Neutral Citation: [2017] EWHC 1896 (Comm)

Case No: CL-2017-000375

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

The Rolls Building,
7 Rolls Buildings,
Fetter Lane,
London EC4A 1NL

Date: Wednesday, 5th July 2017

Before:

HIS HONOUR JUDGE WAKSMAN, QC

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Between:

DANA GAS PJSC **(a company incorporated under the laws of the United Arab Emirates)**	**Applicant/ Claimant**
- and -	
(1) DANA GAS SUKUK LIMITED **(a company incorporated under the laws of Jersey)** **(2) DEUTSCHE TRUSTEE COMPANY LIMITED** **(3) DEUTSCHE BANK AG** **(a company incorporated under the laws of German, acting by its Abu Dhabi Branch)** **(4) COMMERCIAL INTERNATIONAL BANK (EGYPT) SAE** **(a company incorporated under the laws of Egypt)**	**Respondents/ Defendants**

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MR. ALAIN CHOO CHOY, QC and MR. SAM O'LEARY (instructed by **Squire Patton Bogs (UK) LLP**) for the **Claimant**
MR. WILLIAM EDWARDS (instructed by **Fieldfisher LLP**) for the **1st Defendant**
MR. RICHARD HANDYSIDE, QC and MS REBECCA LOVERIDGE (instructed by **Allen and Overy LLP**) for the **2nd Defendant**

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APPROVED JUDGMENT

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HHJ WAKSMAN QC:

Introduction.

1. This is the return day of an injunction granted without notice by Leggatt J on 16th June 2017. The claimant, Dana Gas PJSC, is a company incorporated in the United Arab Emirates (UAE). The first defendant, Dana Gas Sukuk Limited, is a company incorporated in Jersey. The second defendant, Deutsche Trustee Company Limited, is an English company. The third defendant, Deutsche Bank AG, is German, and the fourth defendant, Commercial International Bank (Egypt) SAE, is a company incorporated in Egypt.

2. The claimant, to whom I shall refer as "Dana" and the first defendant, to whom I shall refer as "the Trustee", entered into a Mudarabah Agreement on 8th May 2013. On the same date, they entered into a Purchase agreement to which additionally the second defendant, to which I shall refer as "the Delegate", was also a party. The Mudarabah Agreement itself was governed by UAE law, the Purchase agreement by English law.

3. I need to say something about the concept of Mudarabah and I take this (because it has not been disputed) from paragraph 8 of the claimant's skeleton. A Mudarabah is akin to a partnership under which one partner, the Rab al-Maal, provides capital and the other, the Mudarib, provides skill and labour and any profit will be divided according to agreed proportions. If the venture makes a loss, then the Rab al-Maal loses some or all of the investment and the Mudarib loses the value of their skill and labour. In a Mudarabah Sukuk, which is what this is, Sukuk certificates are issued by an intermediary which holds its interest in the Mudarabah capital on trust with the certificate holders. Sukuk can broadly be understood as an undivided share in the ownership of tangible assets relating to particular projects or special investment activity. Proceeds in the Mudarabah capital are invested in tangible assets. In this particular case, the claimant, Dana Gas, is the Mudarib, the Trustee is the Rab al-Maal, and the Delegate, the second defendant, is its delegate and effectively its appointed agent.

4. The way that this would work as an investment vehicle as I have presaged is that the Trustee would issue Sukuk certificates to be Purchased for money and the proceeds of the issue of those certificates would form a Mudarabah capital then to be invested by the Mudarib here, by Dana. If all went well, then following the investment and at the end of the designated period the capital would be returned plus a return at the end of the project, as well as periodic returns during its currency, or ultimately to inure to the benefit of the certificate holders.

5. The Purchase agreement, governed by English law, effectively provides that if there is a dissolution event or certain other events defined by it and by other documents to which it refers, then the Delegate can require Dana effectively to buy it out by paying a fixed price for what are then the Mudarabah assets, the subject of the investment, regardless of their actual value at the time. In effect, capital is returned to the certificate holders and the guarantee profit element. At the Trustee's option, Dana could be made to pay the price by providing that consideration in the form of its own shares.

6. There is an extensive security package which had to be provided by Dana and in order to secure its various payment obligations. The evidence says that the value of those securities is something in the region of $850m and that reflects the amount of capital raised by the certificate on the making of this 2013 set of agreements. Those agreements were themselves restructured versions of earlier agreements made in 2007, then and in 2013, expert legal opinions had been obtained to say that these transactions were valid according to UAE law and, in particular, those parts of that law which embody a number of principles of Sharia law.

7. Earlier this year Dana had made known its intention to restructure its obligations. This was of particular importance because it has periodic payment obligations during this year. The next one is in July and then on 31st October the investment period comes to an end and the capital, together with a profit, is to be returned.

8. However, by 13th June Dana had also contended that the Mudarabah Agreement and the Purchase Undertaking were invalid and unenforceable according to UAE law. This was because as Mudarib, Dana was effectively made to guarantee repayment of the Mudarabah capital even if it had been lost or diminished and even without negligence on its part, and that was contrary to UAE law because the Mudarib was not to be the partner who would bear the loss of any investment. It would only bear the loss of the value of its own efforts in the Undertaking. The risk of the loss of capital was to be borne and borne only by the investor, here the Trustee on behalf of the certificate holders.

9. Dana was concerned that any challenge of this kind by it to the validity of the Mudarabah and related agreements could lead to the Delegate by itself and on behalf of the Trustee, taking action under the Purchase agreement to enforce its obligations to Purchase the Mudarabah assets due to an event of default and declaring that there had been an event of default, and the concern was that that would be in circumstances where, at least according to Dana, the Mudarabah Agreement was itself unlawful.

10. Accordingly, a claim was issued in this jurisdiction and Leggatt J granted the injunction to prevent the defendants from seeking to take action on the Purchase Undertaking. The material parts of that injunction read that until the return day the respondents were restrained from declaring or issuing any notice declaring either the occurrence of an event of default or a dissolution event within the meaning of the clauses of the Purchase Undertaking and also certain conditions in the certificates themselves, and from exercising or purporting to exercise any of the rights described as being exercisable by them in the Purchase Undertaking, whether by delivery of an exercise note or exercising or purporting to exercise any security rights which derive from that.

11. On the same day the Sharjah court in the UAE also granted an order in similar terms. The short form claim in those proceedings in terms of the ultimate relief sought reads as follows, from the translation:

> "that the court should order the voidance of the Mudarabah contract and the Undertaking to Purchase dated 8th May 2013 together with all their effects and the basis for them and to void all the effects arising from both of them and to void all the agreements and contracts and supplementary annexes as well as

> anything which conflicts with the provision of the law and public policy regulations" which were earlier recited, "to order the release of any guarantees or mortgages and to order an account in settlement with the Trustee and the Delegate to be supervised by a qualified expert, and to order that the Mudarabah assets should be handed over to the Trustee or the Delegate or to give Dana permission to sell them and remit the net proceeds to those entities."

12. The contentions made by Dana as to the violation of the UAE law by the Mudarabah and related agreements were supported before Leggatt J and supported before me by expert evidence on UAE law in this respect. It is not necessary for me to refer to it because the Delegate for today's purposes accepts that there is a serious issue to be tried on the question of the enforceability of the Mudarabah and related agreements under UAE law and for that reason has not filed any expert evidence itself.

13. Yesterday on the hearing before me the main defendant was the Delegate. The first defendant, the Trustee, has taken a neutral stance though it will make an application hereafter in relation to costs and expenses. The Delegate opposes the continued grant of the injunction. The third and fourth defendant banks do not appear and do not have a role to play at this stage.

14. As I have indicated, the Delegate has accepted for today's purposes only that there is a serious issue to be tried as to whether the Mudarabah Agreement and Purchase Undertaking are enforceable according to UAE law. However, it then contends that since the immediately operative agreement is the Purchase Undertaking, Dana must show that there is a serious issue to be tried that it is unenforceable as a matter of English law, and the Delegate says that it cannot do so for the reasons which I will explain below. Alternatively, if there is a serious issue to be tried on that question, it says that the balance of convenience favours the defendants and not Dana, and accordingly the injunction should not be continued.

15. It is necessary now for me to refer to certain provisions in the agreements and I do so by reference first to the Mudarabah Agreement. Clause 2.1 notes that it had commenced on 31st October 2007 and that it will end on the date when the assets are liquidated in compliance with clause 2.2 or the date on which the certificates have been redeemed in full. As I have indicated, there is now a termination date of 31st October 2017.

16. Clause 2.2 is important. It is headed, "Liquidation of Mudarabah Assets". It says:

> "Subject to clause 2.2.2 below, the distributor will profit in respect of the final Mudarabah return period. In accordance with clause 5.1 two days prior to the scheduled redemption date the Mudarib shall liquidate the Mudarabah assets and shall pay into the transaction account from the proceeds of such liquidation and if necessary from the reserve account a sum which when aggregated together with the distributable profit paid into the transaction account is equal to the redemption of the required amount, that is, a set amount which must be repaid. However, clause 2.2.2 states that the Mudarib shall not be

> entitled to liquidate the assets unless the proceeds of such liquidation when aggregated together is equal to or greater than the redemption required amount. If the proceeds exceed the amount required, the Mudarib shall be entitled to retain such excess as an incentive purpose."

17. Clause 2.3 says that the purpose of the Mudarabah is to invest the Mudarabah capital in accordance with the investment plan.

18. Pausing there, what this means is that under the Mudarabah Agreement, if the Mudarabah assets cannot be liquidated with a value together with monies in the reserve accounts sufficient to repay the capital and fixed return, then the liquidation cannot take place under that clause. If that is the position, then clause 12 operates because it says that a failure to liquidate the assets, which would happen if they are not going to meet the required amount, is itself to constitute a Mudarabah event to which I will return later. But if all goes well, and the investment makes a profit, one need look no further than the Mudarabah Agreement.

19. So far as other clauses are concerned, clause 4.2 says that the Trustee acknowledges and consents to the Mudarib commingling the Mudarabah assets with its own assets from time to time. The profit ratios are set by clause 5.1. The Rab al-Maal gets 99% and the Mudarib gets 1%. Then there are provisions for a reserve account, which I do not need to go into, in clause 5.2. The effect of this is that the Mudarib must ensure payment of the periodic required amount from time to time during the currency of the agreement. Even if the distributable profits for that period were less, that, according to Dana, is effectively a guaranteed return irrespective of whether there are the profits to support it, and that is one of the features which Dana contends makes the Mudarabah Agreement itself unlawful according to UAE law.

20. The investment plan itself is set out in the schedule. They are to be Sharia compliant investment activities comprising any of the following, all of the assets of Dana LNG Ventures Limited and investments in one of the following compliant investment activities, strategic acquisitions, and new business opportunities in Egypt, Algeria, Saudi Arabia, Iraq, UAE, India, Bahrain, Pakistan, Libya, Qatar, Kuwait, (unclear) Tunisia and Nigeria, (unclear) or other country as may be selected by the Mudarib, and also any cash awaiting investment may be deposited in a compliant deposit account. Then it says the Mudarabah is expected to generate an average net profit during the term of the Mudarabah equal to the expected distributed profit rate.

21. We then turn to the Purchase agreement. Recital D says that the obligor, which in fact is Dana again, in its corporate capacity and not as Mudarib and not without prejudice to the later provisions as guarantor, gives an irrevocable Undertaking to purchase from the Trustee any and all of the Trustee's rights, benefits and entitlements in the Mudarabah assets if the circumstances specify. The obligor provides this Undertaking to evaluate the nature of an anticipated return on the Mudarabah assets, and the commercial benefit it will receive in acquiring the Mudarabah assets at the relevant exercise price.

22. One of the defined terms here is a dissolution event and to short circuit matters a dissolution event, as described in the conditions, includes an event of default as provided for in this agreement. Mudarabah assets mean the assets of the Mudarabah.

Mudarabah event has the meaning given to it in the Mudarabah Agreement to which I have already referred. Mudarib means the obligor in its capacity as Mudarib.

23. Clause 1.3 under, "Benefit of Undertakings", it says:

> "This Undertaking shall take effect as a (unclear) for the benefit of the Trustee who holds it for the benefit of the certificate holders and the Delegate."

24. Under clause 2, "Undertaking", clause 2.1 reads:

> "The obligor hereby irrevocably grants the following right to the Trustees. 2.1.1 If sub-clause 3.1.1 applies to oblige the obligor (i) to buy all of the Trustee's rights, benefits, and entitlements in the Mudarabah assets then held by the Trustee."

25. Then 2.1.2: "If clause 3.1.2 applies, to buy all of the Trustee's rights,"

26. And going forward, these are all provisions which apply if the respective triggers in 3.1 apply. In relation to all of those the purchase is to be in each case on an as is basis without any warranty, express or implied, and if any warranty is implied shall be excluded from the Trustee at the relevant exercise price on the terms and subject to the conditions of this Undertaking or money to be paid in dollars.

27. Under clause 2.2, the relevant exercise price represents a fair price for the Trustee's rights; the relevant part of the Mudarabah assets and the obligor irrevocably unconditionally undertakes to accept the interest in the Mudarabah assets and will not dispute the basis of interest which the Trustee may have in the same.

28. Clause 2.3 is "Physical Settlement". It says:

> "If in accordance with the agency agreement and the exchangeable conditions physical settlement applies, the obligor must deliver the number of shares specified in accordance with the exchangeable conditions."

29. That is an alternative method of purchase which the obligor can be compelled to undertake. It is not a matter for the obligor to choose.

30. Clause 2.2.3 says:

> "If the obligor is unable to settle by physical settlement, then the obligation on it to pay the relevant exercise price in cash shall not be prejudiced."

31. Clause 2.4 says:

> "The obligor declares it has provided the Undertaking having evaluated the nature and anticipated return on the Mudarabah assets and the commercial benefits it will receive on acquiring the Mudarabah assets at the relevant exercise price."

32. We then come to clause 3, headed, "Exercise". These are the situations in which clause 2.1 purchase provisions are triggered. There are a number of them. I am only going to read the first two.

33. Clause 3.1.1:

> "In the case of 2.1.1 following the occurrence of a dissolution event in respect of exchangeable certificates other than a Mudarabah event."

34. Clause 3.1.2 is following the occurrence of a Mudarabah event.

35. In those circumstances, the Trustee may exercise its rights by serving an exercise notice and 3.2 provides that if it does so the obligor, Dana, is obliged to Purchase all or as applicable part of the Trustee's rights and entitlements in the Mudarabah assets, as is at the relevant exercise price by paying the exercise price of delivering the requisite number of shares.

36. Then Clause 3.3 says:

> "Promptly following such payment and/or delivery the transfer of all or part of the Trustee's rights, benefits and entitlements in the Mudarabah assets shall occur by the obligor and the Trustee executing a sale agreement."

37. Clause 3.4 says:

> "Settlement of the relevant exercise price in accordance with this Undertaking shall constitute full discharge of the obligation to pay or deliver the shares in relation to the exercise price."

38. Clause 5 then sets out a number of events of default, which, as I have indicated in brief, form dissolution events. Clause 5.1.1 is about non payment and 5.1.2 is about breach of other obligations,

39. Clause 5.1.3:

> "Repudiation. Either the obligor or the Mudarib repudiates or challenges the valid legal binding and enforceable nature of any part of the transaction document to which it is a party or causes an act to be done evidencing an intention to repudiate or challenge the valid legal binding and enforcement nature of any transaction document to which it is a party and the transaction documents include the Mudarabah Agreement and Purchase Undertaking, and the sale agreement."

40. Clause 5.1.4:

> "Illegality. At any time it is or will become unlawful for either the obligor or the Mudarib to perform or comply with any of its obligations under the transaction document to which it is a party or any of the obligations of either the obligor or Mudarib

> under the transaction documents are not or cease to be legal valid binding or enforceable."

41. Then there is a whole host of other events to which I do not need to refer.

42. Clause 7.8 says:

> "Any provision of this Undertaking that was invalid and unenforceable shall not affect the validity or enforceability of other provisions (unclear) Any provision is invalid, illegal or unenforceable in any jurisdiction. Its validity legality or enforceability of the remaining provisions or such others will not be affected or impaired thereby,"

43. The governing law is expressed to be by clause 8 English law.

44. One then comes to the sale agreement the form of which is appended to and forms part of the Purchase Undertaking, at Schedule 2. It recites that the agreement is made between Dana on the one hand and the Trustee on the other. It refers to and being pursuant to the Purchase Undertaking and an exercise notice served thereunder. It says under 2:

> "Sale: Pursuant to the terms and conditions of the Purchase Undertaking and the exercise notice referred to in recital A, Dana buys the Trustee's rights, benefits and entitlements to the Mudarabah assets on an as is basis at the relevant exercise price which it has settled on the date of this agreement in accordance with the Purchase Undertaking and the agency agreement."

45. It is therefore contemplated that the sale agreement should in fact be executed on the same day as the purchase price, i.e. immediately upon that payment.

46. Clause 2.2 says that the parties shall:

> "complete all formalities and do all such other acts and things necessary to complete an effect the sale of the Mudarabah assets and assignment of warranties, if any, as contemplated hereunder."

47. Clause 2.3 states again that the Mudarabah assets are sold on an as is basis.

48. Clause 2.4 says:

> "the Trustee agrees to assign any warranties it may have in relation to the assets which constitute the Mudarabah assets."

49. Clause 5.1, the governing law of the sale agreement is UAE law.

50. Accordingly, the purchase agreement is all about, as its title suggests, a purchase by Dana of the Mudarabah assets at the instance of the Trustee if certain events have occurred, which sometimes would lead to the early termination of the Mudarabah or in the case of a failure to be able to liquidate assets with sufficient value to repay the

fixed amount of capital and the returns then due at the end of the period. Effectively, all of this, according to Dana, is to make Dana as Mudarib and notwithstanding the language of the Purchase agreement a guarantor in respect of any loss of capital in the project at the end of the day, which again for the reasons I have recited it says is contrary to UAE law.

51. Turning to these proceedings, the claim form, which has been supplemented by Particulars of Claim, states that Dana seeks declarations from this court that the obligations under the Purchase Undertaking are unenforceable on the basis that the performance of those obligations, including execution of the sale agreement and transfer of shares in Dana, would be unlawful as a matter of UAE law, UAE being the necessary place of performance of those obligations.

52. Secondly, that the performance of closely related obligations, in particular under the Mudarabah Agreement, are unlawful, void, and unenforceable as a matter of their governing law and place of performance and the whole transaction was based on a shared fundamental assumption or understanding that the obligations under them would be legal, valid, and binding as a matter of that governing law and that place of performance, with the consequence that the obligations under the Purchase Undertaking are to be deemed frustrated and being void and unenforceable on the grounds of mistake and/or otherwise not binding.

53. It is those claims for declarations based on English law illegality principles and the law of mistake and frustration, which the Delegate says raise no serious issue to be tried, even if the Mudarabah and related agreements were unenforceable themselves according to UAE law.

Discussion.

54. A fundamental distinction drawn by the Delegate before me is between the Purchase agreement on the one hand and the sale agreement on the other. It points to the fact that these are two separate agreements whereas they could be one and that the former is governed by English law and the latter is governed by the law of UAE, and that no doubt this carefully structured contractual arrangement was adopted advisedly by the parties at the time. As a result, when considering Dana's argument, either as to illegality under *Ralli* principles or the law of mistake, one can and should look no further than the express provisions of the Purchase Undertaking. On that footing, as I shall explain below, the Delegate contends that neither argument deployed by Dana has any prospect of success.

55. In my view, it is at least seriously arguable that one should see the two agreements as constituting different elements of a single purchase process. The process starts with the payment of the price by Dana, it continues with the prompt or indeed simultaneous execution of the sale agreement, and it ends with the implementation of that agreement so that all the relevant assets are vested in Dana.

56. It is, in my judgment, objectively clear or at least for today's purposes seriously arguably so, that notwithstanding the fact that there are two separate agreements the parties contemplated that once the process started it would conclude with the transfer of those assets to Dana so as to achieve the result of the certificate holders effectively

getting their money back and Dana taking the risk of loss where the value of the assets has been diminished, but no more.

57. Points have been made as to the significance or otherwise of one contract being governed by English law and the other by UAE law. The submissions on those points have been somewhat speculative and there is nothing useful I can derive from them that is of assistance to me now. Against that opening background, I consider the particular arguments made.

The Ralli principle.

58. The *Ralli* principle is that as a matter of English domestic law the court will not enforce here a particular obligation of a contract even when governed by English law if that contract requires the performance of an obligation in a jurisdiction where that performance would itself be illegal under local law.

59. Dana now accepts that although the payment of the price by money or by shares would itself be unlawful under UAE law, according to its case since those obligations are not required to be performed in the UAE necessarily and indeed the money obligation is to be performed in London, the *Ralli* principle cannot apply in those respects.

60. As refined, Dana's argument is that performance of the Purchase Undertaking and the process mandated by it includes not only the execution of the sale agreement but its implementation as well, which includes the obligation to which I have referred on both parties to complete all formalities and do all things necessary to effect the sale of the assets as set out in clause 2.2.

61. In that regard, I need to refer to paragraph 10.1 of the second affidavit of Mr. Timms, on behalf of Dana, filed on 16th June. He says:

> "I have been provided with the following information by Muhammad .. who is Dana's board secretary and advises the chairman, also in-house counsel till 2016 as follows: 1. In the context of the implementation of the sale agreement, in order for Dana, which is domiciled in UAE and has its principal place of business within the UAE to complete and effect the sale of the Mudarabah assets as required under clause 2.2 of the sale agreement, it would be necessary for the board of directors of Dana Gas which sits in the UAE to take decisions and actions within the UAE in order to implement the actual purchase of the Trustee's rights and interests in the Mudarabah assets."

62. That part of the purchase process, involving as it does the process of transfer of assets to Dana under Dana's case, would be part and parcel of the overall unlawfulness of these arrangements. I accept that the acts referred to in paragraph 10.1 are not expressly required by the Purchase Undertaking, unlike, for example, the payment of the price or the execution of the sale agreement, but for the reasons already given I consider that this is, at this stage, too narrow a view of what performance of the Purchase Undertaking requires or entails and that one is entitled to look at how the Purchase process started by the Purchase Undertaking will in fact end and, in any

event, the implementation of the sale that would follow might understandably not have been provided for in any detail because objectively it could be assumed that it would follow. Nor do I think that clause 7.8 about one part of the agreement remaining enforceable while another part is not is of any assistance on this point.

63. It has to be admitted that paragraph 10.1 is somewhat vague. On the other hand, while it has been recently questioned in the Delegate's skeleton argument there is no evidence in rebuttal served on behalf of the Delegate. Mr. Timms' second affidavit was served now well over two weeks ago on 16th June. Accordingly, I take the view that Dana has established (just) a serious issue to be tried on the *Ralli* principle by reference to that aspect of the implementation of the purchase process. For the reasons already given, I do not agree that any question of implementation of the process pursuant to the sale agreement itself mandated by the Purchase Undertaking must on any view be excluded for consideration at least for present injunctive purposes.

Mistake.

64. Dana further or alternatively contends that there is a serious issue to be tried that the Purchase Undertaking is void under English law by reason of mutual; mistake. The argument runs thus. Both parties assumed at the time of making the Mudarabah Agreement and the Purchase Undertaking that they were valid according to UAE law; indeed, the Delegate positively asserts this by reference to the legal opinions which it had procured at the time. However, on Dana's case that was a mistaken assumption because the Mudarabah Agreement and the Purchase Undertaking were and are in fact unenforceable as a matter of UAE law and, in particular, it would not be possible under UAE law to give effect to the transfer of assets to Dana following any payment of the price because the sale agreement itself could not be implemented.

65. It is then said that this mistake is sufficiently fundamental to qualify as an operative mistake in English law. At one point Mr. Handyside QC contended was that unless it was a mistake which meant that in truth the contract in question, here the Purchase Undertaking, was impossible of performance it could not qualify. I do not accept that the legal requirements are so narrow. To that end I simply refer to the first part of the headnote in the well known decision of the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, which states as follows:

> "A common or mutual mistake was a common mistake and assumption of fact which rendered the service that would be provided if the contract were performed in accordance with its terms essentially different from the performance the parties had contemplated with the result that the contract was not merely liable to be set aside but was void at common law. The avoidance of the contract on the ground of common mistake resulted not from an implied term but a rule of law under which if it transpired that one or both parties had breached something which was impossible to perform no obligation could arise out of the agreement. Test of common mistake was narrow: if a contract was to be avoided for common mistake there had to be a common assumption about the state of affairs that being no warranty by the other party that the state of affairs existed and

> the non existence of the state of affairs had not to be attributable to the fault of either party. Where it was possible to perform the letter of the contract but it was alleged that there was a common mistake in relation to the fundamental assumption which rendered performance of the essence of the contract impossible, it was necessary to construe it in the light of all the circumstances."

66. The first part of that headnote, in particular, in my judgment, supports the notion that one does not have to show that the whole contract has become impossible of performance. I should add that it is not suggested that a mistake as to enforceability or otherwise of the contract under UAE law could not itself be an operative mistake albeit that it is essentially a mistake of law, and that reflects the increasing congruence between the law of mistake in contract and that of mistake of payments in the law of restitution.

67. The seriously arguable reality, therefore, is that there was a mistaken assumption that if the purchase process was invoked by the Delegate under the Purchase Undertaking, while Dana might have to pay the price, it would at least get the relevant assets back, even if it would make a loss, but if the truth was that it might end up by being obliged to pay and yet received no assets at all because the transfer obligations connoted by the sale agreement could not be enforced as against the Delegate, then this was indeed a fundamental mistake and going to the essence of what the Purchase Undertaking was all about and the extent to which the Purchase process properly could be said to be capable of performance.

68. In truth, it would not be possible to perform the process as contemplated at all and again in that context the fact that the last stage in this process would be about the implementation of the sale agreement itself, mandated by the Purchase Undertaking rather than expressly covenanted in the main body of the Purchase Undertaking, does not make any difference or at least it is seriously arguable that it does not in terms of the existence of a fundamental mistake.

69. On that footing, then, it is seriously arguable there was an operative and fundamental mistake made by both parties when they entered into these suite of documents or in their revised form in 2013. The way that it is put in the particulars of claim is to say, in paragraph 47, there was a shared fundamental assumption and understanding the Mudarabah Agreement was lawful and unenforceable under UAE law and that the obligation to purchase the rights in accordance with the terms of the sale agreement at Schedule 2 to the Purchase Undertakings could be lawfully performed and the intended transfer of rights, benefits and the assets could be lawfully effected.

70. Contrary to that shared fundamental assumption, the Mudarabah Agreement is unlawful and Dana Gas could not lawfully Purchase the Trustee's rights and benefits, and the intended transfer of those rights could not be lawfully effected, and therefore the Purchase Undertakings and the obligations to purchase or to pay the relevant exercise price were void and unenforceable, and of course equally, therefore, there would be a fundamental mistake if the position was that the purchase process could not even be initiated because it is all unenforceable.

71. Mr. Handyside's riposte to this, first, was that the possibility of such a mistake was not only foreseen by both parties at the time of making the contract but Dana expressly took the risk of unlawfulness affecting any part of the agreements and, if so, it cannot now complain about the mistake. The basis for this, or one way in which it has been expressed, is in paragraph 84 of the judgment of the Court of Appeal in *Great Peace*, which judgment was handed down by Lord Phillips:

> "Once the court determined the unforeseen circumstances had indeed resulted in the contract being impossible of performance it is next necessary to determine whether on the true construction of the contract one or other party has undertaken responsibility for the subsistence of the assumed state of affairs. This is another way of asking whether one or other party has undertaken the risk that it may not prove possible to perform the contract. The answer to this question may well be the same as the answer to the question whether the impossibility of performance is attributable to the fault of one or other parties."

72. There is no allegation of fault here, I should add.

73. Mr. Handyside then places significant reliance upon clauses 5.1.3 and 5.1.4 which are two of the events of default in clause 5 of the Purchase Undertaking. The argument is that one or both of them made clear that if there is a challenge to the lawfulness of, for example, the Mudarabah Agreement, then the Purchase Undertaking still triggers the Purchase process in a way designed to protect the interest of the certificate holders by compelling Dana to pay the price even if it can never get the assets. In that way it has assumed the risk of all or part of the assets being incapable of transfer to it and not simply the risk of any loss, and it bears a risk of the initial mistaken entry into the agreements when they were assumed to be lawful.

74. For present purposes, I do not accept that this is a complete answer to the mistake claim. I consider it to be seriously arguable as a matter of construction, that if the payment process as a whole is found to be unlawful as Dana claims, then those two clauses cannot be construed so as to apply in a way which would then force Dana to enter some but not all of the part of the process. I consider that, as with the other triggers in the Purchase process, what was contemplated was that the process would be seen through to completion and so I do not accept that the process can be sliced up in the way in which the Delegate has contended.

75. Another way of looking at it is to say that if, as Dana contends, the whole of the Mudarabah Agreement and the Purchase Undertakings are unenforceable under UAE law, it cannot have been thought objectively that despite all of that, these clauses survive in some way so as to enforce part of the Purchase price. As Mr. Choo Choy QC put it in argument, in the case of fundamental unenforceability, which is Dana's case here, there is a limit to the extent to which you can attempt to avoid its impact.

76. Another suggested riposte to the mistake point proffered by the Delegate is the spectre that Dana might have to pay the price and yet the Delegate would not be able to transfer the assets – this is a false point however, because if the Mudarabah Agreement is invalid, then the Trustee could not be holding on to the assets. If so, the question then arises as to who has the assets. It is, presumably, not Dana and the

Delegate does not suggest that Dana somehow acquires them automatically; but if not the Delegate and if not Dana, then the question is who. The fact that Dana has sought in the Sharjah action to avoid everything does not mean that the Trustee does not have the assets at the moment. So, even without recourse to Dana's instructions obtained recently and not put in evidence, in the light of this point being made by the Delegate in the skeleton argument as to what is the UAE position on that point, I just do not see how this further counter-argument holds water sufficiently to demolish the mistake case at this stage.

77. I recognise, not withstanding all of that, that the points made by Mr. Handyside merit serious consideration. The place for that is a trial and not here. I do not see that the Delegate can today deal the knockout blow to the mistake argument which it needs. For broadly the same reasons I would agree that there is a serious issue to be tried on the question of frustration. Overall, then, I conclude that Dana has established a serious issue to be tried on the merits and I turn to balance of convenience.

Balance of Convenience.

78. I accept there is a real risk to Dana if the injunction is not continued so that the Delegate would now be able to declare an event of default or a dissolution event and then begin to implement the purchase process of forced payment of the price and the resort to the various securities which have been given. That is a real risk and I accept that a declaration itself could cause real reputational damage to Dana, which would be difficult to recover from, and any enforcement of the securities might not realise their full value. The detail of those securities I do not need to set out but they are summarised in paragraph 4 of Dana's skeleton argument.

79. Further, a declaration of default here could trigger other provisions in quite separate agreements which might lead to their cancellation. Those agreements are made, for example, in Egypt and in Kurdistan and in relation to something else called the "pearl joint venture". They are set out in more in paragraphs 67-71 of Mr. Timms' first affidavit and in paragraphs 39-44 of his fourth affidavit.

80. In answer to that, the second defendant did not really dispute that those effects might happen in the light of what might transpire to be a wrongful exercise of its powers under the Purchase Undertaking if no injunction was granted. Rather, Mr. Handyside effectively said that Dana was disabled from relying on such points at the balance of convenience stage, or relying on them strongly, on the basis that it had only itself to blame for voluntarily entering into these agreements in the first place, after all, it is not as if Dana's case is that it did so by reason of misrepresentation or some other vitiating factor which could be laid at the door of the Delegate or the Trustee.

81. I disagree. I fail to see why balance of convenience considerations should be lessened just because the agreement now said to be unenforceable was not thought to be such at the time. I have already rejected for interlocutory purposes the argument that Dana had assumed the risk of unenforceability. I find no reason not to apply fully the usual *American Cyanamid* considerations, which is that once a serious issue to be tried is shown, then one looks at the balance of convenience or, as it is sometimes put these days, the balance of justice by reference to the effect on both parties if the injunction is or as the case may be is not granted when it is later established that the affected party was right all along.

82. I also accept for present purposes that if no injunction is granted and then at trial it was shown the power to declare events of default and invoke the Purchase process is not enforceable, it is hard to see how the damage done to Dana in the meantime could be undone. Unlike Dana, the Delegate does not offer a cross-undertaking in damages if the injunction was wrongfully not granted. It seems to me that the Delegate's real counter-argument is that there are question marks over Dana's financial health going forward. Accordingly, if because of the injunction the Delegate and Trustee cannot enforce their rights under the Purchase Undertaking immediately when they would otherwise like to do so and they were otherwise entitled to do so, and it turns out at trial that they were right all along, they may not then later recover as much when they do exercise the rights because Dana's financial position has worsened in the meantime. I should add that while Dana has said that it cannot pay the July and October instalments due, that, it has made clear, is because it says that they are unenforceable, not because it does not have the financial wherewithal to do so.

83. A number of other points are made in this regard at paragraph 43 of the Delegate's skeleton argument. It refers to the fact that Dana's own forecasts for the next four years are pessimistic and it said it needs to focus on short to medium term cash reservations and a proposal for a new Sukuk would entail a 50% reduction in profit distributions. The financial results published for the first quarter of this year, entitled, Clean Energy for the Future, say it has experienced ongoing difficulties with collections in Egypt, including impact of liquidities and cash reserves, collection of these is 42% and long term uncertainty remains, but 99% of the operations are, as I have indicated, in Egypt and Kurdistan and it recognises social political instability which could affect its ability to conduct the business effectively, and although there are arbitration awards in the Kurdistan region and in respect of the National Iranian Oil Company, it is unclear whether a full recovery would be made, and Dana had said it may take two to three years and beyond as there is inherent volatility in oil and gas projects. Then it refers to the inability to immediately enforce the rights. It also refers to the certificates having declined in value since 13th June, trading prices have gone from 90 cents to 73 cents although Dana says it is more like 77 to 79 cents, and that there is disquiet in the market.

84. On the other hand, Dana has said that in fact one should not overlook that it still has net assets of $2.8bn but there are lodged in place the securities to which I have referred to secure $850m, although I understand that the capital which would be outstanding now is $700m. So far as its own financial statements are concerned, it says that the Delegate has been selected, it points to other points which say that there are total trade receivables of a billion dollars, that there is $298m of cash in hand at the period end, the $60m loan has been repaid in the second quarter, the company reported a 44% increase in revenue, and 83% increase in net profit, reflecting increased production in approved realised prices, that there was continued successful costs reduction down by 23%, positive free cash flow, CAPEX balance in the Egypt collections, and then it says that they have succeeded in one of the arbitrations and that positive outlook in the respects which I have set out is to some extent detailed in internal pages 10 and 11 of that document.

85. So far as any decrease in the value of the certificates in so far as that can be said to relate to this dispute at all, and that is not clear, Dana makes the point, which has force, which is that if that was as a result of the claim as to unenforceability that

would obtain whether an injunction was granted or not, because the very making of that claim, which Dana is perfectly entitled to do, has caused that effect. Therefore, Dana says that the cross-Undertaking, which of course it has to give, is significantly backed up. I should add that the Delegate has reserved its right to apply to the court on a future occasion if an injunction is granted to seek fortification of the cross-Undertaking but it does not do so now.

86. Importantly, for the purposes of this injunction, Dana would also offer a series of Undertakings some of which are contained in the Purchase Undertaking and are effectively designed to ensure that its own financial standing and ability to make payments is not going to be impaired by taking certain actions and, in addition, to agree to Undertakings which the Delegate says would be required if an injunction was granted. For the vast majority of those Undertakings the Delegate has already said that it would meet its requirements.

87. I further have to consider, if there was an injunction, how long the injunction would last. I canvassed certain dates on this hypothesis yesterday. While I cannot give a particular date now, I can say that in any event so far as the trial is concerned and having conferred with Blair J, the judge in charge of the Commercial Court, that this is a case fit for expedition and that I would be saying and it can be included in any part of the order that if at all possible it should be tried before the end of October.

Conclusion

88. Having regard to all of those matters, and the support which is in place for any cross-undertaking and the additional undertakings granted by Dana and the prospect of a speedy trial, I am in no doubt that the balance of convenience is in favour of Dana. Therefore, subject to residual questions of Undertakings and drafting I will continue this injunction. That concludes my judgment. I am very grateful to counsel for the excellence of their submissions. I will now hear them on consequential matters.

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