channel Islands To: Luba Free Port Limited Pomona Villa La Vallee des Vaux St Helier Jersey Channel Islands JE2 3GA May 2006 Dear Sirs Balance due from Luba Free Port Limited (registered in Jersey with company number 67503) ("Luba") to the Incat group of companies in the attached schedule 1 ("Incat") We refer to the provision of plant, services and facilities ("Services") made available by Incat, the invoices for which remain unpaid by Luba (the "Debt") a summary of which to 31 December 2005 is set out in the attached schedule 2. An aggregate amount of Debt together with the cost of additional Services from 31 December 2005 to the date of completion ("Aggregate Debt") in relation to the sale of shares of Luba to Lonrho Africa (Holdings) Limited is to be determined by the arranging bank (in their sole discretion) (the "Arranger") in accordance with the results of the Arranger's due diligence enquiries. Notwithstanding the terms previously agreed between us regarding repayment of the Debt, we hereby agree that the Aggregate Debt shall be repaid by you to us as follows: 1. you shall repay seventy five per cent (75%) of the Aggregate Debt within 28 days following receipt by you of bank debt financing from the Arranger (the "Bank Loan"); and 2. you shall repay the remaining amount of the Aggregate Debt in instalments paid in January and July of each proceeding year from ten per cent (10%) of the rolled up cash flow for the preceding six month period remaining after deducting all payments of interest, fees and other scheduled payments in respect of the Bank Loan during such period until the remaining Aggregate Debt is repaid in full. This letter shall be governed by English law. Please acknowledge your agreement to the terms of this letter by signing below. Yours faithfully For and on behalf of Incat Equatorial Guinea, Inc. acting for itself and on behalf of the companies listed in schedule 1 Acknowledgement and agreement We hereby acknowledge and agree to terms of the above letter. For and on behalf of Luba Free Port Limited". 8. Thus the amount of the Incat debt was to be determined by the arranging bank as well as being deferred pending receipt of bank debt financing. The summary attached as schedule 2 was a summary to 31 st March 2006 and not 31 st December 2005 as stated. 9. The acquisition of the shares of Luba by Lonrho was completed on 11 th May 2006. No bank debt financing has been obtained following completion, with the result that, under the terms of the offer letter, the determination of the amount of the Incat debt has not yet taken place

and its repayment has not yet been triggered. 10. On 23 rd August 2006, Mr Simon Young ("Mr Young") wrote to Miss Emma Priestley ("Miss Priestley") of Lonrho stating his understanding that the bank debt financing had been arranged and that 75% of the Incat debt was now due pursuant to the terms of the offer letter. In her response of 31 st August 2006, Miss Priestley assured him that this was not the case. She said that due diligence was ongoing but the obligation to pay 75% of the debt was not triggered until 28 days had elapsed from the receipt of the bank debt financing. 11. Although Lonrho had intended to appoint Barclays Capital as the arranging bank for the purposes of the offer letter, Barclays Capital dropped out of the picture following completion of the acquisition of Luba as a result of a conflict of interest. 12. An announcement by Lonrho on 25 th September 2006 that it had mandated the Netherlands Development Finance Company to provide up to US\$30,000,000 of debt financing for the development of the port subject to completion of satisfactory due diligence (financing that never materialised) led to a letter from Mr Young of 5 th October 2006 to DLA Piper in which he stated that the refusal of Luba to provide information and its continued raising of finance led the Incat group inextricably to conclude that it had no intention of paying the Incat debt and that accordingly proceedings would be issued. A simple summons claiming US\$8,558,442 plus interest and costs was subsequently issued on the 27 th October 2006. The issues 13. It is helpful to make certain initial observations on the offer letter:- (i) Services were being provided by the Incat group to Luba on an ongoing basis and continued beyond completion of the sale of the shares of Luba. The first paragraph of the offer letter makes reference to a summary of the unpaid invoices as at 31 st December 2005 being set out in schedule 2 (defined as "the Debt") and the second paragraph makes reference to the cost of additional services from 31 st December 2005 to the date of completion, (defined as "the Aggregate Debt"). In essence, the offer letter covered the cost of all services provided by the Incat group to Luba up to the completion of the sale of the shares. (ii) In the second paragraph of the offer letter, the Aggregate Debt was to be determined by the "arranging bank" in its sole discretion, in accordance with the results of its due diligence enquiries. The arranging bank is not identified and the letter is silent as to who is to appoint the arranging bank and the timescales to apply both to the determination of the Aggregate Debt and the obtaining of bank debt financing. Furthermore, the letter does not address the contingency of no bank debt financing being obtained. (iii) Luba's agreement to the offer was to be acknowledged by signing the letter in the place indicated. 14. In claiming repayment of the Incat debt, the Incat group face the hurdle of the offer letter under the terms of which its quantum was to be determined and its repayment deferred. They claim that they are not bound by the offer letter because (in summary):- (i) it was never accepted by Luba on the terms required; (ii) the offer letter did not in any event give rise to an enforceable contract because it attached a summary to 31 st March 2006 and not to st December 2005; (iii) even if it was accepted, and is enforceable, the offer letter was subject to an implied term that finance would be sought and obtained within a reasonable time. That time has expired and Luba is in repudiatory breach which the Incat group accepted by letter dated 7 th November 2006 or alternatively by further letter of 23 rd February 2007. Alternatively, they argue that time was made of the essence by letter dated 16

th January 2007 and having failed to perform the terms, Luba is not now able to set up any such agreement that may have existed in answer to the cause of action on the Incat debt. 15. On the assumption that they succeed in one or more of these submissions, the Incat group do not action Luba on the underlying invoices submitted but claim that the amount of the Incat debt was agreed by e-mail exchanges which took place between their respective accountants in April 2007. 16. Thus the issues before the Court are:- (i) Are the Incat group bound by the offer letter? (ii) If so, what, if any, terms should be implied into the offer letter? (iii) Was the amount of the Incat debt agreed between the parties in the e-mail exchange of April 2007? Hearing 17. The hearing took place on the five days commencing 1 st July 2008. The plaintiffs filed witness statements by Mr Haden and Ronald Ingham ("Mr Ingham"), the Group Financial Controller of the Incat group, both of whom were cross-examined. Luba filed witness statements by David Lenigas ("Mr Lenigas"), the Executive Chairman of Lonrho, Miss Priestley, Howard James McDowall ("Mr McDowall"), a director and general manager of Luba, Laurie Yu ("Mr Yu"), a consultant employed by Lonrho in connection with the Luba project, and Jean Ellis of Duncan Sheard Glass, an independent firm of chartered accountants. Mr Lenigas and Mr McDowall were cross-examined. The Court also had the benefit of an expert accountant's report prepared on behalf of Luba by Mark Fairhurst which was accepted by the Incat group. In the interests of brevity and without meaning any discourtesy to the witnesses who gave of their time to assist the court, we are not going to summarise all the evidence we heard but will refer to it only where we feel it is helpful to do so. 18. The offer letter was expressly governed by English law and the parties accordingly filed affidavits from English counsel, Christopher John Wilson for the Incat group and Stephen William Cogley for Luba. Both counsel helpfully prepared a joint statement setting out the matters in their respective affidavits on which they are agreed and on which they are not agreed, together with their reasons for their disagreement. We have therefore applied English law in relation to the offer letter as advised by counsel and had only one issue of English law upon which they were not agreed to resolve. The offer letter Acceptance 19. We find the facts in relation to execution of the offer letter are these. Mr Haden was travelling in the Far East at the time of the completion and on 8 th May 2006 Mr Young faxed to his hotel in Australia a copy of the offer letter. It did not have the summary attached. Although in his witness statement Mr Haden stated that he signed and returned the side letter on 11 th May 2006 (the day of completion), it is clear, and he accepted under cross-examination, that he must have signed and returned the letter to Mr Young prior to 10 th May 2006 when Mr Young included it as one of a number of attachments relating to the sale which he sent to DLA Piper and others. On that same day, Mr Young had received from Mr Paton the inter-company balances as at 31 st March 2006 and it was these balances that Mr Young attached to schedule 2 of the offer letter signed by Mr Haden. Mr Young dated both the signed letter and the summary 11 th May 2006. 20. The board of Luba met at the port on the day of completion, namely 11 th May 2006. Mr McDowall and Mr Paton were personally present and the remaining five directors (including Mr Haden, who was both chairman and director, and Mr Frederick Marshall, the other beneficial owner of the Incat group) attended by telephone. The board members had earlier received a carefully drafted minute prepared by

DLA Piper to act as an agenda for the meeting, together with copies of the documentation presented to the board, which included the offer letter, which, apart from showing an incorrect address for the Incat group, was the same as that executed by Mr Haden on behalf of the Incat group. In addition to the formal minutes which were in due course signed, Mr McDowall prepared his own notes of the meeting. Initially under cross-examination Mr Haden was uncertain as to whether he had attended for the duration of the meeting, but he accepted that it was clear from Mr McDowall's notes that he was indeed present by telephone from the outset of the meeting to his own closing remarks of thanks to the management of Luba for their efforts over the preceding three years in keeping the project afloat. He also accepted that he was present by telephone when the board resolved to enter into and approve the offer letter and authorised Mr McDowall to execute the same on behalf of Luba. Pursuant to the authority given to him, Mr McDowall printed off a copy of the offer letter in word form which he returned to DLA Piper. He left it to DLA Piper to attach the summary. DLA Piper attached the summary to 31 st March 2006 but it would appear did not pass a copy of the offer letter executed by Mr McDowall on behalf of Luba to the Incat group. 21. It is a general rule of English law that an acceptance has no legal effect until it is communicated to the offeror. The main reason for the rule is said to be that it would be unjust to hold the offeror bound if he did not know that his offer had been accepted. It follows that the offeror may be bound if he knows of the acceptance although it was not communicated to him by the offeree or the offeree's agent. However, indirect information is not sufficient where the offer expressly requires notice of acceptance to the offeror. 22. It was not an express term of the offer letter that Luba return its signed copy to the Incat group. The requirement was for Luba to acknowledge its agreement by signing the letter, although in our view it is to be implied that such acknowledgement was to be communicated to the Incat group. 23. There can be no doubt that the Incat group were well aware that the offer letter had been accepted by Luba. It formed an integral part of Lonrho's offer and was one of a number of documents that had to be executed as part of the completion. In his witness statement Mr Haden stated that he was never told whether or not following the meeting Luba had actually signed the offer letter but he had to accept that he was in attendance by telephone when he and the other board members resolved to enter into and approve the offer letter and authorised Mr McDowall to sign it. 24. We find that the offer letter was accepted by Luba and that acceptance was communicated to the Incat group through (at least) Mr Haden. The Incat group are therefore bound by its terms. There is no requirement therefore for us to go on and consider Luba's submission that the Incat group are in any event estopped from denying the validity of the offer letter, in particular in consequence of Mr Young's letter of 23 rd August 2006, which was clearly written on the basis that the offer letter was valid and enforceable. 25. For completeness, we should make reference to a further pleaded submission made by the Incat group namely that Luba was estopped from asserting that it had accepted the offer letter because it failed to produce or particularise any acceptance letter during the proceedings. This submission was not seriously pursued at the hearing. How estoppel could apply in these circumstances was not clear to the Court but in any event there is ample evidence to show that the offer letter was

accepted by Luba. Uncertainty 26. The Incat group argued that the offer letter was void for uncertainty as a result of a summary to 31 st March 2006 having been attached to schedule 2 as opposed to the summary to 31 st December 2005. Both English counsel were very clear that the English courts are reluctant to hold that an agreement is void for uncertainty and will only do so as a last resort. In the case of Lloyd's Trust Instrument (Unreported) June 24 th 1970 (referred to in Lewison, *The Interpretation of Contracts* at page 328), McGarry J referred with approval to a dictum of Lord Brougham in *Doe d Winter v Perratt*

- (1843) 9 CL & F 606 at 689 - " the difficulty must be so great that it amounts to an impossibility, the doubt so grave that there is not even an inclination of the scales one way ". In *Nea Agrex SA v Baltic Shipping Co Ltd*
- (1976) 1 Q. B. 933, CA Lord Denning M. R. described an argument that a clause was void for uncertainty as " a counsel of despair ". In Mr Cogley's view, the general reluctance to hold an agreement as void for uncertainty is even greater where, as here, the parties are commercial parties who have benefited from legal representation in the drafting of the contractual documentation in question and even greater where the agreement has been partly performed. 27. To the extent necessary Luba sought rectification of the offer letter by deleting the words ' ...a summary of which to 31st December 2005 is set out in the attached schedule 2 ' and substituting the following ' a summary of which to 31st March 2006 is set out in the attached schedule 2 '. In our view it is not necessary. The clear intention of the offer letter was for all the indebtedness of Luba to the Incat group up to the date of completion to be determined by the arranging bank and deferred on the terms set out. It makes no difference whether the summary (which is all it purports to be) is at 31 st December 2005 or 31 st March 2006, because the cost of the services provided after the date of the summary up to completion are included in the definition of Aggregate Debt and it is the Aggregate Debt which is determined and deferred. In our view, the inadvertent insertion of the summary to 31 st March 2006 by Mr Young prior to the completion and by DLA Piper shortly thereafter makes no difference to the validity and effect of the offer letter. Implied terms 28. In *Investors Compensation Limited v West Bromwich Building Society*
- (1998) 1 WLR 896 , the House of Lords held that in construing contractual documents the aim is to find the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties, including anything which would have affected the way a reasonable man would have understood it. However, excluded from this process are previous negotiations and declarations of subjective intent. The rationale behind such exclusion was explained by Lord Wilberforce in *Prenn v Simmonds*
- (1971) 3 All ER 237:- "There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in cl 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience (although the attempt to admit it did greatly prolong the case and add to its expense). It is

simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back; indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to". 29. This is relevant in this case because during the course of the negotiations over the offer letter, Mr Young proposed a number of amendments, including the imposition of a lower limit of US\$7.25M on the amount which the arranging bank would determine and the imposition of time limits of 31 st October 2006 for the payment of a minimum of US\$6,000,000 and 31 st December 2011 for the balance. These amendments were not accepted by Lonrho and Mr Lenigas and Miss Priestley gave evidence that there was no way in which they would have agreed to the insertion of any terms which would have had the effect of setting a definitive time frame for the provision of bank debt financing for payment of the Incat debt. Those amendments were therefore removed from the draft. 30. Mr Cogley, whilst accepting that evidence of pre-contractual negotiations is generally inadmissible as part of the matrix of facts when construing the express terms of a contract, submitted that antecedent prior agreements are admissible. The rationale appeared to him to be that a court should not, as a matter of policy, be required to undertake a lengthy and time consuming analysis of pre-contractual negotiations which may not lead to any clear identification of what the parties' intentions were in all events, whereas if there is in fact a consensus on a certain matter this will be readily identifiable and appropriately relevant (and helpful) to the determination of the parties' intentions. Although he accepted that there was no direct English authority on the point, he advised that an English court would take into account as part of the background material any final position the parties might have reached prior to production of the written contract in respect of the matters that would fall to be addressed by the alleged implied term, in particular if there had been a refusal by one side to agree an express term in the contract dealing with the substance of the implied term or there had been a clear and final consensus between the parties that no such term would be expressly provided for in the contract. Were it otherwise, he argued, the court would be implying a term on the basis of the parties' presumed intentions in circumstances where there was clear, compelling and incontrovertible evidence that the parties had no such intention. His view was shared by Professor Gerard McMeel in his book *The Construction of Contracts: Interpretation, Implication and Rectification*, 2007, and was supported by Commonwealth authority, namely the Australian case of *Codelfa Construction Prop Limited v The State Rail Authority of New South Wales*

- (1982) 149 CLR 337, where Mason J stated as follows:- "There may perhaps be one situation in which evidence of the actual intention of the parties should be allowed to prevail over their presumed intention. If it transpires that the parties have refused to include in their

contract a provision which would give effect to the presumed intention of persons in their position it may be proper to receive evidence of that refusal. After all, the court is interpreting the contract which the parties have made and in that exercise the court takes into account what reasonable men in that situation would have intended to convey by the words chosen. But is it right to carry that exercise to the point of placing on the words of the contract a meaning which the parties have united in rejecting? It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn for the surrounding circumstances". 31. Mr Wilson did not disagree with the proposition that where the parties have previously reached agreement on the matter that is not reflected in a written contract into which they entered, the court may admit evidence about that agreement. That is because the agreement is not wholly contained in the written document. However, he disagreed that English law permitted a court, in determining terms to be implied into a contract, to consider evidence that the parties negotiated in respect of a similar term and that the same did not subsequently appear in the final agreement. Whilst there was some academic support for the contrary approach and observations about it in Commonwealth cases (the comments of Mason J in the *Codelfa Construction* case were couched in terms of possibility only) the admission of such evidence is contrary to a substantial body of English law. Having referred to the judgment of Lord Wilberforce in *Press v Simmonds* quoted above, he referred to the judgment of Waller LJ in *The Rio Assu* (No. 2)

(1999) 1 *Lloyds Re* 115 at 124, CA:- "The negotiations of a contract can often be a compromise. It is dangerous to make the assumption that one party intended to have something supplied or provided for by the contract, or that the other party intended to have something else supplied or provided by the contract. Contracts are negotiated and ultimately each may think that he has what he wishes, but it is for the Court to interpret the language of the contract. There is no doubt about the correctness of the principle". 32. Mr Wilson points out that the orthodox view has been restated by the Court of Appeal in *Square Mile Partnership Ltd v Fitzmaurice McCall Ltd*

[2007] 2 BCLC 23 which was followed in *Berkeley Community Villages Ltd v Pullen*

[2007] EWHC 1330 (Ch) ; and more recently by the Privy Council in *Alexiou v Campbell*

[2007] UKPC 11 . In *IN Newman Ltd v Adlem*

[2006] FSR 16, Jacob LJ in the Court of Appeal said that the rule " was settled years ago ". 33. In our view when engaged in the process of applying a foreign law (in this case English law), we should be cautious in our approach and whilst respecting the opinions expressed by Mr Cogley, we should follow the orthodox view set out in the substantial body of English law referred to by Mr Wilson by not taking into account evidence of the parties' negotiations over the offer letter. 34. Furthermore, we find that there was no agreement or consensus between the parties that there would be no time limits on refinancing. There was no reference in Lonhro's written offer of the 19 th March 2006 to time limits or their

non application or in the subsequent heads of terms executed by Mr Lenigas to Mr Haden on 18 th April 2006. Mr Young proposed certain amendments incorporating time limits which were rejected but the final form of the offer letter was entirely silent on the point, a position which the Incat group, no doubt on advice, accepted. Accepting a draft which is silent on the issue of time limits does not constitute an agreement or consensus that there should be no such limits. 35. In our view the offer letter is not complete and it is necessary for the Court to imply certain terms. This is not surprising because as made clear in Chitty on Contracts 29 th edition at para 13-002, parties are often content to express only the most important terms of their contract, leaving the remaining items to be understood. The Court will then be asked to imply a term or terms to remedy the deficiency. Often a subsequent disagreement reveals that there are contingencies for which the parties have not provided in their express agreement. However, quoting from paragraph 13-009 of Chitty:- "A term ought not to be implied unless it is in all the circumstances equitable and reasonable. But this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so or because it would improve the contract or make its carrying out more convenient. The touchstone is always necessity and not merely reasonableness. The term to be implied must also be capable of being formulated with sufficient clarity and precision. But it may be that lack of precision in the criterion to be embodied in the term is not fatal to any implication, since 'it is no novelty in the common law to find that a criterion on which some important question of liability is to depend can only be defined in imprecise terms which leave a difficult question for decision as to how the criterion applies to the facts of a particular case'. A term will not be implied if it would be inconsistent with the express wording of the contract". 36. Mr Gleeson for Luba accepted that a term was likely to be implied by the Court requiring Luba to seek to obtain bank debt financing. We agree, and do therefore imply such a term, as without it the Incat debt could in effect be permanently deferred, which was not the intention, as made clear by the terms of the letter itself and the very clear and helpful evidence of Mr Lenigas. However, Mr Gleeson went on to argue that there is no necessity for the Court to imply any time by which Luba should discharge its obligation to seek bank debt financing. He submitted that the offer letter would expire of its own accord when it becomes clear that Luba has exhausted all possible applications to obtain bank debt financing in the market, applications which we observe are entirely under Luba's control. We do not accept Luba's submissions in this respect. 37. When no time is specified for performance of an obligation Chitty provides at paragraph 21-020:- "Where a party to a contract undertakes to do an act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance (or merely uses indefinite words such as 'with all dispatch') the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case". 38. The offer letter defers a very substantial claim, a claim which like all claims may become progressively more difficult to prove with the expiry of time (memories fade, documents are lost, employees leave, witnesses die etc). Luba's submissions place not only the performance of the obligation to obtain bank debt financing but also the expiry of the offer letter entirely in its own hands. We conclude

that Luba is obliged under the terms of the offer letter to obtain bank debt financing within a reasonable time, following which the offer letter will cease to be of effect. 39. The more difficult question is what in all the circumstances of this case is a reasonable time? In addressing this question we must have regard to the meaning which the offer letter would convey to a reasonable person having all the background knowledge reasonably available to the parties, including anything which would affect the way a reasonable man would have understood it but excluding previous negotiations and declarations of subjective intent. 40. We were assisted by the evidence of Mr Yu. He worked with another colleague in assisting Lonrho in raising project finance for the expansion of the port. He explained that Luba, at the time of the completion, was asset rich but cash poor. Customers who were using the port would come in and build their own facilities at the port, the cost of which would then be amortised after five years, in return for which those customers would not pay any rent during that period. This was a business model employed by the then management team to ensure that the port continued to expand but it did mean that there was very little cash flow for Luba. The key was to get sufficient capital into Luba so that extra quay could be constructed and revenue could then be generated. By reason of commitments made by Luba to the government of Equatorial Guinea it became clear following completion that the development work would need to commence despite the fact that bank debt financing had not yet been secured and this was funded by Lonrho by way of a short to medium term inter-company loan. He explained the steps taken to secure bank debt financing with some eight institutions. The negotiations were all subject to confidentiality agreements and the Incat group legal advisers had been given access to the 25 lever arch files evidencing those negotiations which were discovered in these proceedings. There is no need for this Court to name the institutions concerned but none of the negotiations have proved fruitful, save in respect of one institution where discussions are ongoing. The evidence of Mr Yu went unchallenged and there is no evidence therefore to suggest that Luba had not been genuine in its efforts to obtain bank debt financing. 41. In his evidence, Mr Lenigas referred to meetings scheduled with two other institutions due to take place shortly. He made the point that with the development to the port already undertaken by Luba the project was becoming more attractive with time as its cash flow and profitability improved. It is clear that obtaining bank debt financing for this project has presented Luba with real and substantial difficulties. 42. In our view, there are a number of factors in the circumstances surrounding the execution of the offer letter indicating that a substantial period in which to procure bank debt financing should be implied. They are as follows:- (i) The substantial sums required - US\$50,000,000 to US\$60,000,000. (ii) The fact that Luba had been unable to procure the necessary level of funding in the years prior to the sale. (iii) The high risk nature of Equatorial Guinea as a jurisdiction in which to invest, in particular the vulnerability of Luba's key asset namely the concession from the government of Equatorial Guinea. (iv) The difficulties that Luba in fact encountered following completion in attempting to secure bank debt financing in the market which, in our view, the parties could reasonably have expected at the time the offer letter was executed. (v) The fact that

Luba's ability to pay the Incat debt was dependent upon it being able to raise bank debt financing (Lonrho being under no obligation to fund it for this purpose). (vi) The need for the cash flow and profitability of the port to be improved in order to attract lenders. 43. As against that, we have to take into account the fact that the longer the period of deferment, the longer the Incat group is kept out of the sums they claim are due to them and the more difficult it might become to prove such claims following the expiry of the offer letter. At the hearing, Mr Goulborn submitted that 12 months was the reasonable period which the Court should imply, a period which we note would have expired after proceedings were issued by the Incat group. 44. Exercising our judgement to the best of our ability on the basis of the evidence we have heard, we determine that the reasonable time for Luba to obtain bank debt financing is 3 years from the date of completion, namely to 11 th May 2009, on the expiry of which the offer letter will cease to be of effect. 45. It follows from this that the Incat group's submissions to the effect that Luba is in repudiatory breach of its obligations under the offer letter or that it made time of the essence by Mr Young's letter of 16 th January 2007 (written after the proceedings were issued) are unsustainable. April 2007 exchange 46. Following completion, Mr Paton remained in the employment of Luba and continued to communicate with Mr Ingham of the Incat group, in particular over the inter-company balances. The Incat group rely on an e-mail sent by Mr Paton to Mr Ingham on 12 th April 2007 as constituting an agreement as to the quantum of the Incat debt. We set out the e-mail in full:- "Ron Please find attached the intercompany schedule as at 31 March 2007. I have incorporated your interest invoices for Dec-Mar 2007. I have also amended your previous invoice which I couldn't tie up with your calculation schedule. The interest from your calculation from 1/4/06 to 30/11/06 amounts to 150,051.584 cfa (summary interest amounts 71,260,723 + 40,260,365 + 38,530,496) - the interest invoice that you sent was for 71,184,284 cfa. I have entered the 150m cfa amount onto the schedule. I think you need to send me a revised invoice covering the 150m and cancelling the 71m. Regards Gordon Gordon Paton Chief Finance Officer" The schedule which was attached showed a balance due of US\$8,631,971.32. Credit has been given by Luba for certain sums which bring this amount down to the sum of US\$8,558,442 claimed in the summons. 47. Luba is a Jersey incorporated company and the parties agreed that Jersey law applies to this issue. By Jersey law there are four requirements for the creation of a valid contract, namely a) consent, b) capacity c) an ' objet ' and d) a 'cause '. (See *Selby v Romeril*

[1996] JLR 210). 48. It is necessary to put this e-mail into context. From the period that Mr Paton joined Luba in September 2003, he and Mr Ingham would agree on a regular basis the intercompany balances between Luba and the Incat group. As made clear in Mr Ingham's witness statement , the purpose of the exercise was to draw a line under the running accounts between Luba and the Incat group for accounting purposes at that point in time. It is also clear from the correspondence we have seen that it was of particular importance to the Incat group to have the intercompany balances agreed because any external funder to Luba or proposed purchaser would inevitably carry out its own due diligence and it was

therefore in the interests of the Incat group to have its house in order. 49. In his e-mail of 3rd February 2006 to Mr Ingham, Mr Paton made reference to being aware of a 'major error somewhere' but not having the time to see where it is, and he went on to say 'However, I do want to go on record as disagreeing personally with some of the figures. In the interests of drawing this long protracted issue to a conclusion, I accept certain figures into our accounts primarily as a provision. I do not necessarily agree with them, but in the interests of applying prudence have provided for these charges'. He then went on to set out the areas where he had concern. 50. Mr Ingham told us that the purpose of the exercise was to make sure that the figures were correct and would therefore satisfy any due diligence undertaken by a third party. In his view, the exercise was contractually binding on the companies concerned. 51. In our view, it is necessary to look at the role being undertaken by the accountants, which was to agree the figures to the best of their ability for accounting purposes. It was not their role to engage contractually so that, for example, any one of the Incat group companies could action Luba on the basis of the figures as agreed by the accountants as opposed to the underlying debt or so that Luba would be deprived of defences that might have been available to it in relation to any one or more invoices. This is particularly the case when one bears in mind the fact that under the terms of the offer letter the quantum of the Incat debt was to be determined by the arranging bank. Furthermore this exchange of e-mails took place some time after the commencement of the proceedings in Jersey and it is inconceivable that the accountants intended somehow to usurp the role of the court. In contractual terms we find that there was no consent by the parties to a binding agreement quantifying the Incat debt. Mr Goulborn accepted that a further claim by Luba in relation to interest arising out of an agreement entered into on 8th July 2002 would fall away if we found against the Incat group on this point.

Conclusion

52. We therefore summarise our findings as follows:- (i) The offer letter is valid and enforceable in accordance with its terms. (ii) The offer letter is subject to an implied term requiring Luba to seek to obtain bank debt financing within a reasonable time, following which it will cease to be of effect. (iii) The reasonable time is 3 years from the date of completion, namely 11th May 2009. (iv) The quantum of the Incat debt has not been agreed through the April 2007 e-mail exchange. 53. The Incat group's summons is therefore dismissed. It follows that if bank debt financing is not obtained by Luba in accordance with the terms of the offer letter before 11th May 2009, the Incat group will be at liberty to pursue their claims in the ordinary way. Authorities *Lloyd's Trust Instrument* (Unreported) June 24th 1970 (referred to in *Lewison, The Interpretation of Contracts*). *Doe d Winter v Perratt* (1843) 9 CL & F 606. *Nea Agrex SA v Baltic Shipping Co Ltd*

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Prepared on 27 October 2026 · Esheria