Neutral Citation Number: **[2020] EWHC 2427 (QB)**

Case No: **QB-2020-001937**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice, Strand, London

Date: **8 September 2020**

Before :

Master Davison

- -

Between :

Bilal Khalifeh	**Claimant**
- and -	
Blom Bank s.a.l	**Defendant**

- -
- -

Jeremy Richmond QC and Zahler Bryan (instructed by **Rosenblatt Ltd**) for the **Claimant**
Ian Wilson QC (instructed by **Dechert Ltd**) for the **Defendant**

Hearing dates: **1st & 2nd September and 8th September 2020**

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JUDGMENT

Master Davison **Tuesday, 8 September 2020**
(**2:09** pm)

Judgment by **MASTER DAVISON**

Introduction

1. The object of this claim and of the claimant's application for summary judgment is an order requiring the defendant bank to pay over to him in this country the balance standing to his credit in a US dollar account he opened with the bank in October 2016. That is a sum a little in excess of US $1.4 million. By a cross-application, the bank contests the jurisdiction of the English court.
2. I heard the two applications on 1 and 2 September 2020. They have generated nine lever-arch files of documents, six lever-arch files of authorities and skeleton arguments running together to more than 100 pages. However, as is so often the case, there are some pivotal issues which are relatively short points. In those circumstances, I need give no more than a brief sketch of the relevant background.

The factual background

3. The claimant is a Lebanese national who in 2012 established a digital media agency, InsideJob Management, which advises and supports businesses with their online brand presence, marketing and social media management. That business, first based in Dubai and now in the UK, was profitable. In about October 2016 he decided to open a personal account with the bank. He physically attended at the main branch in Beirut and there executed a number of documents, all in Arabic, which included (1) "General agreement for opening and operating creditor accounts", (2) "Instructions by phone or fax" (this bears the claimant's signature though he does not specifically recall signing it) and (3) "Securities trading agreement".
4. He signed another copy of the Instructions document in June 2019. This was in English rather than Arabic, but otherwise identical.
5. It is accepted by the claimant's advisers that the express terms of the General Agreement do not impose an obligation on the Bank to make an international transfer in US dollars. The claimant contends that that obligation is found in the Instructions document and for present purposes it does not matter whether that was the one he signed (or appears to have signed) in 2016 or 2019, they being identical. That document was in the following terms:

> We hereby certify that we expressly requested your Bank to execute all of the instructions that we may give you whether by phone or fax regarding any banking transaction of any nature whatsoever, including but not limited to transfer orders, forex operations of any nature whatsoever, and in any currency, as well as any other banking transaction. We also declare that we shall strictly and definitively abide by the instructions we give you as mentioned above.
>
> Therefore, we hereby release you from any liability in connection with the execution of our instructions given to your Bank by phone or fax, and in particular, concerning the amounts, applicable exchange rates, transfers and any instruction of any nature whatsoever given by us, etc. We acknowledge and declare that the mere execution by your Bank of our instructions given as mentioned above represents irrefutable evidence attesting that these instructions were given by us.
>
> We also confirm our absolute, total and final responsibility as regards the faxes sent to your Bank in our name and their content, and we shall be solely liable for any falsification, alteration or distortion in this respect, since we are solely liable for any risk entailed by the use of this means of communication. We also declare that the faxes sent to the Bank in our name represent a sufficient and irrefutable evidence of the instructions we give to your Bank. You may produce these faxes to serve as final evidence against us before any legal or judicial authorities, since we consider them original documents.

Concerning transfers or banking transactions in favor of third parties that exceed five thousand dollars or any other equivalent amount in another currency, we undertake in a final way to contact the branch manager by phone in order to confirm our instructions and hereby confirm to you our knowledge and acceptance that the manager will only execute our instructions after receiving our confirmation by phone.

We also confirm that you may reject the said instructions, since this request shall not be deemed, in any case, an obligation to your Bank. As a result of our instructions by phone or fax, we hereby undertake to follow-up the movements of our accounts opened with you and to regularly control their balances, at least once a month. In all cases, we agree without any reservation that your entries and books shall have absolute supporting value as regards the transactions executed on our behalf and the amounts due to us or by us to you. We waive our right to challenge the execution of this letter.

We also authorize your Bank to tape, when necessary, our phone conversations concerning the abovementioned transactions, on a magnetic tape or on any other medium to be used as an additional means of evidence. Your Bank shall not bear any responsibility in the event you tape our phone conversation as mentioned above."

6. The document was signed and stamped because it formed part of a contract entered into in Lebanon. So much was acknowledged in evidence by Ms Asmar, a senior employee of the bank.
7. The General Agreement provided for one account, but this was split into two main sub-accounts, one a "time deposit non-residence account" and the other a "current account".
8. The first of these was opened with an incoming balance of US$500,995. A further US $740,000 was received in July 2017. The balance peaked at just over US $2 million between January and May 2019. In May 2019 there was a debit of US $500,000 which the claimant has explained was intended to be used as a collateral for a performance bond for one of the InsideJob companies. Of the remaining balance of just over US $1.5 million, the claimant transferred US $1.45 million to the account of the UK InsideJob company in February 2020. This account was also with the Bank and therefore this was an internal transfer.
9. The other sub-account was opened with a balance of US $100,000-odd. The only major movements on this sub-account were the receipt of US $500,000 in May 2019 from the time deposit account, before this was transferred on in June 2019 in connection with the corporate performance bond I have referred to, and a credit of US $1.35 million in June 2020, being the transfer back from the InsideJob account of most of the US $1.45 million transferred from the time deposit account in January 2020. The resulting credit balance on this sub-account as at 30 June 2020 was US $1.439854 million.
10. From around the beginning of April 2020, the claimant has made repeated requests to transfer his funds to the UK. What prompted the requests was the deteriorating financial situation in Lebanon. So far as his requests were met with a response at all, it was that the Bank was unable to do so at that time. It appears that this was due to de facto capital controls imposed on the whole of the Lebanese banking sector. The claimant instructed English lawyers and on 1 May 2020 they made a formal demand by letter, which was to transfer the funds to the claimant's and his company's Lloyds Bank accounts in London.
11. These proceedings were issued on 5 June 2020.

The legal background

12. The proceedings rely on the provisions of Article 17 and 18 of the Judgments Regulation 12/5/2012, commonly referred to as the "Recast Regulation", in order to found jurisdiction in the courts of England and Wales.
13. The relevant articles for present purposes are Articles 17.1 and 17.1(c) and Article 18.1:

Article 17.

"1. In matters relating to a contract concluded by a person the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

"[...]

"(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer' domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities."

"Article 18.

"1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled."

14. Additionally, the claimant relies on the provisions of Article 6 of Regulation 593/2008, commonly referred to as "Rome I", in order to establish that the contract is governed by English law. The relevant articles are Articles 6.1 and 19.3:

"Article 6.

"1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

"(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

"(b) by any means, directs such activities to that country or to several countries including that country and the contract falls within the scope of such activities."

"Article 19.

"[...]

"3. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence."

15. The two applications before me are subject to different legal tests establishing the burden of proof or persuasion and to what standard. So far as jurisdiction is concerned, the test is complex. The claimant bears the burden of demonstrating a good arguable case that the court has jurisdiction and this has three limbs: it requires that (i) the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) if there is an issue of fact about it or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) where the nature of the issue and the limitations of the material available at the interlocutory stage is such that no reliable assessment can be made, there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it; see *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683 at paragraph 9.

16. That test has been the subject of recent further guidance from the Court of Appeal in the case of *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10. The effect of that decision has been helpfully summarised by Mr Wilson QC at paragraphs 84.1 to 84.5 of his skeleton argument, which I gratefully adopt:

"84.1. The reference to 'a plausible evidential basis' in limb (i) requires an evidential basis for showing that the claimant has the better argument: Kaefer at [73]. The test is context-specific and 'flexible': Kaefer at [75].

"84.2. Limb (ii) is an 'instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can': Kaefer at [78].

"84.3. Limb (i) and (ii) together impose a 'relative' test (as opposed to a lower 'absolute' test), which requires the Court to ask who has the stronger argument on the point(s) of jurisdiction, on the material available: Kaefer at [61], [73]-[74], [83].

"84.4. Limb (iii) only arises where the Court is 'simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument': Kaefer at [79]. In those circumstances (and only those circumstances), the Court may consider whether there is a plausible evidential basis for the Court to take jurisdiction. It is, however, important to note that resort should only be made to limb (iii) where strictly necessary; as the Court noted in Kaefer at [85]:

"'Once established, jurisdiction is proven definitively and not reventilated at the trial. In this regard it fits uneasily with the definitive nature of the decision that jurisdiction should be established upon the basis of a low and uncertain threshold of good arguability when, had there been a full-blown investigation, the result might have been different. This is a justification for the test being relative'.

"84.5. Hence, if the (relative) limbs (i) and (ii) are displaced too readily in favour of an absolute test based solely on the search for an abstract evidentiary basis for taking jurisdiction, there is an enhanced (and unwarranted) risk that the Court will wrongly assume jurisdiction where there is none."

17. So far as summary judgment is concerned, the burden is on the claimant to demonstrate that the defendant has no "real prospect" of successfully defending. That has been the subject of guidance from the High Court in the case of *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at paragraph 15.
18. That guidance is set out at paragraph 24.2.3 of the White Book, passages (i) to (vii):

"i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;

"ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

"iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;

"iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

"v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;

"vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;

"vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the

applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

Application of the legal principles to the facts

19. I turn then to the application of the legal principles to the facts of this case, dealing first with jurisdiction.

Jurisdiction

Concluded contract?

20. Article 17 requires that a contract has been concluded. I can deal with this point quite shortly. The Bank's position is that the claimant's claim form and particulars of claim refer to a banking contract concluded in 2018/2019 – the crucial document being the "Instructions by phone or fax" document signed on 10 June 2019. As I have already observed, that document was identical to the document signed on 14 October 2016 at the same time as the General Agreement. It is obvious, and I find, that the concluded contract in this case was that October 2016 General Agreement to which the Instructions by Phone or Fax were collateral. Such a case is now pleaded by amendment and the claim is a claim "relating to" that contract within the meaning of Article 17.
21. Whether the claim, as it has been argued, meets the test for summary judgment is another matter which I will come to separately.

Consumer?

22. The statutory purpose of Articles 17 and 18 of Brussels Recast is found in recital 18, which is in these terms:

    "In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules."

23. Consistent with that purpose, the Court of Justice of the European Communities in a case called *Gruber v Bay Wa AG* Case C-464/01 [2006] QB 204, at paragraphs 39 to 41, said this:

    "It is already apparent from the purposes of Articles 13 to 15 [I interpose that they were the predecessors of the current Articles 17 to 19] namely properly to protect the person who is presumed to be in a weaker position than the other party to the contract that the benefit of those provisions cannot as a matter of principle be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and therefore had only a negligible role in the context of the supply in respect of which the contract was concluded considered in its entirety."

    "That is in no way altered by the fact that the contract at issue also has a private purpose and it remains relevant whatever the relationship between the private and professional use of the goods or services concerned and even though the private use is predominant as long as the proportion of the professional usage is not negligible."

24. This was an account opened by the claimant in his individual name, giving his personal, not business, address. And the stated reason for opening the account was to make a term deposit. The claimant maintains that the account contains his life savings. "These savings are the result of my very hard work and success in business over a number of years and represent most of my private wealth"; see paragraph 10 of the claimant's first witness statement. The claimant's account manager was Ms Basma Orfali. There is nothing in her witness statement to suggest that the account was, or was operated as, a business account. On the contrary, she describes him as a high-net-worth

individual whose object was to secure high investment returns for himself. That would place him squarely into the category of consumer. That he invested some US $100,000 in the bank's own shares and at the bank's suggestion did not render him something different. On the contrary, that was obviously a consumer transaction.

25. The bank questioned the provenance of the funds coming into the account. But the claimant has stated that the funds were generated by his business activities and has provided evidence that those activities generated large sums of money, at least in 2017/2018 and 2018/2019 (and by inference earlier). There is no evidence at all that the money in the accounts represented the working capital of the claimant's businesses or of transactions having that character.
26. The one exception is a transfer of US $500,000 into a separate blocked margin account as collateral for a performance bond in respect of a project which InsideJob Management UK Limited was undertaking in Qatar. This was in 2019 and therefore some two and a half years after the account was opened. It is not at all unusual for a businessman to use personal funds to guarantee a business loan or project. A one-off instance of that kind would not deprive the account of its consumer status. It is also true that the claimant transferred US$1.45 million to InsideJob's account with the bank in February 2020 and US$1.35 million of that money back into his current account in June 2020. He has explained that he did this because he thought that his savings might be better protected if he lodged them in the account of a UK company rather than the account of a Lebanese national, albeit one resident abroad. There is no reason to doubt that explanation, which I find plausible.

Domiciled in the UK at the time of contracting?

27. Mr Richmond QC argued that it was not necessary for the claimant to be domiciled in England and Wales at the time of contracting. It sufficed if he was so domiciled at the date of issue of the proceedings. The Regulation is silent on this and may be contrasted with Article 19.3 of Rome I, which explicitly requires habitual residence "at the time of the conclusion of the contract". Despite the lack of a specific provision, the clear focus of Articles 17.1, 17.1(c) and 18.1 is the conclusion of the contract, and the clear sense of these Articles, taken together, is that there must be a concurrence between the directing of activities into the Member State, the domicile in that Member State of the consumer and the conclusion of the contract. To put that another way, a consumer cannot found jurisdiction retrospectively by the artificial expedient of moving his domicile to a Member State into which the business entity directs or has in the past directed its activities. No authority was offered for such a proposition and it would render the legislative purpose of this part of the Regulation subject to mere happenstance or artifice.

Claimant so domiciled?

28. For the reasons set out in the confidential schedule to this judgment, I find that he was.

Did the bank direct its activities into the UK at the relevant time and did the contract fall within the scope of such activities?

29. The answer to both questions is, Yes. The contrary was not seriously argued. The bank also accepted that, at least so far as jurisdiction was concerned, there was no need for the claimant to demonstrate a causal link between the directing of activities into the UK and the conclusion of the contract; see *Emrek v Sabronovic* Case C-218/12.
30. It follows from the above that jurisdiction in the UK is established and the bank's application contesting jurisdiction and seeking to set aside the order dated 10 June 2020 giving permission to serve outside the jurisdiction is dismissed.

Summary judgment

31. There are multiple triable issues, by which I mean issues upon which the bank has a "real prospect" of successfully defending, and that means that it would be inappropriate to enter summary judgment in the claimant's favour. The triable issues fall under two headings, which are (1) that the claimant

has not demonstrated to the requisite standard that the applicable law is the law of England and Wales and (2) the contractual basis for the claim is far from clear.

32. It is convenient to start with the second of those headings.

Contractual basis for the claim

The "Instructions by Phone or Fax" document

33. I have already recited the relevant provisions of this document. The claimant's case is that it gives rise to an obligation on the part of the Bank "... to execute all of Mr Khalifeh's instructions whether by phone or fax regarding any bank transaction '*of any nature whatsoever including but not limited to transfer orders in respect of foreign currency*'; see the claimant's skeleton argument at paragraph 39(a).
34. The document is a translation from the Arabic original and it is clear that something has been lost in translation because it is neither wholly grammatical nor wholly clear. It does not, in terms, purport to impose any obligations on the Bank of any kind. The purpose is apparently the narrower one of excluding the Bank from a liability it might otherwise incur in respect of remote instructions which turn out to be incorrect or emanating from someone other than the Bank's customer or which are subsequently countermanded. That is, at any rate, how I would construe the document's intentions.
35. It is a very considerable stretch (and certainly not a summary judgment point) to say that it amounts to the "special agreement for banking services", for which Mr Richmond contended. Even if the wording were clearer, it would, as Mr Wilson pointed out, be very surprising to find obligations of such breadth as was contended for in a side document so headed. This being so and the General Agreement being silent as to any obligation to make international transfers in US dollars, the obligation of the Bank was to repay its customer upon demand at the branch where the account was kept and during banking hours. That proposition derives from *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110, see in particular the judgment of Atkin LJ at pages 126 to 127.
36. It has been pointed out that in the era of the internet, the obligation so stated seems dated and overly restrictive. The same can perhaps be said for the rule that it is open to the bank to repay either in units of the money of the account or in sterling at the relevant rate of exchange. Applied to this defendant, that would obligate the Bank to repay in Lebanese pounds in Lebanon, which in present times would effectively be worthless to the claimant. But these are rules of English law of long standing and high authority. I am not at liberty to depart from them, still less on an application for summary judgment.
37. I note in passing that paragraph 4 of the General Conditions arguably confers on the bank an express power to close out the account in Lebanese pounds.
38. Given these conclusions, it is not necessary to go further but mention should be made of Articles 9 and 12.2 of Rome I. Articles 9 and 12.2 of Rome I:

> "Article 9.
>
> "1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
>
> "2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
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> "3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."
>
> "Article 12.
>
> "[...]

"2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place."

39. The current situation in Lebanon is relevant to both Articles. I have read preliminary opinions on Lebanese law from two distinguished Lebanese jurists: Professor Diab for the Bank and Professor Comair-Obeid for the claimant. They appear to agree that Lebanese banks face a liquidity crisis and *de facto* capital controls which make it difficult or impossible for them to honour requests for international transfers. They further agree that these *de facto* controls fall short of express legal regulation, though draft statutes have been circulated and discussed.
40. They disagree as to whether the bank is under a duty, as a matter of Lebanese law, to make a transfer in US dollars and they disagree as to whether such a transfer would, notwithstanding the absence of official controls, be legal or illegal. My attention has been drawn, and I have noted, some inconsistencies in Professor Diab's position on these matters. But these are issues of Lebanese law that cannot be resolved on a summary judgment application and, were Professor Diab's views to prevail, they would provide the bank with a defence to the claim. Indeed, given the wording of Article 9, something less than frank illegality might suffice to provide that defence.

Applicable law

41. I will deal with this with the brevity commensurate to my findings on the position that would result whichever law were to apply. The claimant's case under Rome I required habitual residence at the time he contracted. I have found that he has the better of the argument on that. But, for the reasons I have discussed, it cannot be said that the bank has no real prospect of successfully defending on this issue. The same goes for the claimant's status as a consumer.
42. In relation to Rome I there are additional hurdles not found in Brussels Recast. The claimant must, or arguably must, demonstrate a causal link between the Bank's pursuit of commercial activities in the UK and the conclusion of the contract. The evidence on this is vague and ambiguous and does not meet the Part 24 standard.
43. The Bank, at least arguably, supplied its services exclusively in Lebanon, in which case Article 6.4(a) took the contract out of the scope of the consumer contracts provision. This is a matter of mixed law and fact. But the law is in a state of development and such developing areas are a dangerous territory for summary judgment applications; see *AK Investments CJSC v Kyrgyz Mobil Telephone Limited* [2012] 1 WLR 1804 at paragraph 84.
44. For these reasons this part of the claimant's summary judgment application also fails.

Payment into court?

45. A conditional order would be appropriate if I thought that the Bank had only scraped home on the summary judgment application and/or had given me reason to doubt the *bona fides* of their defence. This is not such a case. Further, if I were to order payment into court, I would be doing the very thing that the Bank says it cannot presently do. I would at the very least be undermining a principal plank of the bank's opposition to the claim. I have great sympathy for the claimant's predicament and I understand his justifiable anxiety as to the safety of his funds in Lebanon. But this is not a proper basis to make the conditional order sought which I therefore, and with some reluctance, refuse.