Neutral Citation Number: [2024] EWHC 1058 (Ch D)

Case No: BL-2021-000987

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

Royal Courts of Justice
The Rolls Building, EC4A 1NL

Date: 3 May 2024

Before :

HHJ PARFITT
(sitting as a Judge of the High Court)

- -

Between :

UBS SWITZERLAND AG	**Claimant**
- and -	
ANIL KUMAR	**Defendant**

- -
- -

Tony Beswetherick KC & Michael Ryan (instructed by **Reed Smith LLP**) for the **Claimant**
Anil Kumar appeared in person
Hearing dates: 11 to 17 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ Parfitt :

Introduction

1. The Defendant was the sole director of Vincom Commodities Limited ("Vincom"). Vincom went into liquidation on 24 January 2018. On 8 January 2021, its liquidators assigned potential claims against the Defendant to the Claimant. The Claimant, among other banks, was a creditor of Vincom. In this action the Claimant alleges that a number of decisions taken by the Defendant, as a director of Vincom, were a breach of his director's duties. Those decisions relate to eight credit notes, dated between 2014 and 2017, but said by the Claimant to most likely have been issued after liquidation became inevitable, and three payments made in November 2017 after service of the winding up petition. The Claimant seeks equitable compensation for the consequences to Vincom of those decisions in a sum of just over USD 13.3 million. All money sums are stated as USD.

2. The impugned decisions breakdown into two categories: credit notes and payments. They are all alleged to have been made for the benefit of companies owned and/or controlled by family members of the Defendant. By trial this was not disputed save to the extent that the Defendant pointed out that one of his brothers was only a 49% shareholder of AST (defined below).

3. While the Defendant's statements of case and disclosure were done while he was represented, by the time of filing his witness statement for trial, and at trial, the Defendant was not represented. The Defendant presented his case respectfully and with considerable self-belief. I had no doubt that I understood the points which he wished the court to bear in mind.

The Claimant's Position – in summary

4. The Claimant says the Defendant wrongly issued credit notes in a total value of $7.769m in favour of a customer called Donald McCarthy Trading Pte Limited ("DMT"). All of those credit notes related to nickel shipments sent by a supplier of Vincom's called AST Metals LLC based in Dubai ("AST"). The credit notes have variously been numbered in their dated order, i.e. DMT1, DMT2 and so on or by reference to the bank which was the relevant funder. While all the credit notes bear the same date as the invoices to which they relate, the Defendant says they were issued a few weeks after the relevant transaction but the Claimant says they were not issued the end of 2017 or early 2018.

5. On 24 November 2017, Vincom was served with a winding up petition. The other three decisions involve payments, said to have been authorised by the Defendant on 24 and 29 November 2017, after he knew of the petition, by which $5.568m was paid to AST. Of this, $4.61m had just come into Vincom's account with National Westminster Bank ("NWB") and $0.9m increased Vincom's indebtedness to Credit Suisse.

6. DMT and AST, who got the immediate financial benefit of all these decisions, were companies owned and/or controlled by brothers of the Defendant. So the Claimant's overall narrative is that the Defendant misused his director's powers for the benefit of

his family and to the detriment of Vincom (including when relevant that of its creditors) with the consequence that Vincom lost the value claimed.

The Defendant's Position – in summary

7. The Defendant explained that he was a trader and his expertise was in getting deals done and building and maintaining relationships. Vincom's business was commodity trading. It purchased and sold commodities, such as scrap nickel, plastics, and fuels. Vincom's business was high turnover but low margin. The Defendant stressed that he was running a $500 million a year business but margins were about 0.3% and trades typically generated profits of only a few thousand dollars. The business was operated from an office at New Bond Street in London. The office comprised the Claimant and three ancillary staff. The Claimant made important decisions but it was those staff members who carried out the mechanics: so, for example, the Defendant said that he had already made the November 2017 deal that required the $5.568m payment by 22 November 2017 which was when he instructed the payment to be made, before service of the petition, and the later payments immediately after such service, were just when the office staff happened to process them.

8. The Defendant also stressed that there were hundreds of transactions carried out by him every year and yet the Claimant has chosen to focus on only eleven of them. The Defendant was concerned that this presented a misleading picture: the matters complained of represented a fraction of Vincom's activity and there was never any reason to expect those particular decisions to generate the focus of a court case. In the Defendant's view the Claimant is unfairly hounding him about matters of which it has no real understanding, basing its case on misleading and incomplete documents and false inferences. The Defendant says his decisions were entirely appropriate and these claims are frivolous and unjustified.

Vincom's Business Model

9. In general, Vincom's business model was to enter into matching deals: buying from a supplier, such as AST, and selling to a customer or offtaker, such as DMT. Vincom financed this trading pattern by establishing credit lines with various banks. Again, typically and in the case of the eight credit note transactions, the banks would provide credit to enable Vincom to pay AST, take security of, for example bills of lading, the goods and/or the customer's obligation to pay the price, and anticipate repayment from Vincom's purchaser, such as DMT, once goods were delivered. The Defendant's defence included the assertion that the relevant bank approved each pair of transactions before they were entered into by Vincom.

10. On many occasions during the trial the Defendant asserted that this structure meant that Vincom did not have liability to its banks because the banks had visibility of, and controlled the transaction but also because the banks knew it was not intended that they would be paid by Vincom but rather Vincom's customer, supported by the security rights over the goods and/or the documents. This is wrong: Vincom was always liable under its various credit agreements with its banks. The Defendant's attitude to this would be to say "yes, of course, but Vincom never had to pay, the bank could always get the money from the customer". A more accurate version of that would be Vincom always had to pay unless someone else had already done so. In seeing this judgment in draft, the Defendant asked me to re-consider this paragraph in

light of the Carriage of Goods By Sea Act 1992. I can see no reason to do so: no reference to this act was made in the parties' statements of case or in their evidence. I cannot see how it can fairly be raised now. I am not sure I followed the point being made by the Defendant in his note, but on the face of it the funding bank's possession of the bills of lading creates a possessory interest in DMT's rights to the goods the subject of the contract of carriage and has no bearing on Vincom's obligation to pay its lenders (it would not surprise me if on such payment being made that such security as was represented by the documents could potentially transfer to Vincom – subject, for example, to any bank's potential rights to aggregate such security).

Vincom's Asset Value

11. The Claimant says that the winding up of Vincom is likely to lead to a deficit of some $40 million. The Defendant says that Vincom was never really insolvent at all, the liquidation was a fabrication engineered by the banks contrary to the interest of Vincom, and the liquidator failed to carry out his duties properly and did not even make use of the Defendant's offers to assist in collecting receivables. That is why there is an apparent deficit.

12. This judgment addresses the following matters in this order: (a) the law; (b) the assignment; (c) the impugned transactions; (d) witnesses; (e) evidence in general; (d) the Defendant's credibility; (e) the credit notes; (f) the AST Payments; (g) quantum.

The Law

13. I do not understand the law to be controversial as between the parties. I have taken this section, for the most part, from the summary in the Claimant's opening written submissions. As I said to the Defendant at the end of evidence: it largely comes down to whether there was a good reason for what the Defendant did (I address below how the burden of proof operates in this case). This arises from the Defendant's case accepting that the eight credit notes were issued and the three payments were made but in each case saying he believed these were for good and sufficient reasons. Nevertheless, I set out the legal framework below and after each relevant description of the law, focus it on the issues in this case.

14. The Defendant owed Vincom the director's duties which are set out in Chapter 2 of the Companies Act 2006. Those of particular relevance are s. 171(b) (using powers for proper purposes); s. 172 (act in good faith to promote the success of the company); and, s. 174 (to exercise reasonable skill and care).

15. Section 171(b):

A director of a company must – (b) only exercise powers for the purposes for which they are conferred.

The Defendant, as director, had the power to conduct Vincom's business. The power is derived from the constitution of the company and might be described as the key power vested in company directors: it's their job to run the business.

16. The "proper purpose" obligation in general, and what might be breach of it, was discussed in *TMO Renewables Limited (in Liquidation) v Yeo* [2021] EWHC 2033

(Ch) at [194], Joanna Smith J. It is sufficient to set out from that paragraph the following quotation from Lord Sumption's speech in *Eclairs* [2015] UKSC 71 at [15]: "It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. 'Where the question is one of abuse of powers' said Viscount Finlay in *Hindle v John Cotton Ltd* 1919 SLR 625 at 630, 'the state of mind of those who acted, and the motive on which they acted, are all important'".

17. The "proper purpose" of a power to deal with the company's assets will be to advance the company's business and commercial interests: "…to protect Extrasure's survival and promote its commercial interests…" – Deputy Judge Jonathan Crow KC [2003] 1 BCLC 598 at [140.2].

18. So, in the present case, it is necessary for the court to make findings about the circumstances in which the credit notes came to be issued and the AST Payments made and what, substantially, the Defendant thought were the reasons for what he was doing. Although different, the findings about circumstances and the findings about reasons will necessarily be connected – if the circumstances show that there was good reason to think nickel was contaminated then the reason for issuing a credit note is much more likely to be for a proper purpose but if no such reasons existed and if the credit note was only issued much later after the company was heading towards liquidation, then the reason is more likely to be improper.

19. Section 172:

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to – (a) the likely consequences of any decision in the long term…(c) the need to foster the company's business relationships with suppliers, customers and others…(e) the desirability of the company maintaining a reputation for high standards of business conduct…(3) The duty imposed by this section has effect subject to any…rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

20. This duty is also subjective: did the particular director believe his actions were in the interests of the company, not whether with the benefit of hindsight the court finds it was not in the interests of the company or what the court might have done in the director's place (*Regentcrest plc v Cohen* [2001] BCC 494, Jonathan Parker J (as he then was) at [120]).

21. As is apparent from s.172(3), the interests of the company can, where a rule of law requires it, include the interests of the company's creditors (as a class). The approach to when creditors' interests might become engaged and the nature of the relevant duty was addressed by the Supreme Court in *BTI 2014 LLC v Sequana* [2022] UKSC 25. The Supreme Court held that the duty remained that of acting in good faith in the interests of the company but such interests included, where a company was "insolvent or bordering on insolvency", the company's creditors and the weight to be given to those interests would flex with the nature and extent of the risk to the company's solvency (see Lord Reed at [11] – [12], [48], [58] and [81] – [82]; Lord Briggs / Lord

Kitchen at [176], [203] and [205]; Lord Hodge at [207], [227] and [246]; Lady Arden at [250]).

22. In the present case the relevant finding about the intention of the Defendant is largely parasitic on the findings about how the credit notes and payments came to be made. The Claimant's primary case is that these decisions were made in a factual context where they could never be justified as being in the best interests of Vincom: credit notes not issued until after the liquidation being a real prospect and then, for no good reason, payments made in respect of a transaction which was not genuine. The Defendant's case, on the other hand, is that these decisions were made in the best interests of the company and as part of usual trading – keeping key customers on-side and making payments as and when they needed to be made in the usual course of Vincom's trading and in circumstances where the continuation of that business was in the interests of all involved, including creditors, given that the petition was based on a false debt which was going to be challenged by Vincom's solicitors. The Defendant's position echoes Lord Briggs JSC at [120] of *Sequana*: "…the directors may perceive there is a reasonable prospect that the company will be able to trade out of insolvency, for the benefit of both creditors and shareholders, a perception often labelled as seeing light at the end of the tunnel."

23. Section 174:

(1) A director of a company must exercise reasonable care, skill and diligence (2)(a) …[being that of]…a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director…and…(b) the general knowledge, skill and experience that the director has.

24. This duty is not fiduciary and is an objective standard. It could arise in the present case if the court found that the Defendant's decisions were made in good faith but were nevertheless careless because, for example, it would be expected a director would have some basis over and above the bare say-so of its customer before accepting that goods were not fit for purpose or might be concerned that one of its counterparties already owed $5 million before extending a further $4 million or so of credit. For the Defendant, these decisions were all reasonable and in keeping with the nature of Vincom's business and its trading relationships.

25. The nature of a director's role, as a fiduciary of company assets, means that certain transactions, such as the disposal of company assets to parties connected to that director (e.g. other family members or companies associated with such family members), might require particular explanation and justification. This is well explained by HHJ Cawson KC in *Aston Risk Management Ltd v Jones* [2023] EWHC 603 (Ch) at 192:

> "I consider that I can draw from these authorities the principle that, whether viewed in terms of a shifting of the evidential burden or an application of the principle that a trustee or other fiduciary is obliged to account for his dealings with the trust estate where he or an associate has received a payment or other benefit therefrom, once liquidators (or here their assignees) prove that the relevant payment has been made, or other benefit received, by a director (or de facto director) or an associate thereof, then the burden is on the director (or de facto director) to explain the transaction."

26. The Claimant raised the gaps in the written evidence that might otherwise be expected in a case of this kind: e.g. there is no direct access to Vincom's emails. I address this in more detail below but the relevant law includes the following propositions: it is for directors to keep and maintain proper records of a company's business and transactions and a director who fails in this respect and so expected written evidence is not available might struggle to prove oral assertions that cannot be tested (*Re Mumtaz Properties Ltd* [2012] 2 BCLC 109 (CA), Arden LJ (as she then was) at [14] and [15].

27. It is the Defendant's case that he handed over all relevant documents to a Mr Lee of the OR's office just after the liquidation on a USB stick. The Defendant is not to be blamed if that has gone missing and no adverse inferences should be drawn against him.

Assignment

28. The Claimant has title to bring these claims through an assignment from Vincom's liquidator dated 8 January 2021 ("the Assignment"). The Assignment was sent by the Claimant to the Defendant's then solicitors (who corresponded with the Claimant about it) and to the Defendant's home, where the courier says it was left with the porter and by direct email. In cross-examination the Defendant said that he did not receive it and that the courier was likely lying. I am satisfied that the Defendant did have notice of the assignment but in any event there is no procedural difficulty in this claim being pursued by the Claimant as an equitable assignee: the liquidator of Vincom has given evidence in support of the claims and there is no doubt about the Claimant being the owner of the relevant causes of action.

29. A further point made by the Defendant in his opening skeleton was that the Assignment could not grant to the Claimant rights which were personal to the liquidator because of *Re Oasis Merchandising Services Ltd* [1998] Ch 170. This was a bad point because the relevant rights here are causes of action owned by Vincom rather than statutory rights of the liquidator but in any event the legislation has changed since *Re Oasis Merchandising* and liquidators can now assign such rights (the relevant law is summarised in *Re Totalbrand Ltd* [2021] BCC 541 at [9] to [15]). In short, there is no difficulty in the Claimant bringing claims as assignee.

The Impugned Transactions

30. In this section I identify and make findings about the basic facts regarding the impugned transactions in chronological order. This is derived from the relevant documents, which are common ground, but the truth behind the transactions is hotly disputed. I have limited description to that which is necessary for what follows and have taken this to a large extent from the Claimant's skeleton argument but checking the relevant documents myself.

The Credit Notes

31. All transactions involve AST selling nickel which is put on ship for delivery to DMT. Vincom is the middleman and so contracts to buy from AST and sell to DMT. Vincom meets its payment obligation to AST from bank funding, with the intention being that such funding will be recovered from the price paid by DMT. Whenever the

credit notes were issued, they had the apparent consequence of cancelling DMT's liability for the price. In correspondence with Vincom's liquidator, DMT refused to pay the price because of the credit notes. The Defendant's pleading admits that the credit notes were the reason for non-payment (defence paragraph 19(ii)(e): "in each case [non-payment] was because [Vincom] raised a credit note in respect of the transaction").

32. DMT1 (AST payments for Vincom funded by BCP) By a contract dated 19 September 2014, Vincom sold 45 mt of nickel melting scrap (+/- 10%) to DMT for $897,750, CIF Kolkata. On 22 September 2014, AST invoiced Vincom for 45.45 mt of nickle silver melting scrap, CIF Kolkata, for a price of $897,637.50. On 22 September 2014 Vincom invoiced DMT for that cargo at a price of $906,727.50. The goods were to be shipped from Jebel Ali to Kolkata and the 3 bills of lading are of the same date as the invoices. In an advice dated 29 September 2014, Banque de Commerce et de Placements ("BCP") recorded Vincom's instructions dated 26 September 2014 to debit its account with the payment of the AST invoice which together with charges amounted to a debit of $900,121.60. The credit note is dated 22 September 2014 and writes off the full invoice value owed by DMT: "Full Credit due to delay in documents. Full Settlement with the Bank".

33. DMT2 / DMT3 (AST payments for Vincom funded by the Claimant) By a contract dated 31 May 2015, AST sold to Vincom 200 mt of nickel silver melting scrap, C&F Singapore, for a price of $4,020,000 to be shipped between May and December 2015. By a contract dated 1 June 2015, Vincom sold that nickel to DMT for $4,040,000. Some 98.14 mt of that contract are relevant to DMT2 and DMT3:

    i) DMT2 An AST invoice to Vincom dated 14 June 2015 for $971,433 (48.33 mt at $20,100 pmt). A Vincom invoice of the same date to DMT for $976,266 for the same nickel. The goods were to be shipped from Jebel Ali to Singapore on the Hyundai Oakland and the 3 bills of lading are of the same date as the invoices. In a request of the same date AST sought payment from UBS of their invoice against documents. On 26 June 2015, the Claimant notified Vincom that the AST invoice had been paid and that accordingly Vincom's account with the Claimant had been debited with $972,553.00. The credit note is dated 14 June 2015 and writes off the full invoice value saying "Full Credit Due to Faulty Goods".

    ii) DMT3 An AST invoice to Vincom dated 5 July 2015 for $1,1001,181 (49.81 mt at $20,100 pmt). A Vincom invoice of the same date to DMT for $1,1006,161 for the same nickel. The goods were to be shipped from Jebel Ali to Singapore on the YM Wealth and the 3 bills of lading are of the same date as the invoices. In a request of the same date AST sought payment from the Claimant of their invoice against documents. The Claimant notified Vincom that the AST invoice had been paid and that accordingly Vincom's account with UBS had been debited with $972,553.00. The credit note is dated 5 July 2015 and writes off the full invoice value saying "Full Credit Due to Faulty Goods".

34. DMT4 / DMT5 / DMT6 (AST payments for Vincom funded by ZKB). By a contract dated 10 January 2017, Vincom sold to DMT 600 mt of prime nickel strips, CIF

Singapore, for a price of $12,120,000 to be shipped between January to June 2017. Some 145.70 mt of that contract are relevant to DMT4, DMT5 and DMT6:

i) DMT4 An AST invoice to Vincom for $969,021 dated 23 April 2017 (48.21 mt at $20,100 pmt). A Vincom invoice to DMT for $973,842 for the same nickel dated 24 April 2017. The goods were to be shipped from Jebel Ali to Singapore on the Ever Diamond and the shipping date was 24 April 2017. The bill of lading was issued on the same date. ZKB paid the AST invoice and debited Vincom's account with $970,252.46. The credit note is dated 24 April 2017 and states: "complete write off as cargo found contaminated with acid".

ii) DMT5 An AST invoice to Vincom dated 3 May 2017 for $981,081 (48.81 mt at $20,100 pmt). A Vincom invoice to DMT for $985,962 for the same nickel dated 3 May 2017. The goods were to be shipped on the Ever Divine from Jebel Ali to Singapore and the shipping date was 3 May 2017. The bill of lading was issued on the same date. ZKB gave a payment confirmation to Vincom dated 8 May 2017 for a total sum of $982,328.00[1]. The credit note is dated 4 May 2017 and states: "complete write off as cargo found contaminated with acid".

iii) DMT6 An AST invoice to Vincom dated 3 May 2017 for $978,468 (48.68 mt at $20,100 pmt). A Vincom invoice to DMT for $983,336 for the same nickel dated 4 May 2017. The goods were to be shipped on the Ever Divine from Jebel Ali to Singapore and the shipping date was 4 May 2017 (this was the same voyage as DMT5). The bill of lading was issued on 4 May 2017. I have no reference to any ZKB payment for DMT6 but I do not understand it to be disputed. The credit note is dated 4 May 2017 and states "complete write off as cargo found contaminated with acid".

35. DMT7 / DMT8 (AST payments for Vincom funded by Sberbank) By a contract dated 7 July 2017 Vincom sold to DMT 600 mt of prime nickel strips at $20,200 pmt cif Singapore for a total contract value of $12,120,000. 95.88 mt of this relates to DMT7 and DMT8:

i) DMT7 On 13 August 2017 AST invoiced Vincom $970,227 for 48.27 mt prime nickel strips. Vincom invoiced DMT $975,054 for the same goods on the same date. Transport between Jebel Ali and Singapore was on the Maliakos and the date shipped was said to be 13 August 2017. The bill of lading is the same date. Sberbank notified Vincom that it had paid AST's invoice on 22 August 2017 (total debit against Vincom's account, $971,702.34). The credit note is dated 13 August 2017, is in the full amount of the DMT invoice, and states "complete write off due to total rejection of cargo".

ii) DMT8 On 13 August 2017 AST invoiced Vincom $956,961 for 47.61 mt prime nickel strips. Vincom invoiced DMT $961,722 for the same goods on the same date. Transport between Jebel Ali and Singapore was also on the Maliakos and the date shipped was said to be 13 August 2017 (the same as DMT7). The bill of lading is the same date. Sberbank notified Vincom that it

[1] The Claimant's skeleton attributes this payment advice to DMT6 but because the amount claimed is the invoiced sum for DMT5 I have included it here.

had paid AST's invoice on 22 August 2017 (total debit against Vincom's account, $958,416.44) The credit note is dated 13 August 2017, is in the full amount of the DMT invoice, and gives states "complete write off due to total rejection of cargo".

The AST Payments and related background

36. In an email dated 20 November 2017, Ms Kozak of Vincom, emailed Credit Suisse, copied to the Defendant, with copies of documents from AST. The email said: "This time we have sold it to someone else as we need DMT to clear up a bit and they could not do it because of inspection". Credit Suisse were asked to give "pre-approval" and there was hope that Vincom would have more incoming funds the next day (21 November 2017). The enclosed documents included a covering letter from AST to Credit Suisse with a document package relating to $952,740 of nickel scrap under invoice AST/705/2017 (47.4 mt at $20,100 pmt, Jebel Ali cif Singapore on the Wenhai, shipped on board 20/11/17).

37. There was a sales contract between Vincom and Dutrade Apac Pte Ltd of Singapore ("Dutrade") for 50 mt "prime nickel strips" at $20,200 pmt, total $1,01m dated 20 November 2017.

38. On 24 November 2017, Credit Suisse responded to the approval for the AST invoice of 20 November 2017 and said to Vincom: "We shall send you the original documents after receipt of your duly signed authorisation for payment and our having been able to effect such payment. In case of refusal, please inform us immediately…".

39. At 10.45 am on 24 November 2017, the Defendant emailed Vincom's solicitors and said "we have just been served with a Winding up application by Brechers with a court stamp dated 10 Nov on Top and hand delivered to us just now". The Claimant says this is vital to the findings the court should make about these November payments. The Defendant's case is that it was essentially irrelevant and the court should find that so far as these transactions were concerned, everything was business as usual.

40. At 1.33 pm on 24 November 2017, NWB notified Vincom that Aureole Trading LLC of Dubai ("Aureole") had credited Vincom with $4,613,954.51 relevant to an invoice number VC-PW-2155 said to be dated 14.2.17 for paraffin (there were various small charges against the sum as sent). The relevant invoice appears to be dated 3.4.17 and the date shipped stated on that invoice was 14.2.17 and the amounts match, so I suspect it is just a misreading at NWB (it is of no consequence).

41. Vincom had purchased the relevant paraffin from a company called Hazel Mercantile Limited of Mumbai ("Hazel"). The invoice from Hazel to Vincom was dated 14.2.17 (also the date of the goods being shipped on board) but then that date is overwritten in hand with 1.4.17. The shipping details are the same. In any event, the price payable by Vincom to Hazel was $4,595,368.18 within 180 days of the bill of lading date (i.e. by 13 August 2017).

42. Later on 24 November 2017, NWB confirmed they had remitted the following urgent transfer: $2,696,117.00 from Vincom account to AST against invoice numbers AST/707/2017 and AST/708/2017 for nickel scrap. This is AST Payment 1.

43. Later on 24 November 2017, NWB confirmed they had remitted $1,918,545 from the same Vincom account to AST against invoice AST/705/2017 and AST/706/2017 for nickel scrap. This is AST Payment 2.

44. Following those payments, Vincom's NWB account had a balance of $6,026.

45. On 28 November 2017 at 4.40 pm, Credit Suisse emailed Vincom ("Oksana" and copied to the Defendant) seeking authority for a payment arising from a request for payment from AST. Oksana, again copied to the Defendant, asked Credit Suisse to make this payment on 29 November 2017 at 11.00. The sum was $952,740 and was paid, according to Credit Suisse's document, in respect of AST's invoice AST/705/2017. This is AST Payment 3.

The Witnesses

46. I will make some comments on the witnesses in the order in which I heard them. I have more to say about the Defendant's evidence in the next section, which addresses the evidential challenges in this case in more detail. The nature of these claims and the lack of a full documentary records means that a detailed chronology of what took place is not possible. Consequently, I have said more about the evidence provided by each witness in this section than might usually be the case.

Claimant's Evidence

47. Benjamin Wiles was one of Vincom's liquidators appointed on 17 May 2018. Mr Wiles set out the history of the liquidation after the winding up order was made on 24 January 2018. Mr Wiles commented on the lack of electronic records for Vincom's business: other than backups from SAGE, there were none. Mr Wiles blamed the Defendant for this. The Defendant said that he had provided a USB stick to the OR, with the relevant records. Hard copy documents had been obtained from the OR who said they had got them from Re10 (a firm the Defendant sought to have appointed as liquidators but the creditor banks objected) or the Defendant. Mr Wiles referred to meetings he had with the Defendant and was critical of the information provided by the Defendant. Mr Wiles set out the unsuccessful steps taken to obtain electronic records.

48. Mr Wiles addressed the Defendant's identity. Mr Wiles said the Defendant did not accept he had the surname Didwania – which was the family name he shared with the brothers involved in DMT and AST and so showed the Defendant's family links with those counterparties and the connections with DMT and AST. Mr Wiles said the Defendant said nothing to him about this family connection.

49. Mr Wiles did not find any of the eight credit notes in the records of Vincom and they were not reflected in Vincom's accounts on Sage. He first knew of them when DMT referred to the credit notes in a letter dated 20 August 2018 in response to a letter of demand for the balance of their debt to Vincom. Mr Wiles discussed them with the Defendant on 10 October 2018. Using the breakdown of the credit notes referred to above, the Defendant said: BCP, the bank was late with documents and had written off the amount claimed; UBS, the nickel was contaminated because of lead in the relevant containers and UBS inspected and were aware of the problem and had sight of the credit notes (and had already written off $1 million); ZKB, DMT agreed to pay

half for this acid contaminated cargo but then ZKB did not keep to this bargain and issued revised bills; Sberbank, the bank had sent five people to inspect and confirmed the contamination and DMT disposed of the goods, which had no value.

50. On the AST Payments, the Defendant told Mr Wiles that AST was paid from money available because they had goods on the sea and he was looking at bank finance which would have enabled him to meet other liabilities (in particular the liability which matched the transaction by which Vincom received the $4.6 million paid to AST).

51. The AST payments appeared to relate to a transaction with DuTrade Apac Pte Ltd ("DuTrade") but Mr Wiles could not find the sale contracts which supported the four invoices addressed to DuTrade. In correspondence DuTrade denied the existence of this or any nickel transaction.

52. Mr Wiles wrote to the named shipper for these trades but received no response. There had been no response from enquires to AST. Mr Wiles anticipated that there would be a deficit in the Vincom liquidation of about $48 million.

53. The Defendant's cross-examination of Mr Wiles was directed at Mr Wiles not having instructed the Defendant to help him with collecting receivables and the Defendant having given the OR the USB stick which would have had the missing data on it. The Defendant was also concerned that Mr Wiles had been conflicted by his involvement with IDB (the bank whose debt was behind the petition). The Defendant also suggested that Mr Wiles had manipulated the document process so as to prefer the Claimant's position and prejudice that of the Defendant. I can see no evidence of this outside of the Defendant's own say so.

54. Jean Jacques Poublet Mr Poublet was the head of Commodities Trade Finance ("CTF") at the Claimant during the relevant period. Mr Poublet signed the lending agreements with Vincom for the Claimant. The day to day management of the Vincom account was with other employees but Mr Poublet became concerned about the state of the Vincom account from October 2015, when due but unpaid receivables were owed by various companies in India and Singapore. Steps were taken to protect the Claimant's position which led to a request for payment of $2.5m and then a notice of default on 2 December 2015. Mr Poublet was unaware of the family connections with Vincom's trading partners during the normal running of the account. Mr Poublet met with the Defendant on 6 January 2016. These negotiations did not lead to a positive outcome and the Claimant sought a repayment agreement. During 2016 and 2017 receivables were late and Vincom did not meet its own payment promises. Eventually, in late May 2017 a repayment agreement was reached with Vincom but except for one payment Vincom defaulted. The Claimant was prepared to waive $627,449.05 of interest and charges if the repayment agreement was met but this did not happen and those charges were reimposed. Nobody at the Claimant was made aware of any quality issues regarding the credit note trades relevant to the Claimant nor that Vincom had written off those receivables by issuing credit notes. Mr Poublet had never come across containerised metals cargo being contaminated in 19 years. When Mr Poublet talked to the Defendant about the amounts outstanding to Vincom from DMT under the two relevant transactions, it was also on the assumed basis that those receivables would be paid by DMT.

55. The Defendant had no cross examination of Mr Poublet.

56. Markus Münch Mr Münch was the credit officer responsible for Vincom between 2014 and 2017 at UBS AG and the Claimant (Vincom's business was transferred as part of an internal reorganisation but I will refer to the Claimant throughout). Mr Münch summarised the credit terms granted by the Claimant to Vincom. The Claimant provided financing credit to Vincom from 10 March 2014 until 19 October 2015 (when existing debts were "frozen" and no further credit would be offered). In general, a transaction package was proposed by Vincom to the relevant Transaction Collateral Manager ("TCM"), the TCM would present that trade to the Relationship Manager for approval (who would approve or refer it up the chain), an approved trade would progress subject to meeting the Claimant's documentary requirements (e.g. bills of lading) – a cash against documents basis. The Claimant's direct rights against Vincom (e.g. to require full cash coverage of any outstanding transaction) were reflected in the Master Credit Agreement of 10 March 2014, and such rights might be used, for example, if a buyer or offtaker failed to make payment for the 90 day term that was typically agreed. Problems with Vincom's account from September 2015 were reflected in payment delays from Vincom's buyers (including DMT). On 24 November 2015, the Claimant demanded $2.5 million within 7 days. This was not paid. Mr Münch was concerned at this time about the number of Vincom's customers not paying and began to look into them in more detail. He said this revealed the family connections between AST, Vincom and DMT (as well as other of Vincom's counterparties). There was no internal rule against this but it was of serious concern. Mr Münch's suspicions were a surprise to other members of the Claimant's staff working with Vincom. Mr Münch set out the investigations he carried out (including for example there being no reference in Vincom's audited account to related trading partners). Mr Münch was told on 7 January 2016 that the Defendant said that certain customers were not related entitles. Mr Münch said that was not true. There was a further meeting on 5 February 2016 at Zurich airport with the Defendant. The Defendant got upset.

57. In the 2016 and 2017 period the Claimant sought to agree repayment plans with Vincom and its offtakers. Mr Münch had a further meeting with the Defendant on 29 March 2017 with a view to agreeing a repayment plan and to encourage Vincom to get its offtakers to make payment. In April 2017, Mr Münch handed the Vincom file to the Claimant's recovery team. This led to a repayment agreement dated 24 May 2017 which required Vincom to make payment of $250,000 a month. Only one payment was made. The Claimant sent a letter of demand on 17 November 2017 and a statutory demand on 27 November 2017.

58. Mr Münch provided evidence derived from the Claimant's records about DMT2 and DMT3. These were both for containerised nickel cargo from AST financed by the Claimant on a CAD basis with the buying customer being DMT who had a 90 day credit. Mr Münch knew nothing of any credit notes until the liquidator provided them and anyone at the Claimant would have drawn Mr Münch's attention to such notes had they been mentioned. Mr Münch had no knowledge of any approval of such credit being given or of problems with the quality of the cargo. Any inspection of cargo would be carried out by an external surveyor and not anyone from the Claimant, who would not have the relevant expertise. During Mr Münch's involvement with the Vincom account he knew nothing of these things.

59. The Defendant did not cross-examine Mr Münch: he said that he had not dealt with Mr Münch and so had no questions.

60. Pierre Paul Briguet Mr Briguet, who has now retired after 30 years of CTF experience, was Vincom's relationship manager at the Claimant. This put him in day to day contact with the Defendant and Vincom's suppliers and sometimes customers / offtakers. Mr Briguet approved the transactions financed by the Claimant. The bank carried out checks on various counterparties, including those now known to be associated with the Defendant's family, but this association was not known until after problems became apparent. The Defendant always referred to himself as "Kumar" and did not use the Didwania name. Even when Mr Briguet asked the Defendant about this at a meeting on 6 January 2016, the Defendant did not disclose the connections. The Claimant would have been concerned by such connections because of the risk that a person would put family ahead of business. Mr Münch first raised these matters and Mr Briguet was surprised and concerned.

61. In late January 2016 Mr Briguet travelled to India to meet some of Vincom's offtakers (all related to the Defendant). On 5 February 2016 Mr Briguet met with the Defendant. The Defendant repeated that he was not connected to the counterparties and then stormed out when the evidence to the contrary was put to him. Later, the Defendant returned and the meeting was more constructive. The debt was about $4.3 million at that time. The Defendant had already told the Claimant that he would seek assistance from his family trust to help meet Vincom's liabilities.

62. Mr Briguet also gave evidence of the history of the relationship between the Claimant and Vincom: reasonably stable over the first twelve months or so and then payment problems from counterparties, Vincom not being able to meet its own liabilities or to get payment from those counterparties (at least on time or in full), a demand, a notice of default and then eventually a repayment agreement which Vincom did not honour.

63. DMT2 and DMT3 were the only two DMT outstanding receivables involving the Claimant between late 2015 and the liquidation. Mr Briguet was not told about contamination or the invoice value having been written off. There was no inspection of these cargos by the Claimant or on its behalf. There was no knowledge at the Claimant of any credit note or discussion of any credit notes or similar. This would have prompted contact with Mr Münch. On the contrary, during Mr Briguet's meeting with DMT (Vinod Didwania) in May 2016 discussions were on the basis that DMT would be paying in full not that DMT denied any obligation to pay.

64. The Defendant cross-examined Mr Briguet. It was asserted that Mr Briguet had been given an indemnity from the Claimant in respect of any consequences arising out of his evidence. Mr Briguet denied this. Mr Briguet was asked why the Claimant had denied that he had been to Singapore. This appeared not to have been the case but rather the Claimant had denied that Mr Briguet or anyone else from the Claimant had inspected the metals said to have been the subject of DMT2 and DMT3. Mr Briguet said that he had been to Singapore to talk to DMT and maintained despite the Defendant's questions that such discussions did not involve any complaint about the quality of the disputed cargos or any suggestion that the relevant receivable was not payable. The Defendant questioned the lack of a formal report about this meeting, Mr Briguet said the email summarising his discussions was all he needed to produce in the circumstances. There was also discussion of Mr Briguet's trip to India and a

meeting he had with the Defendant in Zurich. The Defendant put to Mr Briguet that the DMT2 and DMT3 receivables had been written off and that this was known about and agreed to by the Claimant. Mr Briguet's response was "absolutely not".

65. Hearsay Evidence In addition to live witnesses the Claimant relied on evidence given under hearsay notices. The Defendant stressed that such evidence had not been offered for cross examination and was often based on documents and was not given by individuals who had direct involvement (rather than administrators or lawyers looking at documents). I take all those aspects of this evidence into account but for the most part, the nature of this evidence is merely reflective of the documents which have been produced and is well within the inherent probabilities (i.e. the type of documents and information that would be produced given the relevant transactions and agreements which the material parties had involved themselves in). I summarise this factual evidence in the following paragraphs.

66. Effrosini Giouroukou (re DMT7 & DMT8) Ms Giouroukou is a claims handler with the company responsible for the MV Maliakos. This is the vessel said to have been involved in DMT7 and DMT8 when it was on charter to Korean Maritime Transport Corp (the charter ran from 2016 to 2019). The relevant bills of lading show that the DMT7 and DMT8 cargos were transported on voyage "1706E". The Defendant's defence said that the relevant containers "took in seawater during the voyage to Singapore". Ms Giouroukou's statement addresses that possibility and says that she would have received any claims notifications for sea water ingress (or other cargo damage claims) and no such claims had been made by anyone in respect of this voyage. Based on this the Claimant says there is no likelihood of seawater contamination during the vogage.

67. Mesada Fuchs Ms Fuchs is an employee of Israel Development Bank ("IDB"). It was IDB who successfully petitioned for Vincom's insolvency. Ms Fuchs provided an affidavit and addressed questions raised by the Claimant. She had been a business manager in the Special Credits department and had knowledge of Vincom's dealings with IDB or had obtained that knowledge by looking at documents. Ms Fuchs confirmed that Vincom made use of IDB's London branch until that branch closed in September 2015. Prior to that Vincom had a current account and a loan account at the London branch. Receipts were credited to the current account, expenses were taken out and any net sum would be credited against the loan account. Following transfer of the account to Israel, a new current account and loan account were opened. Vincom's debit balances totalling $4,596,500 were transferred at that time. The Israel based accounts operated in a similar way (with incoming payments from Vincom or third parties being credited first to the current account). The loan account had subsidiary loan accounts for each loan made. There was also an arrears account. Ms Fuchs set out in a table receivables that were and were not received by IDB. Ms Fuchs exhibited IDB's proof of debt in the Vincom liquidation which summarised the basis for a debt of £2,383,865.14. This flowed from a 19 June 2015 settlement agreement whereby Vincom agreed to pay $5,472,935.07 by way of periodic payments. In fact only 8 payments were made against that debt. A letter of default was sent on 22 May 2016. A letter of demand on 18 July 2016. A statutory demand on 10 July 2017 for $3,136,587 and a winding up petition presented on 10 November 2017.

68. It was the Defendant's case that IDB's debt was a fabrication and that it had received the sums which were said to not have been received and that the final statements from

the London accounts, which showed the account balances as zero, proved that there was no indebtedness between IDB and Vincom at that time. Consequently, the Vincom insolvency, founded on the IDB debt, was also a fabrication and, furthermore, the Defendant always believed that Vincom was not insolvent at any material time. I address this below.

69. Sberbank (re DMT7 and DMT8) Sberbank's English solicitors emailed Mr Wiles on 8 June 2018 with a note addressing its Vincom debt and the Sberbank understanding of what took place. The note says that notwithstanding Sberbank holding the relevant documents, the cargos were released to DMT on presentation of a single bill of lading. On 7 December 2017, the Defendant emailed Sberbank and said DMT had rejected the goods because of "contamination of Acid" and so Vincom would have to sell to a new buyer. By agreement with Vincom, Sberbank sent a representative to inspect the goods but this person was refused access to inspect at DMT's warehouse. On 11 December 2017, the Defendant told Sberbank that Vincom had disposed of the goods at scrap value because there was nowhere to keep contaminated cargo. Sberbank had maintained its claims against DMT in respect of the cargo and the proceeds. DMT said the nickel was received and was disposed of by agreement with Vincom. Sberbank said it was not consulted about these arrangements. DMT asserted that a credit note had been raised but DMT had provided Sberbank's solicitors with no evidence of destruction of the cargo or the credit note. The correspondence suggested the cargo was released to DMT on 29 August 2017. It also suggested that the Defendant told Sberbank at the end of November 2017 or early December 2017 that DMT's bank would pay in the first week of December 2017 but that DMT's bank then sent back the original bill of ladings (this prompted the Defendant's email of 7 December 2017 referring to rejected cargo, in which he said "without wasting any more time have asked them to send the docs back"). DMT emailed Sberbank on 8 December 2017 and said "Vincom has full details of cargo rejection". On 11 December 2017, the Defendant told Sberbank, in the context of Sberbank's representative trying to inspect the cargo but being refused by DMT, that Vincom would cover the document and the loan and that DMT was not in the picture. Sberbank pressed DMT for payment and on 17 January 2018, DMT stated "at the request of Vincom, we inspected the materials. As the materials were found to be highly contaminated and rotten, the same was disposed of as per instructions of Vincom with no value payable". Mr Ceni for Sberbank provided a further summary of the bank's viewpoint dated 24 August 2022 in response to a request from the Claimant's solicitors.

70. Susan Aschbacher of BCP (DMT1). Ms Aschbacher is a lawyer at BCP and provided, in various emails, answers to questions raised by the Claimant's solicitors. These confirmed the bare details of DMT1 as summarised above. DMT's bank received the documents on 1 December 2014 and was expected to make payment. Payment was not made. BCP denied that it lost any documents (including any AST / Vincom / DMT transactions prior to 22 September 2014) and said that BCP was still holding 2/3 original bills of lading, which had been returned by Citibank in Singapore once DMT defaulted on the payment. The other original bill of lading had been sent to Vincom. BCP held no information about the cargo being rejected and as not fit for purpose and had not given credit in respect of the purchase price because of any cargo issues or BCP fault and had no knowledge of such rejection for any prior BCP financed transaction (correspondence would have been generated by cargo damage).

BCP and Vincom entered a settlement agreement dated 24 July 2015 (amended on 21 January 2016). In that agreement Vincom acknowledged that the amount outstanding was $3,782,031.10 but that BCP would accept $2,923,698.66 under the terms agreed ("the amount to be due and payable by Vincom and or its customers"). At clause 6, if Vincom met its payment obligations, BCP would release to it documents arising from DMT1 (that amount being included within BCP's write off calculation). If Vincom breached its repayment obligations then the full amount would become payable. The amendment adjusted the agreement to allow Vincom to maintain its payment discount in circumstances where it had failed to meet the stage payment obligations.

71. Ms Aschbacher's answers were given without any responsibility on the part of BCP. The Claimant and the liquidators had already confirmed that no claims would be made against BCP in respect of its transactions with Vincom (or payments made by Vincom).

72. Ruedi Eggel of Credit Suisse (AST Payment 3). Mr Eggel responsed to questions asked by the Claimant's lawyers of Credit Suisse. The liquidators gave their consent on behalf of Vincom. The answers were based on Credit Suisse's records and after consultation with the CTF department. The details of AST Payment 3 summarised above were confirmed, in particular it was made following a request on 29 November 2017, which was a mandatory part of the process, and increased Vincom's indebtedness to Credit Suisse at that time. If the 29 November 2017 authorisation had not been given the payment would not have been made.

73. ZKB (DMT4 to DMT6). During the course of the trial and pursuant to a letter of request, the Claimant obtained documents from ZKB. ZKB claimed for $3,135,392.62 (or its GBP equivalent) in the Vincom liquidation. These were sums outstanding under a credit facility dated 17 March 2016. Those sums included the amounts arising from DMT's failure to duly pay the sums relevant to DMT4, DMT5 and DMT6. These sums should have been paid by DMT on 2 August 2017, 21 August 2017 and 24 August 2017 but were not paid. Vincom was prima facie obligated to make those payments to ZKB. ZKB provided email exchanges dated from 9 October 2017 with the Defendant. On 17 October 2017, the Defendant proposed a repayment plan involving, as relevant, three new $500k bills (the third for $556k) issued against DMT for payment now and in 6 months and 12 months. ZKB did not agree and wanted to keep its rights against DMT arising out of the original bills (from DMT4 to DMT6). A final repayment plan over 15 months was put forward by ZKB for acceptance or it would terminate the facility. The Defendant maintained that his proposal was as had previously been agreed in a call. On DMT the Defendant said "we had a quality settlement as advised to you…and after settlement of the percentage shortages we have agreed the three amounts mentioned…" (i.e. $500k / $500k / $556k). ZKB said no and asserted their rights against DMT under the existing documents. On 6 November 2017, the Defendant said "…we have to accept the rejection and agree a settlement" and repeated the request for revised documents.

74. Expert Evidence The Claimant called Mr Peter Daniels, an accountant, who had been through Viacom's financial records, and Dr Ian Moody, a metallurgist, the gist of whose evidence was that it was extremely unlikely that contamination would have taken place to the various nickel cargos such as would have rendered those cargos worthless.

75. Mr Daniels addressed two issues: (a) the accounting treatment of the disputed transactions; (b) Vincom's solvency in the run up to the liquidation.

76. The Sage accounting system showed entries for the last five of the credit notes but the entries were bunched together as items 11019 to 11022 on the software. These postings were made on 11 January 2018. The first three credit notes do not appear in the records. Mr Daniels' view is that those three material credit notes would not have been reflected in the statutory accounts since they were not in Sage system at any relevant time. It is possible that manual adjustments to the accounts were made to reflect the credit notes but Mr Daniels would expect such adjustments to be carried over into the accounting records thereafter and there is no evidence of that having happened.

77. In addressing balance sheet solvency, Mr Daniels rewrote Vincom's accounts on the assumption that those debts which, to date, have proved irrecoverable in the liquidation (a total of just under $30 million) should be given a nil value from the date they became notional assets of Vincom. This resulted in Vincom being balance sheet insolvent at least from the date of its last filed accounts with a deficit of over $17 million at the latest filed account date. On a cash flow basis, and focusing only on what I regard as potentially relevant to the position around November 2017 and thereafter, Vincom's settlement agreement with the Claimant was in default (only two payments had been made and about $4.5 million was due), the settlement agreement with IDB was also in default (arrears built up from December 2015 onwards and totalled over $3 million by 7 July 2017 when a statutory demand was served on Vincom), Vincom owed ZKB under its trade finance agreements just over $3 million as of 17 November 2017 but on the other hand, the settlement agreement with BCP (the first in time), while not strictly kept to, was paid off by December 2017 (payments were made by Vincom's offtakers). Mr Daniels' analysis, set out in in a graph, was that Vincom did not meet its obligations to its lenders from December 2015 onwards and the position was increasingly serious from 1 July 2017 (c. $7.8 million) through to 1 December 2017 (c. $10.8 million). Vincom had neither cash nor assets to meet these payments and did not choose to do so on those occasions when its accounts were in credit. Mr Daniels' view, therefore, on the factual assumptions he made, which can be summarised as being that the sums said by the banks to be owed by Vincom were owed by Vincom to the banks, was that throughout the relevant period, Vincom was cash flow insolvent.

78. The gist of the Defendant's cross-examination of Mr Daniels was to question the assumption that monies owed to Vincom that had not been paid in the liquidation should be written down to zero. The Defendant's position was that they should have been collected. In addition, it was said that the banks all had security for their debts and so Vincom would not have had those liabilities. It was also suggested based on schedules provided by Re10 that the book debts owed to Vincom should be about $11 million higher than assumed by Mr Daniels.

79. I address the relevant evidential disputes, which relate to the extent to which the Defendant should have taken account of the interests of creditors in the November 2017 period, below.

80. The relevant gist of Dr Moody's evidence, which I accept, was to address the various explanations put forward in the defence and further information which raised quality

type issues and provide expert input directed at the likelihood of these things having occurred. The context of this evidence was the lack of evidence about what had actually occurred – the position was the same at trial, the Defendant had no direct evidence to prove that anything was wrong with any of the cargos. At best, the Defendant's position at trial was (a) DMT did not pay; (b) the Defendant was told that the cargos were being rejected; (c) the Defendant did not take any further steps to investigate (but the various banks did or would have done); (d) the Defendant has looked up nickel on google and so has theories about what might have happened. Dr Moody's evidence provides some valuable assistance which enables the court to better understand the inherent probabilities relevant to the allegations in the Defendant's statements of case. I will summarise by reference to each set of DMT transactions.

81. DMT1. The inherent properties of nickel (including "nickel scrap") mean that mere delay is extremely unlikely to cause significant damage because it is largely immune to atmospheric corrosion. Contamination by sulphuric and cyanic acid is unlikely to affect nickel but nitric acid might cause surface damage, which could be washed clean and disposed of without a significant loss of value. Generally, nickel has good resistance to acid attack. Seawater contamination is of no consequence to nickel. At most salt might need to be cleaned off before smelting.

82. DMT2 / DMT3. generally either prime nickel or scrap nickel would be packed within discrete packaging and then that packaging packed into shipping containers. The assertion about the cargo being "loose packed into containers for shipping" or "bound into bundles with thin wire, but with no other packaging" would be very unusual. Regardless, contamination with lead would be most unlikely: both chemicals are solids at room temperature, they would not interact beyond perhaps some contract transfer which could be cleaned off at minimal cost. But even theoretical contamination would be easily removed because lead melts at a much lower temperature than nickel. Even if the nickel was lower quality, the likelihood of any significant contamination would be very unlikely. So far as acid contamination was concerned, if present at loading and extensive, this would be obvious on loading. But only nitric acid might cause some corrosion to nickel and that only to the nickel surface. Lower quality nickel compounds would be less resistant to acid and so processing costs could be higher. It is inconceivable that any such contamination would reduce the value to nothing.

83. DMT4/DMT5/DMT6. Dr Moody repeats his comments about potential acid contamination addressed under DMT2 / DMT3.

84. DMT7/DMT8. Dr Moody states that it would be usual for prime nickel strips to be packaged so as to have some measure of protection from seawater during the voyage. In any event, even if nickel was exposed to seawater the likely consequence would be minimal cleaning cost and it would be extremely unlikely for seawater ingress during carriage to cause any significant loss to the buyer.

85. Dr Moody produced a further report which addressed a report prepared at the request of the Defendant's former solicitors by a David Duckworth. As relevant and supplementary to his main report, Dr Moody said: if the nickel was cut into short lengths then it would be packed into drums rather than packaged as he had previously considered; it is highly unlikely that nickel strips would be shipped loose in a

container; for hydrogen cyanide or potassium cyanide to be leaking in a warehouse would be a major incident with serious consequences and the chance of the cargo being exposed would be "extremely low" and the mere storage of these products next to each other is unlikely to result in any contamination but in any event, even dripping acid would create negligible damage and would be "highly unlikely" to render the nickel unfit for use; direct exposure to seawater or a higher than normal chloride atmosphere (because of proximity to the sea) would be highly unlikely and would not have an impact on value; cross-contamination would be highly unlikely and would not impact value; if hydrogen cyanide was released in the warehouse it would cause fatalities and/or explosions, these risks are fanciful; even if there was cyanide compound contamination once cleaned the product would be fit for purpose.

86. The Defendant only questioned Dr Moody to ask whether nickel contamination with acid was possible and whether it was possible that this would be more serious if the intended use of the nickel was in precision aircraft parts. Dr Moody agreed this was possible. This cross-examination goes nowhere since the civil court is concerned not with possibilities but with likelihoods.

Defendant's Evidence

87. The Defendant's evidence for trial was contained in his 6th witness statement dated 18 October 2023 and his 8th witness statement dated 15 January 2024. The Defendant also filed a 9th witness statement on 27 February 2024. The Defendant called no other witnesses and served no hearsay notices. While the Defendant had lawyers when his statements of case were filed by the time when his witness statement was prepared he was acting in person. The Defendant made the contrast between the resources available to him and those of the Claimant. I take that into account throughout.

88. The Defendant's 6th witness statement was not a narrative addressing the issues in the case and in particular gave no factual account of what he had done which led to the impugned transactions which are the subject of this claim or what his intentions were in respect of those decisions. What was said was that Vincom was a successful business which at the time of the liquidation had been in discussions about a possible listing. The key benefit of the business was its $500 million plus turnover. The business model put the responsibility for trading partners and getting payments in the hands of the relevant banks. The banks carried out due diligence and transactions would not have been authorised if there were any problems. At all times all the banks had more than sufficient security: that was the nature of Vincom's business, typically banks would have 120% collateral. The London office consisted of three desk tops which were linked. From late 2015 onwards Sage was used with weekly or monthly data entries. There were no monies owed to IDB, who were "fraudulent and malicious" in pursuing the winding up petition. The Defendant cooperated fully with the OR and the liquidators and provided all that was asked of him. The Defendant's good faith in this respect was contrasted with the Claimant, who had been subject to fines all over the world and would "break any law to achieve their means".

89. The Defendant's 8th witness statement set out his reasons why Mr Daniels was wrong and Vincom was not insolvent. This flowed from the value that the Defendant attributed to the documentary security that might have been held by the bank creditors. The Defendant gave a general account of the disputed transactions by way of a response to Mr Daniels' report and asserted that Vincom was not insolvent at any

relevant time and that Vincom's debts should have been collected. The Defendant set out his case about IDB not being owed any money at the time insolvency proceedings were brought by IDB against Vincom

90. The Defendant was cross-examined in detail and I address below the Claimant's assertion that the consequence of that cross-examination is that I should find that the Defendant was lying to the court throughout his evidence.

General Observations About Evidence in Civil Claims

91. The purpose of this section is to highlight for the Defendant some general features of the litigation process and how those impact the framework for the decisions being made by the court in this case.

92. The Claimant, in closing, referred me to a familiar trio of cases about the assessment of evidence in commercial disputes: *The Ocean Frost* [1985] 1 Lloyd's Rep 1, Robert Goff LJ at [57]; *Gestmin SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560, Leggatt J at [16] to [22]; *In Re Mumtaz Properties* [2012] 2 BCLC 109, Arden LJ at [14] to [17]. The emphasis in these passages is the importance of objective facts and documentary evidence rather than the subjective belief of a witness about the accuracy of what the court is being told or the court's assessment of witness credibility based on demeanour or performance in the witness box. The focus on documents can include, in an appropriate case, inferences that can fairly be drawn about the lack of such evidence.

93. I was also referred to what Lord Leggatt said in *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3863 at [41] where, when discussing that adverse inferences may properly be drawn against a party who could be expected to call a particular witness but does not, his lordship emphasised that considerations of this kind are not rules of law but examples of "ordinary rationality" and said: "So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so…". It seems to me this is a useful emphasis on the role that common-sense must play in the assessment of evidence, tightly focused, as Lord Leggatt goes on to emphasise, on the facts and circumstances of the particular case.

94. In a civil case, the Claimant must prove the relevant facts to establish liability on the balance of probabilities: it is more likely than not that those facts occurred. This contrasts with a criminal case where the standard of proof is beyond reasonable doubt. This means that whereas in a criminal case it might be enough for a defendant to demonstrate that a particular fact might not have happened, which could be enough to raise a reasonable doubt, in a civil case this is unlikely to be sufficient. A real possibility that an event did not happen in the manner asserted by one party, does not prevent the court making a finding, in an appropriate case, that such an event was more likely than not on the evidence.

95. This can be illustrated by the Defendant's cross-examination of Dr Moody: Dr Moody gave evidence, in the broadest of summaries, that it was extremely unlikely that the various nickel cargos could have been contaminated as alleged by the Defendant, the Defendant asked if acid contamination of nickel was possible, to which Dr Moody replied that it was possible. It may be that on consideration of all the relevant

evidence, the possibility that acid could contaminate nickel might be sufficient to demonstrate that the Defendant believed that this is what occurred in the present case but, of itself, a possibility is likely to be of relatively little weight in the civil context. At best it might demonstrate that a particular fact or set of facts should not be excluded altogether from the scope of what might be included within the inherent probabilities but it would say little or nothing about where such facts might fit in the scale of likelihood.

96. In a similar way, the common-sense assessment of evidence, which is the touchstone of the court's fact finding function, has regard to general consistency: a person who is telling the truth is likely to give more or less the same factual account on each serious occasion when that account is given or at least if they have not, it might be expected that there was a reason why not. In particular a court can reasonably expect a person to set out a broadly consistent case between their statements of case and their witness evidence and during their cross-examination and in closing submissions. It is the Claimant's case before me that the Defendant has failed to do this and that the Defendant is lying to the court throughout. The Defendant says it is the Claimant and its witnesses who are lying because they are out to get him.

97. Finally, I have assessed the evidence in this case holistically. I remind myself of the common proposition that just because a witness's evidence is unreliable or even dishonest in one or more respects does not mean that the evidence can be rejected altogether. I have kept in mind the wider evidential picture at the same time as considering the particular brushstrokes that make up that picture.

98. Nevertheless, it is necessary to address the points made by the Claimant against the Defendant one at a time and I do so in the next section.

The Defendant's Credibility

99. While generally polite and always respectful to the court, the Defendant's approach to the trial, whether he was giving evidence, cross-examining or making submissions (oral or written) was essentially antagonistic and dismissive. My overall impression of the Defendant was that he was not concerned to address the truth about what had taken place but just to argue with what was being said against him by the Claimant: the truth was not a reality outside of what could be argued for but only a construct which the Defendant could manipulate to suit his own ends. There was no need to give any honest recollection about an incident if the Claimant's evidence could be criticised.

100. It was not unrelated to this approach that there was little or nothing put forward by the Defendant independent of his own say so to support what he had to say. Documents that could be said to remotely touch on a matter being asserted by the Defendant would be relied on as supporting his case (when they were not close to being consistent in any real way) and the majority of inconsistent documents (mostly from the various banks) were either ignored or said to be wrong or misleading.

101. Two simple but telling and damaging examples of the Defendant's attitude to the truth came in his defence. At paragraph 3 of his original defence, the Defendant denied that he went by the name Anil Kumar Didwania or Anil Ramgopal Didwania. Subsequently, he had to amend his defence to accept that his full name was Anil

Kumar Ramgopal Didwania. The Defendant knew, because he had a row with the Claimant about it in earlier 2016, that there was an issue about his connection to the Didwania family and the links between that family and Vincom's trading partners: all the entities relevant to the disputed transactions the subject of this claim involved Didwania family members as directors of the relevant companies. The original defence was deliberately misleading.

102. In a similar way, at paragraph 10 of the Amended Defendant ("ADef"), it was denied that the Defendant knew about the statutory demand or the petition presented by IDB and at paragraph 34 of the original defence, it was alleged that the Defendant had no knowledge of the presentation of that petition at the time the AST Metal payments were made. In fact, as the Defendant accepted in his 9th witness statement dated 27 February 2024 (a couple of weeks before trial), he had emailed his solicitor about both documents soon after receiving them on 10 July 2017 and 24 November 2017 respectively. In his witness statement, the Defendant said that because of the lapse of time he had forgotten. Given the significance of these events to Vincom's business, how quickly he acted on getting the documents (emailing his solicitor shortly thereafter) and the on-going consequences from those documents, it is inconceivable that the Defendant's explanation about "lapse of memory" is true. I have no doubt that he was lying about this.

103. The Claimant's closing focused on a number of aspects of the Defendant's evidence as demonstrating his lack of credibility. The various topics addressed included: the Defendant's denial that he received the Assignment between the liquidator and the Claimant when there was evidence from a courier that it was left with the porter at the Defendant's residence in London (and the Defendant's then solicitors corresponded with the Claimant's solicitors about the document); the Defendant saying he had been given 4 hours to leave Viacom's offices when the landlord's agents said that while keys were sent back, they did not accept the surrender of the lease; the Defendant saying that he had no bank account in Dubai (in the context of seeking funds to travel to Dubai which was required under a freezing order), when he did have such an account and it was an account into which AST had made substantial payments to the Defendant between November 2018 and January 2022 (receipts just over £271k); and, the Defendant not being frank about his use of the family name, which is at least on his passport and lying to the Claimant about the family links to his trading network (in particular at a meeting on 6 January 2016 when Mr Briguet asked him whether his Indian offtakers were independent and not related to each other, the Defendant said falsely that they were not related). In a similar way, the Defendant denied to the liquidator that he was Anil Didwania, saying Anil was his cousin. There is much merit in the Claimant's criticism of the Defendant's evidence on all these areas.

104. However, I regard it as a safer approach for present purposes to focus the judgment on the evidence which directly bears on the impugned transactions or, to an extent, the lack thereof. This has the benefit, from the Defendant's point of view, of not allowing any adverse findings on these, perhaps, more peripheral matters to cloud the assessment of the direct evidence bearing on the key features. This benevolent approach to the Defendant's opportunistic attitude to the truth cannot apply where the Defendant's lack of credibility or dishonesty on particular matters is of direct relevance to a factual issue being considered.

The Credit Notes

105. I have addressed each of the credit note transactions separately. But there are a number of common features. I find that there is no documentary reference to the credit notes or to DMT having repudiated the obligation to pay the price in respect of the relevant transaction prior to the liquidation (this is different from the references, particularly around DMT7 and DMT8 to DMT not having made payment). I also find that the credit notes are not referred to, nor are they taken account of, in Viacom's accounts (whether the statutory accounts or the Sage system). This is based on Mr Wiles' evidence and that of Mr Daniels. Neither was cross-examined so as to raise any doubt about their conclusion about the lack of reference to the credit notes. It is also telling that the credit notes, which would have been documents of equal documentary significance as the contracts and invoices, which were contained in the hard copy files obtained by the OR / liquidators from Re10 (having been supplied to RE10 by the Defendant), were not present in those files. The Defendant suggested that this was because they were removed by the liquidator and/or were not disclosed. There is no evidence of this. In addition the hard copy files themselves were made available to the Defendant's previous solicitors for the purpose of the disclosure exercise: they were free to examine and identify those files, request such copies as they wished and raise any issues with any missing documents. I do not understand any such issues were raised.

106. I bear in mind throughout a general point arising out of the nature of Vincom's business. The Defendant explained that Vincom's success was based on high turnover / low profits. The turnover was about $500 million a year and profits were typically about 3%. Mr Daniels' evidence was that from 2014 onwards the typical profit margin for Vincom's transactions appear to be about 0.45%. The DMT transactions appear to be even less than that. This has a simple consequence: writing off income worth say $900,000 is the equivalent of the profit on half the transactions that Vincom would carry out in a year to generate its high turnover. It follows from this that these 8 credit notes issued over a three period could have been expected to wipe out all Vincom's profits. I make this point to set against an argument made by the Defendant which was that it was unfair to single out these particular credit notes from the many hundreds of successful transactions carried out. It seems to me that the potential impact on Vincom's business of issuing these credit notes and/or not being paid by DMT for these transactions was extremely serious.

107. I also find that had any of the credit note transactions taken place in the manner asserted by the Defendant (i.e. that they were genuine contemporaneous business decisions taken in response to a genuine customer complaint about the quality of goods supplied) then those circumstances would have created documentary evidence and it was to be expected that the Defendant would have been able to provide such documentary evidence, either because as a director of Vincom he was bound to provide such to the OR and/or the liquidator or because as a defendant in this case it would have been expected that the Defendant would have obtained some documents from his counterparties (i.e. AST and/or DMT) to evidence these contentions. In this respect it is relevant that his counterparties were owned and/or controlled by family members.

108. I have taken into account the Defendant's various explanations regarding the lack of that documentary evidence but none are persuasive. The relevant material would have been (and according to the Defendant was) accessible via the company's computers

and servers. The Defendant says that he copied such material to a USB stick. However, the explanations regarding the computers being left behind because of an urgent need to leave the offices are wholly implausible and contradicted by the evidence from the landlord's agents about no action being taken to recover the premises. The explanation about the website being taken down was inconsistent with evidence obtained via WayBack (although as a discrete point this seemed to me of less significance). The USB stick story, which involves the OR losing the USB and then either forgetting that he ever had it or lying about it, is wholly implausible. Likewise, to me it is implausible that the Defendant would not have kept a copy of emails and so on (particularly given his general distrust of anybody else with regards to his own business) and wholly implausible that a director acting properly with regard to his company's business would leave its computers in a vacated office.

109. These surrounding matters do not prove the Claimant's case for them but they are aspects of the evidential picture which point towards the Claimant's case being potentially more persuasive than the Defendant's. But that does not, of itself, mean that the Defendant's case might not be sufficient to stop the Claimant meeting the overall burden of proof upon it.

110. At paragraph 19 the ADef admits the underlying transactions and that DMT made no payments because Vincom "raised a credit note in respect of the Transaction". The ADef also asserts that in each transaction the goods were rejected. It is also said, at paragraph 20, that the date on the credit notes was the date of the bill of lading rather than the later date when the credit note was issued. This was said to be Vincom's practice (I have not been shown any credit notes outside of the disputed documents to demonstrate or disprove this).

111. It will be seen that in each case I find that the credit notes were not issued when the Defendant's statements of case said they were. I conclude at the end of this section that they were not issued until the liquidation was inevitable and that the reason for them being issued by the Defendant was not because the relevant invoices were not due but because the Defendant decided, contrary to his obligations to Vincom, to prefer the interests of DMT over those of Vincom: the credit notes were provided for the purpose DMT used them, to enable DMT to deny its liability to Vincom and so not make payment of its outstanding invoices.

112. I have kept in mind throughout a practical test about when it might be appropriate for credit notes to be issued against previously issued invoices, which I take to be when it would not be appropriate for the company's books and records to reflect that invoiced debt. There might be many reasons for this: an invoice issued wholly in error; an invoice issued in respect of goods where for whatever reason the buyer's obligation to pay the price has been duly rescinded; a cross-claim which is best settled by the issuing of a credit note. The practical point is that there should be a good reason for cancelling what would otherwise be an asset of the company.

113. I have summarised the Defendant's pleaded case (found in the Amended Defence ("ADef") and the responses to a request for further information ("RFI") and then addressed the evidence at trial that bears on that case. I take the credit notes in the same order and groupings as identified above.

114. I have summarised Dr Moody's evidence above. In respect of each of the alleged circumstances of contamination of cargo, that evidence suggests that the allegations made in the ADef and RFI are inherently improbable. I accept that evidence. This, of itself, does not mean that any of those allegations of contamination did not occur but it creates an evidential landscape in which I would need some weighty evidence to satisfy me on a balance of probabilities that the cargo was contaminated as alleged. It is the Defendant who has made those allegations and so the Defendant who must prove them, even though in general the burden of proof is on the Claimant to prove its case that the Defendant's actions were in breach of his duties to Vincom. I do not refer again to Dr Moody's evidence under the individual items but have kept it in mind.

115. A final general point it is worth addressing at the outset is the Defendant's position, stated a number of times in his closing submissions, that the Claimant cannot prove that there was nothing wrong with the various deliveries and that DMT should have paid but did not because DMT and perhaps Vincom were in cahoots and committing some kind of fraud on the banks. This is not right. The Claimant's case on the credit notes is that in issuing the credit notes, most likely in the run up to the winding up order on 24 January 2018, the Defendant acted in breach of his fiduciary duties to Vincom. In answer to that case the Defendant has alleged that the credit notes were issued properly, and in each case about 6 weeks after the date of shipping, because of DMT rejecting the various cargos for the reasons set out in the defence. It does not help the Defendant in that context to point to other possibilities that might justify some credit being given or have provided a reason why DMT have not paid. The reason explanations are in play at all is because of the defence. If that defence fails, the Claimant does not have to go further and prove the absence of any other good explanation for DMT not making the payments. Not least because the Defendant's defence also asserts that if it were not for the credit notes then DMT would have made the relevant payments: it is common ground between the parties on the pleadings that it was because DMT held the credit notes that it did not make payment.

DMT1

116. The ADef states the goods which were the subject of the transaction were shipped in 2014 but that BCP lost the original documents and this delayed delivery for four months and that when the goods were delivered they were no longer fit for purpose and so were rejected. Vincom issued the credit note in 2015 and BCP credited Vincom with the full purchase price of the goods.

117. The RFI adds that AST gave permission for DMT to inspect the goods and following that inspection, DMT said they would reject the goods on the grounds of them being not fit for purpose and delay in the delivery of the documents. The Defendant's understanding was that contaminants in the container (including acid and seawater) "had begun to degrade the goods". Following the rejection the goods were shipped back to Dubai and then resold to Softel Associates Pvt Ltd ("Softel") for $125,000 and shipped to Kolkata as a result on 22 September 2014. A Vincom employee wrongly raised an invoice for the original contract sum and the credit note cancelled that invoice.

118. The case put forward by the Defendant in answer to questions in cross-examination and in his closing submissions appeared different to the substance of the defence

(delay in documents and rejection). This asserted that BCP did not make the payment to AST. AST shipped two containers under one bill of lading and provided documents to BCP, who did not pay. Without the original bills of lading the containers could not be delivered and so sat at the port in Singapore. After three months AST gave Vincom permission to inspect and Vincom asked DMT to inspect, who said that in the meantime the nickel had deteriorated. Then in July 2014, AST "by letter of indemnity" arranged shipment at the Defendant's request back to Dubai from where the contaminated nickel was sold by AST to Softel in Kolkata. BCP paid AST the full value as per the initial contract in September 2014 since "they accepted the error as their fault". BCP then wrongly sent the new documents to DMT's bank in Singapore, who returned them unpaid.

119. The Claimant said this new version, involving a shipment of the relevant goods many months earlier than the apparent shipment evidenced by the documents referred to in the particulars of claim, was a fabrication made necessary by the impossibility of the goods going to Singapore and then back to Dubai and then to Kolkata within the time frame provided for by the undisputed documents.

120. The Claimant also pointed out that this is different again to what the Defendant told the liquidator at a meeting on 12 October 2018, which was essentially that BCP had written off the amount claimed because it had lost the original documents and hence the credit note was issued.

121. The essence of the Defendant's final version is that the credit note was required to cancel a wrongly issued invoice: nothing was due from DMT for the September 2014 transaction because this was a salvage sale between Vincom and Softel made necessary as a result of BCP's failures some months previously to deliver compliant documents and/or to make payment to AST. BCP's failure to pay AST is stressed in the Defendant's written closing.

122. The Defendant's version of events is implausible and not supported by any documents. The Defendant says that this is because the Claimant and/or the liquidator have hidden the relevant documents and not carried out the inquiries that they should have done to demonstrate the truth of what the Defendant asserts. There is no merit in either of these complaints: firstly, all the liquidators' documents (which themselves were obtained from Re10, the Defendant's potential insolvency practitioners and/or proposed liquidators) were made available to the Defendant's previous legal advisors; secondly, the Claimant has no obligation to the Defendant in the course of litigation to investigate anything. Parties must provide disclosure but what evidence they put forward and the steps they take to find evidence is a matter for them.

123. Moreover, the Defendant's version is inconsistent with the documents which establish the basic facts of the DMT1 transaction. These show the back to back purchase and sale by Vincom with AST and DMT as the counterparties. The sale contract is dated 19 September 2014 for a September shipment to Kolkata with DMT having an obligation to pay $19,950 pmt for the nickel. Softel is named as the consignee on the bill of lading but that bill is consistent with the full value sale to DMT. There is no salvage sale agreement to Softel. Moreover, there is evidence that BCP paid AST the full value sought by AST of $897,637.50 because BCP sent a remittance advice to this effect to Vincom dated 29 September 2014 and debited Vincom's account accordingly.

124. In cross-examination the Defendant said, for the first time so far as I am aware, that the sale contract was not the original but a revised contract with the first one being entered into three or four months earlier. But there is no indication of that on the document itself (or in any other documents). I find the Defendant's evidence on this issue to be a fabrication. The Defendant also said that he had emailed a copy of the credit note to BCP. In my view, had this happened it is more likely than not that BCP would have provided a copy in response to the questions asked of Ms Aschbacher. I would also have expected this assertion to have formed part of the defence, the RFI or the Defendant's witness statement (not least because that would have given the Claimant the opportunity to make further and more specific enquiries).

125. It does the Defendant no credit that when asked why he had not told the liquidator about the alleged salvage sale, when asked to explain the issuing of the DMT1 credit note, the Defendant's response was to say the liquidator had not asked him about the salvage sale. The Defendant had been given an opportunity (and had an obligation) to explain fully to the liquidator what had occurred. The Defendant said nothing consistent with his case at trial or anything similar. His explanation in the witness box was that he answered the specific questions with generalities about what normally happens. At best, this was wilful ignorance in the face of his duties to cooperate. It further undermines the weight that can be given to the Defendant's evidence before me.

126. Finally, and in my view, most tellingly is the settlement agreement between BCP and Vincom. The reason I consider this of particular significance is that it is a bilateral agreement, entered into by BCP and Vincom sometime after the disputed events. If the Defendant was right and (a) the relevant transaction had been reversed; and, (b) BCP accepted fault and accepted the loss; and, (c) the bills were of no value because they were wrongly issued, then this would have been reflected at least to some extent in that settlement agreement. This is not the case. The settlement agreement asserts the transaction represented by the documents summarised under DMT1 above.

127. The relevant invoice was issued by Vincom to DMT dated 22 September 2014. It is invoice number VC-NS-1862. The Defendant's case requires this to have been issued by mistake and/or otherwise for it to have no value. The settlement agreement is dated 24 July 2015. The Defendant signed it on behalf of Vincom. The recitals said that BCP was owed $3,782.031 but was prepared to offer a discount to Vincom of $858,332.34 if the terms of the settlement agreement were kept to. If not then BCP would revert to the full outstanding amount. Among other things the value of the rights in BCP's favour arising out of the DMT1 transaction were averred by the settlement agreement as security held by BCP. Moreover, should Vincom keep to the terms of the settlement agreement and so get the benefit of the discount then BCP agreed to endorse to Vincom the security rights related to the DMT1 transaction and reflected by invoice VC-NS-1862. I note that the agreement says "part of this amount representing part of the Bank's write off calculation" but this is not a recognition that the transaction has been unwound: on the contrary, the documents are considered to remain valuable.

128. These findings, which are by far the most likely narrative arising from the documents, are also supported by the hearsay evidence of Ms Aschbacher of BCP. It follows that there was no basis for any credit note to be issued in 2015, which is when it is alleged that the DMT1 credit note was issued.

129. The Defendant's closing submissions referred me to a number of documents which he said support his case:

i) A Vincom account statement from BCP for the period from January 2015 to May 2016 with an account credit of $883,330.24 dated 21 January 2015. There is no basis for concluding this has anything to do with DMT1 – on the contrary the account statement shows the level of indebtedness at the date of the settlement agreement to be consistent with the $3.78m owed at that date, which takes account of that credit, whereas the settlement agreement asserts the full value of the impugned transaction as part of the $3.78m.

ii) An amendment to the settlement agreement dated 20 January 2016 but in this Vincom acknowledges the indebtedness in the full value set out in the earlier agreement (less payments made) and so it is inconsistent with any writing off of the DMT1 debt and the potential value of the existing security documents remains unchanged from the earlier agreement (where Vincom was to take possession of such documents if it met its repayment obligations).

iii) Vincom paid off BCP as of 21 December 2017. This proves nothing so far as the DMT1 transaction is concerned. Ms Aschbacher confirmed the repayments were made as anticipated by the settlement agreement albeit not on the timings contained in that agreement.

130. I find that there was no delay in BCP providing documents and that there was no delay in DMT being able to take possession of the relevant cargo. I find that the DMT1 transaction had nothing to do with any earlier transaction which was ineffective and nor did it relevantly involve any salvage sale to Softel. The Vincom invoice VC-NS-1862 was not issued in error, it reflected the value of what was sold by Vincom to DMT pursuant to the contract dated 19 September 2014.

131. I find that there was no good reason for the DMT1 credit note to be issued. I find that there is no evidence to support the assertion in the defence that any credit note was issued in 2015 and the evidence of the settlement agreement is directly contrary to such a proposition. I find that it is most likely that this credit note was issued at the end of 2017 or early 2018.

DMT2 / DMT3

132. The ADef says that the relevant credit notes were raised about 6 weeks after shipment (and so approximately mid-July and mid-August 2015) which would have been with the knowledge of the Claimant. It is alleged that the Claimant sent an officer to inspect the relevant cargo and the inspection showed that the goods were contaminated and the credit notes were properly raised.

133. In the RFI this was supplemented by the following details: the goods were "prime nickel strips" (meaning 99% recycled nickel); the Defendant believed acids (including nitric, sulphuric and cyanide) leaked onto the goods while they were "stored loose" on the warehouse floor; after delivery the goods were stated to have been contaminated with cyanide acid as determined by DMT (as far as the Defendant was aware); DMT were asked to dispose of the goods but the Defendant did not know about any salvage sale.

134. The Defendant told the liquidator in the 12 October 2018 meeting that the contamination occurred during shipping because of contaminated containers and so was not the responsibility of AST. The Defendant said that decontaminating containers can often be overlooked. Any claim should be against the shipping company. The Claimant was said to have inspected the cargo and knew that it was faulty but they wanted to maintain a claim against DMT.

135. In cross-examination, the Defendant said that his response to the liquidators was only what "he presumed". If true, this would indicate the Defendant had no knowledge about what happened to the cargo, even on a hearsay basis, and so almost necessarily would have no good basis for issuing a credit note. However, the Defendant also said that he knew before that that there had been acid contamination but, he said in court, it did not occur to him to tell the liquidator what actually happened. The Defendant said that DMT told him the goods were not fit for purpose and he made no further enquiry but issued the credit notes. The Defendant maintained throughout that the bank knew about the credit notes and the alleged contaminated cargo and had seen a sample. The Defendant's sixth witness statement, as in the ADef, said the bank inspected the cargo. By cross-examination the Defendant had changed that to say that the bank looked at samples which had been taken before DMT disposed of the cargo by a salvage sale but that the basis for this was an assumption on the Defendant's part because nobody told him.

136. In his closing submissions the Defendant said "the only evidence as to the condition of the nickel when it arrived late July 2015 is from DMT". This assertion was based on the Defendant saying, for the first time, in his cross examination that a Syed Mohammed of DMT called the Defendant after the goods had arrived to say they were contaminated, with no residual value. The Defendant said that the Claimant had inspected contaminated samples and had been sent, by him, photographs by email of the contamination in about August 2015. The Defendant said that Mr Briguet's evidence of not knowing about the contamination and not inspecting the samples was false. The Defendant said that it was for the Claimant to prove there was no contamination and they had not done so. The Defendant also maintained that the Claimant had lied when saying that Mr Briguet had not been to Singapore.

137. Again, I find the most useful way in to this issue to be the settlement agreement reached between Vincom and the Claimant. Just as with BCP, after a year or so of trading Vincom had got into arrears.

138. Mr Briguet explained what occurred in his witness statement and it is not necessary to recite the detail in this judgment. I accept his evidence, it has not been contradicted. In short summary, Vincom and its offtakers had failed to make payments. The Claimant spent months seeking payments and negotiating and increasing the pressure regarding obtaining funds. On occasion the Defendant said that his family trust would stand by Vincom. Eventually, this situation was resolved by an agreement which consolidated existing debt with a benefit to Vincom if it met its obligations under the settlement agreement.

139. The settlement agreement between Vincom and the Claimant was dated 22 May 2017. It was signed by the Defendant on behalf of Vincom and in it the parties acknowledged that Vincom was indebted to the Claimant in the sum of $4,203,624.70. However, if Vincom paid in accordance with the agreement, the

Claimant would waive some of the interest part of that total and so Vincom would be able to only pay $4 million. There was no writing off of any sums because of the Claimant recognising a faulty goods claim. I add that I cannot see any basis why a bank would give Vincom credit because Vincom failed to perform its contract with DMT: this would have no impact on the bank's lending or its contractual rights against Vincom and would most likely be a default by Vincom in relation to the bank's security interest in DMT's obligation to pay the price.

140. There is a factual dispute about whether Mr Briguet of the Claimant was told about the defective cargo claim and the credit note and whether the Claimant ever inspected the cargo (the ADef / sixth witness statement version) or samples (the later version). I have no hesitation in preferring the evidence of Mr Briguet in this respect. It is consistent with the documents produced at the time and has been clearly stated throughout the proceedings. This contrasts with the Defendant's evidence which has been vague, inconsistent and based on plainly false assumptions. In particular, the Defendant wrongly stated on a number of occasions at trial that the Claimant had denied that Mr Briguet went to Singapore. I could see no evidence of this: Mr Briguet's witness statement addressed his visit to Singapore at paragraph 52, where he said that he discussed DMT's failure to pay these invoices with Vinod Didwania (the Defendant's brother) in Singapore in May 2016. Mr Briguet said these discussions were on the basis that full payment would be made and nothing was said to him by anyone at DMT or the Defendant about any allegation of defective cargo. I accept this evidence. Mr Briguet came across as a reliable witness and what he said is entirely consistent with his contemporaneous emails. Moreover, Mr Briguet gives a considerable amount of detail of how throughout 2016 he had to deal with Vincom's default and indebtedness and this involved discussions with the Defendant and with Vincom's customers who had not paid. The outstanding amounts under DMT2 and DMT3 were about $1.9 / $4.3 million total debt. If there were serious issues with the quality of the cargo and/or if Vincom had written off DMT's obligation to pay the price then those matters would have been raised and relied on by Vincom and DMT during these discussions. I accept Mr Briguet's evidence that they were not.

141. There is a telling illustration of the inherent probabilities in play here from what happened when the liquidator wrote to DMT post liquidation requiring payment of the outstanding invoices (the credit notes were not on the hard copy Vincom files received from Re10 or referenced in Vincom's accounting software). DMT's response (its letters of 8 August 2018 and 20 August 2018) immediately referred to and relied upon and then provided copies of the credit notes. This is what might be expected from someone against whom payment is sought for invoices for which there is a credit note cancelling them. The lack of any reference to such credit notes during Mr Briguet's discussions with DMT (and Vincom) about obtaining payment of outstanding receivables is strong evidence that the relevant credit notes did not exist at that time. This is strong evidence that circumstances which would have justified such credit notes to have been issued also did not exist at that time.

142. The Defendant's only answer to these various points was to assert that the Claimant and the liquidator had been dishonest: hiding emails that would assist the Defendant and lying in their evidence about what documents existed and what discussions were had. I reject these contentions. They are not supported by the slightest shred of evidence and are inconsistent with such emails as are available which, in the case of

Mr Briguet's discussions with DMT and/or Vincom, show an apparently complete record of what took place but without any mention of credit notes or of the unpaid price not being due. I have noted that there is some reference to DMT facing delay claims from its own customers. Mr Briguet was not asked about those but on the face of it they are different from and not probative of any assertion that the invoice price was vitiated or contested.

143. Finally, I have taken into account the evidence of Dr Moody, summarised above, which gives assistance to how likely the alleged contamination might be. I accept Dr Moody's evidence. The Defendant had a non-CPR compliant statement from a Mr David Duckworth but this carries no weight: essentially Mr Duckworth was asked to assume that the contamination had occurred and expressed that view that had it done so then it was possible that it would have done. None of that merited any weight (even if it was admissible as expert evidence).

144. I find that the credit notes in respect of DMT2 and DMT3 were not issued when the ADef says they were and that the cargo was not rejected by DMT on the basis of alleged contamination. I also find there was no material contamination of the cargo.

DMT4 / DMT5 / DMT6

145. The ADef asserted that the relevant goods were contaminated on arrival at Singapore either because they were contaminated while awaiting loading or because the containers in which the goods were placed were themselves contaminated. The goods were rejected as not fit for purpose and credit notes were raised about 6 weeks after shipment (and so about June or July 2017). The financing bank, ZKB, knew about the issuing of the credit notes – the defence says this was because ZKB had had the relevant receivables assigned to it rather than asserting any facts from which the knowledge could be attributed to them. Finally, it was asserted that because of the rejection of the goods and the issuing of the credit notes, ZKB agreed to reduce Vincom's indebtedness on these transactions by 50%.

146. The RFI provided the following further information. The acid contamination was understood to include cyanide acid but nitric acid and sulphuric acid might also have been involved given "the circumstances in which the goods were stored in the warehouse prior to packing". The contamination was said to have arisen from acids leaking on to the metals (just as was alleged to have happened in DMT2 and DMT3). DMT determined the goods were not fit for purpose and rejected them. Vincom then asked DMT to dispose of them.

147. In cross-examination it appeared that the Defendant was not sure what had happened: he both said that he was told by DMT about the contamination and that it was possible that DMT said nothing about contamination. The Defendant was asked about why there was no claims against AST or why there was no attempt to stop this alleged contamination problem from recurring. The Defendant indicated that AST was just a finance house and gave no quality assurance (the Defendant referred to terms and conditions that were not in evidence) and that an agent "for people selling" inspected the goods called Julian Lee Chuang. This person or any agent had never been mentioned by the Defendant previously. None of this was satisfactory or persuasive.

148. Standing back it seems like a highly unlikely, or at best highly uncommercial, arrangement. If the Defendant is to be believed then he was content for Vincom to keep exposing itself to the risk of supplying bad stock (which would wipe out about 50% of its annual profits each time it occurred) rather than taking steps to limit the risk of the poor quality of nickel recurring. All in a context where what is said, is that the problems were occurring because of how the stock was stored at the warehouse – in too close proximity to potentially corrosive acids.

149. In any event, in his closing submissions the Defendant pointed to emails from ZKB which became available during the trial and which showed discussion of quality issues with the cargo. The Claimant, in its closing, relied on the same emails as showing that there was no acceptance or knowledge of ZKB of a credit note or DMT having no liability.

150. The ZKB documents were made available as a result of interrogatories sent by the Claimant to the Swiss court. It is helpful to start from the proof of debt that ZKB submitted in the liquidation. This made reference to it holding bills of exchange for which DMT was the drawee in respect of each of these DMT transactions. The bills had not been paid and ZKB had protested the dishonour of the bills. ZKB still held Vincom liable for its borrowings notwithstanding these bills.

151. The email negotiations during October and November 2017, show the Defendant for Vincom trying to persuade ZKB to issue revised bills but ZKB refusing to do so. The Defendant made a proposal along those lines dated 17 October 2017 but which would still have seen ZKB receiving payment from DMT of $1.5m (or at least issuing new bills of exchange in this respect). This is very different from DMT having no liability because the cargo was rejected. In any event, ZKB rejected this proposal and offered a final repayment plan reducing the $3,085.442.44 owed to zero over 16 months with the bills being released as payments were made. There is no suggestion in these exchanges of the cargo being written off or worthless. Indeed even in the Defendant's email criticising ZKB for writing emails inconsistent with his understanding of the his oral negotiations with ZKB, the Defendant refers to his understanding that: "on DMT you wanted 500k now and balance 100k per month…". There was a mention of "a quality settlement" and "after settlement of the percentage shortages" and those justifying the proposal for revised amounts (but still totalling over $1.5 million). ZKB did not accept this.

152. The most helpful email to the Defendant's case is one he sent on 6 November 2017 because he does refer to "a faulty delivery of the cargo covered by our 3 invoices to DMT, the entire goods have been rejected and we are trying our best to salvage the deal by offering discount. Delay means goods are incurring storage charges and more changes of outright rejection rather than a resolution. This would mean we may not get any funds for the cargo…".

153. It is clear from that email that there had not been an outright rejection as at the date the email was written and neither had Vincom issued a credit note because it was urging on ZKB a settlement proposal for a reduced liability of just over $1.5 million. The Defendant was trying to "salvage the deal". There is nothing in the correspondence to indicate what the problem was said to be and there is no suggestion that it would have justified the issuing of credit notes.

154. From this correspondence is it highly improbable that the Defendant had already issued credit notes as alleged in the defence. I reject the Defendant's case in this respect. I also find that the cargo was not written off and nor was it contaminated by acid as alleged. I find that the Defendant knew at all material times that there was no good reason for credit notes to be issued.

DMT7 / DMT8

155. The ADef alleged that the containers "in which the goods were shipped took in sea water during the voyage to Singapore" and that on arrival the goods were rejected as not fit for purpose. The credit notes were raised some six weeks after shipment (and so about October 2017) and Sberbank knew about the credit notes because the receivables had been assigned to Sberbank. Sberbank are said to have found that the reasons for the rejection were justified.

156. The RFI provided the further detail that the contamination was with seawater and that the Defendant told DMT to try and sell the goods to recover their costs.

157. In his closing submissions, the Defendant said Sberbank received and accepted the credit note and that Sberbank's officers attended DMT in Singapore and transferred the documents to DMT because of the condition of the nickel cargo so that DMT could dispose of the cargo.

158. The Defendant was cross-examined about the difference between an email dated 7 December 2017 to Sberbank, where he told Sberbank that the goods had been contaminated by acid leakage in containers and so Vincom would have to find a new buyer and the case in the ADef about seawater. The Defendant's response was to say that there was acid present and the seawater came into the container and exacerbated the whole thing and that "during the voyage" was not limited to the time when the goods were on the sea but also included when the goods were taken into the containers at the port. The Claimant said that this addition to the Defendant's narrative about the loading period was a lying attempt to distance the Defendant's case from the evidence of Ms Giouroukou which was that there had been no seawater ingress during the relevant voyage.

159. Again, a useful starting point is the evidence from Sberbank, including its email exchanges with the Defendant. It is plain from this that Sberbank have throughout maintained its rights against both DMT and Vincom. It follows that Sberbank have not accepted DMT's rejection of the cargo. It is also clear from the Defendant's own email dated 7 December 2017 to Sberbank, and the earlier emails from Sberbank to the Defendant summarising the Defendant's discussions with the bank, that the Defendant's case is false. The emails show the Defendant telling Sberbank that the goods have been moved inland in Singapore under DMT's control and the Defendant saying on 5 December 2017 that DMT would pay next week. The Defendant does not contradict any of this in his own email but updates the situation on 7 December 2017 saying "we could not agree the deal with DMT and therefore without wasting any more time have asked them to send the docs bank". It necessarily follows from those exchanges that (a) there had been no accepted rejection as between Vincom and DMT by that time and so no credit note issued, and (b) Sberbank did not agree as alleged by the Defendant in his closing.

160. After the Defendant's email of 7 December 2017, Sberbank emailed DMT directly on 8 December 2017 and asked about DMT's rejection of the goods and where the goods were, given that Sberbank held them as security. DMT referred Sberbank to Vincom, who were said to have "full details of cargo rejection". This is curious, since the Defendant's general evidence to the court was that he did not know what happened with respect to the cargo beyond a general assertion (repeated for other transactions) that he was called by DMT and told the goods were rejected without being given details. In cross-examination, the Defendant said that Sberbank had released the goods to DMT because that was the only way the goods could have been released. This is contradicted by Sberbank's complaints about how the goods came to be released without their consent and the Defendant's emails at the time.

161. There is also correspondence in the bundle between Sberbank and the shipping agent in Singapore confirming that the goods were released to DMT without the knowledge or authority of Sberbank. Indeed, the agent concludes by telling the bank that they had no interest in the goods and no right to be provided with further information. It also appears the cargo was released to DMT on 29 August 2017.

162. The Claimant pointed out in its closing submissions, that the Defendant's answer in cross-examination that his language was being interpreted wrongly was self-serving and unpersuasive. I agree. The inconsistencies between who controlled the goods (the contemporaneous emails allow no conclusion but DMT / the RFI say Vincom after the rejection told DMT to try and sell them but heard no more) and the seawater allegation ("during the voyage" versus while waiting to be loaded) point strongly towards the Defendant making it up as he goes along and trying to string whatever narrative thread he thinks will survive to defeat the claims against him regardless of the factual reality.

163. I note from Sberbank's evidence that it tried to send an agent to view the cargo but their agent was refused entry and that the Defendant did not attempt to facilitate the inspection but, on the contrary, emailed Sberbank on 11 December 2017 and stated that DMT was not in the picture and that the agent should "carry on with his other work".

164. Finally, when Sberbank pressed its payment claim against DMT by a notice dated 17 January 2018, DMT's response was to say they had nothing to do with the transactions or financing and that they had inspected the materials "at the request of Vincom" and "as the materials were found to be highly contaminated and rotten" they were disposed of as per Vincom's instructions with no value payable. There was no reference in that response to any credit note having been issued.

165. There is no persuasive evidence that DMT7 and DMT8 were contaminated at all. On the contrary, the evidence referred to by the Defendant is vague and contradictory. The Defendant's case relies in large part on Sberbank having accepted the rejection but it is clear that Sberbank did no such thing. The various descriptions of how any damage to the nickel might have happened and what that damage was and how it might have impacted value are all hopelessly lacking in detail. Against the relevant and helpful context provided by Dr Moody's report, which shows that seawater contamination (which is what is alleged in the ADef) is highly unlikely to damage nickel in a significant way, and it being equally unlikely that acid contamination could occur and, again, unlikely that if it did occur it would significantly damage the cargo,

there would need to be far better evidence. I am satisfied that there was no basis upon which the credit note should have been issued.

166. I also find that it is more likely than not that DMT (at least Vinod Kumar, who wrote the email dated 17 January 2018) did not have knowledge of the credit notes for DMT7 and DMT8 at the time of writing that email. Those credit notes were posted to the Vincom Sage system on 11 January 2018. The ADef case was that the credit notes were issued about October 2017. If this was true than it is highly unlikely that the correspondence between Sberbank, Vincom / the Defendant and DMT would not have made reference to them. It follows that it is most likely that those credit notes were not submitted to DMT until sometime after they were posted to Sage. It appears that the first reference to any of them was DMT's denial of liability letter of August 2018.

167. I conclude that the DMT7 and DMT8 credit notes were not issued when the ADef says they were and that they were not issued for the reasons set out in the ADef and that there is no evidence upon which I can reach a conclusion that the relevant goods were not fit for purpose.

Conclusions on the Credit Note Transactions

168. The overall picture in respect of all 8 credit note transactions is consistent and I reach the following conclusions:

i) The Defendant issued the credit notes on behalf of Vincom. This is not disputed.

ii) The credit notes were not issued contemporaneously with the relevant transactions (i.e. as alleged in the ADef of about 6 weeks or so after shipment). It is more likely than not that all those notes were created in late December 2017 or January 2018 prior to 5 of them being posted to Sage on 11 January 2018. I am not sure it matters greatly but I suspect they were only sent out to DMT after that date.

iii) I am wholly unpersuaded that any of the allegedly damaged cargos were damaged to any material extent. I find that objectively the credit notes should not have been issued as a result of any purported damage: such damage as is alleged by the Defendant did not exist.

iv) I am also unpersuaded that at any material time (say when the credit notes were issued in about early January 2018) that the Defendant had any acceptable subjective reason to issue such credit notes. On the contrary, notwithstanding the seriousness of the finding, it is more likely than not that the operative belief of the Defendant was to help DMT (a company which was under the control of his brother) and protect DMT from claims made on Vincom's behalf in the imminent liquidation. In doing this the Defendant was not acting in a manner which was good faith in the interests of Vincom. On the contrary, he was acting in bad faith and contrary to the interests of Vincom.

v) I also find that no reasonable company director would have acted in this way.

169. The ADef raised a limitation defence in respect of the first credit note transaction. In the event, since I have found the credit note was not raised until the end of 2017 or early 2018 then no limitation defence could arise in any event. I add that I would have agreed with the Claimant that limitation as between Vincom and its sole director could not run until Vincom was free from the conflict inherent in that directorship (so far as breach of fiduciary claims against the Defendant was concerned).

170. It follows that in issuing the credit notes the Defendant was acting contrary to his duties under sections 171 and 172 of the 2006 Act and in breach of fiduciary duty.

The AST Metals Payments

171. The Claimant's case is that these payments do not relate to genuine transactions but were done to pay about $4.5 million of Vincom's cash and just under $1 million of Vincom's Credit Suisse credit line to the Defendant's brother's company, AST. This was done in the face of the winding up petition which was served just before the cash payments were authorised. Alternatively, the Claimant says the payments were made contrary to the obligation to have regard to Vincom's creditors or without exercising reasonable skill and care.

172. The ADef admits that the payments were made at the dates and times alleged by the Claimant. It relies on invoice numbers 705, 705A, 706, 707 and 708. It describes the relevant trades as fitting in with Vincom's normal pattern – so that funding was provided by "the relevant bank" on contracts entered into between 19 and 22 November 2017. The contracts were in the interests of Vincom because they enabled a profit of $18,256.95 to be made on goods acquired for $5,586,542.59 (this is 0.03%).

173. The parties' statements of case identified further issues of detail addressed to the genuineness of the transactions. The Claimant said there were no sale contracts with AST, the Defendant said the documents were with the OR and that the liquidator knew all the details. The Claimant alleged invoices 705 and 705A were duplicates, the Defendant said both were genuine and that the liquidator had confirmed with the shipping lines. The Claimant said that invoices 707 and 708 were at implausibly high prices for "nickel scrap" (this is what the ADef says the shipments were). The Defendant by way of amendment (while not deleting the "nickel scrap" description at paragraph 30) asserted that "this quality of nickel" has "silver coating and gold ends" and that different coatings attract different prices but in any event the price was negotiated between buyer and seller. The Claimant said that there were two invoices numbered 707, one with a lower and more likely price. The Defendant said two different invoices will have different prices if the metal is different. The Claimant said Du Trade was not a genuine trading partner and had not entered into this trade. The Defendant said it was and did and that the liquidator gave DuTrade a year of leeway, which was the main reason for non-payment. The Defendant said these goods were taken unrefined to protect against the contamination issues and the buyer inspected and would pay the price agreed.

174. The Defendant's case in closing was that these transactions were being negotiated from the first week of October 2017 and that Vincom would have been responsible for the shipment from day 1. The payments to AST had been planned for in Vincom's cash flow excel spreadsheet and the exact date would be determined by the date of

shipping and receipt of invoices from AST. It was necessary to make the payments from the funds that came in from Aureole and ask Hazel to wait longer for their payment. The Defendant authorised the payment on 22 November 2018 on the relevant document file. The office then actioned the payments on 24 November 2018. The timing of the payments was not related to the receipt of the petition. The Credit Suisse payment had also been in the pipeline: documents were sent to Credit Suisse on 23 November 2017. Overall, the process for these transactions had been in place for some 6 to 8 weeks and the Defendant had no reason not to make these payments as part of usual trading.

175. There is no evidence which supports the Defendant's extended contract negotiation case. The Claimant rightly identified that the written closing submissions were the first time this case was put forward. I can make no findings that might support that case because it is neither put forward in the ADef nor does it have support from the Defendant's own witness statements for trial, nor his answers in cross-examination, nor any documents. In my view it is another example of the Defendant cobbling together a narrative which he considers might be a plausible explanation and so undermine the Claimant's case. Again, I am struck by the impression that the Defendant's intent is to answer the Claimant's case by raising some plausible alternative explanation that might create a reasonable doubt rather than the full and frank engagement with the truth and the evidence which might be expected in civil litigation where the court's role is to make findings between the parties' rival contentions set out in their statements of case and based on balance of probabilities.

176. The relevant starting point on the evidence is the sale to Vincom of a cargo of paraffin by a company called Hazel Mercantile Limited ("Hazel"). The invoice for that sale is dated 14 February 2017, the price was $4,595,368.18 which was due 180 days from the date of the bill of lading. The relevant bill of lading was dated 14 February 2017 and so payment was due on 13 August 2017 (there is another version of this invoice hand dated to 1 April 2017). Vincom's counterparty was Aureole. Vincom's invoice to Aureole for that paraffin was dated 3 April 2017 and referenced a contract dated 10 February 2017. Aureole was obliged to pay Vincom $4,613,998.05. As of mid-November 2017 Hazel had not paid Vincom and Vincom had not paid Aureole.

177. In 2017 Vincom's position with its various previous bankers was continuing to deteriorate: IDB believed Vincom had failed to adhere to a settlement agreement, its solicitors had issued a letter of demand for $2.88 million on 16 November 2016 and a statutory demand followed on 7 July 2017 claiming $3,136,587; Vincom was not meeting the payment requirements under the agreement with BCP (albeit as at December 2017 BCP was repaid); the debt to the Claimant, acknowledged and consolidated in the 22 May 2017 settlement agreement, of about $4.2 million became all owing in about July 2017 once Vincom failed to meet its payment obligations under that agreement; in August 2017 Vincom failed to make or procure payments to ZKB relevant to the DMT4, DMT5 and DMT6, discussion about how Vincom would meet that and its other payment obligations to ZKB were on-going during October 2017 but payments were not made. On 10 November 2017 ZKB presented a winding up petition for over $3 million. On 17 November 2017, ZKB demanded just over $3 million and the Claimant demanded $4.5 million.

178. On 20 November 2017, Ms Kozak of Vincom emailed Credit Suisse, copied to the Defendant, seeking approval of a purchase from AST to be sold to Du Trade. The

email asked for "pre-approval" for this deal so that it would be ready to go once the documents arrived. The letter from AST addressed to Credit Suisse referred to a purchase of nickel scrap under invoice AST/705/2017, 47.4 MT at $20,100 pmt for a total value of $952,740 to be shipped on Wanhai to Singapore. The consignee was not stated on the bill of lading. The bill stated the cargo was shipped on 20 November 2017. The email included a copy of the matching DuTrade contract dated 20 November 2017 for 50 mt at a price of $20,200 pmt (about 0.005% margin).

179. While the Defendant did not identify it as such, in my view this email is the best evidence in support of the Defendant's case that the AST payment transactions were part of normal trading and not a smoke screen to benefit AST at Vincom's expense. The email points to a transaction, involving Du Trade as the offtaker, at a value of just under $1 million. This was to become the third AST payment on 29 November 2017. The Claimant points out that contrary to Vincom's normal trading pattern there is no contract with AST for this cargo and that the email does not evidence a completed transaction but one for which Vincom is seeking the bank's approval.

180. This is a good point. Generally, in his own evidence the Defendant stressed that all of Vincom's trades were approved by its banks – this was part of the Defendant's overall narrative that Vincom was only a middle man who generally only carried out transactions with the approval of and essentially at the risk of its bankers. I do not accept that overall narrative: Vincom had obligations to perform to its trading partners and its bankers and was always the primary obligor so far as the banks were concerned, but I do find that the email of 20 November 2017 supports a potential purchase from AST and not a contract which had already been concluded.

181. I also agree with the Claimant that this appears to be unusual because, taking the credit note trades as illustrative examples (and no others have been explored in evidence before me), the bank approval would, presumably, have happened prior to the bill of lading date. In this case the bill of lading and the invoices are sent to the bank for approval after they have been issued rather than before. However, I do not have other bank emails to compare and am cautious about making any assumptions about what would have been usual. There is nothing in the email text which suggests anything remarkable in the communication beyond an explanation being offered as to why DMT were not the offtaker: "…we need DMT to clear up a bit and they could not do it because of inspection…Can you please get pre-approval for this deal to have it ready when docs arrive".

182. I do not agree with the Claimant that the lack of a contract between AST and Vincom in the papers is remarkable because that appears to apply to various of the DMT transactions as well (presumably there was such a contract but the documents available do not include those contracts in all cases).

183. The Claimant also says that DuTrade denied to the liquidator that there was any contract between themselves and Vincom for nickel in a letter dated 8 August 2018. Since in the same letter DuTrade admitted owing more than $5 million which they appear to have had no prospect of paying anyway, there does not appear to be any reason why they would not admit any contract for nickel if they believed one existed (they went into liquidation on 7 December 2018 and their liquidators told Vincom's liquidators that the former directors had absconded leaving no books or records). On the other hand if I assume Du Trade being generally of bad faith – which the Claimant

invites me to do as part of their argument that no reasonable director would have entered into transactions with them, least of all when they already owed more than $5 million – then perhaps I should not put much store by anything they might say.

184. In any event, on 24 November 2017 Credit Suisse emailed AST acknowledging receipt of the documents relevant to what was to become the third AST payment. Credit Suisse told AST they would present the documents to Vincom for authorisation to make that payment.

185. Vincom / the Defendant returned the authorisation for that payment on 29 November 2017 with a handwritten note on the standard form authorisation asking that it be noted that payment was against invoice number AST/705/2017 for nickel scrap. The authorisation was emailed back to Credit Suisse on 29 November 2017 at 11.00 and payment to AST of $952,740 followed on the same day.

186. I will not make findings to determine the Claimant's case about this transaction at this point because it needs to be looked at in the overall context of the other two AST payment claims. However, in doing that I also caution myself against allowing this third payment, which has structure involving a finance bank and is more obviously similar to Vincom's usual trading pattern demonstrated by the DMT Credit note transactions, to be swept along with any adverse momentum created by the potential findings on AST payments one and two, which for reasons I am about to address are immediately more problematic.

187. I have addressed above how the Defendant received the winding up petition and then denied that in the defence, eventually recognising this factual error in his ninth witness statement. I agree with the Claimant that the Defendant's explanation, which was that it was a lapse of memory because of the stress surrounding the collapse of Vincom, was incredible and that the Defendant chose to lie in the Defence. This conclusion inevitably follows from the Defendant accepting in evidence that the receipt of the winding up petition was a serious matter and that he "remembered everything" about it. The Defendant recognised that immediately after he received the winding up petition he took advice and gave instructions to his solicitors. His own chronology sent to the OR at the end of February or beginning of March 2018 referred to this on 24 November 2017: "PM wrote to IDB with request that they withdraw petition…". His own case was that the winding up petition was part of a fraud against Vincom (as I discuss below I find this to be a fanciful suggestion) but one way or another the prospect of a person having a lapse of memory about having received it and then, given that state of mind, making a positive assertion about not having received it in a defence signed with a statement of truth, without checking their own records, as the Defendant said in evidence, is fanciful.

188. I agree with the Claimant that the Defendant's lies in the ADef about not receiving the winding up petition on 24 November 2017 are not just generally reflective of a person lacking credibility but raise specific concerns about why the Defendant considered it necessary to put forward that falsity in the context of the Claimant's allegations about the AST payments. The obvious inference, which I bear in mind but do not assume is determinative of itself, is that advanced by the Claimant before me: the Defendant lied to try and undermine what he knew to be a truthful case.

189. At 13.33 on 24 November 2017, NWB notified the Defendant that Aureole had deposited $4,613,954.51 into Vincom's NWB account. The Defendant had already seen the winding up petition and had emailed his solicitors about it at 10.45. This transaction involved Hazel as supplier and the Hazel invoice was long due for payment by Vincom. Vincom's usual trading model (matching back to back transactions) would have suggested that the outstanding supplier invoice would have been met from the offtaker payment. The Defendant made the point that there was no obligation on Vincom to do this and if it did not have bank finance available then on occasion it might use its own resources to fund a future transaction rather than match offtaker payment against supply. I take that point on board but the choice to pay money to a company owned and/or controlled by a family member in these circumstances does raise question marks.

190. It is obvious but worth stating that were it not for the payment by Aureole then Vincom could not have made the first and second AST payments. It had no other resources to do so.

191. The first AST payment was made in the sum of $2,696,117 by NWB against invoice numbers AST/707/2017 and AST/708/2017. The second AST payment was made in the sum of $1,918,545 against invoice number AST/705/2017 and AST/706/2017. A total of $4,614,662. This reduced Vincom's NWB account balance down to about $6k. I agree with the Claimant that this stripping out of the account shortly after the winding up petition was received in favour AST, a company owned and/or controlled by a family member raises concerns in any event.

192. Those concerns loom larger once the invoices said to justify those payments are subject to some analysis and comparison against what can be described as the inherent probabilities arising from Vincom's general trading pattern reflected in the Defendant's statements of case and evidence, the DMT transactions considered in detail above and the general evidence about commodities trading reflected in the Claimant's evidence. All the relevant invoices are in the format AST/xxx/2017. For convenience in the discussion which follows I only refer to the "xxx" portion. In considering the invoices I bear in mind that they are AST's invoices and not Vincom's but any significant weight this point might otherwise have had is undermined by AST not being independent of the Defendant (his brother is the director and he continued to get payments from AST after the Vincom liquidation) and the lack of any evidence from AST called by the Defendant (or relevant documents to which AST might have had access).

193. The Claimant makes a number of points. The first is that NWB was asked to pay against invoice 705, which was the same invoice which Credit Suisse had been sent for the purpose of what was to become the third AST payment. The Defendant in evidence said this was a failure on the part of someone in the Vincom office and the "true" invoice should have been 705A.

194. However, invoice 705A is nothing more than an exact duplicate of invoice 705: the same quantity of the same cargo at virtually the same price stated to have been shipped on the same ship on the same voyage. Unlike in respect of invoice 705 there is no email attaching this invoice when it was sent to a third party. There is no email by which it was sent from AST to Vincom. There is no evidence from AST as to why this additional "A" invoice needed to be issued rather than another invoice with

conventional numbering. There is no separate bill of lading. There is no contract in evidence between Vincom and AST which would show there was a contracted quantity x which might comprise the cargo evidenced to have been shipped by a series of invoices which might include 705 and 705A.

195. The Defendant refers to Vincom's invoices to DuTrade, numbers VC-NS-2170 and VC-NS-2174 as being the sale contracts for the cargo covered by the invoices 705 and 705A. However, again there is no documentary record of any negotiation or other exchange which would provide supporting evidence for that proposition. DuTrade have denied to the liquidator that any contract existed. The Defendant has called no other evidence to support the proposition beyond his own say-so (which I cannot place much weight on because of the problems with the Defendant's approach to the truth generally, specifically evidenced by the petition notice lie).

196. The invoices themselves only differ in respect of the price (20,200 pmt vs 20,201 pmt) but refer to the same alleged contract number. The contracts in the bundle are consistent and, not surprisingly, show an agreement to buy an amount of cargo (often plus or minus 10%) at a fixed price. A single contract with an agreement to pay a price with a $1 pmt difference for the same cargo on the same ship at the same time appears at best unlikely and is, in any event, inconsistent with the DuTrade contract which was sent to Credit Suisse on 20 November 2017. It can be said with some force that in all the circumstances that one change points to an attempt to fabricate a difference where one did not exist.

197. I also agree that the numbering of these alleged Vincom / DuTrade invoices is peculiar: VC-NS-2170, which was sent to Credit Suisse on 20 November 2017 but then VC-NS-2174 for an invoice alleged to have been raised on the same date albeit invoice VC-NS-2172 is dated 22 November 2017 and invoice VC-NS-2173 is dated 25 November 2017 (the Claimant's case includes the proposition that those invoices are not genuine either).

198. The Defendant seeks to justify the first AST payment by invoice numbers 707 and 708. These invoices record a liability of Vincom's to pay for nickel silver scrap at a price of $56,181 pmt. The Claimant's case is that these are fabrications: they duplicate the same cargo and were also the subject of another invoice number 707 which was found in the liquidator's papers. That other invoice 707 also appeared to cover the same cargo and was at a price of $20,100 pmt. In order to distinguish between the two invoice number 707s I will refer to 707($56) and 707($20).

199. The papers contain only one potential bill of lading relevant to this alleged shipment. It is dated 25 November 2017. It does not name a consignee ("to order") and Vincom is a notified party. The cargo is in two containers and weighs 47.99 mt. Shipment is on the Hyundai Pride/018.

200. Invoice 707($20) refers to a cargo weighing 47.99 mt to be shipped on the Hyundai Price/018. On the face of it this invoice, which the Defendant says was replaced by 707($56) and 708, appears potentially unremarkable except that it is dated 22 November 2017 which is 3 days before the bill of lading. Generally (with I think one exception) the AST invoices I have seen bear the same date as the bill of lading. Invoice 707($20) appears to match with a purported Vincom to DuTrade invoice VC-NS-2173 dated 25 November 2017, referring to a contract VIN/NS/2173/17 (a copy

of which I have not been referred to). The Vincom invoice relies on a price of 20,200 pmt for 47.99 mt of nickel scrap.

201. Invoices 707($56) and 708 are also dated 22 November 2017. These appear to split the cargo covered by the bill of lading of 25 November into two and AST charge under these invoices $56,181 pmt so making a combined total of $2,700,925. There are invoices between Vincom and DuTrade corresponding to the AST invoices and numbered VC-NS-2173 but numbered VC-NS-2173A and VC-NS-2173B (both those invoices are dated 22 November 2017 which is earlier than the 25 November 2017 date put on invoice VC-NS-2173).

202. The Defendant says that this was a more valuable cargo because the nickel was in part coated with silver and gold. There is no evidence of this beyond his say so or the price stated on the invoices themselves (but it is the validity of those which is in issue). I cannot and do not give the unsupported assertions of the Defendant much weight.

203. The Claimant points out that all three invoices are dated 22 November 2017 and yet refer to the goods being "shipped by vessel: Hyundai Pride / 018" but the bill of lading was not issued until 25 November 2017. The same problem exists with the alleged invoices by Vincom to DuTrade numbered VC-NS-2173A and VC-NS-2173B: these are dated 22 November 2017 yet refer to cargo having been shipped on the Hyundai Pride / 018. These things could be an unexplained anomaly but in the circumstances the Claimant's offered explanation of backdating to give the impression of a payment commitment which predated the service of the petition is persuasive.

204. The Claimant points to the prices in invoices 707($56) and 708 being twice as high as any other of the nickel invoices involved in the case and also being four times the relevant LME market price during this period ($11,979 - $11,229 pmt). As I have said the Defendant justifies this by asserting that this nickel included valuable gold and sliver plating. There is no evidence of this either as a possibility – such a nickel product would be within the inherent probabilities for supply in the market Vincom alleges it was purchasing from – or as relevant to the actual transaction – an email or some other evidence indicating that such a product was the subject of any relevant contract. Moreover, the existence of invoice 707($20) and the descriptions of "nickel silver scrap" and "nickel silver" are all strong pointers against the Defendant's explanation.

205. The Claimant makes the same points with the curiously numbered Vincom invoices to DuTrade: again these appear to be vastly inflated prices relative to other evidence which bears on the type of price Vincom usual dealt in for nickel cargos.

206. The Claimant asserts that DuTrade was an unattractive and unlikely customer for these transactions: it already owed Vincom more than $5.7 million and there was no indication as to how or when it might be able to pay that and it was a company that had only been set up some 12 months previously. The Defendant said without details or substantive justification (i.e. evidence of the facts which would justify such a conclusion) that he knew the individuals behind DuTrade and they were reputable. Their own conduct in the context of the DuTrade liquidation: leaving the jurisdiction and leaving no books or records of the company behind them, suggests otherwise. I

agree with the Claimant that in all the circumstances DuTrade as a legitimate customer is improbable.

207. In material summary of the analysis and findings I have set above, the invoices alleged to support the existence of the transaction behind AST Payments 1 and 2 are wholly unreliable because of their apparent duplication between themselves, their inconsistent numbering, their inflated prices without any evidenced justification, their lack of any material supporting evidence either directed at their own inherent validity or the validity of the alleged transaction and the said transaction involves an unlikely counterparty which itself has denied its existence. Against this is the much more likely assertion by the Claimant that these documents and the alleged transaction was made up to justify the clearing out of Vincom's bank account to the detriment of its creditors / insolvency and the benefit of the Defendant and/or his associates (in particular AST, a company owned and/or controlled by his brother).

208. A final point I take into account is that just before trial the Claimant obtained from Dubai, bank accounts of the Defendant (which should in any event have been disclosed in these proceedings – aside from the Defendant's obligation to disclose them as part of the freezing order process) which showed that between November 2018 and January 2022, the Defendant received over £270,000 from AST. The Defendant explained these as relating to commission payments and that they were small sums which also included a loan repayment. The relevant point is that after AST received the sums in dispute here, the Defendant was receiving payments from AST long after Vincom's business had ceased.

209. Essentially, the Claimant's case in relation to the AST payments is that they were fraudulent. The burden of proof is the same for an allegation of fraud as any other allegation made in civil proceedings. However, in determining whether that burden is reached, the court will have regard to fraud being a relatively unlikely explanation and always a most serious allegation to have made. Nevertheless, the simple question for the court when making findings of fact about an alleged fraud remains: on the evidence is fraud more likely to be the explanation?

210. I have no hesitation in finding that the payments authorised by the Defendant from Vincom's NWB bank account were fraudulent and made by the Defendant knowing that there was no corresponding obligation on Vincom to make those payments. The purpose of the payments was to put assets that might otherwise be available to Vincom's creditors out of their reach and into the close hands of the Defendant's brother's company. The Defendant authorised these payments from NWB for this purpose. This applies to the first two AST Payments totalling $4,614,662.

211. I am not persuaded that the third AST Payment was fraudulent in this way. The tipping point is the 20 November 2017 email to Credit Suisse. This gives some additional credibility to the third payment which is wholly lacking from the other two payments. Moreover, the problems with which the documents alleged to justify the first two payments are riddled do not apply to the third payment. I have considered whether the Defendant's false use of invoice 705 to justify with NWB part of AST Payment 2 should carry over into falsifying use of the same invoice to justify AST Payment 3. In my view this would be akin to double counting. The correct finding is that invoice 705 had already been put forward to Credit Suisse as justifying the payment eventually instructed on 29 November 2017 and so putting it forward to

NWB to support another payment in the meantime was dishonest unless the on-going process involving Credit Suisse was halted.

212. In respect of AST Payments 1 and 2, the Defendant's conduct was known to him to be not for the proper purpose of Vincom's business and known to be preferring the interests of himself and his family to those of Vincom. As described in the Claimant's written closing this is a straightforward and obvious breach of fiduciary duty.

213. The Claimant has a secondary case that the AST Payments were made in breach of the particular duties owed to creditors as a result of the imminent insolvency of Vincom. In the circumstances I will only consider this in regard to AST Payment 3.

214. The Defendant's case was that he had no reason to consider that the insolvency of Vincom was imminent at the time the AST Payments were made. I consider this an absurd contention. It is said to be justified by reference to a schedule prepared by Re10 and as to which I have no persuasive evidence to support the underlying assumptions. It flies in the face of Vincom's increasing difficulties in meeting its obligations to its various bankers which were becoming acute by the summer of 2017 and were only getting worse by November 2017. It also requires that I accept the Defendant had a genuine belief that the IDB petition debt was false. On the evidence I have seen, no person could have genuinely believed this. It depends on an allegation that IDB had been paid more than $2 million by Vincom's offtakers over the years but had overlooked those payments. Not only is this highly unlikely but there is zero evidence in support of it: the letters from those offtakers merely reciting alleged payments does not support such an allegation. What would have been required is evidence from the bank accounts of those entities (or from their own bankers) showing the dates and amounts of the payments said to have been made. Those payments could then have been checked against the relevant entries on IDB's books and Vincom's accounts. I accept the evidence from IDB's Mesada Fuchs about the history of IDB's debt with Vincom and the history of payments received and not received. The Defendant put forward no evidence to counter this – rather he made unsupported and unpersuasive assertions.

215. Of course by the time of the AST Payments, Vincom had received the statutory demand and winding up petition from IDB and the letters of demand from the Claimant and ZKB and had substantial debts with Sberbank also. The Defendant and Vincom took no substantive steps to challenge the statutory demand or winding up process. The Defendant blamed his then lawyers for this but I have seen no credible basis for any such challenge.

216. The Claimant, rightly, also points out that by 12 December 2017 at the latest, the Defendant appears to have formed the view himself that Vincom was insolvent. On 12 December 2017 Re10 wrote to the Defendant a general letter detailing the services they could provide in the context of a proposed creditors' voluntary liquidation. The letter states: "the options discussed at our initial meeting and the rationale for the proposed Creditors' Voluntary Liquidation are detailed at Appendix 4". Appendix 4 includes the statement: "…the directors have confirmed they wish to enter into a CVL for the following reasons: 1. The Company is insolvent…". It is not suggested that there was any material change in Vincom's circumstances between mid-November and early December 2017. On the evidence I have seen the position was equally

perilous: banks were closing in and there were no available assets to meet Vincom's liabilities as and when they fell due.

217. I find that by mid-November 2017 (at the latest) the practical certainty of Vincom's insolvency meant that the Defendant was bound as part of his obligation to act in the interests of Vincom to have regard to the interests of Vincom's creditors as a whole. In that light was the AST Payment 3 transaction one which was made in breach of that duty?

218. The impact of AST Payment 3 was to increase Vincom's debt by just under $1 million because the source for this payment was the Credit Suisse finance facility in return for a potential gain of $4,740 out of which there would be transaction specific costs (e.g. to the lender) and general overheads. Even at this stage in the analysis it appears a transaction without any substantial benefit given the size of the demands being made on Vincom at that time.

219. However, that analysis fails to take into account that there was a significant and obvious risk that even that benefit to Vincom would not be realised. The proposed counterparty in this transaction was DuTrade. This was a customer without substantial good standing who already owed Vincom well in excess of $5 million. The Defendant has provided no explanation as to why he considered that DuTrade was likely to make payment of this nickel transaction when it had failed to pay the far larger sums owed already. I suspect that the Defendant's answer to this would be to rely on Credit Suisse having approved the transaction and say that Credit Suisse would have had security over the relevant goods but that is to ignore the reality of DuTrade's existing indebtedness and the fact that the underlying risk was always at Vincom's door, which beyond any confusion was being demonstrated by the demands being made by the previous lenders at that time.

220. I find that AST Payment 3 was a breach by the Defendant of his duty under section 172(3) to promote Vincom's business mindful of the interests of its creditors as a whole. AST Payment 3 should not have been authorised and the Defendant should not have caused Vincom to enter into the contract with AST or the contract with Du Trade in those circumstances.

221. For completeness, if I was wrong about my primary findings that the alleged transactions behind AST Payments 1 and 2 were fraudulent then I would have found that entering into those transactions and making those payments was a breach of the Defendant's duty to Vincom to have regard to the interests of its body of creditors as a whole for substantially the same reasons as relate to AST Payment 3.

Quantum

222. DMT Credit Notes I have found that the credit notes were issued in the run up to the insolvency in breach of the Defendant's duty to Vincom to use director's powers for proper purposes because the credit notes were issued not for the benefit of Vincom but to prefer the position of DMT in Vincom's liquidation by providing a basis upon which DMT could refuse payment of assets which would otherwise be for the benefit of Vincom. It is accepted in the ADef and was stated by DMT in their correspondence on August 2018 with the liquidator, that the reason for non-payment of the relevant invoices was the credit notes cancelling those debts. On these facts the loss caused to

Vincom by the Defendant's actions is the full value of the cancelled invoices: $7,769,071.

223. AST Payments 1 & 2 I have found that the Defendant fabricated transactions in order to justify paying away Vincom's assets to AST. This was a fraud on Vincom and also a breach of his duties to use his powers for proper purposes. The appropriate measure of compensation is for the Defendant to make good the assets lost to Vincom as a consequence of this wrongful conduct: $4,614,662.

224. AST Payments 3 In this case the Defendant in breach of his duties to Vincom caused it to enter into a transaction with AST which resulted in Vincom increasing its indebtedness to Credit Suisse without any compensating benefit (the value of the apparent promise by Du Trade to pay for the relevant nickle was always likely to be negligible and it so turned out to be). I can see that potentially there might be a set off in respect of any genuine value to be attributed to any rights that Credit Suisse and/or Vincom might have to the cargo but there is no evidence about this and it has not been argued by the Defendant. On the evidence before me, the appropriate compensation to Vincom for the loss caused by AST Payment 3 is the amount by which its debts have increased as a consequence of entering into this transaction: $953,580.

Conclusion

225. The Defendant must pay equitable compensation to the Claimant of $13,337,313. Interest is also claimed and, as requested, I will hear further submissions on that at a consequentials hearing arising from my findings above.