



Neutral Citation Number: [2019] EWHC 1573 (Comm)

Case No: LM-2018-000024

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 21/06/2019

Before :

CHRISTOPHER HANCOCK QC
(Sitting as a Judge of the High Court)

Between :

LONGULF TRADING (UK) LIMITED
- and -
(1) NIYAZI ONEN GIDA SAN. A.S.
(2) MR NIYAZI ONEN

Claimant

Defendants

Rebecca Zaman (instructed by **K&L Gates LLP**) for the **Claimants**
The Defendants did not appear and were not represented

Hearing dates: 8 February 2019

Approved Judgment
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Christopher Hancock QC :

I. Overview

1. This is a claim brought by the Claimant against two Guarantors, under a written Guarantee signed 23 January 2016.
2. The Defendants were duly served with the claim in Turkey, and in June 2018 instructed solicitors Morgan Lewis LLP, who received (among other items) the order of 22 October 2018 listing the claim for trial. Despite that, the Defendants have failed to date to file a defence or any evidence in these proceedings, or to apply to set aside or vary the order of 22 October 2018. I have therefore heard the trial in the absence of the Defendants.

II. Conduct of a one-sided trial

3. The Claimant has acknowledged its obligations when presenting a claim in the absence of the Defendants. In *CMOC Sales & Marketing Limited v Persons Unknown and 38 Others* [2018] EWHC 2230 (Comm), HHJ Waksman QC conducted the trial of a claim against defendants who, as here, did not engage with the process, and observed the following:

"14 Where the trial is not attended by one of the parties, there is still an obligation of fair presentation which is less extensive than the duty of full and frank disclosure on a without notice application. Mr Justice Cresswell in Braspetro Oil Services v FPSO Construction Inc [2007] EWHC 1359 (Comm) said as follows, that he required the claimant to draw to the attention of the court: " points, factual or legal, that might be to the benefit of [the defendant]. " He noted that claims which were considered not to be sustainable were not in fact pursued. He said that the claimant brought to the attention of the court points which the defendant had taken before it decided to play no further part. He said that the claimant brought to his attention points which had never been taken by the defendant but which might have been had it decided to defend the proceedings, and it had taken all steps to bring to the attention of the defendant what has been happening here. The court had, in that case, through the eight-day hearing, carefully examined and tested the claimant's case. I adopt those observations and I consider that the injunctions of Mr Justice Cresswell have been fully followed here. I also did not regard this trial as merely an exercise of rubber-stamping but tested and considered all aspects of the case.

15 Another feature of this case which follows on is that, in my judgment, this litigation brought by CMOC has been marked by (a) scrupulous attention to detail and to the requirements of the very many applicable procedural rules, and (b) rigorous observance of the obligations of material disclosure on the many without notice applications on the part of solicitors and counsel involved for the claimant, and the obligations of fair

presentation otherwise, to which I have referred. There have been no short cuts taken and no glossing over of any problematic points. This is also the case for the trial itself.”

4. I also note these injunctions, and I have followed them. I consider that the Claimants have clearly complied with their obligations here. Accordingly, the claim has been fully and fairly presented; I have been taken carefully through all of the evidence; all of the points which might have been taken by the Defendants have been brought to my attention and I consider them all in this judgment.

III The Claimants’ case

5. In my judgment, the Claimant must satisfy the Court of the following matters:
 - a. First, that there is a valid Guarantee in effect between the Claimant and the Defendants;
 - b. Second, that Dardanel has incurred “Obligations” to Longulf under the Procurement Agreement (as defined in clause 1.2 of the Guarantee);
 - c. Third, that the circumstances in which the Claimants may call on the Defendants under clause 2.1 of the Guarantee to pay the Obligations (an “Event of Default” as defined in clause 6.1 of the Procurement Agreement) have arisen;
 - d. Fourth, that the Claimant has duly made a written demand on the Defendants under the Guarantee, accompanied by a certificate setting forth the Obligations to be paid pursuant to the Guarantee (per clause 2.2);
 - e. Fifth, that the Obligations remain unpaid by either Dardanel or the Defendants; and
 - f. Sixth, that the Claimant is entitled to the full sum of “Obligations” now claimed, including principal, interest, and legal costs.
6. I have heard from the Claimant and its witnesses. I have also seen documentary evidence produced by the Claimant. Finally, I have heard from Ms Zaman, of Counsel, who, I am satisfied, has put before me all the arguments that the Defendants might have put before me had they appeared.

IV The elements of the Claimants’ case.

A. Was the Guarantee valid and effective?

7. I was referred to the Guarantee. It is in writing and signed by the First Defendant’s President and by the Second Defendant in person. The Second Defendant is the Chairman of each of Dardanel and the First Defendant.
8. The Guarantee is in the form of a written contract rather than a deed. It is therefore necessary for the Claimant to show that consideration has moved from it to the Defendants in return for the promise of guarantee. That consideration is referred to in the Preamble to the Guarantee. The Guarantee is dated January 19, 2016, and is stated to be made between Niyazi Onen Gida San. A.S, a corporation organised under the law of Turkey and Mr Niyazi Onen, Turkish national, defined together as the “Guarantor” or Guarantors”, in favour of

“Jointly Longulf Trading (UK) Ltd, a company organised under the laws of England”, defined as the Purchaser.

9. The Preamble to that Guarantee records the following:

WHEREAS Dardanel Onentas Gida Sanayi A.S. dba as Dardanel, corporation organised under the laws of Turkey (hereinafter referred to as “Company”), the Guarantor, and Purchaser have entered into a Procurement Agreement dated November 19, 2016 providing for procurement services on the terms and conditions therein set forth (the “Procurement Agreement”);

WHEREAS it is a condition precedent to the provision of any services under the Procurement Agreement that the Guarantor must enter into and execute this agreement and that a copy of same be delivered to Purchaser;

WHEREAS Guarantor has an economic interest in the Company and it is in the best interests of the Guarantor to guarantee all payment obligations of the Company to Purchaser under the Procurement Agreement, all in accordance with and subject to the terms and conditions of this Agreement;

NOW, THEREFORE, in consideration of, inter alia, Purchaser having entered into the Procurement Agreement with the Company and having agreed, subject to the terms and conditions therein provided, to provide the services under the Procurement Agreement to the Company, the parties hereto have agreed as follows:...

2.1 Guarantee

The Guarantor hereby irrevocably guarantees the payment of the Obligations, which the Guarantor expressly covenants to pay to Purchaser, as and from any written demand therefor presented by Purchaser, which demand shall only be presented to the Guarantor following the occurrence of an event of default by the Company under the terms and conditions of the Procurement Agreement (“Event of Default”).

10. The Procurement Agreement, also dated January 19 2016, in its turn, contemplated the entering into of the Guarantee and was indeed expressly conditional on the provision of such a guarantee. Thus, the Procurement Agreement, which was made between Dardanel Onentas Gida Sanayi A.S., a corporation organised under the laws of Turkey (the “**Company**”), Niyazi Onen Gida San, A.S, a corporation organised under the laws of Turkey and the personal guaranty of Mr Niyazi Onen (the “**Guarantor**”) and Longulf Trading (UK) Ltd, a company organised under the laws of England (“**LGT**”), stated in its recitals that LGT was “willing to enter into this Agreement only if Guarantor guarantees all of the obligations of Company hereunder and Guarantor has agreed to do so”.

11. The Procurement Agreement was thus entered into shortly before the Guarantee. Ms Zaman recognised that it might therefore have been argued by the Defendants that any consideration for the guarantee was past consideration. In this connection, the relevant approach is set out clearly in *Chitty on Contracts*, 33rd ed, at paragraph 45-022, where the learned editors say this:

“More difficulty arises where the surety guarantees some past debt or transaction. Prima facie such a guarantee is given merely for past consideration and is void. So where a surety guaranteed payments under a hire-purchase agreement entered into four days previously, it was held that the guarantee was given for past consideration only and was void. However, if the consideration is expressed so as to be ambiguous whether it is past or not, it is open to the creditor to show that the consideration was not past. Thus where a guarantee was expressed to be given “in consideration of your having this day advanced to” the principal debtor some £750, it was held that parol evidence was admissible to prove that the money was advanced simultaneously with the giving of the guarantee, and that there was therefore good consideration. Moreover, in accordance with the position as regards contracts in general, consideration to support a promise of guarantee may be found in an act done before it is made, provided that the act is done at the guarantor’s request, that the parties understood that the act was to be remunerated in some way and that the conferment of a benefit would have been legally enforceable had it been promised in advance.”

12. Here, it is clear that at the time of the Procurement Agreement, it was understood that the Guarantee would be provided and that the Guarantors were requesting that the procurement agreement would be entered into. The provisions of the last sentence of the passage from *Chitty on Contracts* set out above are clearly satisfied in this case, and accordingly I find that the Guarantee is valid and effective, having been provided in writing, signed by or on behalf of each of the Defendants, and provided in exchange for consideration.
13. There is a further potential argument that I should deal with at this stage. Ms Zaman has correctly pointed out that, as a matter of English law, if the obligations of the principal debtor are varied, this will, as a general matter, discharge the guarantor. In this regard, it is noted, in *Chitty on Contracts* (33rd ed, 2018) at [45-104] that:

“It is a well established and strictly applied principle that any variation in the terms of the agreement between the creditor and the debtor which could prejudice the surety will, unless he consents thereto, discharge him from liability, unless the contract of suretyship provides to the contrary.”

14. Since 23 January 2016, there have been five amendments to the Procurement Agreement which gives rise to Dardanel’s obligations. Ms Zaman pointed out that it might be said for the Defendants that these amendments have varied Dardanel’s obligations (including, by

the 5th Amendment, extending the Term of the Procurement Agreement) to the prejudice of the Defendants, thus discharging the Guarantee.

15. Here, however:

- a. The contract of Guarantee expressly provides that the Defendants' obligations shall continue in force even should any rights under the Procurement Agreement be amended or waived (per clause 2.9);
- b. The Second Defendant in his capacity as Chairman of each of Dardanel and the First Defendant signed the Procurement Agreement, and each of the 1st to 5th Amendments thereto on behalf of each of those companies, indicating the Defendants' actual knowledge of and consent to the Procurement Agreement amendments; and, most importantly of all
- c. The Defendants formally consented to the variations of the Procurement Agreement in their capacities as Guarantors. Each of the Defendants signed written amendments to the Guarantee, ratifying the amendments to the Procurement Agreement and confirming the continued obligations of the Defendants under the Guarantee: see 1st, 2nd and 3rd Amendments to the Guarantee. That consent is sufficient to continue to bind the surety to the Guarantee, even in the absence of fresh consideration.¹

B. Has Dardanel incurred "Obligations" under the Procurement Agreement

16. The Guarantee provided that the Defendants (jointly and severally) would guarantee Dardanel's "Obligations" under the Procurement Agreement. "Obligations" are defined in the Guarantee as follows:

"Obligations" means all present and future debts and liabilities of the Company to Purchaser (whether as principal debtor, guarantor, surety or otherwise), of any and every nature whatsoever (direct or indirect, absolute or contingent, matured or not, in principal, interest or otherwise) and howsoever incurred under, in connection with or with respect to the Procurement Agreement."

17. The scheme of the contract was as follows:

- a. LGT was appointed by the Defendants to procure seafood for resale to the Company: see clause 1.1(a).
- b. LGT was to be the Company's sole agent: see clause 1.1(b).
- c. The Company could submit Company Procurement Orders to LGT which were then irrevocable: see clause 1.1(c).

¹ *Mayhew v Crickett* (1918) 2 Swanst. 185 per Eldon LJ. See also *Maxted v Investec Bank Plc* [2017] EWHC 1997 (Ch) at [12], [20-22].

- d. If LGT accepted the Company Procurement Order, it would place the order: clauses 1.1(c) and 1.2(a).
- e. LGT would then resell the goods to the Company: see clause 1.2(a).
- f. The Company would then be obliged to take delivery of the goods and pay for them in accordance with clause 1.4(a).

18. Various invoices were rendered by the Plaintiffs to Dardanel between 27 September 2016 and 17 February 2017. Under the terms of the Procurement Agreement, payment of these invoices was due in accordance with the provisions of clause 1.4, as follows:

1.4 Obligation to purchase.

(a) Company shall be obligated to take delivery of all Goods (or arrange for a designee to take delivery of such Goods) purchased by LGT under a LGT Purchase Order issued in response to a Company Procurement Order, and to pay for such Goods in accordance with such Company Purchase Order, the Commercial Invoice and this Agreement not later than the earliest of (i) 20% within 45 days from LGT's payment for such Goods, (ii) 30% within 90 days from LGT's payment for such Goods, (iii) 30% within 135 days from LGT's payment for such Goods, (iv) the remaining 20% within 180 days from LGT's payment for such Goods and, (v) the last day of the Term."

19. Between 23 February 2017 and 15 August 2017, Dardanel failed to make 18 payments as they fell due, totalling US\$2,472,615 ("**the Debt**"), corresponding to a number of invoices dated between 27 September 2016 and 17 February 2017. Mr Pieri gave evidence before me, and I was shown the invoices in question. I am satisfied on the evidence that the sales covered by these invoices took place; that the invoices were rendered; that no payment (except as detailed below) has been made; and that, accordingly, the debt, as defined, was due from Dardanel to the Claimant.

20. A schedule of the invoices and their due dates for payment is attached to this judgment as Schedule 1.

C. An Event of Default has taken place

21. An "Event of Default" is defined in clause 6.1 of the Procurement Agreement. Clause 6.1 of the Procurement Agreement provides as follows:

*6.1 Defaults. The occurrence of any of the following events shall constitute an event of default ("**Event of Default**" hereunder:*

(a) Failure by Company to pay to LGT any amount payable to this Agreement within ten (10) Business Days after the date when such amount became due and payable;...

... (e) Company shall fail to pay any principal of any debt when due in an aggregate outstanding principal amount in excess of \$100,000, or any interest on such debt when due;"

22. Here, as is apparent from the schedule of invoices which was annexed to the demand to which I make reference below (annexed to this judgment as Schedule 2), as at 20 October

2017, the total of \$2,472,615 was outstanding, by way of principal. In addition to the Schedule to which I have made reference, a certificate was produced by the Claimants dated 6 November 2017, certifying, in accordance with Article 2.3 (the text of which I set out below) that this sum was due. That certificate was, in accordance with the terms of clause 2.3, prima facie evidence that the sum was due and owing, and I have seen no evidence to the contrary. I return to the topic of interest below.

23. The sum then due was therefore clearly well in excess of US\$100,000, thereby triggering clause 6.1(e). In addition, as at October 2017, as is also apparent from Schedule 2, the various invoices in that schedule were more than 10 business days overdue, thus triggering clause 6.1(a).

24. In the light of the above, I am satisfied that:

- a. Pursuant to clause 6.1(e), the Debt then exceeded US\$100,000 and so constituted an Event of Default; and
- b. Pursuant to clause 6.1(a), Dardanel failed to settle at least the vast majority of the outstanding sums within 10 business days, which also constituted an Event of Default.

D. The Claimant has made a written demand on the Defendants

25. Clauses 2.1, 2.2 and 2.3 of the Guarantee provide as follows:

2.1 Guarantee

The Guarantor hereby irrevocably guarantees the payment of the Obligations, which the Guarantor expressly covenants to pay to Purchaser, as and from any written demand therefor presented by Purchaser, which demand shall only be presented to the Guarantor following the occurrence of an event of default by the Company under the terms and conditions of the Procurement Agreement (“Event of Default”).

2.2 Payment Upon Receipt of Written Demand

Upon receipt of a written demand from Purchaser pursuant to Section 2.1, the Guarantor shall pay the Obligations and/or make payment of the amount claimed at the location as Purchaser may specify in writing from time to time, in the same currency in which the Obligations may be outstanding, in funds immediately available to Purchaser at such location. Each such demand shall be accompanied by a certificate of Purchaser setting forth the Obligations to be paid pursuant to the guarantee contemplated in this Agreement and the basis of the calculations made by Purchaser in order to arrive at such amount. All payments due under this Agreement shall be made to Purchaser.

2.3 Statement of Purchaser constituting Prima Facie Evidence of Amount due by the Company

Any statement prepared by Purchaser shall, absent manifest error, constitute prima facie evidence of the amount which, as at the date of the statement so prepared, is due by the Company to the Purchaser in respect of the Obligations and the Guarantor shall be bound by every such statement.

26. By letters dated 9 November 2017, the Claimant made a formal written demand (“**the Demand**”) on the Defendants for payment of the Debt, pursuant to clauses 2.1 and 2.2 of the Guarantee (as well as a demand on Dardanel). Each letter of demand was accompanied by a certificate confirming the overdue sums and enclosing an “Analysis of Overdue Receivables” as at 20 October 2017. I was shown a copy of each of these letters, and I heard evidence from Mr Pieri confirming that they were sent. As I have noted above, by this time there had been Events of Default as defined in the Procurement Agreement, which meant that the Claimants were entitled to serve demands pursuant to clause 2.1 of the Guarantee.
27. By paragraph 13 of each Demand, the Claimant demanded payment of the Debt by no later than 21 days from receipt of the letter. The letter was received on 15 November 2017.
28. Each Demand called for payment of the Debt only, but formally reserved the Claimant’s rights to claim the full scope of the Obligations incurred by Dardanel, including interest at 15% per annum and legal costs. The letter however indicated that if the full amount of the Debt was paid within the 21 day period specified, the steps which the Claimant was reserving the right to take would not be needed. These included the commencement of Court proceedings and a claim for contractual interest.
29. The first question under this head is whether the Demand was a valid demand in relation to the sums set out within it, which comprised the principal debt.
30. This first question, in my view, admits of only one answer.
 - a. There had, as I have noted, been Events of Default.
 - b. This in turn entitled the Plaintiffs to serve a written demand under clause 2.1 on the Defendants, which they did.
 - c. As soon as that written demand was served, the Guarantors became obligated to pay the “Obligations”, as defined.
 - d. The Demand, under clause 2.2, had to specify the obligations to be paid, together with the basis of the calculations made by the Purchaser in order to arrive at the amount to be paid.
31. Here, the Demand specified the amount of the Debt; it showed how that sum had been calculated, by reference to the schedule attached; it included the necessary certificate; and it specified the bank account to which payment had to be made. All of the preconditions for the payment of the Debt were therefore satisfied and I hold that the Defendants were obliged to make payment of the debt to the nominated bank account.

E. The Debt, or part of it, remains outstanding

32. To date, neither the Defendants nor Dardanel have paid the Debt in full, as has been confirmed before me by Mr Pieri. However, since the date of the Demand, Dardanel has paid US\$172,445 in part payment of two of the 18 invoices. Mr Pieri understands this payment to be towards invoice numbers 10148 (in part) and 10160 (in whole). The payments were made in the sums of US\$72,505 on 28 February 2018 and US\$99,940 on 31 March 2018.
33. This has reduced the total principal outstanding in respect of the invoices to US\$2,300,170. It is this amount which is claimed in respect of the principal due under the invoices.

F. The procurement fee.

34. Clause 3.1 of the Procurement Agreement provided as follows:

“3.1 Procurement Fees. Company shall pay a procurement fee... to LGT on the first Business Day of each month. The amount of the Procurement Fee payable on each Fee Payment Date shall equal 1.25% of the “Average Daily Outstanding” for the “Applicable Month”. The Applicable Month means the month most recently ended before each Fee Payment Date. The Average Daily Outstanding shall be equal to (a) the sum of (i) the price of all Goods (calculated at the price of such goods as stated in the applicable Company Purchase Order) purchased by LGT, whether paid directly to the Supplier or to Company for transfer to supplier, for which LGT has not received payment from Company at the close of business on each day in the Applicable Month, (ii) all shipping, handling, transportation, taxes, warehouse, wire transfer fees, insurance premiums and other charges and reimbursable expenses that are incurred by LGT in connection with the purchase of such Goods from an Accepted Supplier to the extent not reimbursed to LGT by Company at the close of business on each day in the Applicable Month and (iii) the amount of all fees paid, cash collateral posted, and deposits made by LGT as a condition of a bank’s opening and continuing any outstanding letter of credit issued or confirmed to pay the Accepted Supplier for the Goods purchased by LGT, divided by (b) the number of days in the Applicable Month.”

35. Dardanel was obliged to pay Procurement Fees to the Claimant for the duration of the term of that Agreement (which by the 5th Amendment to the Procurement Agreement was extended to 19 January 2019).²

² The Procurement Agreement has now come to an end. However, under clause 7.3, the rights of the Claimant to payment of all overdue sums under the Procurement Agreement survive termination. Per clause 2.4 of the Guarantee, the obligations of the Defendants to pay the outstanding Obligations continue “until the indefeasible payment in full of the Obligations”. The Claimant claimed the full Obligations, including the Procurement Fee and interest on it, from the Defendants.

36. Dardanel has failed to pay the Procurement Fees since 1 June 2018, after the issuance of the Demand to which I have made reference and indeed after the commencement of these proceedings, which were started on 1 February 2018. The outstanding Procurement Fees, unpaid from 1 June 2018 to 2 January 2019 (inclusive), total US\$ 234,841.65, as set out in Schedule 3 to this judgment.
37. In relation to the Procurement Fees, there are two possible arguments which I need to deal with.
- a. First, it might be said for the Defendants that the application of the Procurement Fee amounts to a penalty clause.
 - b. Secondly, the claims in respect of Procurement Fees were not comprised within the formal demand served on 9 November 2017 to which I have made reference.
38. The leading case on penalty clauses is the Supreme Court decision in *Cavendish Square Holding BV v Makdessi* [2016] AC 1162. Lord Neuberger and Lord Sumption stated:

“[13] ... There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. ... the courts do not review the fairness of men’s bargains either at law or in equity. **The penalty rule regulates only the remedies available for breach of a party’s primary obligations, not the primary obligations themselves.** [This distinction] provided the whole basis of the classic distinction made at law between a penalty and a genuine pre-estimate of loss, the former being essentially a way of punishing the contract-breaker rather than compensating the innocent party for his breach.

...

“[32] *The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance.*”

39. Here, the Procurement Fee is a primary obligation owed by Dardanel in exchange for the Claimant providing the services under the Procurement Agreement. Whilst it is calculated by reference to the amount owed by Dardanel to the Claimant, the obligation to pay the fee forms part of the bargain between the parties, and its imposition does not depend on any breach of a primary obligation. It is not, therefore, a penalty, in my judgment. It is simply a separate part of the consideration in respect of the services provided by the Claimant.
40. As regards the fact that these charges did not form part of the demand, this argument is, in my view, far more difficult. Ms Zaman submitted that, upon service of the demand, the Guarantor was to pay the “Obligations”, as defined, and that the definition of Obligations was broad enough to cover all present and future debts and liabilities of the Company to

the Purchaser, whether matured or not, incurred or in connection with or with respect to the Procurement Agreement. Accordingly, she argued, the service of the Demand in effect turned the Guarantor into a principal debtor, obliged to make payment of those future obligations as and when they fell due, even if not covered by the Demand itself.

41. I am afraid that I cannot accept this argument. In my judgment, clause 2.2 indicates that the Demand must give details of the calculation of the sums which are being claimed. Here, there was such a calculation of the sums being claimed as due for non-payment of invoices. There was no such calculation – nor could there be – in relation to Procurement Fees since, as I understand the position, none were due at the time. Accordingly, the Demand did not comply in this respect with clause 2.2 and did not trigger any obligation to pay Procurement Fees. Of course, it remains open to the Claimant to make a Demand.

G. Interest.

42. Interest is provided for by clauses 3.9 and 8.1 of the Procurement Agreement, which provide as follows:

“3.9 Late Payments. If any amount payable by Company hereunder (including any fee or any reimbursement amount), under any Company Purchase Order or any Commercial Invoice is not paid when due, such amount shall accrue interest, payable on demand, at the Default Rate, computed from the due date of such payment until such amount is paid in full....

*...8.1 “**Default Rate**” means a rate of 15% per annum in addition to the Procurement Fees, but not in excess of the maximum rate permitted by applicable law.”*

43. In my judgment, this makes clear that interest at the Default Rate of 15% per annum is to accrue on the Debt as set out in the 18 invoices referred to above. That amount of interest totalled [] as at the date of this judgment and order. A spreadsheet of interest calculations on the overdue invoices is attached to this judgment (which takes account of Dardanel’s February and March 2018 payments) as Schedule 4.
44. Again, there are two issues which arise in relation to this element of the claim. The first is whether the interest rate is penal. The second is whether the Demand is sufficient to cover the interest obligations. This second issue can be subdivided into the following sub-issues, namely:
- a. Whether the Demand was sufficient to cover interest accrued as at the date of the demand;
 - b. Whether it covered interest accruing due thereafter up until the issuance of the Particulars of Claim;
 - c. Whether it covered interest accruing due prior to judgment;
 - d. Whether it covers interest due after judgment.
45. As for whether or not the accrual of interest at the “Default Rate” constitutes a penalty, Ms Zaman submitted that the detriment imposed on Dardanel by applying interest at the

Default Rate is not “out of all proportion” to the Claimant’s legitimate interest in timely payments under the Procurement Agreement. This is because the structure of the Procurement Agreement required the Claimant regularly to make significant upfront payments on Dardanel’s behalf, with the result that almost US\$2.5m fell due within just 6 months of non-payment. This is a significant sum in any balance sheet. The Claimant’s own cash flow security would be affected if it did not receive prompt payment from Dardanel of sums due. The high rate of interest was thus agreed between the parties in order to encourage Dardanel’s prompt performance of its payment obligations, and to provide some protection for the Claimant should it be in a position of having made significant outlays and having to procure its own bridging finance or loans to cover gaps in cash flow.

46. I accept this submission, particularly in the light of the evidence of Mr Pieri. It is clear that the failure to make payment when due had a significant effect on the cashflow and borrowing requirements of the Claimant.
47. Again, the more difficult questions are those which arise under the second head. Ms Zaman had similar submissions to those which she raised in relation to procurement expenses. In my view, the considerations are not entirely the same.
48. The Claimant acknowledges that the Claimant’s initial Demand of 9 November 2017 demanded only part of the Obligations, this being the principal overdue for the 18 invoices. However, it argues that the Claimant:
 - a. Expressly reserved its rights to claim the full Obligations in the letter of demand should the sum called for remain unpaid; and
 - b. Was entitled to decide whether or not to enforce all or part of the Obligations without affecting the liability of the Defendants under the Guarantee, pursuant to clause 2.9.3 of the Guarantee.
49. It is therefore submitted by the Claimant that the Claimant, having called on the Defendants by written demand of 9 November 2017, with its position reserved as to calling in the full Obligations should the Defendants fail to pay, is entitled in these proceedings to claim from the Defendants the full scope of the Obligations as at 8 February 2019, and indeed (as I understand the submission) thereafter.
50. I will approach this submission in a number of stages.
 - a. As at the date of the Demand, there were a number of amounts which were overdue, both in relation to principal and interest. Those amounts were detailed in the schedule attached to the demand. The demand required payment of the principal amounts, but did not demand payment of the interest. Instead, it offered to forego such payments if payment of the principal was made within the specified timescale, which it was not.
 - b. In my judgment, therefore, this demand did comply with Article 2.2, as regards the interest then due. It specified the amounts of interest; it indicated that no further demand would be made if payment of the principal amount was made in the relevant period; but it reserved the right to make claim for the other amounts if no such payment was made within 21 days. This was, as Ms Zaman put it, a demand

coupled with an offer to accept less if payment was made within the specified period.

- c. The same is not true in relation to future amounts of interest. No calculation was made of the amounts which would accrue due. No demand was actually made for such payment. It is true that the Claimant reserved the right to make such a demand, but no further demand was in fact made.
- d. As at the date of the commencement of the action, therefore, a demand had been made for the outstanding amounts of interest as at the date of the Demand, coupled with an offer to forego the claim for such outstanding amounts if payment of the principal amount was made within a set period. No such payment was made.
- e. As at the date of the commencement of the action, in my judgment, there had therefore been a demand which complied with the requirements of the contract in relation to interest due as at the date of that demand. The Guarantors were thus obliged to pay these amounts, unless they accepted the offer to accept less, which they did not.
- f. The same analysis does not apply in relation to amounts becoming due after the date of the Demand. There has been no further demand in relation to these amounts. The amounts were not at this stage due. Although it may be said that they were becoming due and not yet “mature”, within the meaning of the definition of obligations, they were clearly not specified in the demand which was served. I do not think that it would be right to give judgement in the absence of the Defendants in relation to these amounts.
- g. As to amounts falling due after the commencement of the action, then the same analysis must apply and must indeed be *a fortiori*. It may well be that amounts are due at the contractual rate of interest because of late payments of principal. However, no sufficient demand has been served to trigger the obligation on the part of the Guarantors to make these payments.

51. As to amounts by way of interest on Procurement Fees, then in my view the Claimant’s case is still weaker.

H. Legal and other expenses.

52. The Claimant has also incurred costs and expenses in enforcing its rights against Dardanel under the Procurement Agreement, for which Dardanel is liable under clause 9.5 (“Expenses”) and which therefore form part of the Obligations.

53. These total US\$17,432.34 in respect of Turkish counsel and a further £16,161.85 incurred in respect of K&L Gates LLP.³

I. Statutory interest.

³ These fees were incurred prior to the point that K&L Gates LLP was instructed to commence proceedings under the Guarantee against the Defendants, which the Claimant accepted did not constitute legal costs incurred under the Procurement Agreement.

54. In addition to the amounts set out above, by way of principal and contractual interest, the Claimants are, in my judgment, entitled to statutory interest from the date on which those amounts should have been paid until the date of this judgment and order. The appropriate rate for such interest, in my judgment, this being a dollar claim, is US\$ LIBOR plus 1%. It is up to the Claimant to decide whether to claim this statutory interest, or to serve a new notice claiming the further contractual interest that has accrued due between the date of the last demand, referred to above, and the date of this judgment and order.

Overall conclusion

55. I can summarise my overall conclusion as follows:

- a. I am satisfied that all of the arguments that could have been put forward on behalf of the Defendant have been put forward and I have given full consideration to all of them.
- b. I have concluded that the Claimant has established its entitlement to the amounts claimed pursuant to the invoices rendered, as set out in Schedules 1 and 2. Taking account of the payments that the Defendant has made, the total amount claimable by way of principal is US\$2,300,170.
- c. I have also concluded that the Claimant is entitled to interest at the contractual rate from the date on which invoices should have been paid until the date of demand under the contract. The relevant amounts are set out in Schedule 4.
- d. The Claimant is not entitled to claim procurement fees since no sufficient demand has been made for such. It remains open to the Claimant to make demand.
- e. The Claimant is clearly therefore not entitled to interest on procurement fees.
- f. The Claimant is entitled to claim the legal expenses which are identified above.
- g. The Claimant is not entitled to claim interest for periods after the contractual demand, in the absence of a further demand.
- h. The Claimant is however entitled to statutory interest on sums awarded from the date on which they should have been paid until the date of this judgment, at US\$ LIBOR plus 1%. Alternatively, the Claimant may elect to make a further demand for contractual interest. It is up to the Claimant to decide which of these alternatives it wishes to pursue.

56. I would be grateful if an order could be drawn up giving effect to the conclusions set out in this judgment.

Schedule 1

Dardanel Onetas
Analysis of Overdue Invoices

Invoice Number	CustPORef	Amount(USD)	Invoice Date	Due Date
10108	PR160025-26	154,200.00	27/09/2016	25/03/2017
10123	FA16000161	81,000.00	03/11/2016	17/03/2017
10128	FA16000161	121,200.00	07/11/2016	21/03/2017
10132	FA16000161	219,000.00	15/11/2016	29/03/2017
10136	2016	122,640.00	15/11/2016	29/03/2017
10148	2016	218,985.00	02/12/2016	02/03/2017
10150	2016	145,990.00	02/12/2016	31/05/2017
10160	PR160038	101,600.00	10/01/2016	23/02/2017
10162	PR160038	152,400.00	10/01/2017	24/05/2017
10163	PR160038	101,600.00	10/01/2017	08/07/2017
10164	PR160038	31,200.00	20/01/2017	05/03/2017
10166	PR160038	46,800.00	20/01/2017	03/06/2017
10167	PR160038	31,200.00	20/01/2017	18/07/2017
10169	A02/439	119,400.00	24/01/2017	07/06/2017
10170	A02/439	119,400.00	24/01/2017	22/07/2017
10185	IB17006	282,400.00	17/02/2017	17/05/2017
10186	IB17006	211,800.00	17/02/2017	01/07/2017
10187	IB17006	211,800.00	17/02/2017	15/08/2017
Totals		2,472,615.00		

Schedule 2

Dardanel
Analysis of Overdue Receivables
As at 20th October 2017

Inv No	CustPORef	Amount(USD)	InvDate	DueDate	DaysDelay
10108	PR160025-26	154,200.00	30/09/2016	25/03/2017	-209.00
10123	FA16000161	81,000.00	07/11/2016	19/03/2017	-215.00
10128	FA16000161	121,200.00	14/11/2016	21/03/2017	-213.00
10132	FA16000161	219,000.00	18/11/2016	29/03/2017	-205.00
10136	2016	122,640.00	18/11/2016	29/03/2017	-205.00
10148	2016	218,985.00	06/12/2016	02/03/2017	-232.00
10150	2016	145,990.00	06/12/2016	31/05/2017	-142.00
10160	PR160038	101,600.00	16/01/2017	24/02/2017	-238.00
10162	PR160038	152,400.00	16/01/2017	24/05/2017	-149.00
10163	PR160038	101,600.00	16/01/2017	08/07/2017	-104.00
10164	PR160038	31,200.00	25/01/2017	05/03/2017	-229.00
10166	PR160038	46,800.00	25/01/2017	03/06/2017	-139.00
10167	PR160038	31,200.00	25/01/2017	18/07/2017	-94.00
10169	A02/439	119,400.00	25/01/2017	07/06/2017	-135.00
10170	A02/439	119,400.00	25/01/2017	22/07/2017	-90.00
10185	IB17006	282,400.00	29/03/2017	17/05/2017	-156.00
10186	IB17006	211,800.00	29/03/2017	01/07/2017	-111.00
10187	IB17006	211,800.00	29/03/2017	15/08/2017	-66.00
Totals		2,472,615.00			

ANALYSIS OF OVERDUE SINCE FEBRUARY 2017							
Due	Due	Due	Due	Due	Due	Due	Due
Feb-17	Mar-17	Apr-17	May-17	Jun-17	Jul-17	Aug-17	
	154,200						
	81,000						
	121,200						
	219,000						
	122,640						
	218,985						
			145,990				
101,600							
			152,400				
					101,600		
	31,200						
				46,800			
					31,200		
				119,400			
						119,400	
			282,400				
						211,800	
							211,800
101,600	948,225	-	580,790	166,200	464,000	211,800	

PAYMENTS RECEIVED RECENTLY			
DateRec	DateDue	Description	Amount (USD)
05.05.17	16.04.17	Pd In 10149 - CMDT 1154	-218,985
05.05.17	19.04.17	Pd In 10165 - CMDT 1155	-46,800
12.05.17	23.04.17	Pd CMDT1156 / 10168	-159,200
28.07.17	12.02.17	PD 10131,10135,10142,10124,10129,10133	-1,049,200
04.10.17	23.02.17	Pd In 10115 - CMDT 1151	-270,600

Dardanel Onetas
Analysis of Overdue Procurement Fees
As at 21/06/2019

Invoice Number	CustPORef	Amount(USD)	Invoice Date	Due Date	Interest Accrues From	Days Delay	Daily Interest @15%pa	Total Default Interest	Total Due
10280	PROC FEES	29,758.33	31/05/2018	01/06/2018	02/06/2018	-384	\$ 12.40	\$ 4,761.33	\$ 34,519.66
10282	PROC FEES	28,750.00	30/06/2018	01/07/2018	02/07/2018	-354	\$ 11.98	\$ 4,240.63	\$ 32,990.63
10287	PROC FEES	29,708.33	31/07/2018	01/08/2018	02/08/2018	-323	\$ 12.38	\$ 3,998.25	\$ 33,706.58
10294	PROC FEES	29,708.33	31/08/2018	01/09/2018	02/09/2018	-292	\$ 12.38	\$ 3,614.51	\$ 33,322.84
10303	PROC FEES	28,750.00	30/09/2018	01/10/2018	02/10/2018	-262	\$ 11.98	\$ 3,138.54	\$ 31,888.54
10311	PROC FEES	29,708.33	31/10/2018	01/11/2018	02/11/2018	-231	\$ 12.38	\$ 2,859.43	\$ 32,567.76
10316	PROC FEES	28,750.00	30/11/2018	01/12/2018	02/12/2018	-201	\$ 11.98	\$ 2,407.81	\$ 31,157.81
10323	PROC FEES	29,708.33	31/12/2018	01/01/2019	02/01/2019	-170	\$ 12.38	\$ 2,104.34	\$ 31,812.67
Totals		234,841.65					\$ 97.85	\$ 27,124.84	\$ 261,966.49

Schedule 3

Schedule 4

Dardanel Onetas
Analysis of Overdue Invoices
As at 21/06/2019

Invoice Number	CustPORef	Amount(USD)	Invoice Date	Due Date	Interest Accrues From	Days Delay to 09/11/17 (the Demand)	Days Delay to 21/06/2019 (Judgment)	Daily Interest @15%pa	Default Interest due at 09/11/17	Total Interest	Default Interest	Total Due
10108	PR160025-26	154,200.00	27/09/2016	25/03/2017	26/03/2017	-229	-817	\$ 64.25	\$ 14,713.25	\$ 52,492.25	\$	206,692.25
10123	FA16000161	81,000.00	03/11/2016	17/03/2017	18/03/2017	-237	-825	\$ 33.75	\$ 7,998.75	\$ 27,843.75	\$	108,843.75
10128	FA16000161	121,200.00	07/11/2016	21/03/2017	22/03/2017	-233	-821	\$ 50.50	\$ 11,766.50	\$ 41,460.50	\$	162,660.50
10132	FA16000161	219,000.00	15/11/2016	29/03/2017	30/03/2017	-225	-813	\$ 91.25	\$ 20,531.25	\$ 74,186.25	\$	293,186.25
10136	2016	122,640.00	15/11/2016	29/03/2017	30/03/2017	-225	-813	\$ 51.10	\$ 11,497.50	\$ 41,544.30	\$	164,184.30
10148	2016	218,985.00	02/12/2016	02/03/2017	03/03/2017	-252	-840	\$ 91.24	\$ 22,993.43	\$ 76,644.75	\$	295,629.75
	RECEIPT	-70,845.00	06/12/2016	31/03/2018*	31/03/2018 **		-447	\$ -29.52		\$ -13,194.88	\$	-84,039.88
		148,140.00						\$ 61.73		\$ 63,449.87		
10150	2016	145,990.00	02/12/2016	31/05/2017	01/06/2017	-162	-750	\$ 60.83	\$ 9,854.33	\$ 45,621.88	\$	191,611.88
10160	PR160038	101,600.00	10/01/2016	23/02/2017	24/02/2017	-259	-847	\$ 42.33	\$ 10,964.33	\$ 35,856.33	\$	137,456.33
	RECEIPT	-72,505.00	10/01/2017	28/02/2018*	28/02/2018 **		-478	\$ -30.21		\$ -14,440.58	\$	-86,945.58
	RECEIPT	-29,095.00	10/01/2017	31/03/2018*	31/03/2018 **		-447	\$ -12.12		\$ -5,418.94	\$	-34,513.94
		0.00								\$ 15,996.81		
10162	PR160038	152,400.00	10/01/2017	24/05/2017	25/05/2017	-169	-757	\$ 63.50	\$ 10,731.50	\$ 48,069.50	\$	200,469.50
10163	PR160038	101,600.00	10/01/2017	08/07/2017	09/07/2017	-124	-712	\$ 42.33	\$ 5,249.33	\$ 30,141.33	\$	131,741.33
10164	PR160038	31,200.00	20/01/2017	05/03/2017	06/03/2017	-249	-837	\$ 13.00	\$ 3,237.00	\$ 10,881.00	\$	42,081.00
10166	PR160038	46,800.00	20/01/2017	03/06/2017	04/06/2017	-159	-747	\$ 19.50	\$ 3,100.50	\$ 14,566.50	\$	61,366.50
10167	PR160038	31,200.00	20/01/2017	18/07/2017	19/07/2017	-114	-702	\$ 13.00	\$ 1,482.00	\$ 9,126.00	\$	40,326.00
10169	A02/439	119,400.00	24/01/2017	07/06/2017	08/06/2017	-155	-743	\$ 49.75	\$ 7,711.25	\$ 36,964.25	\$	156,364.25
10170	A02/439	119,400.00	24/01/2017	22/07/2017	23/07/2017	-110	-698	\$ 49.75	\$ 5,472.50	\$ 34,725.50	\$	154,125.50
10185	IB17006	282,400.00	17/02/2017	17/05/2017	18/05/2017	-176	-764	\$ 117.67	\$ 20,709.33	\$ 89,897.33	\$	372,297.33
10186	IB17006	211,800.00	17/02/2017	01/07/2017	02/07/2017	-131	-719	\$ 88.25	\$ 11,560.75	\$ 63,451.75	\$	275,251.75
10187	IB17006	211,800.00	17/02/2017	15/08/2017	16/08/2017	-86	-674	\$ 88.25	\$ 7,589.50	\$ 59,480.50	\$	271,280.50
Totals		2,300,170.00						\$ 958.40	\$ 187,163.00	\$ 759,899.27	\$	3,060,069.27

* Date payment received.

** Date interest stopped accruing.