Neutral Citation Number: [2020] EWHC 1417 (Ch)

Case No: CR-2020-000220

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Date: 03/06/2020

Before :

JOANNE WICKS QC sitting as a Judge of the High Court

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Between :

COLT TECHNOLOGY SERVICES	**Applicant**
- and -	
SG GLOBAL GROUP SRL	**Respondent**

- -
- -

Mr W Willson (instructed by **Baker McKenzie LLP**) for the **Applicant**
Mr D Lewis (instructed by **Giambrone & Partners**) for the **Respondent**

Hearing date: 6 May 2020

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Judgment Approved by the court for handing down

JOANNE WICKS QC sitting as a Judge of the High Court:

1. This is an application by Colt Technology Services ("**Colt UK**") for an injunction to restrain SG Global Group SRL ("**SGG**") from presenting a winding-up petition against it. SGG claims that Colt UK is indebted to it in the sum of US$4,936,619.93 plus interest. Colt UK contends that the debt is *bona fide* disputed on substantial grounds, such that the Companies Court is not an appropriate forum to determine the dispute and the presentation of a winding-up petition would be an abuse of process.

Introduction

2. Colt UK is a telecommunications company incorporated in England and Wales and part of the Colt group. SGG is an Italian company.

3. On 14 March 2016, Colt UK and SGG entered into a bilateral VoIP ("voice over internet protocol") interconnect agreement ("**the Agreement**") under which SGG agreed to provide Colt UK with voice trading services. In the Agreement, Colt UK nominated another member of its group, an Italian company, Colt Technology Services SpA ("**Colt Italy**") as its "Affiliate" to receive the services to be provided by SGG and to be invoiced by it. The Agreement is governed by English law and includes a clause giving exclusive jurisdiction to the Courts of England and Wales.

4. Pursuant to the Agreement, in 2016 and early 2017 SGG provided Colt Italy with voice trading services under which SGG granted Colt Italy's business customers with access to its overseas networks outside Italy, mainly Africa. Seven invoices were submitted to Colt Italy for more than €40 million including VAT. These invoices were met by Colt Italy.

5. In January 2017, Colt UK's auditors, PriceWaterhouseCoopers ("**PwC**"), raised concerns over what they considered to be anomalies regarding SGG. Colt UK says that these raised suspicions that SGG was not the true supplier of the services under the Agreement, but was a shell company acting as a front for another supplier and was engaged in a form of VAT "missing trader" fraud.

6. After further enquiries were made, Colt UK suspended payment of SGG's outstanding invoices. These comprise:

    i) An invoice dated 1 February 2017 for US$2,459,542.02 including VAT;

    ii) An invoice dated 16 February 2017 for US$1,701,379.45 including VAT; and

    iii) An invoice dated 3 March 2017 for US$775,698.46, including VAT

    (together "**the invoices**").

7. On 21 June 2017 SGG commenced an action against Colt Italy before the Court of Milan for payment of the invoices ("**the Milan Proceedings**"). In circumstances I shall explain in more detail below, Colt UK intervened in the Milan Proceedings and is now party to an appeal to the Milan Court of Appeal.

8. On 12 January 2018, SGG served a statutory demand on Colt UK claiming US$5,108,227.10 (equivalent to £4,187,072) in respect of the invoices and interest.

Following correspondence between the parties, an undertaking was given not to issue any petition on that statutory demand without giving notice.

9. On 20 December 2019, following the first instance decision in the Milan Proceedings, SGG served a further statutory demand claiming that Colt UK owed it a debt of US$5,442,768.05, equivalent to £4,170,248.88, comprising the principal sum under the invoices plus contractual interest to the date thereof.

10. This application was made on 13 January 2020. By way of evidence in support, the applicant relies upon three witness statements of Richard Tilbrook, a director of Colt UK, and two witness statements of Luca Pescatore, an Italian-qualified lawyer with conduct of the Milan Proceedings on behalf of Colt UK and Colt Italy. The respondent relies upon a witness statement of Jamie Johnston, the director of SGG, and three witness statements of Gabriele Giambrone, an Italian-qualified lawyer with conduct of the Milan Proceedings on behalf of SGG.

11. By order dated 21 February 2020, ICC Judge Prentis gave Colt UK permission to rely on an amended version of an expert report of Professor Avv. Eugenio Della Valle, a Professor of Tax Law at Sapienza University, in relation to Italian law, and gave permission to SGG to rely on expert evidence of Italian law in response. SGG has served an expert report of Professor Avv. Alessandro Dagnino, a University lecturer in Tax Law at the University of L'Aquila. The expert witnesses have prepared a joint statement setting out the areas on which they agree and disagree, dated 27 April 2020.

12. At the hearing before me, Colt UK was represented by Mr William Willson of Counsel and SGG by Mr Daniel Lewis of Counsel. I am grateful to both Counsel for the high quality and focussed nature of their oral and written submissions.

The Parties' Contentions

13. As I have indicated, Colt UK's application is made on the basis that the sums claimed by SGG against it are, and have been for some considerable time, *bona fide* disputed on substantial grounds. It contends that it has a properly arguable defence that the obligation to pay the invoices is unenforceable for illegality. This is because, it says, there are significant indications that SGG is part of a missing trader scheme to defraud the Italian tax authorities of VAT charged on the services supplied under the Agreement, and payment of the invoiced sums would involve the commission of a criminal offence by Colt UK under Italian law. Colt UK therefore relies on the principle in *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287 ("**the Ralli Bros principle**"), namely that a contractual obligation will not be enforced where doing so would require the obligor to commit a criminal offence in the place where the obligation falls to be performed. Alternatively, it contends that it has a genuine and arguable defence based on the principle of *ex turpi causa*, because SGG entered into the Agreement with the purpose and intention of defrauding the Italian tax authorities, or subsequently developed such a purpose in relation to the Agreement. Colt UK argues that it first notified SGG that the invoices were disputed in accordance with the contractual timescale under the Agreement and that the dispute

should be resolved in the Milan Proceedings. It also contends that a winding-up petition against it would have the collateral and improper purpose of pressurising Colt UK, whose solvency is not in real doubt, into paying the alleged debt rather than continuing to contest the Milan Proceedings.

14. SGG resists the application for an injunction on the basis that the invoiced sums are due from Colt UK; that Colt UK does not dispute that it received the services for which the sums are the payment and has sold those services on to its own customers. It contends that Colt UK's reliance on the *Ralli Bros* principle is misplaced and that its arguments fundamentally misunderstand it; moreover that Colt UK has not adduced evidence that supports its contention that SGG is or was ever engaged in any illegal conduct. SGG strongly rejects the allegation that it has been involved in a missing trader fraud and points, as evidence of its honesty and the desire to find a pragmatic solution, to an offer made on 24 March 2020, under which Colt UK would pay the total amount under the invoices to SGG's Italian lawyers against an undertaking that SGG will pay the total amount of VAT to the Italian tax authorities and only release the net sum to SGG after the VAT liability, to be calculated by an independent chartered accountant, has been met.

The Agreement and Invoices

15. The Agreement is expressed to be made between Colt UK and SGG: it is signed by Mr Tilbrook for Colt UK and by Fernando Biscaioli, a former director of SGG, for SGG. The registered office of Colt UK is given as Beaufort House, 15 St Botolph Street, London EC3A 7QN; the registered office of SGG is given as 112 Viale Africa, 00144, Rome. The "*Services*" to be provided by SGG under the Agreement are defined to mean the establishment of a transmission path through a party's transmission system and conveyance by that party of a signal handed over by the originating party over such transmission path.

16. On the front page of the Agreement, there are various provisions relating to payment. The currency in which payment is to be made is shown as US dollars and sums become due 30 days from the date of an invoice. Colt Italy is shown as the nominated Colt Affiliate and pursuant to clause 10.2 it is to receive the Services, be invoiced for the Services and serve as SGG's point of contact for all matters in connection with the Agreement. Its invoicing address is given as 56 Viale E. Jenner, 20159, Milan.

17. By clause 1.6, it is agreed that the parties "*will provide and use the Services in accordance with all applicable laws*". By clause 2.2 each party has the right to suspend the Services if, amongst other reasons, that party is aware of or has reasonable grounds to suspect any abuse (including fraudulent use) of the Services or the other party engages in activities which in its reasonable opinion are unlawful. By clause 2.3, each party acknowledges and agrees that the other party has no obligation to monitor or actively seek facts or circumstances indicating any abuse or illegal activities. Clause 11 also provides that both parties shall comply with all applicable laws, statutes, regulations and codes.

18. By clause 4.5,

"*A party shall pay all amounts not disputed in accordance with clause 4.6 as soon as possible after receipt of the invoice for such amount from the other, but in any event no later than the Due Date specified in the front sheet."*

19. By clause 4.6:

"*All payments shall be made in full in immediately available funds by telegraphic transfer or such other method as agreed by the parties…into such account as is notified in writing by the invoicing party to the paying party from time to time in accordance with clause 9.1…"*

20. Clause 9.1 is a clause relating to notices. It states that

"*Any notice, statement or other document which may be given by a party under this Agreement shall be deemed to have been duly given if delivered by hand or sent by pre-paid first class post for notices and international registered post for international notices or fax to the address set out at the beginning of this Agreement and for the attention of the Head of Voice Trading for Colt…"*

21. Clause 4.7 provides for interest to be charged on sums owing at 4% above the base rate of the European Central Bank and continues that

"Interest shall be payable on disputed amounts withheld in accordance with clause 4.5 unless such disputed amounts are ultimately agreed by the parties or found (by a final court of competent jurisdiction) not to be payable."

22. By clause 4.8:

"*If a party, in good faith, disputes the amount or appropriateness of a charge included in an invoice from the other party, it shall notify the other party in writing as soon as reasonably practicable but in any event no later than 30 days after the date of such invoice and provide any documentation reasonably requested by the party that has sent the invoice to assist in resolving such dispute. Failure to dispute a charge included in an invoice within 30 days of the date of such invoice shall create an irrebuttable presumption of the correctness of the charge. The parties shall endeavour to resolve the disputed charges within 30 days after receipt of any notice of dispute."*

23. As I have mentioned, by clause 12.1 the Agreement is governed by the laws of England and the parties agree to submit to the exclusive jurisdiction of the English courts.

24. The three invoices are each in the same format. Each is addressed to Colt Italy as the "customer" and shows SGG's address at its registered office in Rome. At the bottom of each invoice are bank account details for an account in the name of SGG with Wells Fargo NA, 420 Montgomery, San Francisco, in California.

The Milan Proceedings

25. On 21 June 2017, SGG commenced a civil action against Colt Italy before the Court of Milan for payment of the sums claimed to be due under the invoices. The first step involved making a without notice application for a summary payment injunction in the sum of €4,634,165.50 plus interest. This injunction was granted, but the Court of

Milan did not make any order for execution, so it could not be enforced. Having been served with the injunction, Colt Italy filed its opposition on 26 September 2017. Notwithstanding the exclusive jurisdiction clause in the Agreement, Colt Italy did not challenge the Court of Milan's jurisdiction, but it opposed the injunction on the basis that SGG may have been involved in criminal activity relating to its VAT filings in Italy and that the invoices may have been fraudulently issued. Colt Italy also issued a counterclaim against SGG for tortious damages. This was on the basis that in May 2017 Colt Italy had removed from its 2016 tax returns some €6.3 million of VAT deductions and some €8.7 million of other income and regional tax deductions relating to the services under the Agreement to avoid, it said, any possible violation of Italian criminal law.

26. On 31 January 2018, Colt UK filed a notice of intervention in the Milan Proceedings, adopted Colt Italy's submissions and claimed a declaration that it, Colt UK, did not have any obligation in relation to the sums claimed under the invoices. There then followed an extensive exchange of statements and briefs by all three parties which, amongst other things, made apparent that the basis on which Colt UK was contending that it was not liable to pay the invoices was the illegality defence based on the *Ralli Bros* principle which it also relies on in this application. At hearings on 21 February and 4 July 2018 the Court of Milan refused SGG permission to enforce the summary payment injunction which had been obtained against Colt Italy.

27. A final hearing took place before the Court of Milan on 18 September 2019, with judgment given on 13 November 2019. The court

    i) revoked the summary payment injunction against Colt Italy, declaring that it did not have capacity to sue or be sued in respect of the Agreement on the grounds that it was neither a party to the Agreement nor an assignee of it;

    ii) rejected Colt Italy's counterclaims against SGG;

    iii) rejected the application by Colt UK for a declaration that it was not liable under the invoices on the basis that it would not be a criminal offence under Italian law for Colt UK to pay the sums claimed and consequently it had no illegality defence in English law. This was because Colt UK lacked the necessary *mens rea* for criminal activity, as it had no knowledge or suspicion of any tax fraud on the part of SGG when it purchased the services from it under the Agreement.

28. It is of relevance to note that the Court of Milan did not order Colt UK to pay the invoices. There was no such claim made against it by SGG in the Milan proceedings: SGG's claim for payment in the Milan proceedings was that Colt Italy was liable to pay the invoiced sums. There is some debate between the parties as to whether or not the Milan Court would have jurisdiction to make an order requiring payment by Colt UK, but I do not need to resolve that question for the purposes of this application.

29. On 23 December 2019, Colt UK served and filed an appeal against the judgment of the Court of First Instance. Colt UK contends that the Court of First Instance was wrong to conclude that it lacked the necessary *mens rea* to commit a criminal offence under Italian law by paying the sums claimed by SGG, on the basis that the relevant time for judging *mens rea* is the time of payment, and Colt UK now knows enough

about the alleged criminal activity of SGG to become liable itself if it makes payment. Colt Italy is also appealing the rejection of its counterclaim and SGG is cross-appealing the dismissal of its claim against Colt Italy.

Jurisdiction to Restrain Winding-Up Petition

30. Both Counsel took me to the summary by Hildyard J of the principles applicable to an application for an injunction to restrain presentation of a petition in *Coilcolour Ltd v Camtrex Ltd* [2015] EWHC 3203, [2016] BPIR 1129 at [31]-[42], including the following:

> "*31. The court will grant an injunction to prevent presentation of a winding-up petition where it considers that the petition would be an abuse of process and/or that the petition is bound to fail (to the extent they are different):* Mann v Goldstein *[1968] 1 WLR 1091.*
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> 32. *The Court will restrain a company from presenting a winding-up petition if the company disputes, on substantial grounds, the existence of the debt on which the petition is based. In such circumstances, the would-be petitioner's claim to be, and standing as, a creditor is in issue. The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the Court's settled practice to dismiss the petition. That practice is the consequence of both the fact that there is in such circumstances a threshold issue as to standing, and the nature of the Companies Court's procedure on such petitions, which involves no pleadings or disclosure, where no oral evidence is ordinarily permitted, and which is ill-equipped to deal with the resolution of disputes of fact…*
>
> 34. *Further, it is an abuse of process to present a winding-up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as to whether that money is owed:* Re a Company *(No 0012209 of 1991) [1992] BCLC 865 .*
>
> 35. *However, the practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will suffice to warrant the matter proceeding by way of ordinary litigation. The Court must be persuaded that there is substance in the dispute and in the Company's refusal to pay: a "cloud of objections" contrived to justify factual inquiry and suggest that in all fairness cross-examination is necessary will not do*."

31. On this application, Counsel were agreed that if Colt UK could show that the debts based on the invoices were unenforceable against it on the *Ralli Bros* principle, SGG would have no standing as a creditor to present a winding-up petition. Mr Lewis, however, submitted that the burden lies on Colt UK to show that such a defence had sufficient prospects of success. The relevant question is whether the argument really has a rational prospect of success: *Re A Company (No 0012209)* [1992] 1 WLR 351 at 354B.

32. Hildyard J in *Coilcolour* also considered the extent to which proof of the company's solvency was relevant, holding:

> "*41. …a company opposing a petition on the basis that it is not insolvent and the debt asserted is disputed on grounds on which it has at least a prospect of success, is not using solvency as a shield or insulation, but as part of a composite answer as to why the Companies Court is not the appropriate forum, and is thus being abused. In such a context, the Court can usually be expected to give the company the benefit of the doubt and not do anything to encourage the use of the Companies Court as an alternative to ordinary court processes, even if the case is one of sufficient strength in the perception of the petitioner that it would be proper to resort to an application for summary judgment under CPR Part 24.*
>
> *42. In short, in my judgment, although solvency is not a defence to a petition based on an undisputed claim, and the Court will always consider whether any dispute has real substance such as to make the Companies Court an inappropriate forum for its resolution, the Court will also wish to be satisfied that the remedy is not being invoked as a means of putting pressure on a company of which the solvency is not in real doubt, and where there is a dispute as to indebtedness. Further, in my view, the remedy is ultimately discretionary; and the more obvious it is that the remedy is being threatened or pursued as a threat or to exert inappropriate pressure, the more likely the Court is to give the company the benefit of any reasonable doubt, both at the interlocutory stage of an injunction and subsequently, in determining whether its defences or cross-claims give rise to a sufficiently substantial dispute to make the Companies Court process inappropriate."*

Illegality under Foreign Law

33. In *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287, an English firm chartered a steamship from a Spanish firm to carry a cargo of jute from Calcutta to Barcelona under a charterparty governed by English law. Half of the freight was to be paid in London when the vessel sailed from Calcutta, with the balance being payable in Barcelona. Before the vessel arrived in Barcelona, a Spanish decree had been passed making it illegal to pay more than 875 pesetas a ton freight on jute, which the freight reserved by the charterparty largely exceeded. The Court of Appeal applied a principle stated in the 2nd edition of Dicey on Conflicts of Laws that "*a contract…is, in general, invalid in so far as…the performance of it is unlawful by the law of the country where the contract is to be performed*", to hold that the owners could not recover more than the freight permitted by Spanish law. The *Ralli Bros* principle was recently encapsulated by Cockerill J in *Magdeev v Tsvetkov* [2020] EWHC 887 at [297] in this way:

> *"…the Court will not enforce a contract if the performance of that contract necessarily requires an act in a friendly foreign state which would be unlawful by the law of that state. The rule does not require the parties to intend the illegality or even to be aware of the fact that what they have bargained for will involve an act unlawful by the place of performance. It simply requires it to be established that their bargain necessarily involves such an act."*

34. Mr Lewis emphasised in his submissions the requirement for it to be shown that performance of the contract would necessarily involve an act which would be illegal in the place of performance: see Chitty on Contracts, 33rd edn, para. 16-059. In *Dell Emerging Markets (EMEA) Ltd v Systems Equipment Telecommunications Services SAL* [2018] EWHC 702 (Comm) the parties entered into a distributorship agreement as to the supply of the claimants' products in Lebanon. The agreement provided that it was subject to English law and that the High Court of England and Wales had exclusive jurisdiction. The defendant argued that the exclusive jurisdiction clause was unenforceable because it was illegal in Lebanon. Moulder J held (at [40]) that because it was not illegal for Dell to supply goods and services in Lebanon, performance of the contract did not necessarily involve doing an act which was unlawful by the law of the place where the act had to be done. Consequently, the *Ralli Bros* principle had no application. *Cargill International Trading PTE v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) concerned a claim for default compensation payable under two agreements governed by English law. The defendant alleged that the clause imposing default compensation was illegal and therefore unenforceable pursuant to the *Ralli Bros* principle because it would make payment through its bank accounts in India, where, it argued, such payment would be illegal. Bryan J held that the Indian regulation in question did not apply to default compensation and therefore that no illegality was established, but in any event that the *Ralli Bros* principle was not engaged because the agreements did not require payment to be made from the Defendant's bank accounts in India. It was open to it to pay the sums due from anywhere in the world. It follows, in my view, that when considering the *Ralli Bros* principle it is necessary to analyse with precision exactly what acts the contract requires to be carried out, and where. It is not enough that the parties contemplate that the contract will be performed in a particular way, if the contract does not itself require performance in that way: *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728 at 743H-745A.

35. The *Ralli Bros* principle is to be distinguished from a different but related principle, which may be called the *Foster v Driscoll* principle. In *Foster v Driscoll* [1929] 1 KB 470, a group of people planned to acquire a steamship and load it with Scottish whisky to be sold in the USA, where, due to Prohibition, the sale of alcohol was illegal. The syndicate entered into a contract to purchase a ship and drew up memoranda of agreement between themselves. When they fell out (the whisky having never left Scotland), the main agreement between the members of the syndicate was pleaded to be illegal and void to the knowledge of all the parties. The principle on which the majority of the Court of Appeal decided the case was set out by Sankey LJ at 521:

> "*An English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally*."

Both the *Ralli Bros* principle and the *Foster v Driscoll* principle were considered and approved by the House of Lords in *Regazzoni v KC Sethia* [1958] AC 301. Both principles can also be seen at play in *Fielding & Platt Ltd v Selim Najjar* [1969] 1 WLR 357. The claimant, an English company, contracted with the defendant, a

Lebanese company, to make and deliver an aluminium press. Payment was to be made by six promissory notes given by the managing director of the Lebanese company personally at intervals during the progress of the works. On a claim to payment under the first two promissory notes, the managing director raised a defence of illegality, claiming that the English company agreed to put in a false invoice so as to pretend that the press was a rolling-mill (for which he had an import licence) rather than a press (for which he did not). Lord Denning MR first addressed the *Ralli Bros* principle, holding (362G-H):

"*In order for this to be any kind of defence, he must show first of all that the contract contained a term that the English company were to give a false invoice: so that it could not lawfully be performed. For if it would be lawfully performed (by giving a correct invoice) the English company can certainly sue upon it. I do not think there was any such term…The English company would therefore quite justifiably refuse to give such invoice, and insist on the contract being lawfully performed."*

Then addressing the *Foster v Driscoll* principle, he held (363A-B):

"*In the second place, even if it were a term, the defendant would have to show that the English company were implicated in this illegality, that is, that they had knowledge of it and were actively participating in it: see* Foster v Driscoll *[1929] 1 KB 470, 518, by Sankey LJ. I can see no evidence worthy of the name to suggest that the English company knew of this illegality."*

36. In *Magdeev v Tsvetkov*, above, Cockerill J said at [307]:

"*The Foster v Driscoll and Ralli Bros principles differ in this way: the latter is concerned only with whether the contract between the parties necessarily involves performance of an act which is illegal by the law of the place of performance, irrespective of the object and intention of the parties; the former is only concerned with whether the object and intention of the parties is to perform their agreement in a manner which involves an illegal act in the place of performance, and is not concerned with whether the contract necessitates the undertaking of such an act. As Robert Goff J concluded in* Toprak Mahsulleri v Finigrain *[1979] Lloyd's Rep 98 at 107* "…these principles are distinct, though related in the sense that they spring from the principle of comity…*" One might say that they are complementary aspects of comity as it applies to foreign illegality."*

37. Cockerill J also considered the extent to which the factors-based approach applied by the Supreme Court to domestic illegality in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 should also now apply to foreign illegality. She said ([331]-[332]):

"*The public policy underpinning the law relating to domestic illegality is as noted above: ex turpi causa and consistency. But that underpinning both* Ralli *and* Foster v Driscoll *is international comity*.

Having said that I do not consider that this involves…a perverse dichotomy with a flexible rule in one context and a rigid and inflexible rule in another. Patel v Mirza *does provide a guide in this sense…where the clear answer is not given by either of the main principles [i.e. Ralli or Foster v Driscoll], one balances the relevant factors discernable from the case law in light of the underpinning principle…"*

38. In the present case Colt UK relies on the *Ralli Bros* principle and not on the *Foster v Driscoll* principle: it certainly does not contend that there was any common intention on the part of both parties to commit a VAT fraud in Italy or anywhere else. I have, however, taken some time to set out the *Foster v Driscoll* principle because it has relevance in the context of Colt UK's alternative defence based on *ex turpi causa*.

***Ralli Bros* Principle: Place of Performance of the Agreement**

39. As I have said, the proper application of the *Ralli Bros* principle requires a careful analysis of the contract to see exactly what acts it requires to be carried out, and where.

40. Until very recently, it was common ground between the parties that the application of the *Ralli Bros* principle to the facts of the current case required consideration of Italian law, the relevant question being whether payment of the invoices involved illegality under Italian law. This is the basis on which the Milan Proceedings were conducted and on which the Milan appeal is proceeding. It was also the consensus in February of this year, when Colt UK applied for permission to adduce expert evidence of Italian law. Although SGG opposed that application on various grounds, it did not contend that Italian law was irrelevant: indeed, as appears from the judgment of ICC Judge Prentis on that application, it contended that Italian law could be addressed by the parties' own Italian-qualified lawyers, rather than by expert witnesses.

41. In its skeleton argument for this hearing, however, SGG took a new point. It contended that if the *Ralli Bros* principle is to apply, the contract must require performance to take place in a specified place and that in this case the Agreement contained no requirement that payment must be made in Italy. Mr Lewis argued that this case is analogous to the *Cargill* case: just as the contract in that case did not require payment to be made from the defendant's Indian bank account, the Agreement does not require payment to be made in Italy. For that reason it was contended that it is not relevant whether or not payment of the invoices would be illegal under Italian law.

42. Mr Willson's primary position in response was that the Agreement does require payment to be made in Italy. His secondary position was that payment is required to be made in California, given the Californian bank account in the invoices and that, as his client had been surprised by the changed position of SGG on this point, the application should be adjourned to allow his client to put in expert evidence of Californian law.

43. The general rule in English law is that if no place of payment is expressly or impliedly specified by the contract, it is the debtor's duty to seek out the creditor and pay them at their place of business or residence: see Chitty on Contracts, 33rd edn, para. 21-056. That general rule, however, is readily displaced implicitly as well as expressly: *Canyon Offshore Ltd v GDF Suez E & P Nederland BV* [2014] EWHC 3810 (Comm); [2015] Bus. LR 578 at [38]. The question is ultimately one of construction of the contract, in its proper context.

44. In *Thompson v Palmer* [1893] 2 QB 80, the plaintiff was a civil engineer, carrying on business in Newcastle, who was engaged by the defendants to construct docks in Spain. The contract did not expressly state where the plaintiff was to be paid. The

Court of Appeal held that payments were to be made at Newcastle. Lord Esher MR said at 84:

"*The question is whether in the case of such a contract made with such a man, there is any, and if so, what implication as to the place where such payments were to be made. I think the implication is that they were to be made at Newcastle, where the plaintiff generally carried on business, and where the necessary plans and calculations for the works would be made. The suggestion that the defendants might tender the amount due at any remote part of the world, where the plaintiff might at the moment be, and where he might not have the means of ascertaining the correctness or otherwise of the amount tendered, does not appear to me to be correct. It seems to me that under this contract the plaintiff had a right to be paid at Newcastle, and, no other place of payment being named, the defendants were bound to pay him there. Of course, if he asked for or accepted payment elsewhere, such payment would be equivalent to payment under the contract; but I think that the contract, according to its true construction, is to pay at Newcastle."*

45. In the present case, the Agreement contains an express provision dealing with the place of payment. By clause 4.6, payments are to be made "*into such account as is notified in writing by the invoicing party to the paying party from time to time in accordance with clause 9.1…*" There is no evidence to suggest that any notice under clause 9.1 was ever given specifying an account into which payments should be made under clause 4.6. Such a notice would have to have been delivered or sent to Colt UK at Beaufort House in London, marked for the attention of the Head of Voice Trading.

46. Mr Lewis' argument in effect requires it to be implied into clause 4.6 that pending service of a notice specifying an account into which payments should be made, the Agreement may be performed by Colt UK making payment to SGG anywhere in the world it might choose, regardless of the absence of any connection between the place of payment and the Agreement or the parties to it. That would in my view be uncommercial and incoherent and is highly unlikely to have been the parties' intention.

47. In my view on the contrary it is to be implied (on the grounds of business efficacy and obviousness, applying *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742) that, pending the giving of a valid notice under clause 4.6, payments were to be made to SGG at its registered office address shown on the frontsheet to the Agreement, namely 112 Viale Africa, Rome. Not only is that consistent with the general rule that a debtor should make payment at a creditor's usual place of business or residence, it is also consistent with the connections which the Agreement had with Italy. SGG was an Italian company and under clause 10.2, it was Colt Italy which was to receive the Services, be invoiced for the Services and serve as SGG's "point of contact". As Mr Willson put it, the Agreement's "centre of gravity" is Italy.

48. The fact that the invoices requested payment to a bank in California did not in my view alter the contractual requirements for payment. The invoices, post-dating the Agreement, are not admissible in its construction (see *Canyon Offshore*, above, at [38]). Nor do they constitute notices given under clause 4.6 specifying an account into which payment should be made, since they were not served on Colt UK in accordance with clause 9.1: they were instead addressed to Colt Italy, as required by clause 10.2.

49. The reference to the Californian bank details on the invoices constituted a direction by SGG that payment could be made to that bank as its agent. Had payment been made to the Californian bank, then it would not be open to SGG to contend that the Agreement had not been performed, in the same way that Mr Thompson, the civil engineer in *Thompson v Palmer*, could not have asked for payment a second time if he had accepted money tendered somewhere other than Newcastle. But that does not mean that Colt UK's obligation under the Agreement was to pay in California. It was entitled to make payment in Italy: if monies had been paid at SGG's registered office in Rome, SGG could not have claimed that was not sufficient performance of the Agreement.

50. In my judgment, therefore, the Agreement did impliedly specify a place for payment of invoices by Colt UK, and that place was in Italy. It follows that the relevant question under the *Ralli Bros* principle is whether such payment would be illegal under Italian law. Consideration of that issue in the context of this application involves a judgment being made as to whether there is a rational prospect that Colt UK will show on the facts that SGG is or has been involved in criminal activity, namely a missing trader fraud, and whether payment by it would be illegal under Italian law. It is to those points which I now turn.

Illegality of Performance: Evidence of Missing Trader Fraud

51. Missing trader schemes are a well-known variety of VAT fraud. As Mr Tilbrook explains in his first witness statement, they exploit VAT neutrality mechanisms to obtain criminal profits. In a simplified scenario, a fraudster purchases goods from an overseas supplier, taking advantage of the VAT zero-rate regime applicable to intra-EU transfers of goods and services. The fraudster sells the goods to an actual customer, who, unaware of the fraudulent scheme, pays VAT on the goods purchased. Whilst the innocent customer may set off the VAT against a VAT deduction in its own returns, the fraudster does not declare receipt of the VAT payment and usually goes missing. In order to avoid detection, the fraudster will often interpose one or more companies – "buffers" – between itself and the innocent customer. Fraudsters and buffers are often incorporated as shell companies; they have no significant operating structure in terms of premises and personnel, they do not fulfil basic corporate obligations and are owned or managed by nominee directors and shareholders who often disappear when the fraudulent companies do. Colt UK alleges that SGG is a buffer company in a missing trader fraud scheme and accepts that the burden of proof lies on it to demonstrate SGG's involvement in criminal activity.

52. Unsurprisingly, the expert witnesses agree that under Italian law, individuals involved in a VAT fraud may commit a number of crimes under Legislative Decree No. 74/2000, the Italian legislation regulating tax crimes.

53. A report by Smith & Williamson dated 11 April 2017 commissioned by SGG sets out some potential indicators of missing trader fraud, namely

    i) A company only recently incorporated, or one which has recently changed ownership;

    ii) Companies trading with high turnover despite trading for a comparatively short period of time and/or little experience in a market;

iii) Companies offering significant discounts on their goods/services compared to prevailing market prices;

iv) Offices or staff that appear inconsistent with the business being conducted; and

v) Other factors which may lead a reasonable businessperson to conclude that the business proposition is "too good to be true".

Colt UK contends that a number of these features are present here.

54. The history of Colt UK's investigations into SGG is set out in Mr Tilbrook's evidence. As indicated above, PwC initially raised concerns with Colt UK that SGG might be involved in a missing trader fraud and brought to their attention certain alleged anomalies, including the absence of corporate filings. There followed requests by Colt UK to SGG for various documents, some of which were supplied, but which Colt UK contends only raised further queries. For its part SGG draws my attention to the fact that Colt UK undoubtedly received the services contracted for under the Agreement and that it continued to receive those services after PwC had reported; it complains that Colt UK has mounted a roving enquiry into its affairs in which the meeting of each demand for documentation produces a further demand for more and an insistence that SGG jump through impossible hoops. It says that that the burden of proof has effectively (and wrongly) been shifted onto it to disprove criminal activity and that Colt UK is determined to find fault with any reasonable attempt to satisfy it of the genuineness of its trading.

55. SGG was incorporated in 1995. The person who signed the Agreement on its behalf on 23 February 2016 was Mr Biscaioli, then sole director and shareholder. He was replaced as director by Ms Armanda Rossi on 7 August 2016. On 7 July 2017 (i.e. after the Milan Proceedings had been commenced) Mr Johnston, who lives in Ireland, purchased Mr Biscaioli's shareholding in SGG for €100 and on 11 July 2017 he was appointed sole director instead of Ms Rossi. In support of its case that SGG was or is involved in missing trader fraud, Colt UK has points to make about SGG itself, a supplier to it, an Italian company called New Energy Corporation Srl ("**New Energy**"), about Mr Biscaioli, Ms Rossi and Mr Johnston.

SGG

56. Amongst the documents which SGG provided to Colt UK when requested were its VAT register for 2016, its 2016 supplier invoices and evidence of their payment. Colt UK contends that these show that SGG had sourced voice traffic (at least for supply to Colt Italy) in 2016 only from New Energy. It says that these documents indicate that SGG had resold the services received from New Energy to Colt Italy with no mark-up or charge, with the result that SGG had a near-neutral VAT position for 2016, which is indicative of fraud. SGG refers to a report produced by Dr Vicenzo Marzullo in the Milan Proceedings (only in evidence in Italian) which is said to indicate that SGG in fact made a margin of between 0.27% and 0.35% on traffic received from New Energy and resold to Colt UK. Mr Johnston's evidence is that this level of margin is

in line with industry standards. On the other hand, Mr Tilbrook contends that a margin at this level on €40 million of voice traffic is so low for an intermediated activity of this sort to amount to no margin at all, and too low to allow SGG to cover the expenses of the operating structure which would be needed to generate the volume of turnover which SGG claims to generate.

57. I am not in a position on this application to make any determination as to whether the margins under discussion are usual or not in this particular market. I do, however, note that the evidence indicates that despite high levels of turnover, SGG received a VAT credit for 2016 of €17,992.

58. Mr Tilbrook's evidence is that in early May 2017, Colt UK instructed forensic accountants to review Colt's records relating to SGG and a global investigations firm to look into SGG and New Energy. He says that these investigations found no evidence that SGG or New Energy were active or trading companies. SGG's registered address in Rome was a residential apartment; there was no indication that it operated from that location or that anyone connected with the company lived there. All indications were that SGG did not have a physical place of business and had no employees. Its corporate records indicated that it had two secondary units, but investigators visiting them found them both to be former phone shops, now abandoned.

59. In response, Mr Johnston says that SGG cannot be accused of being a shell company. It has been active for more than 20 years and he describes it as "*one of the leading companies in the telecoms sector in Southern Italy*". In his witness statement, Mr Johnston sets out SGG's turnover in the financial years 2012-2015, which runs into many millions of euros. Mr Johnston's evidence is that it is wrong to suggest that New Energy was SGG's sole supplier in 2016, and he produces agreements with three other companies: Advise SRL; Carrier Italia SRL and Voip Capital International, although the second of these is unsigned and the third is in draft form only. Mr Johnston also produces what he describes as SGG's bank statements with Standard Chartered Bank (although in fact these documents are produced by "SureRevenue"), which show, he says, credit and debit entries to several other suppliers and to employees. However, I agree with Colt UK that the picture which Mr Johnston paints of the financial health and activity of SGG sits uncomfortably with the sale of the shares in SGG from Mr Biscaioli to Mr Johnston for the low, if not nominal, price of €100.

60. Mr Johnston denies that the address at Viale Africa in Rome – which has remained SGG's registered office despite the 2017 change in ownership - is a residential address. He claims that SGG uses the address of its accountants as its registered address, implying that those accountants are Studio Associato Rinaldi. However, this is at odds with other parts of his evidence, in which he indicates that the company's accountant is or was Mr Enrico Zizza, whose address is in Pulsano. Mr Tilbrook refers to another suggestion in the evidence that SGG's accountants are Studio Associato Michele Morrone, whose address is in Foggia, Italy.

61. Mr Johnston also contends that Colt UK's investigators must have visited the wrong trading premises, because between August 2016 and July 2017 the trading address of the company was shown in official entries from Inland Revenue records as Viale Laurentina 203, Rome. He also says that the information reported by Colt UK's

investigators as to the secondary units is wrong. However, Mr Tilbrook points out that the very records which Mr Johnston relies upon to show the address from which SGG was trading in 2016-7 show that it is now trading from the Viale Africa address – yet this is the address which Mr Johnston claims is not a trading address but merely the address of SGG's accountants. I also consider that the fact that the invoices requested payment into a Californian bank account tends to suggest that SGG does not have an active trading presence in Italy.

Mr Biscaioli

62. In relation to Mr Biscaioli, Colt UK points to the fact that he was disqualified to act as a director between 2002 and 2012 and for a further 10 years from 2012. Mr Johnston's response is that the allegations are historic, there is no evidence of a criminal conviction and that the more recent disqualification relates to an entirely different company, unrelated to SGG. It does seem to me to be of potential relevance, however, that Mr Biscaioli was disqualified to act as a director when signing the Agreement as director of SGG.

Ms Rossi

63. Colt UK's case in respect of Ms Rossi is that it has been unable to identify any records of Ms Rossi's experience in the telecoms sector and that it appears that she was a nominee director. Mr Johnston claims this is "pure assertion" and denies that there is any evidential basis for it. He says that to his knowledge the company was managed properly by Ms Rossi whilst she was in office. I agree with SGG that the evidence in relation to Ms Rossi is rather thin.

Mr Johnston

64. Colt UK also raises various concerns about Mr Johnston. As indicated, he purchased Mr Biscaioli's shareholding in July 2017. However, he did not personally sign the share transfer agreement, which was executed on his behalf by Mr Biscaioli under a power of attorney. He appears, so Colt UK contends, to have no connections with Italy. Mr Johnston holds himself out as an experienced operator in the telephone services industry, but Mr Willson was able to point to various discrepancies between the CV and other information which is publicly available and to differences between the date of birth given for Mr Johnston in various documents and his signature on them. Mr Lewis submitted that Colt UK's arguments in these respects were just casting about for anomalies and I tend to agree that taken by themselves they are not strong evidence of participation in a fraud. Nevertheless, at any trial they are matters which would be put into the mix with the other evidence available.

New Energy

65. Colt UK makes the following points in relation to New Energy:

    i) It last filed accounts in 2009. Those accounts showed no assets.

    ii) New Energy's majority shareholder and sole director was Mr Mohammed Saifur Rahman, who was 26 years old and did not appear to have any

discernible background in the telecommunications industry, having worked as an employee in a laundry in Rome.

iii) A November 2016 report from the Taranto Chambers of Commerce indicated that New Energy's main business activity is registered as work relating to plastering and flooring; its minority shareholder (and former sole director and shareholder) is Mr Zizza (SGG's accountant) and that it had no employees.

iv) New Energy is headquartered in Pulsano, at an address which appears to correspond to that of Mr Zizza; its trading address is a clothing shop which has been at that location for 40 years.

66. I find it striking that Mr Johnston made no attempt to rebut any of these allegations, saying only that he "*would not be drawn into the allegations made by Mr Tilbrook against New Energy…because New Energy is not a party to the dispute*". This is a clearly inadequate response given the nature of the issues in this application and the evidence provided in support of it.

67. Furthermore, Mr Willson took me to New Energy's 2016 VAT return, which was provided to Colt UK as part of the Smith & Williamson report referred to above. This also shows high levels of turnover but a close to neutral VAT position (turnover of €42,422,229 bearing output VAT of €9,332,890 as against total purchases of €42,718,872 and deductible VAT of €9,398,152) and a VAT credit of €70,454.

Evidence of Investigations

68. A considerable amount of the evidence was taken up with the question whether SGG has been or is currently being investigated by the Italian Finance/Tax Police or Public Prosecutor's Office. This question does not seem to me to warrant the amount of energy expended upon it: the existence of an investigation would not be proof of guilt and the absence of an investigation would not be proof of innocence. In any event, the evidence is in my view inconclusive. In their joint report of 27 April 2020, the expert witnesses agreed that there was no evidence (at least in the documents disclosed to them with their instructions) that any criminal actions had been commenced against SGG's directors or employees since 2017 but they could not exclude the possibility that a criminal investigation was started or is currently ongoing or had ended with the case dismissed. The third and fourth witness statements of Mr Giambrone post-date that joint statement and refer, firstly, to a telephone conversation which Mr Giambrone had with the Public Prosecutor's office during which he was informed that there was no investigation against SGG and secondly to three "335 certificates" issued by the Court of Rome on 5 February 2018, the Court of Rome on 28 February 2020 and the Court of Taranto on 5 May 2020 which are said to confirm that there are currently no criminal investigations pending against SGG in Rome or Taranto. However, as the three certificates all relate to Mr Johnston, rather than to SGG or any of the other individuals associated with SGG, I do not consider that any firm conclusion can be drawn from them.

Conclusion on SGG's Illegality

69. It is not for me to determine whether or not SGG is guilty of any offence in Italy as a consequence of being involved in a missing trader fraud. On this application the

relevant question is whether the debt alleged to be due from Colt UK to SGG is *bona fide* disputed on substantial grounds and therefore whether Colt UK's allegations against SGG have a rational prospect of success. I bear in mind that Colt UK bears the burden of proof of showing illegality under Italian law and that that burden, involving a very serious claim of fraud, is a heavy one. I also take into account the offer that SGG made on 24 March, as evidence of its current willingness to ensure payment of the VAT on the invoiced sums to the Italian authorities. Nevertheless it seems to me that I cannot say that Colt's allegations are without a rational prospect of success, when fully investigated with the benefit of cross-examination of relevant witnesses. As set out above, there are a number of issues which warrant further investigation and explanation. In my judgment Colt UK has a properly arguable case on the evidence that SGG is not an active trading company but is effectively a shell through which others (as yet unidentified) provided VoiP services to Colt Italy; that both SGG and New Energy are buffer companies inserted into the chain to disguise a "missing trader" and that they serve or served in effect as conduits through which the services passed up the chain to Colt Italy and the price and VAT passed back down the chain, with a view to being siphoned off rather than paid to the Italian tax authorities.

Illegality of Performance: Colt UK's *mens rea*

70. The joint statement of the expert witnesses explains that they have considered two criminal offences under the Italian Criminal Code which Colt UK could potentially commit under Italian law by making payment of the invoices. The first is aiding and abetting a crime, under Art. 110. The second is "favouring an offender", pursuant to Art. 379.

71. There are a number of differences between the expert witnesses, but the primary difference of significance between them relates to the *mens rea* requirement of both crimes. In Professor Della Valle's opinion, even if Colt UK's directors and employees acted in good faith at the time of entering into the Agreement, if at the time they pay the invoices they are aware of several significant indicia evidencing a fraud, this is likely to be considered "wilful" misconduct from an Italian criminal law perspective, thereby triggering the *mens rea* requirement of both crimes. Professor Dagnino does not consider that Colt UK would reasonably be at risk of criminal liability under Arts 110 or 379. He is of the opinion that if payment of the invoices is made under a contractual obligation, and in particular pursuant to a court order, the *mens rea* arguments about the state of knowledge of Colt all fall away. He also adds that in his view Colt would only be entitled to withhold payment of the VAT element of each invoice and not the base price.

72. The position of each expert witness on these issues of Italian law echoes the positions of each of the parties in their submissions in the appeal in the Milan Proceedings.

73. Both Counsel accept that it would be inappropriate for me to resolve the differences between the expert witnesses on matters of Italian law without cross-examination. Mr Lewis, however, argues that it is not necessary to do so, because there is no cogent evidence supporting an allegation of illegality against SGG. For the reasons I have given above, I do not agree. I conclude therefore that Colt UK has an arguable case, with a rational prospect of success, that it would commit a crime under Italian law were it to make payment of the claimed sums pursuant to the invoices.

Illegality of Performance: Conclusion

74. For the reasons I have given above, I consider that Colt UK has a properly arguable illegality defence to the sums claimed by SGG based on the *Ralli Bros* principle.

75. In passing I mention that Mr Willson submitted that his client had complied with the provisions of clause 4.8 of the Agreement, which require notice to be given of any dispute no later than 30 days after an invoice, failing which an "irrebuttable presumption of correctness" is created. I agree that Colt UK gave notice (by letters dated 2 March 2017 and 9 March 2017) that it disputed the correctness of the invoices, within the 30 day period. In my judgment however, as parties to an agreement cannot contract out of the effect of an illegality defence based on *Ralli Bros*, such a defence would be available to Colt UK even if it had not given notice under clause 4.8.

Ex Turpi Causa

76. In addition to its defence based on the *Ralli Bros* principle, Colt UK seeks to rely upon what it describes as "*the general principle that a party cannot enforce an illegal contract*", citing *Patel v Mirza*, above. It contends that SGG's claim is barred under this heading because it entered into the Agreement for the fraudulent purpose of defrauding the Italian tax authorities. SGG submits that this is a new argument not previously made and that there is no evidence to support the contention of a fraudulent purpose. Colt UK responds that the evidence is the same as it relies upon in relation to the *Ralli Bros* principle, namely that SGG was a buffer company involved in a missing trader VAT fraud.

77. The difficulty for Colt UK in this argument is that historically English law has taken a different approach to acts which are illegal under domestic law from those which are illegal under a foreign law and *Patel v Mirza* is concerned with the former. As explained above, there are different public policy considerations underpinning the law relating to domestic illegality from the principles of international comity which underpin the *Ralli Bros* and *Foster v Driscoll* principles. There would be no need for a defendant to show a common intention to commit an illegal act abroad for the purposes of the *Foster v Driscoll* principle if, as Colt UK contends, it is sufficient to show that one party entered into the contract with the purpose of committing an illegal act abroad.

78. It is right, however, to say that the law of illegality remains in a state of development. In *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430 the Supreme Court considered, and rejected, an alleged illegality defence based on infringement of a Canadian patent, by reference solely to the authorities on domestic illegality. It may be in future that there will be a greater assimilation of the law relating to foreign illegality with that relating to domestic illegality and that the *Ralli Bros* and *Foster v Driscoll* principles will be restated as aspects of a factors-based test like that applied to domestic illegality. However, as this argument was not developed

before me, and given that it is unnecessary to do so given my decision on the basis of the traditional *Ralli Bros* principle, I do not express a final conclusion on it.

Solvency

79. Mr Tilbrook's evidence deals with the question of Colt UK's solvency. To his first witness statement he exhibited Colt UK's accounts for the financial year ending 31 December 2018. The balance sheet shows fixed assets valued at £412.6 million and current assets valued at £183.5 million, including £2.2 million in cash at bank and in hand. £833 million is due to Colt UK's creditors within one year, of which £728 million is owed to other entities within the group. There is a deficit of £236.9 million in respect of total assets less current liabilities. Following some submissions made at a directions hearing, Mr Tilbrook produced further evidence in his second witness statement. He there exhibits an extract of Colt UK's draft accounts for the year ending 31 December 2019. The balance sheet shows fixed assets valued at £404.2 million and current assets at £207.3 million, including £12 million cash at bank and in hand. In the 2019 draft accounts sums due to creditors within a year are £896 million, of which £779.5 million is owed to other entities within Colt UK's group. There is an overall deficit of £284.4 million. Mr Tilbrook's evidence is that the terms of Colt UK's arrangements with intra-group lenders provide for repayment on demand with a notice period of six months and that the balances have been accumulating for many years. He says also that the largest intra-group lender is Colt Telecom Holdings Limited, which is owed about £511 million. Mr Tilbrook produces the 2018 accounts of Colt Telecom Holdings Limited showing a balance sheet with net equity of about £528 million and explains that both Colt UK and Colt Telecom Holdings Limited are subsidiary undertakings of Colt Group Holdings Limited, the consolidated financial statements for which for 2018 show net equity of just under €1.5 billion.

80. Based on this evidence, Mr Lewis argues that Colt UK is balance sheet insolvent within s.123(2) of the Insolvency Act 1986, both on the basis of the 2018 filed accounts and the 2019 draft accounts. He submits that the creditors do not include the debts alleged to be due to SGG; that the 2018 accounts do not show sufficient cash at bank or in hand to pay SGG's invoices and that there is no evidence of the detailed terms which govern the intra-group debt.

81. In *BNY Corporate Trustee Services Ltd v Neuberger Berman Europe Ltd* [2013] UKSC 28, Lord Walker agreed with what Toulson LJ had said of s.123(2) in the Court of Appeal, namely

> "*Essentially, section 123(2) requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be to establish*."

82. In my view, Colt UK is solvent. Although superficially its 2018 and draft 2019 balance sheets show a deficit, the vast bulk of the sums due within a year are owed to other group undertakings which have in practice been content to allow the debts to accumulate over many years and it has a parent company with very substantial net equity. Making the judgment which *BNY* directs, Colt UK can reasonably be expected

to meet its prospective and contingent liabilities. The reason why Colt UK has not paid SGG's debt is because that debt is disputed, not because it cannot do so.

Disposal of this Application

83. As I have explained, I consider that Colt UK has a properly arguable illegality defence to the sums claimed by SGG, based on the *Ralli Bros* principle. Moreover, it has been clear to SGG for some years that Colt UK is contesting its liability to pay the invoices on this ground. By letter of 2 March 2017, Colt UK wrote to SGG indicating that it harboured "*serious doubts that SG is trading in its own right, and in accordance with all applicable laws*." It said that it had been advised "*that sufficient doubts remain to engender a significant risk that Colt will be deemed by the relevant authorities to have dealt in sham transactions.*" The *Ralli Bros* principle was specifically mentioned in a letter from Baker McKenzie to SGG's then solicitors, Neumans LLP, dated 4 May 2017. The application of the *Ralli Bros* principle formed the basis of Colt UK's rejection of the 2018 statutory demand and the arguments in the Milan Proceedings and on the Milan appeal. In the circumstances, it is quite clear that the *Ralli Bros* defence to the sums claimed is and has been put forward in good faith by Colt UK and is not a last-minute attempt to ward off a debt which it knows to be due.

84. In my judgment this is a case like that considered by Hildyard J in *Coilcolour* at [42], where the purpose of invoking the insolvency jurisdiction is to put pressure on a company of which the solvency is not in real doubt, and where there is a dispute as to indebtedness. SGG's service of a statutory demand was a clear attempt to shortcircuit the Milan appeal proceedings: in which, it must be noted, SGG's case is that the liability to pay the invoices lies on Colt Italy, not Colt UK. The presentation of a winding-up petition against Colt UK would be an abuse of process and in all the circumstances it is right to restrain SGG from taking that step. I will therefore grant the application.