Neutral Citation Number: [2018] EWCA Civ 1390

Case No: A3/2018/0082

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
FINANCIAL LIST (COMMERCIAL COURT)
THE HON. MR JUSTICE POPPLEWELL
[2018] EWHC 300 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2018

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HAMBLEN
and
LORD JUSTICE FLAUX

- -

Between :

(1) National Bank of Kazakhstan **(2) The Republic of Kazakhstan**	**Claimants/ Appellants**
- and -	
The Bank of New York Mellon SA/NV, London Branch	**Defendant/ Respondent**

- -
- -

Ali Malek QC, David Quest QC and William Edwards (instructed by **Stewarts Law LLP**) for the **Claimants/Appellants**
Richard Handyside QC and Rupert Allen (instructed by **Linklaters LLP**) for the **Defendant/ Respondent**

Hearing date: 22 May 2018

- -

Judgment Approved

Lord Justice Hamblen :

Introduction

1. The appellants appeal against the decision of Popplewell J dismissing their claim for declaratory relief as to the effect of orders made by the Dutch and Belgian courts on their banking relationship with the respondent.

2. The respondent's position, as upheld by the judge, is that the effect of the court orders is that it is required to freeze all assets which it holds under a Global Custody Agreement ("the GCA") with the first appellant and that it is entitled so to do under clause 16(i) of the GCA.

3. This is disputed by the appellants who seek declaratory relief that the respondent is not entitled to freeze the assets and is obliged to hold and deal with them pursuant to the terms of the GCA and as instructed by the first appellant.

The factual background

4. This is set out at [4] to [36] of the judgment and is not disputed. These paragraphs are to be treated as being incorporated into this judgment and are summarised (with judgment references) below.

5. The second appellant is the Republic of Kazakhstan ("ROK"). The first appellant is the National Bank of Kazakhstan ("NBK"). The respondent is a bank incorporated in Belgium with a branch in London. Through its London branch it provides banking and custody services to NBK in respect of the National Fund of Kazakhstan ("the National Fund"), pursuant to the GCA [2].

6. The National Fund is a fund of assets held with the aims of securing the stable social and economic development of Kazakhstan, accumulating financial assets for future generations and reducing the dependence of the Kazakhstan economy on unfavourable external factors, and under Kazakh law it constitutes state property [5]. The assets in the National Fund are managed by NBK pursuant to a Trust Management Agreement, dated 11 June 2001 [6].

7. The respondent ("BNYM") is a limited liability company incorporated in Belgium with its registered office in Brussels. It is ultimately wholly owned by The Bank of New York Mellon Corporation, a United States entity. It has branches in a number of places, including in London. These branches are not separate legal entities with a distinct legal personality from the Belgium incorporated entity [8].

8. BNYM provides banking and custodian services to NBK in respect of the National Fund pursuant to and upon the terms of the GCA. As of 31 October 2017, the total value of the assets held by BNYM pursuant to the GCA was a little in excess of US$ 22.6 billion. The assets fell broadly within four classes: (i) cash and cash equivalents; (ii) equities; (iii) fixed income and; (iv) preferred securities [14].

9. The GCA was originally entered into on 24 December 2001 between NBK and (i) Boston Safe Deposit and Trust Company, ("Boston Safe") and (ii) Mellon Bank NA (London Branch). Boston Safe was a corporation established under the laws of

Massachusetts USA. Mellon Bank NA was a US entity with a London branch. The GCA expressed itself to be with the London branch of Mellon Bank NA [10].

10. Clause 19 of the GCA provided that, in the event of a merger or reorganisation, Boston Safe and/or Mellon Bank NA could assign their respective rights, duties or obligations to any affiliated company of Mellon Bank NA or a successor in title to either company. This is what occurred by a deed of assignment, dated 25 January 2003, whereby the rights, title and interest in the GCA were assigned to ABN Amro Mellon Global Securities Services BV (London branch) ("AAMGS"), which is BNYM, by a subsequent name change. The assignment was expressed to be to the London branch of AAMGS, i.e., to BNYM (London branch) [11].

11. The GCA is governed by English law and provides for non-exclusive English jurisdiction. Clause 16 is headed "Scope of Responsibility". Of particular importance is clause 16(i) which provides that:

> "[BNYM London] shall [not] be liable for and no default shall be caused by any delay or failure on the part of [BNYM London] to perform any obligation which, in whole or in part, arises out of or is caused by circumstances beyond its direct and reasonable control including without limitation nationalisation, or enactment, promulgation, imposition or enforcement by any governmental authority of currency restrictions, exchange controls or other charges affecting the Assets, or acts of war, acts of God, terrorism, insurrection or revolution or breakdown, or failure or malfunction of any transmission or communications or computer facilities, or postal or other strikes or industrial action by any third party or the failure or disruption of any relevant stock exchange, clearing house, settlement system, Securities System or market or civil disturbance or riot or the act of any civil or military authority or any order, rule, regulation or requirement imposed by any government, judicial or regulatory authority or self-regulatory organisation."

12. A dispute arose between Mr Anatolie Stati and others ("the Stati Parties") and ROK out of projects for the exploration and extraction of hydrocarbons in Kazakhstan. By an award dated 19 December 2013, in arbitral proceedings seated in Sweden, ROK was ordered to pay damages to the Stati Parties in a sum of approximately US$ 497.7 million, together with costs of approximately US$ 8.9 million, and, by a subsequent award, to pay three quarters of the costs of the arbitration, in an amount of approximately €800,000 [20]. The award has been unsuccessfully challenged in the Swedish courts and is now final and unappealable [21].

13. The Stati Parties obtained an ex parte order to enforce the award as a judgment in this country but ROK has applied to set that order aside on the grounds that the award was obtained by fraud [22]. In a judgment dated 6 June 2017 Knowles J found that there was a *prima facie* case of fraud and directed that the issue should be tried for the purposes of determining the Stati Parties' entitlement to enforce the award. The trial of that issue has been set down for a hearing commencing on 31 October 2018 [23].

14. BNYM has a branch in Amsterdam. On 23 August 2017, the Stati Parties applied without notice to the Dutch interim relief court, seeking a number of pre-judgment attachments/garnishments as a prelude to seeking exequatur of the award and garnishment by way of execution [24].

15. In a judgment of 8 September 2017, the interim relief judge granted an attachment but stated that it would not apply to assets at branches of BNYM outside the Netherlands. Dutch garnishment writs dated 14 September 2017 were issued pursuant to that decision, but neither writ contained the limitation in the judge's decision, and on their face each writ extended to all debts owed by BNYM whether within or outside the Netherlands [25]. It is common ground that the garnishment attaches to assets or debts in an unlimited amount and is not confined to the amount of the debt owed by ROK to the Stati Parties under the award with interest, which is the amount in respect of exequatur which it is sought to enforce in the Netherlands [26].

16. BNYM was served with the garnishment on 14 September 2017. Under Dutch procedural law, the garnishee is obliged to issue a declaration as to the assets owing to or held on behalf of the debtor [27]. Having taken legal advice, BNYM took the view that it was arguable that the Dutch order, as a matter of Dutch law, effectively attached the whole of the National Fund, and accordingly made a further declaration on 1 November 2017, stating that, given the uncertainties regarding the legal relationship between NBK and ROK, it could not fully exclude that ROK had claims, or would have claims, on BNYM, or that BNYM held assets of, or for, ROK, including the National Fund, which were subject to the garnishment [28].

17. NBK applied to set aside the garnishment and the Dutch court orders were lifted following a hearing on 23 January 2018. The Stati Parties are appealing against that decision.

18. On 29 September 2017, the Stati Parties applied without notice in the Belgian courts for pre-judgment attachments/garnishments, again as a prelude to seeking exequatur of the award and garnishment by way of execution. On 11 October 2017, the Belgian judge granted the relief sought. As under Dutch procedural law, BNYM was obliged under Belgian procedural law to make a declaration as to the assets and debts garnished. On 30 or 31 October 2017, BNYM made a declaration in the same terms as it was to make in relation to the Dutch proceedings on 1 November 2017 [31].

19. ROK issued proceedings to set aside the Belgian garnishment. At the time of the appeal hearing that application has been heard but judgment had yet to be given. We have since been informed that judgment was given on 25 May 2018 and that the Belgian court decided to continue the conservatory attachment but reduced its amount to US$530 million. It did not decide whether BNYM had towards ROK an obligation capable of garnishment but ruled that this was a question for the English court, applying English law.

The procedural background

20. By a Part 8 claim form issued on 22 November 2017, the appellants sought various declarations, all of which were refused by the judge. The only declaration with which the appeal is concerned is declaration (6):

> "(6) Notwithstanding the Dutch Order and the Belgian Order (and any further Order that may be made in the courts of either of those countries):
>
> (i) BNYM London remains obliged to hold and deal with the assets of the National Fund pursuant to the terms of the GCA and on the instructions of the NBK;
>
> (ii) BNYM London is not entitled to freeze those assets; and
>
> (iii) BNYM London is not entitled to transfer any of those assets to the Stati Parties."

21. On 11 December 2017, BNYM issued an application challenging jurisdiction. This application was dismissed by the judge and his decision is not appealed.

22. The hearing of the Part 8 claim was expedited and was heard by the judge on 19 and 20 December 2017. Judgment was given orally on 21 December 2017, the last day of the Michaelmas Term.

23. Permission to appeal was given by Longmore LJ on 30 January 2018.

The grounds of appeal

24. The appellants contend that the judge should have granted the declaration sought and that he erred in law in failing to hold that, notwithstanding the Dutch and Belgian court orders, clause 16(i) of the GCA did not excuse BNYM from performance of its obligations in relation to the assets of the National Fund.

25. The appellants' case is that the judge should have held that clause 16(i) was not engaged by foreign court orders which were not recognisable in England or under English law.

26. BNYM has issued a Respondent's Notice seeking, if necessary, to contend that even if the appellants' interpretation of clause 16(i) were correct, their claim for declaratory relief against BNYM should still be dismissed because:

    (1) The appellants' argument is founded on their assertion that all of the assets held by BNYM under the GCA are to be regarded as situated in London, and not in Belgium or the Netherlands, as a matter of English private international law, but this fundamental premise has not been established in relation to the securities.

    (2) In circumstances where the appellants are themselves party to the proceedings in which the Belgian and Dutch Orders have been made, it is not correct that the English court would necessarily refuse to recognise or enforce the orders of the Belgian or Dutch courts, even if the GCA assets are not situated in Belgium or the Netherlands as a matter of English private international law.

    (3) The English court should not grant the declarations sought by the appellants in the absence of the Stati Parties because (i) they have the principal interest in contesting the appellants' position as to the situs of the GCA assets as a matter of English private international law, and (ii) the appellants would likely seek to

deploy any declaration that is granted in ongoing foreign proceedings against the Stati Parties.

The judge's decision

27. The judge assumed without deciding that, in the absence of clause 16(i), the Dutch and Belgian orders would not excuse BNYM from performance under the GCA for the reasons given by the appellants.

28. On that assumed premise the judge nevertheless rejected the appellants' case on the proper construction of clause 16(i). He identified nine reasons for so doing, which may be summarised as follows:

(1) There is no evidence to support the proposition that the appellants deliberately chose to contract with the London branch of BNYM so as to protect the assets from enforcement processes outside the UK [74]-[83];

(2) The respondent's construction does not have "extraordinary commercial consequences", as the appellants contended, when taking into account the bank's interest and the foreseeable risk that it would be exposed to double jeopardy [84];

(3) Whilst the commercial consequences of the bargain are relevant, unfavourable consequences alone are insufficient to conclude that the language used cannot have been intended to have these consequences [85];

(4) The language of the clause is clear, in particular the reference to "any" judicial authority [86].

(5) The construction that "any" should be taken to have its natural meaning, is consistent with wording elsewhere in the clause which suggests that it is intended to "alter the common law position by having extensive exculpatory effect" [87];

(6) The presence of other similarly broad clauses elsewhere in the GCA suggests that the appellants did agree seriously and significantly to alter the common law position in many respects [88]-[89];

(7) If any qualification is to be read into the language of clause 16(i), there is no reason why this qualification should be by reference to the common law position which would have pertained in the absence of the provision [90];

(8) The construction for which the appellants contended involves reading in a qualification which is "uncertain in its scope and application"; the parties would have wished to avoid such uncertainty [93].

(9) Even if a qualification were read in to the language "any…judicial authority", it should nevertheless remain wide enough to encompass orders of the Belgian court, Belgium being the state in which the respondent is domiciled and in which many of its client facing activities were rendered to the appellants [94].

The appellants' case

29. The appellants contend that the appropriate contextual starting point is to consider what obligations BNYM London would have as custodian and banker in respect of the assets absent clause 16(i).

30. The Dutch and Belgian orders would not (subject to clause 16(i)) affect BNYM's contractual obligations under the GCA because:

    (1) Where a contract contains an express choice of law, that law governs any issues as to the interpretation, performance, breach and discharge of the contract.

    (2) Contractual performance is excused if it would be illegal under foreign law, but only if that foreign law is (i) the law governing the contract or (ii) the law of the place of performance. Neither law is the law of the Netherlands or Belgium.

    (3) An attachment by a foreign court of a contractual debt will be recognised in England only if (i) the judgment has been entered by a court which is, by generally accepted principles of international law, a court of competent jurisdiction; (ii) the situs of the attached debt is the foreign country in question; and (iii) payment of the attached debt pursuant to the attachment would discharge it.

31. Under the "separate entity doctrine" a branch of an international bank is not a separate legal entity generally but it is treated as one for certain purposes, in particular in relation to the enforcement and attachment of assets held at the branch. One consequence of the principle is that the rights and obligations under the banking relationship are treated as sited and performable at the relevant branch and not at (for example) the bank's head office. Thus, foreign courts have no jurisdiction to attach or enforce against assets held at an English branch, and vice versa.

32. It follows that, subject to the operation of clause 16(i), the Dutch and Belgian orders would not provide any contractual justification for non-performance by BNYM London of its English law obligations. A party in that position would not lightly give up those rights and to do so is both commercially unlikely and would require clear wording. The need for clear wording is all the greater given that clause 16(i) is in the nature of an exclusion and *force majeure* provision.

33. This context is significant and deserves much greater weight than the judge gave it. It means that a customer of a London branch of an international bank contracting under English law has a legitimate expectation, subject to agreement to the contrary, that his assets in London would not be affected by enforcement action against the bank in foreign courts.

34. Against that background, clause 16(i) should be construed so that it only applies to a judicial order which would be recognisable under English law. Specifically:

    (1) The word "circumstances" as used in the clause must be understood as referring to circumstances affecting BNYM London, that being the party

required to provide the performance. It does not therefore include foreign orders that would be regarded as ineffective as against the branch as a matter of English law.

(2) Despite the use of apparently all-encompassing words, the phrase "any order, rule or regulation imposed by any government, judicial or regulatory authority or self-regulatory organisation" must be subject to some limitation. The only coherent and logical limitation is to limit it to orders or rules that the English court would recognise and give effect to, and that would therefore be regarded as relevant in English law. Orders that would not be recognised are irrelevant and can be disregarded.

(3) The causation requirement encapsulated in the words "arises out of or is caused by" is not satisfied merely because performance would be in breach of a foreign order. BNYM London is in fact capable of performing its obligations under the GCA. By doing so it may incur liability in a foreign court for breach of a foreign order, but if the foreign order would not be recognised in England then the risk of such liability should not be regarded as causative of any failure to perform.

35. It is also relevant that clause 16(i) is in substance a *force majeure* clause in that it excuses BNYM London from non-performance caused by circumstances beyond its reasonable control. As such, (i) it is a form of exceptions clause and is to be construed strictly: (ii) it is for a party relying on a *force majeure* clause to show that it clearly applies; (iii) a *force majeure* clause is not generally construed so as to cover a case where performance becomes "commercially" impossible or uneconomic, as opposed to physically impossible or illegal, absent clear words:

36. For all these reasons the judge was wrong to find that clause 16(i) justified BNYM's actions in freezing the assets in question. The judge should have held that clause 16(i) did not entitle BNYM to rely on exorbitant assertions of jurisdiction resulting in court orders which would not be recognised by English law, such as the Dutch and Belgian orders.

The proper approach to construction

37. There have been a number of recent Supreme Court cases which have sought to provide guidance on contractual interpretation, including *Arnold v Britton* [2015] UKSC 36; [2015] AC 1618 and *Wood v Capita Insurance Services* [2017] UKSC 24; [2017] AC 1173. The latest guidance is to be found in *Wood.* The single judgment in that case was given by Lord Hodge, with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agreed. He stated as follows at [11]-[13]:

> "11. ….Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299* , paras 13, 16);

> and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> 12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn [2010] 1 All ER 571* , para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> 13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn [2010] 1 All ER 571* , para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

38. *Wood* makes it clear that textualism and contextualism are both tools to be used to ascertain the objective meaning of the words used. The relative importance of these tools will vary according to the circumstances, including the quality and expertise of the drafting.

39. In the present case, the GCA is a carefully drafted and formal contract, drawn up with the assistance of lawyers and concluded between sophisticated parties. There is no suggestion that anything has gone wrong in the drafting process. Nor is there any patent ambiguity in the terms used in clause 16(i). In accordance with the guidance provided in *Wood*, it is the type of agreement in relation to which textual analysis will be of particular importance.

40. In such a case the emphasis that Lord Neuberger in *Arnold* placed on the importance of the language used is of particular relevance. As he stated at [17]:

> "17. …The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision."

Textual considerations

41. So far as is relevant in the present case, clause 16(i) applies where there is (i) "a delay or failure on the part of [BNYM] to perform any obligation" which (ii) "in whole or in part, arises out of or is caused by circumstances beyond its direct and reasonable control including" (iii) "any order … imposed by any … judicial … authority".

42. There is no dispute that there has been a delay or failure to perform by BNYM. There can equally be no dispute that each of the Dutch and Belgian orders are an "order" which has been "imposed by" a "judicial authority". The making of a without notice order by the Dutch and Belgian courts was a circumstance beyond BNYM's "direct and reasonable control". Whether the order is sufficiently causally connected to the delay or failure to perform potentially raises factual issues which it would be inappropriate to determine in Part 8 proceedings, but the nature of the test to be applied is clearly set out.

43. As a matter of language, the Dutch and Belgian orders therefore clearly fall within the terms of clause 16(i). Moreover, the clause is drawn in wide and unqualified terms. It applies to "any" order by "any" judicial authority. It is not limited to domestic court orders or to foreign court orders of a particular type or status. The causal test to be applied is also drawn in broad terms. It applies to a delay or failure to perform which in whole "or in part" is caused by or "arises out of" circumstances beyond BNYM's "direct and reasonable" control. As the judge observed, it is a clause which is clearly intended to have "extensive exculpatory effect".

44. The respondent's case is that "any" means "any" and that there is no reason or justification for reading down the clear words used, as the appellants' construction requires. Although the appellants say this is a matter of interpretation, their construction does require limiting words. On the appellants' case, "any" order means "any" order which would be recognised and enforced by the English court applying English law.

45. The justification for reading in such a limitation is said by the appellants to be that "as a matter of logic and commercial common sense" there must be some limit to the kind of orders, rules or regulations that are capable of engaging clause 16(i). To support this argument the appellants give the example of a Ruritanian court order which had no connection with the GCA or the parties. It is submitted that such an order cannot engage the clause, as the judge seemingly accepted. This shows, it is said, that the order must in some sense be one that is binding on BNYM London. This is a far-

fetched example but the answer to it is to be found in the causation requirements of clause 16(i), as the judge held. A court order made by a court with no connection with the GCA or the parties is unlikely to have any practical, coercive or causative effect. As the judge observed at [91], if BNYM "chose to use the order as an excuse to freeze funds, no doubt it would have considerable difficulty in bringing itself within the causative test".

46. The causation requirements of clause 16(i) provide a limit to its scope of application and there is no necessity to read in some further limit. The focus of that limitation is on the factual consequences of the circumstance relied upon, not their legal consequences or status, as the appellants' argument assumes.

47. If one has regard to factual consequences, the practical effect on BNYM's ability to perform its obligations under the GCA of (i) the Belgian and Dutch court orders and (ii) a foreign court order which would be recognised or enforced by the English Court applying English private international law is likely to be materially the same. On the appellants' case, however, the two situations are to be distinguished.

48. Nor is such a distinction justified by the suggestion that BNYM is in fact capable of performing its obligations under the GCA notwithstanding a foreign court order. It is also in fact capable of doing so if there is an English court order. What matters in both cases is the consequences to BNYM of doing so in breach of an order of a court which has jurisdiction over it.

49. Considerations of English private international law are in any event unlikely to have been at the forefront of the parties' minds, yet that is inherent in the appellants' case. As the respondent submits, it is implausible that the parties would have intended the clause to have a meaning whose effect could only be understood by reference to such "technical" and "specialist" principles of law.

50. In support of their textual arguments the appellants also seek to place reliance on various authorities on *force majeure* clauses. Assuming without deciding that clause 16 is to be treated as a *force majeure* clause, the principles that such clauses are to be construed strictly, and that it is for a party relying on a *force majeure* clause to show that it clearly applies, do not assist. This is not a case involving ambiguity. It is a case which concerns which of two rival interpretations is the correct interpretation of clause 16(i). Who needs to show the clause applies does not bear on how the court is to answer that question. Nor is this a case in which the relevant circumstance raises questions of commercial impossibility as opposed to physical impossibility or illegality. The effect of court orders is not a matter of economics or of the costs of performance. In any event, the wide causation test under clause 16(i) falls far short of a requirement of proof of impossibility.

51. For all these reasons, in my judgment textual considerations strongly favour the construction of the clause upheld by the judge. As he stated at [86]-[87]:

> "86. …the language in clause 16(i) is in my view clear. The operative wording, before one gets to the non-limiting examples, requires: "circumstances beyond the direct and reasonable control of BNYM". The Belgian and Dutch orders made by courts to which BNYM owes *in personam* loyalty, and which it must obey if it is not to face civil liability and criminal sanction, fall fairly and squarely within that

language. Mr. Quest QC, on behalf of the Claimants, did not seek to argue otherwise. The same is true in my view of the specific wording which follows, and in particular the words, "any order....imposed by.... any....judicial....authority". The natural meaning of "any" in this context, used twice, is that it means "any" without limitation…."

Contextual considerations

52. Considering first the contractual context, the judge said that his construction of the clause was supported by the width of other exculpatory clauses within the GCA, such as clauses 7(a), 7(b), 13(d), 16(c) and 16(d). These concern different subject-matters to clause 16(i) and I agree with the appellants that they provide limited assistance.

53. The appellants place great reliance on the fact that BNYM London (rather than any other branch or the corporate entity as a whole) was expressly identified as NBK's counterparty as from 2003.

54. It is submitted that the "selection" of the London branch must have been intended to have contractual significance and that the natural presumption is that the parties had in mind the special doctrine in English law applicable to branches of banks, a central feature of which is that branches are treated as distinct entities for the purposes of enforcement, and so not exposed to attachment proceedings at the place of their head office.

55. The first difficulty with this argument is that BNYM London branch is not the contractual counterparty. The contracting party is and can only be BNYM. BNYM London branch had no distinct capacity of its own to enter contracts.

56. The second difficulty lies in the contractual history. The original contracting party as custodian under the GCA was Boston Safe, which was a Massachusetts corporation. Mellon Bank NA London branch was to provide the banking services under the GCA. Mellon Bank NA is a US entity.

57. The international rather than London-centric nature of the relationship between the parties established by the GCA is apparent from a number of the terms of the GCA. For example:

    (1) Clause 3(a) required Boston Safe to open one or more accounts in its books for all the non-cash assets of NBK, but there was nothing in the GCA which required those accounts to be opened or kept by Boston Safe in London.

    (2) Under clause 5(a), Boston Safe was entitled to appoint sub-custodians which could include "any domestic or foreign company which may be associated with, or an affiliate of, Boston Safe".

    (3) Under clause 5(c), NBK acknowledged that assets may be held by sub-custodians outside the UK and provided that NBK would bear the risk of any loss in connection with "different settlement, legal and regulatory requirements and different practices relating to the segregation of [assets]". Accounts could accordingly be kept and assets held outside the UK at Boston Safe's discretion and, moreover, at NBK's risk.

    (4) Clause 6(b) provides that Boston Safe may arrange for securities held outside the UK to be registered in the name of either Boston Safe itself or a sub-custodian, recognising that the securities may be held in Boston Safe's name abroad.

    (5) Clause 19 of the GCA permitted Boston Safe and Bank Mellon NA to assign their "rights, duties or obligations" to "any affiliate or associated company"

> or "successor in title … by reason of any merger or reorganisation". There was no restriction on the assignment of obligations to an entity with a London branch, nor any contractual requirement that Bank Mellon NA should maintain a London branch.

58. It was in that contractual context that clause 16(i) was agreed. Subsequently, BNYM became party to the GCA pursuant to a Deed of Assignment dated 25 January 2003. Whilst the Deed of Assignment refers to the London branch, NBK was not a party to it. Over 13 years later, on 6 April 2016, BNYM entered into an agreement with NBK to amend certain terms of the GCA which agreement also referred to the London branch. However, these subsequent contractual developments cannot bear on the proper interpretation of clause 16(i). The meaning of clause 16(i) is not changed by the subsequent assignment and variation agreements made.

59. In these circumstances I agree with the judge's conclusion that the terms of the GCA provide little support for the appellants' argument that the presumed intention of NBK was to choose to place assets with the London branch of BNYM to protect them against foreign enforcement process.

60. As to the wider context, the appellants place great emphasis on the fact that the Dutch and Belgian orders would not (subject to clause 16(i)) affect BNYM's contractual obligations under the GCA, and on the separate entity doctrine and its importance to the GCA. Like the judge, I am prepared to assume without deciding that the orders would not affect BNYM's obligations for the reasons given by the appellants, as summarised at [30] above.

61. As to the separate entity doctrine, the appellants emphasise that this is recognised not merely as a matter of English law, as illustrated by cases such as *R v Grossman* (1981) 73 Cr App R 302 and *Power Curber International Ltd v The National Bank of Kuwait SAK* [1981] 1 WLR 1233, but that it is of wide-spread application, as explained in the resolution and report of the International Law Conference's Committee on International Monetary Law in 2012, to which we were referred.

62. The appellants submit that, against this background, their legitimate expectations would be that English assets could not be subject to foreign attachment and that clear words would be needed for performance of the contract to be affected or excused by foreign attachment orders.

63. If this had been purely a London Custody Agreement, under which it was clear that all the sovereign assets were to be sited in London, there may have been some force in these contextual arguments. As already noted however, the GCA was an international or "global" agreement, not one which was to be entirely London centric. Further, as the judge observed at [74], there is no evidence that "the intention of NBK was to contract only with the London branch of a bank so as to protect the National Fund from any enforcement process because the assets would be treated as located only in London".

64. Further, the fact that a foreign court order will not be recognised by the English courts does not mean that an English court will ignore it or its effect. This is illustrated by the case of *Deutsche Schachtbau-und Tiefbohr-Gesellschaft MBH v Shell International Petroleum Co Ltd* [1990] 1 AC 295. That case concerned whether the

court should exercise its discretion to make a garnishee order absolute. It was held that the fact that there was a real risk that the garnishee would nevertheless be compelled by a foreign court to pay the debt made it inequitable to do so. It did not matter that the foreign court would be exercising an exorbitant jurisdiction, or that the order of the foreign court would not be entitled to recognition or enforcement by the English court. What mattered was "the reality of the risk".

65. In this case the reality of the risk faced by BNYM as a result of the Belgian and Dutch orders is very clear, even if such orders would not be recognised under English private international law. BNYM is a Belgian company with a branch in Amsterdam, so it is subject to the in personam jurisdiction of both the Belgian and Dutch courts. If BNYM did not comply with the Belgian order or the Dutch orders, it would be exposed in Belgium or the Netherlands (as the case may be) to the risk of criminal and/or civil liability (the latter potentially in the full amount of the award). The separate entity doctrine does not affect that potential liability.

66. For all these reasons I do not consider that the contextual considerations relied upon the appellants have any great weight.

The commercial consequences of the rival interpretations

67. The appellants contend that the judge's interpretation has uncommercial consequences. A customer who places assets with the London branch of an international bank by reference to English law and jurisdiction would not expect his assets to be at risk of foreign enforcement proceedings wherever they may be pursued, if those proceedings would not be recognised in England. Being free of such risk is an important protection for those who deal with banks in London, and is a significant reason for choosing so to do. The judge's construction undermines that legitimate expectation and erodes that important protection.

68. The respondent contends that the appellants' interpretation has the uncommercial consequence of exposing it to the risk of double jeopardy, namely the risk, if court orders are not complied with, of criminal liability and of incurring civil liability which it would be required to meet from its own resources, without recourse against the appellants, in connection with disputes between the appellants and third parties, which have nothing to do with BNYM.

69. This is a well known risk, as illustrated by the case of *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728. There is every reason why an international bank would wish to protect itself from the risk of being exposed to very substantial liabilities as a result of disputes between its customer and third parties.

70. The gravity of the risk is borne out by the facts of this case. If BNYM did not comply with the Belgian Order or the Dutch Order, it would be exposed in Belgium or the Netherlands to the risk of criminal and/or civil liability up to the full amount of the award.

71. For BNYM to take the risk of criminal liability and/or civil liability to third parties up to the full value of the assets that it holds merely by accepting deposits or custody of assets would be a commercially insensible outcome.

72. Both sides can therefore point to uncommercial consequences of the rival interpretation. The consequences identified by the appellants do, however, depend on its case as to legitimate expectations and the extent to which that can be objectively justified in this particular case. Those identified by the respondent are an inevitable consequence of the appellants' interpretation of the GCA, and are well illustrated by the facts of the present case.

Conclusion

73. Balancing the indications given by all these various considerations, I have reached the clear conclusion that the judge's decision was correct and that the appellant's construction of clause 16(i) must be rejected.

74. I agree with the judge that the language of clause 16(i) is clear and that, subject to causation, it applies to the Dutch and Belgian orders. The appellants' construction of the clause requires it be read down and subject to an implied limitation. Their arguments based on contextual considerations and uncommercial consequences do not justify this, even if it is correct to regard it as a matter of mere interpretation.

75. For all these reasons I would dismiss the appeal. In those circumstances it is not necessary to consider the discretionary arguments raised by the Respondent's Notice.

Lord Justice Flaux :

76. I agree.

Lord Justice Patten :

77. I also agree.