JUDGMENT : Mr. Justice Teare: : Commercial Court. 28th July 2008

The application

1. This is an application by the Claimants for summary judgment upon the Second Defendant's counterclaim. In order to succeed the Claimants must establish that the counterclaim has no real prospect of success and that there is no other compelling reason why the counterclaim should be disposed of at trial; see CPR 24.2. There is also an application by the Defendants to continue a Freezing Order granted by Goldring J. on 14 June 2008.

The context

2. The Third Claimant ("Caspian") was a Scottish limited partnership. Caspian owned a 51% share in Shirvan Oil Limited, a joint venture company established in Azerbaijan with rights in an oil field in Azerbaijan. The partners in Caspian were the First and Second Defendants ("Swinnbrook" and "Rosserlane"), respectively British Virgin Islands and Isle of Man companies. Rosserlane was the general partner and Swinbrook was the limited partner. It appears that the ultimate owner of these companies was the Third Defendant, Dr. Leshkasheli, a citizen of the Republic of Georgia.

3. In order to obtain finance Dr. Leshkasheli and the corporate and other entities controlled by him, including, amongst others, Rosserlane, Swinbrook and Caspian, entered into a Loan Agreement dated 14 December 2006 with Credit Suisse ("the bank") for a loan facility of US$127m.

4. The following provisions of the Loan Agreement are to be noted:

"THIS LOAN AGREEMENT (this Agreement) is made on 14 December 2006 (the Execution Date) as amended and restated from time to time"

BETWEEN:

CASPIAN ENERGY GROUP, a limited partnership registered in Scotland under the Limited Partnerships Act 1907 with partnership number SL005104 (the Borrower), acting by its general partner Rosserlane Consultants Limited, a company established and existing under the laws of the Isle of Man, under registration number 068332C with its registered address at 26-28 Athol Street, Douglas, Isle of Man, IM1 1JB (the General Partner);

ROSSERLANE CONSULTANTS LIMITED, a company established and existing under the laws of the Isle of Man, under registration number 068332C with its registered address at 26-28 Athol Street, Douglas, Isle of Man IM1 1JB, as guarantor (Rosserlane);

……

WHEREAS

The Borrower wishes to borrow, and the Lenders wish to make facilities available in an aggregate sum of up to one hundred and twenty seven million Dollars (US$127,000,000) pursuant to and in accordance with the provisions of this agreement.

1.1 Definitions

……

Guarantors means the Borrower, Roanoaks, Mayfair, Swinbrook, SPV, Rosserlane, CEG BVI, and the General Partnership and "Guarantor" means any of them;

……

Obligors means the Borrower and Guarantors and Obligor means any of them;

……..

Construction of Certain Terms

In this Agreement, unless the context otherwise requires:

……..

(c) a "guarantee" also includes any other obligation (whatever called) of any person to pay, purchase, provide funds (whether by way of the advance of money, the purchase of or subscription for shares or other securities, the purchase of assets or services, or otherwise) for the payment of, indemnity against the consequences of default in payment of, or otherwise be responsible for any Indebtedness of any other person;

THE LOAN

2.1 Loans

The Lenders, relying upon the representations and warranties set out in Clause 14.1 (Representations and Warranties), agree to lend:

(a) the First Loan in the principal amount of one hundred and fifteen million Dollars ($115,000,000) to the General Partner (acting on behalf of the Borrower) during the First Loan Availability Period; and

(b) the Drilling Plan Loan in the principal amount of twelve million Dollars ($12,000,000) to the General Partner (acting on behalf of the Borrower) during the Drilling Plan Loan Availability Period,

in each case, upon and subject to the terms and conditions of this Agreement.

……

REPAYMENT

9.1 First Loan

The Borrower shall, repay the First Loan in full on the Final Repayment date.

9.2 Drilling Plan Loan

The Borrower shall repay the Drilling Plan Loan in full on the Final Repayment date.

JOINT AND SEVERAL OBLIGATIONS

10. The obligations of the Obligors to repay the Loans and to pay interest on the Loans, the fee specified in Clause 7 (Fees) and any other amounts under the Finance Documents are joint and several obligations.

……

GUARANTEE

19.1 Guarantee

In consideration of the Finance Parties entering into the Finance Documents and making the Loans available to the Borrower, the Guarantors jointly and severally and irrevocably and unconditionally:

(a) guarantee to each Finance Party punctual performance by an Obligor of their respective obligations under the Finance Documents;

(b) agree to pay as if they were primary obligor from time to time immediately on demand the full sum or sums of money which any Obligor is at any time liable to pay to any Finance Party under or pursuant to the Finance Documents (including for breach of any warranty, representation or covenant) and which has become due and payable but has not been paid at the time such demand is made;

……..

19.4 Waiver of Defences

The obligations of the Guarantors under this Clause 19 (Guarantee) will not be affected by an act, omission, matter or thing which, but for this clause, would reduce, release or prejudice any of its obligations under this Clause 19 (Guarantee) (without limitation and whether or not known to it or any Finance Party (or any agent or trustee on its behalf)) including:

(a) any time, waiver or consent granted to, or composition with any person;

……

19.8 Joint and several obligations of the Guarantors

The obligations of the Guarantors under this Agreement are joint and several obligations."

5. Concurrently with the Loan Agreement several other related financial agreements were made; a Deed of Warranty, a Security Agreement and a Participation Agreement.

6. The Security Agreement, which made provision for security for the loan advanced by the bank, stated as follows:

"THIS SECURITY AGREEMENT is dated 14 December 2006 (as amended on 14 May 2007) and is made by way of deed

BETWEEN:

(1) THE ENTITIES identified in Schedule 1 and each company which becomes a party to this Security Agreement by executing a Deed of Accession, each a Chargor and together the Chargors); and

(2) CREDIT SUISSE LONDON BRANCH (the Security Agent) acting as agent, nominee and trustee on all acts and obligations and receiving all sums as agent, nominee and trustee under this Security Agreement for and on behalf of each of the Beneficiaries (as defined below).

WHEREAS:

(a) The Lenders have agreed to make available to the Chargors certain term loan facilities (the Facilities) on and subject to the terms of the Loan Agreement.

(b) It is a condition precedent to the Lenders making the Facilities available that the Chargors enter into this Security Agreement.

……

1.1 Definitions

……

Secured Liabilities means:

(a) all present and future monies, obligations and liabilities (whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever and in any currency) of each Obligor to the Beneficiaries (or any of them) or the Security Agent (for an on behalf of the Beneficiaries) under each or any of the Finance Documents or any other document evidencing or securing any such liabilities;

……..

2.1 Covenant to pay

Each Chargor, as primary obligor and not merely as surety, covenants with the Security Agent that it will on demand pay or discharge (on an after-tax basis) the Secured Liabilities on the date or dates on which such Secured Liabilities are expressed to become due or apply and in the manner provided in the relevant Finance Document.

……..

4.1 Assignments

Each Chargor as continuing security for the payment, discharge and performance of the Secured Liabilities at any time owed or due to the Beneficiaries (or any of them), assigns and agrees to assign to the Security Agent (as agent and trustee for the Beneficiaries) absolutely all its right, title, interest and benefit (if any) in and to:

(a) the Insurances;

(b) the Material Contracts;

(c) the Scottish Partnership Interests; and

(d) the Inter Company Loans."

7. The Participation Agreement made provision for the sale of the interests of Rosserlane and Swinbrook in Caspian and for the manner in which the proceeds of sale were to be applied.

"3. EQUITY UPSIDE PAYMENT

3.1 If a Sale occurs and the amount of the Sale Proceeds are within the Low Range, the Selling Equity Owner shall ensure (and each of the other Equity Owners shall procure) that the Sale Proceeds are paid directly to the Bank at completion of the Sale for application by the Bank in the following order:

(a) firstly, payment to the Finance Parties of all outstanding principal, interest any other amounts due owing to them (or any of them) under the relevant Finance Documents; and

(b) secondly, payment to the Selling Equity Owner of any amount remaining of the Sale Proceeds after the deduction of the payments under Clause 3.1(a).

3.2 If a Sale occurs and the amount of the Sale Proceeds are within the Mid Range, the selling Equity Owner shall ensure (and each of the other Equity Owners shall procure) that the Sale Proceeds are paid directly to the Bank at completion of the Sale for application by the Bank in the following order:

(a) firstly, payment to the Finance Parties of all outstanding principal, interest any other amounts due and owing to them (or any of them) under the Relevant Finance Documents;

(b) secondly, to the Bank of 27.0% of the Sale Proceeds in excess of $180,000,000; and

(c) thirdly, to the Equity Owner of any amount remaining of the Sale Proceeds after the deduction of the payments under Clauses 3.2(a) and 3.2(b).

3.3 If a Sale occurs and the amount of the Sale Proceeds are within the Top Range, the Selling Equity Owner shall ensure (and each of the other Equity Owners shall procure) that the Sale Proceeds are paid directly to the Bank at completion of the Sale for application by the Bank in the following order:

(a) firstly, payment to the Finance Parties of all outstanding principal, interest any other amounts due and owing to them (or any of them) under the Relevant Finance Documents;

(b) secondly, to the Bank of 27.0% of the Sale Proceeds in excess of $180,000,000 and equal to or less than $400,000,000;

(c) thirdly, to the Bank of 12.0% of the Sale Proceeds in excess of $400,000,000 save that one-sixth of such payment will not be payable pursuant to this Clause if a Sale of the Equity Interest or the Assets is made to the Oil and Natural Gas Corporation Limited of India and fully and irrevocably completes prior to 1 March 2007; and

(d) fourthly, to the Equity Owner of any amount remaining of the Sale Proceeds after the deduction of the payments under Clauses 3.3(a) to (c)."

8. Provision was also made in the Participation Agreement for Credit Suisse to force a sale if a sale had not taken place within a certain time.

"MANDATORY SALE

4.1 If by the date which falls eight months after the date of this Agreement (the "Trigger Date"), no Sale of 100% of the Equity Interests of one of the Equity Owners or of 100% of the Assets has completed, the Bank shall be entitled to force the equity Owners to Sell, or procure the Sale of, the Equity Interests or the Assets (in whole or in part) to any purchaser provided that the Sale Proceeds from such Sale are not less than $180,000,000 ("Forced Sale").

4.2 For the purposes of effecting a Forced Sale, each of the Equity Owners:

4.2.1 hereby irrevocably appoints the Bank as its attorney to execute and do in its name or otherwise and on its behalf all documents, acts, deeds and things which the Bank shall in its absolute discretion consider necessary or desirable in order to implement the Forced Sale; and ….."

9. In the event Credit Suisse exercised its right to force a sale on 15 February 2008. The First and Second Claimants purchased the partnership interests of Rosserlane and Swinbrook. The terms of the Sale Agreement provided as follows:

"2. SALE AND PURCHASE

2.1 Upon the terms and subject to the conditions of this agreement, the Sellers shall sell and the Buyer shall purchase, on behalf of itself and the Buyer's Nominee, the Partnership Interests, with effect from Completion, free from any Encumbrance together with all accrued benefits and rights.

2.2 The consideration for such sale and purchase shall be the sum of two thousand and forty one million twenty six thousand seven hundred and forty seven US Dollars and forty one cents (US$241,026,747.41) to be satisfied in cash on Completion.

2.3 In addition to the amount payable pursuant to Clause 2.2, the Buyer shall procure the discharge of an outstanding debt of the Partnership owed to an affiliate of Credit Suisse in the amount of three million nine hundred and seventy three thousand two hundred and fifty two US Dollars and fifty nine cents (US$3,973,252.59) (the "Relevant Debt") by payment to Credit Suisse on Completion of the amount of three million nine hundred and seventy three thousand two hundred and fifty two US Dollars and fifty nine cents (US$3,973,252.59) The Buyer authorises Credit Suisse as its agent to apply such amount in satisfaction of the Relevant Debt.

2.4 The Buyer shall be the new general partner of the Partnership and hereby nominates the Buyer's Nominee to be the new limited partner of the Partnership.

3. COMPLETION

3.1 Completion shall take place at the offices of Herbert Smith, Exchange House, Primrose Street, London EC2A 2HS immediately after the execution of this agreement.

3.2 On Completion all (but not some only) of the steps set out below shall take place and, for the avoidance of doubt, each party shall be obliged to carry out its steps simultaneously with the other party's steps:

(a) The Sellers shall deliver to the Buyer:

(i) the duly executed deed of assumption and retiral and assignation of partnership interests in respect of Rosserlane as general partner in the Partnership and the Rosserlane Partnership Interest in the form attached as schedule 3;

(ii) the duly executed deed of assumption and assignation of partnership interests in respect of the Swinbrook Partnership Interest in favour of the Buyer's Nominee in the form attached as schedule 4; and

(iii) certificates of incorporation and statutory forms of the Partnership as held by Companies House Scotland.

(b) The Buyer shall:

(i) pay two hundred and forty five million US Dollars (US$245,000,000) (being the consideration specified in clause 2.2 and the amount of the Relevant Debt specified in clause 2.3) by way of bank transfer into the Proceeds Bank Account and receipt by the Proceeds Bank of such sum shall be a complete discharge to the Buyer of its obligation to pay such sum; ……..."

10. The "deed of assumption" provided as follows:

"3. ASSIGNATION

In consideration of the payment by the Assignee to the Assignor of two hundred and forty five million US dollars (US $245,000.000) under the Sale and Purchase Agreement dated 15th February 2008 between the Assignor, Assignee and the Limited Partner (receipt of which is hereby acknowledged), the assignor HEREBY ASSIGNS its whole right, title and interest in and to the Assigning Interest to the Assignee.

4. ASSUMPTION OF OBLIGATIONS

The Assignee hereby acknowledges its assumption of the obligations of the Assignor under the Partnership Agreement in respect of the Assigning Interest and agrees to be bound by the terms of the Partnership Agreement as if it were an original signatory as a general partner thereto.

5. RETIREMENT AND RELEASE OF ASSIGNOR

Immediately following the assumption of the Assignee as a general partner of the Partnership and the assignation to the Assignee of the Assigning Interest, the Assignor retires from the Partnership and ceases to be a partner of the Partnership in all respects and thereafter shall have no further rights or claims, or obligations as partner of the Partnership. The Assignee and the Limited Partner hereby consent to the retiral of the Assignor and release the Assignor from all obligations under the Partnership Agreement in respect of the Assigning Interest."

11. Notwithstanding the execution and completion of the Sale Agreement it proved necessary for the Claimants to commence proceedings against the Defendants for a declaration that the First and Second Claimants were the owners of Caspian and for delivery up of its assets. Interim relief was sought and obtained and later resolved by a Consent Order dated 19 March 2008 which included a declaration that the First and Second Claimants had purchased and were the owners of the entirety of the partnership interests in Caspian.

The Counterclaim

12. On 1 April 2008 notice of a claim pursuant to a "Resolution" dated 5 January 2007 was given by Rosserlane to Caspian. The Resolution provided as follows:

"CASPIAN ENERGY GROUP (the "Partnership")

WRITTEN RESOLUTION of Rosserlane Consultants Limited as the General Partner of the Partnership ("Rosserlane") dated 5 January 2007

WHEREAS:

(A) A Loan Agreement was concluded between the Partnership and Credit Suisse Bank, London Branch, on 14 December 2006. The General Partner is interested in the transaction as a result of its interest in the capital in the Partnership;

(B) The Loan was concluded by the Partnership in order to meet certain short term funding objectives of the Partnership;

(C) The fundraising took the form of a loan made, inter alia, to the Partnership by Credit Suisse London Branch ("Credit Suisse") in a principal aggregate sum of US$127,000,000 (the "Loan") the terms of which were provided for in the loan agreement entered into between, inter alia, Credit Suisse and the Partnership on 14 December 2006;

(D) The Partnership is seeking to conclude a sale by way of its partners, Rosserlane Consultants Limited and Swinbrook Developments Limited.

IT IS RESOLVED THAT:

1. On the conclusion of a sale of the Partnership, the debts of the Partnership in respect of the Loan and all related interest and costs are to be repaid from the proceeds of the sale, as an interest free loan from Rosserlane to the Partnership. If such a sale is concluded on the basis that no liabilities pass to any eventual purchaser, then it is agreed that the Partnership will not repay this loan. If such a sale is concluded on the basis that liabilities will pass to any eventual purchaser, then it is agreed that the Partnership will repay this loan to Rosserlane.

Duly authorised for and on behalf of Rosserlane Consultants Limited, General Partner of CASPIAN ENERGY GROUP:
(Signature)
Dr. Zaur Leshkasheli, Director
For and on behalf of Rosserlane Consultants Limited"

13. On 9 June 2008 the Second Defendant's Counterclaim, relying upon the Resolution and other causes of action, was issued. The issue before the Court is whether that counterclaim has any real prospect of success.

The arguments

14. Mr. Berry QC, on behalf of the Second Defendant, has submitted that as between Caspian and Rosserlane, the latter was guarantor of the former's indebtedness to the bank. He said that the likely sequence of events after the First and Second Claimants had paid the price for the partnership interests of Rosserlane and Swinbrook to Credit Suisse was that the bank paid it to Rosserlane who in turn paid back to the bank the amount of the debt under the Loan Agreement. Counsel submits that in doing so Rosserlane discharged Caspian's debt to the bank as guarantor or surety and accordingly Caspian is obliged to indemnify Rosserlane in the amount of the debt. Alternatively, Caspian is obliged to make restitution to Rosserlane in the sum of the debt. Further or alternatively, that sum is repayable by Caspian to Rosserlane pursuant to the debt evidenced by the Resolution.

15. In order to show that a party may be a principal debtor as against the creditor but a surety as against another debtor, and why, reliance was placed upon *Chitty on Contracts* 29th ed. para.44-003:
"It is by no means unusual for a party to a contract to be a principal debtor as against the creditor, but surety as against another debtor. Such an arrangement is commonly entered into where the creditor wishes to avoid the technical rules relating to contracts of suretyship under which the surety may become discharged from liability in various circumstances."

16. In support of the right to recoupment from one debtor in favour of another and the circumstances in which such right existed reliance was placed on *Goff and Jones, The Law of Restitution 7th* ed. para.15-015:

"It is therefore critical that the payment discharged the defendant's liability to a third party, who will normally be the person exercising the compulsion. The liability will generally be a debt. There is no doubt that the defendant's liability will be discharged if both he and the claimant are liable *in solidum* for the same debt. There are many cases. Prominent among them is ***Brook's Wharf Ltd. v Goodman Bros***. [1937] 1 KB 534, where bonded warehousemen who had been compelled by statute to pay customs duties owed by their customers. In the words of Lord Wright MR:

> 'The essence of the rule is that there is liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment because his debt is discharged either entirely or *pro tanto*, whereas the defendant is primarily liable to pay as between himself and the plaintiff.' "

17. Mr. Leggatt QC, on behalf of the Claimants, has submitted that the principal ways in which the counterclaim is put are defeated by the terms of the Loan Agreement. That agreement, to which Rosserlane and Caspian were party, provided that Rosserlane was jointly and severally liable for the indebtedness to the bank. There was therefore no scope for saying that as between Rosserlane and Caspian the former was the guarantor and the latter was the principal debtor. That being so there is no basis for the suggested claim as guarantor or for the suggested claim in restitution. As to the claim in debt based upon the Resolution, that document did not contain or evince a contractual undertaking on behalf of Caspian. If it did, such rights as it conferred had been assigned to the First and Second Claimants pursuant to the Sale Agreement or released pursuant to the Deed of Assumption. In any event, the terms of the Loan Agreement and the other financial agreements precluded the suggested claim based upon the Resolution.

18. Mr. Leggatt QC did not dispute that Rosserlane would have a claim with a real prospect of success if the relationship between Rosserlane and Caspian were one of guarantor and principal debtor. Nor did Mr. Berry QC say that the Claimants would have a defence if, as between Rosserlane and Caspian, each was a principal debtor to the bank. Thus the claims based upon the law of guarantee and the law of restitution depended upon the true construction of the Loan Agreement and associated financial agreements.

19. It was common ground that if this matter proceeded to trial there would be no further background or factual matrix than was before me which would inform the construction of the Loan Agreement and associated financial agreements. The Second Defendant adduced evidence on certain matters but they were not disputed for the purpose of this application. It therefore appeared that this was a case where, if the counterclaim had no real prospect of success, there was no "other compelling reason why the counterclaim should be disposed of at trial". Although Mr. Berry QC referred to this matter in his Outline Submissions it was not pressed during his oral submissions.

Discussion and Conclusions

20. The parties to the Loan Agreement included Credit Suisse, Caspian and Rosserlane. The list of parties described Caspian as "the Borrower" and Rosserlane as "guarantor". The recital stated that the Borrower wished to borrow US$127m.

21. Clause 2.1 provided that the bank agreed to lend US$127m. to "the General Partner (acting on behalf of the Borrower)". It is common ground that the General Partner is Rosserlane. Clause 4 provided that the Borrower may request the drawdown of the loan and clause 9.1 provided that the Borrower shall repay the loan.

22. These matters all favoured the construction put forward by counsel for the Second Defendant.

23. However, clauses 10 and 19 favour the construction put forward by counsel for the Claimants.

24. The Obligors were defined by clause 1.1 as "the Borrower and the Guarantors and Obligor means any of them". The Guarantors were defined as *"the Borrower, … Swinbrook, … Rosserlane …* and *"Guarantor" means any of them*."

25. Clause 10 provided as follows:
"The obligations of the Obligors to repay the Loans and to pay interest on the Loans ……are joint and several obligations."

26. Clause 19 provided that in consideration of the bank making the loan "available to the Borrower, the Guarantors jointly and severally and irrevocably and unconditionally (a) guarantee to each Finance Party punctual performance by any Obligor of their respective obligations under the Finance Documents" and "(b) agree to pay as if they were the primary obligor from time to time immediately on demand the full sum or sums of money which any Obligor is at any time liable to pay to any Finance Party……."

27. The definitions of Obligor and Guarantor and the terms of clauses 10 and 19 suggest that Caspian, Rosserlane and Swinbrook (and the other parties to the Loan Agreement save the bank) are each jointly and severally liable to repay the indebtedness to the bank and to guarantee each other's liability to repay that debt. They therefore favour the construction put forward on behalf of the Claimants.

28. However, clause 9 identified the Borrower as the person who shall repay the loan. Counsel for the Second Defendant submitted that clause 9 therefore made clear that Caspian was the primary debtor. Whilst he accepted that clause 10 provided for Rosserlane to have a joint and several liability to repay the loan to the bank that was to ensure that as between the bank and Rosserlane the bank had a primary claim and was not reliant only upon a secondary claim against Rosserlane as guarantor. Consistent with this was clause 19 which provided that Rosserlane agreed to pay "as if they were the primary obligor" and that defences otherwise available to a guarantor were waived.

29. The difficulty with this submission, as it appears to me, is that the contractual structure of the Loan Agreement, to which both Caspian and Rosserlane were party, is that each Obligor, including Caspian and Rosserlane, is jointly and severally liable to repay the debt and each Guarantor, including Caspian and Rosserlane, is also jointly and severally liable to guarantee to the bank performance by each Obligor of its obligations. Thus, each party (save the bank) is at one and the same time an obligor and a guarantor. Since this is the effect of the Loan Agreement and Caspian and Rosserlane are both parties to the Loan Agreement it is not possible, in my judgment, for Rosserlane to say that, as between Rosserlane and Caspian, Rosserlane was only a guarantor of Caspian's obligations as the primary obligor. They both agreed that each was a primary obligor and a guarantor. Rosserlane is not able to contend that there is any difference between the nature of its liability to repay the loan and the nature of Caspian's liability to repay the loan because Rosserlane and Caspian have agreed that their obligations are identical.

30. The agreement between Caspian and Rosserlane that each was a primary obligor is also reflected in the Security Agreement. Clause 2.1 provided that each Chargor (which is defined as including Rosserlane and Caspian) "*as primary obligor and not merely as surety, covenants….that it will on demand pay or discharge….the Secured Liabilities*".

31. Pursuant to the terms of the Participation Agreement, to which Caspian and Rosserlane were party, the payment of the proceeds of sale to the bank, to the knowledge of and with the consent of Rosserlane and Caspian, were applied to repay the debt to the bank. That repayment discharged both the liability of Caspian and the liability of Rosserlane to pay that debt. It matters not, in my judgment, whether notionally or actually, the bank paid the proceeds to Rosserlane who then paid the debt to the bank. That is because Rosserlane and Caspian agreed, by clause 3 of the Participation Agreement, that the sale proceeds were paid to the bank "*for application by the Bank*" to payment of the debt.

32. In those circumstances there is, in my judgment, no scope for Rosserlane to claim a right to be indemnified by Caspian, either by way of the law of guarantee or pursuant to a right to restitution.

33. This conclusion accords with business common sense. The bank has, in substance, provided finance to Dr. Leshkasheli and the group of companies and other entities, including Rosserlane and Caspian, ultimately controlled by him. It would be a remarkable effect of the Loan Agreement and the Participation Agreement, and one contrary to business common sense, if a sale of the partnership interests of Rosserlane in Caspian (a sale forced by the bank to protect its interests) and the resulting repayment of the debt to the bank out of the proceeds of sale were to result in Caspian (an entity formerly controlled by Dr. Leshkasheli) having to pay Rosserlane (a company still controlled by Dr. Leshkasheli) the amount of the debt. In describing such effect as remarkable and contrary to business common sense I have not ignored the evidence, assumed to be true for the purposes of this application, that Caspian passed into the control and ownership of the Claimants burdened with its liabilities and that the market value of the partnership interests in Caspian was considerably more than the aggregate of the price paid

and the amount of the debt. The construction of the Loan Agreement put forward on behalf of the Second Defendant remains remarkable because it would enable Dr. Leshkasheli to have the loan repaid to the bank (which was the intended effect of the Participation Agreement) and, because of that repayment, to have another of his companies (which was party to the Loan Agreement and jointly and severally liable to repay the debt) indemnified in the amount of that repayment.

34. The claim based upon the Resolution depends upon the meaning and effect of the Resolution. It is said to be an acceptance by Caspian of a liability to repay an interest free loan to Rosserlane. The Claimants say that it is not because it is not an instrument signed by or on behalf of Caspian.

35. The Second Defendant's case is that Caspian is a Scottish Partnership which is a legal person and can only act through its General Partner, Rosserlane. For the purposes of this application there is no dispute as to that. Reference was made to the terms of the Resolution. Firstly, it was headed "Caspian Energy Group (the Partnership)". Secondly, the resolution was "of Rosserlane…..as the General Partner of the Partnership". Thirdly, the wording states that "it is agreed that the Partnership will repay this loan to Rosserlane". Fourthly, it is signed by Dr. Leshkasheli for and on behalf of Rosserlane "duly authorised for and on behalf of Rosserlane Consultants Limited, General Partner of Caspian Energy Group." Counsel submitted that in signing the Resolution Rosserlane was acting on behalf of Caspian. Thus the resolution was a unilateral promise of Caspian and there was evidence that in Scots law (which it was common ground governed the Resolution) a unilateral promise was binding. Moreover, the Scots lawyer Mr. Simon Brown has expressed the opinion that the Resolution "is valid as an instrument of Caspian" relying upon principles of Scots law.

36. Counsel for the Claimants took the short and simple point that Rosserlane did not purport in signing the Resolution to do so for and on behalf of Caspian. The resolution was not therefore a unilateral promise by Caspian. The explanation for Rosserlane acting "as the General Partner of the Partnership" was that such capacity explained the basis upon which Rosserlane was making the loan. Clause 4(ii) of the Partnership Agreement dated 15 December 2003 between Rosserlane and the predecessor of Swinbrook provided that finance for the purpose of the Partnership was to be provided by way of interest free loans from the Partners pro rata according to the proportions of their original contributions. (It does not appear that Swinbrook paid any proportion of the loan but neither counsel made anything of this.)

37. The argument on behalf of the Claimants appears to me to be very persuasive. However, since the Resolution is governed by Scots law and a Scots lawyer, relying upon Scots law, has expressed the opinion that it is valid as an instrument of Caspian I do not feel able to say that the argument on behalf of the Second Defendant lacks a real prospect of success.

38. The next point taken by Counsel for the Claimants was that if the Resolution was a promise by Caspian the right of Rosserlane to repayment had been assigned to the Claimants pursuant to clause 2.1 of the Sale Agreement. The subject matter of the sale was described as "the Partnership Interests, with effect from Completion, free from any Encumbrance together with all accrued benefits and rights". Counsel for the Claimants submitted that the assumed right to repayment pursuant to the Resolution was one of the accrued benefits and rights sold to the Claimants. It was accepted that not every accrued benefit and right of Rosserlane passed to the Claimants; only such rights as Rosserlane had as General Partner.

39. Counsel for Rosserlane submitted that the right to repayment was not an accrued benefit or right. Firstly, it was said not to be an *accrued* benefit or right. It would only accrue when the sale price had been paid and the interest free loan made by Rosserlane to Caspian. Secondly, it was said not to be a partnership benefit or claim because it was a claim against Caspian. Thirdly, the means by which effect was given to the sale was the Deed of Assumption and all that was assigned was "the assigning interest" which, it was common ground, did not include the (assumed) right to repayment pursuant to the Resolution.

40. I am not persuaded by any of these three points. I do not consider that any of them has a real prospect of success. Firstly, either the right to repayment accrues on sale (because the making of the loan occurs simultaneously with the paying of the price) or, if there is a scintilla of time between the paying of the price and the making of the loan, it cannot have been intended that such a scintilla of time would prevent the right being described as having accrued on sale. Secondly, the rights which are transferred are those which Rosserlane had as general partner. The right to repayment was a right of Rosserlane as general partner because that was the capacity in which it had made the loan. Thirdly, the fact that the Deed of Assumption does not refer to the sale of the accrued benefits and rights does not prevent them passing pursuant to the terms of the Sale Agreement.

41. If I am wrong in concluding that the right to repayment was an "*accrued benefit or right*" then it was released pursuant to clause 5 of the Deed of Assumption. That clause provided that Rosserlane "*shall have no further rights or claims, or obligations as partner of the Partnership.*" In response it was said that the right to repayment was not a partnership right. However, it seems to me that it was clearly a right which Rosserlane had as partner of the Partnership. The interest free loan had been made because Rosserlane was the general partner.

42. I have therefore concluded that if Rosserlane had a right to repayment from Caspian pursuant to the terms of the Resolution it has either been transferred to the Claimants or released and cannot provide Rosserlane with a counterclaim.

43. In these circumstances it is unnecessary to deal with the final point relied upon by the Claimants. I shall however deal with it briefly in case this matter goes further.

44. It was said that in any event the right to repayment pursuant to the Resolution was inconsistent with the Loan Agreement which was restated on 13 December 2007 after the date of the Resolution and therefore could not be effective. I agree that Caspian's obligation to repay the interest free loan to Rosserlane is contrary to the scheme and business sense of the Loan Agreement but I am not persuaded that on that account it cannot be effective as between Rosserlane and Caspian. If this had been the only point I would not have said that there was no real prospect of the counterclaim succeeding on account of it.

45. For these reasons I have concluded that the counterclaim has no real prospect of success and that there is no other compelling reason why the counterclaim should be disposed of at trial. The Claimants are entitled to summary judgment upon the counterclaim.

The Freezing Order

46. It follows from my decision on the application for summary judgment that the freezing order obtained by the Defendants in support of the counterclaim must be set aside.

47. Had the application for summary judgment failed it was nevertheless submitted that the freezing order should be set aside. Caspian had sold its interest in Shirvan Oil Limited on 20 March 2008 in return for two promissory notes in a total amount of US$245m. These notes were, or were to be, pledged to Brander Enterprises Limited as security for loans made to the First Claimant to finance the acquisition of Caspian. Caspian has since been dissolved and its assets have passed to the First Claimant which is now in liquidation in Cyprus. It was therefore said that there was no purpose in continuing the injunction because the assets of the First Claimant were now controlled by the liquidator who would distribute them in accordance with the law.

48. It is unnecessary for me to decide whether, in these circumstances, it would be appropriate to continue the injunction. But in case this matter should go further I will indicate what my decision would have been. In principle there can be no purpose in a freezing order where the company on whom that order is served is in liquidation. A freezing order cannot affect priorities in the liquidation and the liquidator must be permitted to distribute the assets of the company in accordance with the law governing the liquidation.

49. However, in the present case Rosserlane argues that the sale of Caspian's interest in Shirvan Oil Limited was not at arm's length and should be set aside and that the pledge of the promissory notes was a preference of one creditor to another (assuming, contrary to my finding, that Rosserlane has a good claim against Caspian) and should be set aside. Rosserlane further says that there is doubt as to where the promissory notes are. There was conflicting evidence as to whether the delivery of the notes to Brander had been completed or had been prevented by the freezing order. There was no clear evidence as to who had possession of them. They might still be in the possession of the First Claimant as opposed to the possession of the liquidator.

50. Although the First Claimant can now only act through the liquidator I would have decided that there was sufficient force in these points to have justified continuing the freezing order notwithstanding the liquidation of the First Claimant.

Conclusion

51. The Claimants are entitled to summary judgment upon the counterclaim and the freezing order issued in support of the counterclaim should be discharged.

52. I will ask counsel to agree the terms of an order giving effect to my decision.

George Leggatt QC and Sarah Ford (instructed by Grundberg Mocatta Rakison LLP) for the Claimants
Steven Berry QC (instructed by Masseys LLP) for the Defendants