IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2023-404-98
[2023] NZHC 230

BETWEEN	TARGA CAPITAL LIMITED Plaintiff
AND	WESTPAC NEW ZEALAND LIMITED Defendant

Hearing:	8 February 2023
Appearances:	D H McLellan KC, J W Little and J Morton for the plaintiff S M Hunter KC, S C Gollin and A F Church for the defendant
Judgment:	17 February 2023

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 17 February 2023 at 3.00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

[1] Targa Capital Ltd (**Targa**) banks with Westpac New Zealand Ltd (**Westpac**). Westpac has given notice to Targa that it will be withdrawing from providing banking services to Targa and will be closing Targa's bank accounts. Targa disputes Westpac's entitlement to do so. Pending resolution of that dispute, Targa applies for an interim injunction prohibiting Westpac from terminating its banking relationship with Targa and from closing Targa's bank accounts.

[2] Westpac opposes Targa's application, though it has agreed not to terminate the banking relationship or close the bank accounts pending judgment on the application.

[3] To succeed on its application, Targa must first show that there is a serious question to be tried. If that is shown, the Court will then consider the balance of convenience and where the overall justice lies.[1]

Background

Targa, HBHL and Endurance

[4] Targa is a New Zealand company. It was formed in 2016 for the purpose of funding Helena Bay Holdings Ltd (**HBHL**). HBHL owns and operates Helena Bay Lodge, a luxury lodge in Northland.

[5] HBHL is loss-making and depends on Targa. It employs around 25 staff in Northland. For ten years it has worked to eradicate predators from the 340-hectare property around Helena Bay Lodge. Its work has seen kiwi return after 100 years.

[6] Targa is now an active investor in the New Zealand property and funding sector, including investing with Ockham Group Ltd (**Ockham**) and through a lending syndicate. Targa is currently involved in development projects with an estimated completion value of approximately $750 million which, in turn, employ an estimated 200 workers.

[7] The sole shareholder of both Targa and HBHL is Endurance Capital Ltd (**Endurance**). Targa and Endurance have the same three directors: Christopher Seel,

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1 *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344 at [23]–[24].

a New Zealand businessperson and investor who lives in Auckland; Geoffrey Hosking, a New Zealand solicitor and partner at Anthony Harper; and Ian Cochrane, a New Zealand citizen who lives in Moscow. Mr Seel owns all the shares in Endurance.

The Raglan Trust

[8] Endurance holds it shares in Targa and HBHL on trust under the terms of the Raglan Trust, of which it is the sole trustee. The Raglan Trust was settled in 2009 to benefit Alexander Abramov and his family. Mr Abramov is the co-founder of Russia's largest steel company. The discretionary beneficiaries of the Trust included, until recently, Mr Abramov, his wife and children.

[9] Mr Abramov has, over several years, gifted approximately $260 million to the Raglan Trust (or to HBHL).

[10] In October 2018, the terms of the Raglan Trust were amended. Among other things, the definitions of the Trust's discretionary and final beneficiaries were amended so that any individual who suffered an "Emergency Event" would be "deemed not to be a beneficiary of this Trust" for the period of the Emergency Event. An "Emergency Event" was defined as, among other things, the individual being included on a list of restrictive measures issued by the United Kingdom, France, Germany, Italy, Japan, Canada or the United States of America.

[11] The trustee was also empowered, in its absolute discretion, to determine that a "Deemed Emergency Event" had arisen in respect of an individual, in which case that individual was deemed to have suffered an Emergency Event for the period that the Deemed Emergency Event continued to apply (as determined by the trustee).

[12] In short, if a beneficiary of the Raglan Trust suffered an Emergency Event or was deemed by the trustee (Endurance) to have suffered an Emergency Event, that individual was deemed not to be a beneficiary for the period of the Event. Effectively, that individual was deemed to be suspended as a beneficiary.

Mr Abramov is deemed to be suspended as a beneficiary

[13] On 24 February 2022, Russia invaded Ukraine. The invasion was condemned by many Western nations.

[14] On 11 March 2022, Endurance passed a resolution as trustee of the Raglan Trust. Endurance noted that recent international events had the potential to result in New Zealand-based sanctions against wealthy Russians with investment interests in New Zealand and that this had caused Endurance to consider the Deemed Emergency Events provisions of the trust deed. Endurance determined that an Emergency Event had arisen in respect of Mr Abramov.

[15] The effect of that resolution was that Mr Abramov was deemed to be suspended as a beneficiary of the Raglan Trust.[2] That deemed suspension remains in effect. Mr Abramov's wife and children have not been deemed to be suspended as beneficiaries.

Sanctions are imposed on Mr Abramov

[16] Western nations have identified Mr Abramov as being one of a small number of "oligarchs" with close ties to Russia's president. Some of those nations have imposed sanctions on Mr Abramov.

[17] On 7 April 2022, Mr Abramov was designated in Australia as being subject to targeted financial sanctions and a travel ban. Australia revoked that designation on 16 September 2022 but redesignated him the same day. At the time, Mr Abramov was seeking a judicial review of his designation.

[18] The United Kingdom imposed financial sanctions on Mr Abramov on 2 November 2022. New Zealand chose not to impose financial sanctions on Mr Abramov but on 11 October 2022 imposed travel-related sanctions on him and his immediate family.

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[2] Targa says the deemed suspension became effective on 24 March 2022. Although Targa does not say, I presume that was the date on which Endurance gave notice of its determination to Mr Abramov. The precise date is of no moment for this judgment.

Targa's banking facilities with Westpac, and Westpac's notice terminating the facilities

[19] Westpac is a wholly owned subsidiary of an Australian bank, Westpac Banking Corporation (**WBC**). With WBC and other related companies, Westpac is part of the wider Westpac group of companies (**Westpac Group**).

[20] WBC has a branch in New Zealand (**WBC NZ Branch**). Westpac uses the WBC NZ Branch to provide its customers with certain services, including international payment services and same day cleared payment services.

[21] Targa opened business bank accounts with Westpac in 2017. It has two accounts, a transactional account and a savings account. Both are in credit. Targa does not have an overdraft or any other debt facility with Westpac.

[22] The terms and conditions governing Targa's banking relationship with Westpac entitle Westpac to terminate the relationship "if Westpac believes it has reasonable grounds for doing so", provided Westpac gives 14 days' notice.

[23] From April to September 2022 (after Mr Abramov was sanctioned in Australia), Westpac undertook an internal review to ascertain whether there were any connections between Mr Abramov and any Westpac customers. It identified a link between Targa and Mr Abramov. Westpac became concerned about the risk providing banking services to Mr Abramov posed to Westpac and the Westpac Group. Westpac perceived this risk as arising notwithstanding that Mr Abramov had not been sanctioned in New Zealand. This was because of the perceived implications for WBC and for Australian resident directors of Westpac. Both WBC and the Australian resident directors are bound by Australia's sanctions regime.

[24] New Zealand imposed travel-related sanctions on Mr Abramov on 11 October 2022. Soon thereafter, Westpac introduced measures that it considered would mitigate the risk of WBC or Westpac's Australian resident directors breaching Australian sanctions, while allowing Westpac to continue to provide Targa with domestic banking services pending further investigation into Targa's relationship with Mr Abramov. WBC and the Australian resident directors were recused from decision-making regarding Targa's accounts, and Westpac ceased providing Targa with the

services (such as international payment services and same day cleared payment services) that were provided through the WBC NZ Branch.

[25] Westpac wrote to Targa on 14 October 2022. It advised that it was no longer able to provide certain services to Targa. Westpac also requested information from Targa on its relationship with Mr Abramov. Targa responded on 2 November 2022. Westpac wrote again to Targa on 22 November 2022, requesting further information and documents. Targa responded on 28 November 2022.

[26] Targa considered that its responses provided Westpac with a significant volume of evidence, all to the effect that Targa, and related entities including Endurance, HBHL and the Raglan Trust, were governed independently of Mr Abramov and were not within his control.

[27] Westpac was not satisfied that was the case. By letter dated 7 December 2022, Westpac gave notice to Targa that, as from 21 December 2022, it would withdraw from providing banking services to Targa and would close Targa's bank accounts.

[28] Further correspondence ensued. Initially, Targa sought, and Westpac granted, an extension of the date on which Targa's accounts would be closed. On 9 January 2023, Targa disputed Westpac's entitlement to close Targa's accounts. Westpac responded on 10 January 2023, for the first time identifying the reasons for its decision. Westpac said it was not satisfied that Mr Abramov did not retain ultimate control of Targa. As such, Westpac believed that continuing to provide banking services to Targa put Westpac entities and personnel at risk of breaching United Kingdom and Australian sanctions and of breaching contractual obligations to third parties in the United Kingdom and Australia, that expressly required Westpac to comply with those countries' sanctions regimes. Westpac said it therefore believed it had reasonable grounds for withdrawing banking services from Targa.

The contract between Westpac and Targa

[29] The contract under which Westpac provides banking services to Targa includes a term addressing Westpac's right to close accounts and withdraw products and services (**the termination clause**):

Closing accounts and withdrawing products and services.

…

Westpac may close your account or withdraw a product or service if Westpac believes it has reasonable grounds for doing so provided you will be given at least 14 days' notice in accordance with the Notifications section of these General Terms and Conditions. Westpac may close your account or withdraw a product or service immediately and without prior notice if:

- Westpac learns of your or any guarantor's death, lack of legal capacity, or that you or any guarantor has suffered a Bankruptcy Event or an Insolvency Event;

- any third party claims an interest in any of your accounts;

- there is not enough money to cover payment instructions or other obligations (including obligations which will or may arise later and Westpac bank charges);

- Westpac is required to by a court order or any law or regulation;

- Westpac determines that you are a "politically exposed person" (as defined in the Anti-Money Laundering and Countering Financing of Terrorism Act 2009);

- you have acted unlawfully;

- you have breached these General Terms and Conditions or any other applicable terms and conditions; or

- you have acted abusively to Westpac's staff.

…

[30] An additional clause deals with anti-money laundering and sanctions:

Anti-money laundering and sanctions.

You agree to provide all information to Westpac which Westpac requires in order to manage its anti money-laundering and countering terrorism-financing obligations, to manage its economic trade sanctions risks, or to comply with any laws, rules or regulations in New Zealand or any other country. You agree that Westpac may refuse to establish a business relationship with you, may be required to delay, defer, stop or refuse to process any transaction, or may terminate its business relationship with you at any time without notice, if you fail to provide this information to Westpac in the manner and timeframe specified by Westpac.

You agree that Westpac may delay, defer, stop, or refuse to process any transaction without incurring any liability if Westpac knows or suspects that:

- the transaction will or may breach any laws or regulations in New Zealand or any other country; or

> - the transaction involves any person (natural, corporate or governmental) who is itself sanctioned, or is connected directly or indirectly, to any person (natural, corporate or governmental) who is sanctioned, under economic and trade sanctions imposed by any country.
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> You agree that, unless you have disclosed to Westpac that you are acting in a trustee capacity or on behalf of another party, you are taken to have warranted to Westpac that you are acting solely on your own behalf when opening or operating an account or service or undertaking any transaction with Westpac.

[31] Westpac's exercise of any discretion under the banking contract is controlled by the following (**the discretion clause**):

> **Exercise of Westpac's discretion.**
>
> When we exercise discretion under these General Terms and Conditions or any other applicable terms and conditions, we will do so in a reasonable and consistent way. We have provided some examples in this document of when we may exercise a discretion.

Targa's substantive claims

[32] Targa advances two substantive claims against Westpac. First, it says Westpac would be acting in breach of contract were it to close Targa's accounts and withdraw banking services. There are two aspects to its breach of contract claim:

(a) Targa says that the termination clause, properly construed, requires Westpac to have a *reasonable* belief it has reasonable grounds to close Targa's accounts. Targa says Westpac has no such reasonable belief, and so is not entitled to close Targa's accounts.

(b) Alternatively, if Westpac is entitled under the termination clause to close Targa's accounts, to do so would be an exercise of a discretion. Targa says that Westpac's exercise of that discretion to close the accounts would be unreasonable and therefore would be in breach of the discretion clause.

[33] Secondly, Targa says that the closure of its accounts and withdrawal of banking services would be unconscionable conduct in breach of s 7 of the Fair Trading Act 1986 (**the FTA**).

Is there a serious issue to be tried on Targa's breach of contract claim?

[34] I will deal separately with the two aspects of Targa's breach of contract claim.

The termination clause

[35] The position at common law is that, absent an agreement to the contrary or statutory impediment, a contract by a bank to provide banking services to a customer is terminable by the bank upon reasonable notice.[3]

[36] Mr McLellan KC, counsel for Targa, submitted that the termination clause modified this common law default position. He said that the clause's requirement that Westpac believe it has "reasonable grounds" would be redundant if it did not modify the default position. Properly construed, including in view of the critical importance of banking facilities to operate in modern society, he submitted the clause requires Westpac to have a reasonable basis of objective fact for believing it has reasonable grounds to terminate. He said this interpretation was supported by the recent finding, in *The Christian Church Community Trust v Bank of New Zealand* that it was seriously arguable that "there must be reasonable cause to terminate a banking relationship".[4]

[37] In essence, Targa asks that the words in the termination clause "if Westpac believes it has reasonable grounds for [terminating]" be interpreted to mean "if Westpac *reasonably* believes it has reasonable grounds for [terminating]".

[38] The plain language of the termination clause requires an inquiry into Westpac's subjective belief as to whether it has reasonable grounds to terminate. Targa's interpretation would flip a subjective inquiry to an objective inquiry. It would introduce an objective qualifier to Westpac's belief that the contract did not include. Such objective qualifiers are found elsewhere in the contract:

(a) Westpac may immediately suspend the operation of an account "where Westpac *reasonably believes* you [are] using … a service illegally".

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3 *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 127; *Prosperity Ltd v Lloyds Bank Ltd* (1923) 39 TLR 372; *Hill v National Bank of New Zealand* [1985] 1 NZLR 736 (HC) at 744; and *National Commercial Bank of Jamaica Ltd v Olint Corporation Ltd* [2009] UKPC 16 at [1].

4 *The Christian Church Community Trust v Bank of New Zealand* [2022] NZHC 3271at [28].

(b) "Westpac may impose such restrictions as it *reasonably thinks fit* for the efficient processing of transactions …".

(c) "Where Westpac *reasonably believes* that you have used or allowed your account to be used to process fraudulent or unauthorised transactions … you may be liable for some or all of the loss suffered".

(d) "In addition to Westpac's rights to close your accounts and withdraw any product or service … set out in these General Terms and Conditions, Westpac can also suspend or cancel your access to a Westpac Electronic Banking Service without prior notice … on any reasonable grounds, including … where, in Westpac's *reasonable opinion*, you have misused any Westpac Electronic Banking Service".

[39] Given those repeated uses of an objective qualifier, and the absence of such a qualifier on Westpac's belief in the termination clause, Targa's interpretation is not tenable. It would involve an illegitimate re-writing of the clause.

[40] As noted, Targa sought support for its interpretation in *The Christian Church Community Trust v Bank of New Zealand*.[5] There, the contract stated that "We [the bank] can close your account … for any reason." A non-exhaustive list of possible reasons followed. Dunningham J noted that there were not even draft pleadings from the plaintiff and that it was therefore difficult to assess the merits of the plaintiffs' claims. Her Honour continued:[6]

> That said, I accept that the assertion on behalf of the applicants that it is seriously arguable that there are constraints on the exercise of the power to terminate a contract, particularly given the importance of banking facilities to function in today's society. In other words, there must be reasonable cause to terminate a banking relationship …

[41] The first sentence in that passage does not assist Targa. It is concerned with constraints on the *exercise* of a power to terminate. It is well-established, and not disputed by Westpac, that there are constraints on the exercise of contractual

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5 *The Christian Church Community Trust v Bank of New Zealand* [2022] NZHC 3271.
6 At [28].

discretions such as an express power to terminate. In this case, there are express constraints in the discretion clause (which is the basis of the second aspect of Targa's breach of contract claim, considered next). The current interpretative issue, by contrast, is concerned with when the power to terminate *arises*.

[42] The second sentence, standing alone, does assist Targa, in that it suggests that a bank has no power to terminate in the absence of reasonable cause. But, read in context, I consider that Dunningham J was merely expressing, in different words, the view that there are constraints on the exercise of a power to terminate a banking contract. It is most unlikely that her Honour was expressing a departure from the settled principle that a bank may terminate a banking relationship merely by giving reasonable notice. Her Honour did not refer to any of the authorities that established that principle, nor indicate that she thought she was departing from a settled principle.[7]

[43] For these reasons, I consider that Targa's interpretation of the termination clause, and therefore the first aspect of Targa's breach of contract claim, is not seriously arguable.

The discretion clause

[44] Mr McLellan submitted that where a contract confers a discretionary power on one party, the default rule is that the discretion must not be exercised arbitrarily, capriciously or in bad faith, or unreasonably in the sense that no reasonable contracting party could have so acted.[8] He said the discretion clause modified that default rule, by requiring "reasonableness simpliciter" as opposed to the more forgiving *Wednesbury* standard applicable under the default rule.[9] Given the discretion clause is in a set of general terms and conditions directed at banking customers generally, he submitted there could be no basis for reading the "reasonable" requirement as reflecting the lower *Wednesbury* standard. It was seriously arguable that Westpac's exercise of its discretion to terminate was unreasonable in this sense.

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7 See the authorities above n 3.

8 Relying on *Woolley v Fonterra Co-operative Group Ltd* [2021] NZHC 2690 at [411].

9 A reference to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[45] Mr Hunter KC, counsel for Westpac, accepted that Westpac must not exercise its discretion to terminate capriciously, arbitrarily, or unreasonably in the sense that no reasonable contracting party could have so acted. He said that this was embodied by the requirement in the discretion clause that Westpac exercise any discretion under the contract "in a reasonable and consistent way". He submitted the discretion clause incorporated (but did not modify) the default rule, albeit expressing it more succinctly. Regardless of whether it modified the default rule, Westpac was entitled, when exercising the discretion, to give due consideration to its legitimate commercial interests and the purpose for which the discretion was exercised.[10] Understood in that way, it was not seriously arguable that Westpac had exercised its discretion unreasonably.

[46] It is not in dispute that the discretion clause controls the exercise of Westpac's power under the termination clause.[11] I do not have to decide whether the discretion clause has modified the default rule. That is because I have reached the clear view that, even if the discretion clause requires "reasonableness simpliciter", it is not seriously arguable that Westpac has exercised its discretion in an unreasonable way.

[47] I assume, for Targa's benefit, that the discretion clause, when requiring that a discretion be exercised in a reasonable and consistent "way", is concerned with both process and substance.[12]

[48] As to process, it cannot seriously be argued that Westpac acted unreasonably. It did not rush to terminate. It sought information from Targa. It made other inquiries. The decision was made at a high level within Westpac. Westpac engaged in correspondence with Targa once the decision was made and provided extensions to the termination date.

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10 Relying on *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] 1 WLR 3529 (CA) at [169]; and *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690 at [73].

11 Were it not for the discretion clause, it would be an open question whether Westpac's power under the termination clause was subject to the default rule. It is difficult to see why the default rule should apply to the exercise of a power to terminate a contract for breach (a matter that Isac J touched on in *Woolley v Fonterra Co-operative Group Ltd* [2021] NZHC 2690 at [439]). The position is less clear for express powers to terminate.

12 Mr Hunter suggested, without pressing the point, that "way" indicated a concern with the manner (process) in which the discretion was exercised.

[49] Targa submitted that the time that Westpac took to make its decision showed that the decision was unreasonable,[13] saying that Westpac's preparedness to deal with Targa while it made its decision showed that Westpac could not reasonably believe that it faced any sanctions risks. I reject that submission. Westpac's considered approach meant it adopted a reasonable process (and a reasonable process increases the likelihood of a substantively reasonable outcome).

[50] As to substance, in assessing the reasonableness of Westpac's exercise of its discretion, I accept Mr Hunter's submission that Westpac is entitled to have regard to its own legitimate commercial interests. The primary purpose of any clause in a relational commercial contract allowing a party to terminate without cause (or, in this case, on what the party believes are reasonable grounds) is to allow that party, for its own commercial interests, to end its contractual relationship with the other party. This informs the Court's assessment of whether such a discretion has been exercised reasonably. A court should be reluctant to find that a party has unreasonably assessed its own commercial interests.

[51] One of the commercial interests that Westpac, or any bank, has in a banking relationship is the management of risks that may arise from dealing with a particular customer. These include risks relating to sanctions. In the present contract, Westpac's interest in managing its sanctions risks is expressly recognised in the anti-money laundering and sanctions clause, which refers to Westpac's management of its "economic trade sanctions risks".[14] The scope of its interest in those risks is apparent from this part of that clause:

> Westpac may … refuse to process any transaction … if Westpac knows *or suspects* that … the transaction involves any person (natural, corporate or governmental) who is itself sanctioned, *or is connected directly or indirectly*, to any person (natural, corporate or governmental) who is sanctioned, under economic and trade sanctions imposed by any country.
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> [emphasis added]

[52] Affidavits from several senior Westpac employees describe the sanctions risks to which Westpac believes it may be exposed if it continues its relationship with Targa.

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13 Targa did not draw any distinction in is submissions between process and substance.

14 Set out at [30] above.

Three risks are identified. There is a risk of other Westpac Group entities, Westpac Group's employees in the United Kingdom or Australia, and Westpac's or Westpac Group's employees that are United Kingdom or Australian citizens, breaching the United Kingdom or Australian sanctions regimes (**the regulatory risk**). There is a risk of Westpac breaching, or being alleged to have breached, contractual undertakings regarding Westpac's compliance with sanctions regimes given to third parties (such as correspondent banks and credit card companies) that are critical to Westpac providing a full range of banking services to its customers (**the contract risk**). There is a risk that Westpac's ability to access offshore capital markets will be impaired because third party financial institutions may perceive there is a risk that Westpac is breaching sanctions regimes, in which case those third parties may (depending on their own sanctions risk appetite) decline to deal with Westpac (**the capital markets risk**). The affidavits say that Westpac believes these three risks arise because Westpac believes that Mr Abramov likely retains ultimate control of Targa.

[53] These three risks are of *a type* that provide a reasonable basis for Westpac deciding to terminate its banking relationship with Targa. Targa did not suggest otherwise. Rather, Targa submitted it was seriously arguable that these risks were not real or substantial and therefore that it was unreasonable for Westpac to make its decision in reliance on them.

[54] In this respect, Targa's primary submission was that "it was overwhelmingly clear on the evidence" that Mr Abramov does not and cannot exercise ultimate control of Targa. Targa relied on the following:

(a) Targa and Endurance are controlled by its three directors, including Mr Seel, not by Mr Abramov.

(b) Endurance is the trustee of the Raglan Trust. Since March 2022, Mr Abramov has not been a beneficiary of the Trust. Mr Abramov has no ability to have himself reinstated as a beneficiary, to add or remove trustees, to vary the Trust, or to do anything else that might affect control of the Trust.

(c) Endurance cannot be removed as trustee without its consent. Nor can any trustee be added without its consent.

(d) Mr Abramov is not a creditor of Targa or its related entities, including Endurance.

[55] Targa also noted that Endurance's directors are prepared to undertake to Westpac and the Court that the current structure of the Raglan Trust (including Endurance's status as sole trustee and Mr Abramov's "exclusion" as a beneficiary) will not be changed without giving Westpac at least three months' notice.

[56] The Court does not have to decide (either now or at trial) whether Mr Abramov controls Targa or whether any of the three risks identified by Westpac will eventuate if Westpac does not terminate its relationship with Targa. The issue is whether it is seriously arguable that Westpac has exercised its termination discretion in an unreasonable way. This depends on whether it is seriously arguable that Westpac has, on the information available, unreasonably formed the view that it will be exposed to the three identified risks if it continues its relationship with Targa. I consider that is not seriously arguable, because:

(a) The sanctions regimes are broad in scope.

(b) There are circumstances that reasonably indicate that Westpac will be exposed to regulatory risk.

(c) The contract risk and the capital markets risk depend on third parties' perceptions.

(d) Other banks have acted similarly to Westpac.

[57] I expand on these points.

The sanctions regimes are broad in scope

[58] There are some disputes as to the scope and effect of the Australian and United Kingdom sanctions regimes. Counsel did not suggest I had to resolve those disputes. It will suffice to refer to matters that I understood to be common ground.

[59] The United Kingdom regime is in the Russia (Sanctions) (EU Exit) Regulations 2019 (UK).[15] The Australian regime is in the Autonomous Sanctions Regulations 2011 (Cth).[16] Both regimes apply to sanctioned conduct within those jurisdictions, regardless of who undertakes them. They also have some extra-territorial effect. They apply to sanctioned conduct by citizens of those jurisdictions and by corporations incorporated in those jurisdictions, whether the conduct occurs inside or outside the jurisdiction.

[60] A breach of the sanctions regimes attracts criminal liability.

[61] In the United Kingdom regime, the sanctioned conduct includes, in reg 12:

> (1) A person ("P") must not make funds available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available.
>
> …
>
> (4) The reference in paragraph (1) to making funds available indirectly to a designated person includes, in particular, a reference to making them available to a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person.

[62] The breadth of reg 12(4) is revealed by reg 7, which provides that a person who is not an individual ("C") is "owned or controlled directly or indirectly" by another person ("P") if either or both of two conditions are met. The second condition is very wide, and was aptly described by Mr Hunter as a "real-world" test for ownership or control:

> [I]t is reasonable, having regard to all the circumstances, to expect that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P's wishes.

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15 These regulations are made under the Sanctions and Anti-Money Laundering Act 2018 (UK).

16 These regulations are made under the Autonomous Sanctions Act 2011 (Cth).

[63] For example, a person subject to the United Kingdom regime (which includes United Kingdom nationals working for Westpac) would breach reg 12 if they had reasonable cause to suspect that they were making funds available to a person (such as Targa) who is (in terms of the real-world test in reg 7) owned or controlled directly or indirectly by Mr Abramov.

[64] The sanctions in the Australian regime include, in reg 12, "directly or indirectly mak[ing] an asset available to, or for the benefit of, a designated person". Given the extra-territorial effect of the regime, this prohibition applies to conduct in New Zealand by the WBC NZ Branch and by Australian nationals working for Westpac.[17] However, the Australian regime does not have an equivalent to the United Kingdom "real-world" test.

There are circumstances that reasonably indicate that Westpac will be exposed to regulatory risk

[65] Given the broad scope of the above regimes, it is reasonable for Westpac to look closely at, and beyond, the legal structures of Targa and the Raglan Trust. Westpac's reasonable concerns are not simply with, for example, the identity of the directors of Targa and Endurance. In respect of the United Kingdom regime, for example, it is reasonable for it to be concerned with whether, having regard to all the circumstances, it is reasonable to expect that Mr Abramov would be able, in significant respects and by whatever means, to achieve the result that Targa's affairs were conducted in accordance with his wishes.

[66] In that light, a combination of the following circumstances means that it is not seriously arguable that Westpac unreasonably formed the view that it will be exposed to regulatory risk if it continues its relationship with Targa:

(a) Targa is an asset of the Raglan Trust, which was originally established to benefit Mr Abramov and his family.

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[17] There is a dispute as to whether WBC could be derivatively liable for conduct by Westpac that breached this prohibition. For the purposes of this judgment, I assume WBC could not be.

(b) Targa has benefited from gifts made by Mr Abramov of $260 million. The most recent was a $30 million gift (via HBHL) in January 2022.

(c) Mr Abramov was originally the appointor under the Raglan Trust, having the power to remove and appoint trustees. Since the October 2018 amendment to the trust deed, Mr Abramov is no longer the appointor and no longer has this power. However, that amendment made provision for a "protector". The protector has a degree of negative control over the Raglan Trust (because the appointor is defined as the protector and the trustee acting together). It is also an available interpretation of the amended trust deed that the protector has the power to remove the existing trustee and appoint a new trustee. Clause 29.11 provides that the protector may remove all of the trustees provided this will not leave fewer than two individual or one corporate trustee "whether by virtue of a contemporaneous appointment of any new trustee or otherwise". It is arguably implicit in this provision that the protector has the power to make that contemporaneous appointment. Targa submitted that the power to appoint new trustees was bestowed solely on the appointor, under cl 13.1. However, cl 29.11 bestows powers on the protector that are additional to those in cl 13.[18] For that reason, I consider it an available (and reasonable) interpretation that the protector can remove all trustees and appoint a new trustee.

(d) The protector is a Swiss banker, Nicola Maurice. There is an association between Mr Maurice and Mr Abramov. The United Kingdom Companies House records Mr Maurice as being a person with "significant control" in respect of several United Kingdom entities linked to Mr Abramov.

(e) Endurance's decision to determine that an Emergency Event had arisen in respect of Mr Abramov expressly records that it was made against the background that recent events had the potential to result in New

[18] Compare, for example, cl 29.11 with cl 13.4.

Zealand sanctions against "wealthy Russians with investment interests in New Zealand".

(f) The result of Endurance's determination was that Mr Abramov was merely deemed not to be a beneficiary of the Raglan Trust. He has been (temporarily) suspended, not removed, as a beneficiary.

(g) The Overseas Investment Office (**OIO**) made decisions on applications by Targa in January 2020 and August 2021. In both instances the OIO said that Targa was "ultimately controlled" by Mr Abramov. Mr Seel deposes that the OIO was "simply wrong". But that does not mean it was or is unreasonable for Westpac to rely on the OIO's characterisation. Further, Targa's applications to the OIO described Mr Abramov (and Mr Maurice) as one of the "individuals with control" of Targa.

(h) On 10 October 2022, the New Zealand Foreign Minister, the Hon Nanaia Mahuta, issued a press release in relation to the decision to impose a travel ban (but not full economic sanctions) on Mr Abramov. She said that, after taking extensive advice, she had decided not to impose full sanctions because of the impact that would have on small businesses and livelihoods connected with Mr Abramov's business interests. A reasonable interpretation of the Minister's comments is that she was of the view that Mr Abramov owned or controlled business interests in New Zealand. There is nothing to suggest that could be anything other than Endurance, Targa, and their subsidiaries.

The contract risk and the capital markets risk depend on third parties' perceptions

[67] Westpac's assessment of its exposure to contract risk and capital markets risk requires an assessment of whether third parties perceive that Westpac may be breaching sanctions. Those perceptions are to a certain extent outside Westpac's control, as are the third parties' responses to such perceptions.

[68] Targa submitted that Westpac did not suggest in its evidence that there was any reasonable likelihood of third parties declining to provide funding to or otherwise deal with Westpac if Westpac did not terminate its relationship with Targa. I disagree. The affidavits filed on behalf of Westpac provide detailed and cogent explanations of banking practices and of Westpac's dealings with third parties. Targa did not dispute, either in evidence or submissions, these explanations. Further, Westpac provided evidence that its relationship with Targa had already caused delays to one funding programme, resolved only once Westpac had begun steps to terminate that relationship.

[69] Given the circumstances that I addressed in the preceding section, and that Westpac has limited control on how third parties perceive the risk of sanctions breaches or react to that perception, I consider it is not seriously arguable that Westpac unreasonably assessed its exposure to contract risk and capital markets risk from continuing its relationship with Targa.

Other banks have acted similarly to Westpac

[70] Westpac's decision not to have a continuing relationship with Targa aligns with decisions made by other New Zealand banks. The ASB Bank has closed accounts held by Targa and by HBHL. Mr Seel deposes that he has made enquiries with several other New Zealand banks, none of which is prepared to provide banking facilities to Targa. I acknowledge that declining to accept a new customer is not the same as deciding to terminate an existing customer. Nonetheless, the decisions by the ASB Bank to close accounts and the decision by other banks not to open accounts suggest that Westpac's approach to its sanctions risk is not unreasonable when compared to banking practice in this country.

Conclusion

[71] I conclude that there is no serious issue to be tried on Targa's breach of contract claim.

Is there a serious issue to be tried on Targa's FTA claim?

[72] Section 7 of the FTA prohibits a person, in trade, from engaging in conduct that is unconscionable. Section 8 sets out matters to which the Court may have regard in determining whether conduct is unconscionable.

[73] Targa submitted that Westpac's closure of Targa's accounts would be unconscionable on essentially the same grounds it put forward in respect of its breach of contract claim.

[74] Section 7 is relatively new and is untested. It is unnecessary for me to embark upon a detailed examination of its provenance. It suffices to observe that the Explanatory Note to the Fair Trading Amendment Bill 2019 (which introduced s 7) described unconscionable conduct as "serious misconduct that goes far beyond being commercially necessary or appropriate". This indicates what was intended.

[75] For the reasons I have given in finding that Targa's breach of contract claim does not raise a serious issue, I find there is no serious issue to be tried that Westpac would be acting unconscionably in closing Targa's accounts.

Balance of convenience and overall justice

[76] Given my conclusion that there is no serious issue to be tried, it is not necessary for me to address the balance of convenience or overall justice.

Result

[77] I decline Targa's application.

[78] Westpac is entitled to costs on the application. I expect the parties will be able to agree costs. If not, Westpac is to file a memorandum (no more than two pages, together with relevant schedules and annexures) by 3 March 2023, Targa to follow suit by 10 March 2023. I would then determine costs on the papers.

Campbell J