Neutral Citation Number: [2017] EWHC 2928 (Comm)

Case No: FL-2017-000004

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2017

Before:

MR JUSTICE LEGGATT

- -

Between:

DANA GAS PJSC **Claimant**
(a company incorporated under the laws of the United Arab Emirates)

– and –

(1) DANA GAS SUKUK LIMITED
(2) DEUTSCHE TRUSTEE COMPANY LIMITED
(3) DEUTSCHE BANK AG
(4) COMMERCIAL INTERNATIONAL BANK (EGYPT) SAE
(5) BLACKROCK GLOBAL ALLOCATION FUND, INC.

Defendants

- -

Neil Kitchener QC, Sam O'Leary and **Maximilian Schlote** (instructed by **Squire Patton Boggs**) for the **Claimant**
Richard Handyside QC and **Rebecca Loveridge** (instructed by **Weil, Gotshal and Manges (London) LLP**) for the **Fifth Defendant**
The **First** to **Fourth Defendants** did not appear

Hearing dates: 25 September and 13 November 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE LEGGATT

Mr Justice Leggatt:

Introduction

1. In his *Commentaries on the Laws of England* (1765-69) William Blackstone observed that "when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use, … [the increase] is called interest by those who think it lawful, and usury by those who do not."[1] Different views about the lawfulness of paying compensation for the use of money continue to be taken in different legal systems. The present case concerns a financial transaction which is governed partly by English law and partly by the law of the United Arab Emirates (UAE). The claimant has alleged that the transaction infringes principles of Islamic *Shari'a* which form part of UAE law and prohibit usury (*riba*) and is thus invalid and unenforceable under the law of the UAE. The defendants deny this. The defendants also contend that, even if the claimant's case on UAE law is correct, this does not affect the validity of a Purchase Undertaking governed by English law, which they wish to enforce.

2. This judgment follows the trial of a preliminary issue to determine whether this last contention is correct: in other words, assuming without deciding in the claimant's favour that the transaction is invalid under the law of the UAE, is the Purchase Undertaking nevertheless valid and enforceable?

3. Before addressing the issue (and framing it more precisely), I will first identify the parties and outline the structure of the transaction.

The parties

4. The claimant ("Dana Gas") is a Public Joint Stock Company incorporated under the laws of the UAE. Its shares are listed on the Abu Dhabi Stock Exchange. Dana Gas was founded in 2005 and is the first private sector regional gas company in the Middle East, with businesses in Egypt, the Kurdistan region of Iraq and the UAE.

5. In 2007 Dana Gas raised finance of US$1 billion through an issue of certificates. The transaction was restructured in 2013 when new certificates were issued with an aggregate face value of US$850,080,000. The certificates are tradeable and are listed on the Irish Stock Exchange. They were due for redemption on 31 October 2017.

6. The certificates were issued by the first defendant (the "Trustee"). The proceeds of the issue and the assets derived from those proceeds are held by the Trustee absolutely on trust for the Certificateholders on the terms of an Amended and Restated Declaration of Trust dated 8 May 2013, which is governed by English law. Pursuant to clause 6 of the Declaration of Trust, all of the Trustee's powers are exercised under delegated authority by the second defendant (the "Delegate").

7. The third and fourth defendants are agents of the Trustee in relation to assets provided as security by Dana Gas for certain of its obligations. They have taken no active part in the proceedings.

---

[1] Book 2, ch 30, pp454-5.

8. The fifth defendant ("BlackRock") is an investor which holds a substantial number of the certificates.

The certificates

9. There are two classes of certificate: Exchangeable Certificates, which can be exchanged for shares in Dana Gas, and Ordinary Certificates. Pursuant to the Conditions governing each class of certificate which are scheduled to the Declaration of Trust, a sum described as the "Periodic Distribution Amount" was payable quarterly at a rate of 7% per annum on the Exchangeable Certificates and 9% per annum on the Ordinary Certificates. The Conditions further provide that on the "Scheduled Redemption Date", which is defined as 31 October 2017, a sum referred to in the transaction documents as the "Standard Redemption Amount" comprising the principal amount of the certificates plus any accrued and unpaid distribution amounts was to be paid to the Certificateholders.

10. The certificates were issued to raise money for investment which was intended to be made in a manner compliant with Islamic religious law (*Shari'a*). Such certificates are known as *sukuk*. *Sukuk* may be issued to finance a variety of different *Shari'a*-compliant investment activities or structures. One such structure, used in this case, is known as a *mudarabah* and hence the certificates were described in the listing particulars as *sukuk al-mudarabah*. A *mudarabah* is a form of joint venture in which one party (the *rab al-maal*) invests capital and the other party (the *mudarib*) invests skill or labour with a view to making a profit which will ultimately be shared between them on an agreed basis.

The Mudarabah Agreement

11. The proceeds of the certificates were invested under an Amended and Restated Mudarabah Agreement dated 8 May 2013 made between the Trustee as *rab-al-maal* and Dana Gas as *mudarib*. The Mudarabah Agreement is governed by UAE law. It provides for the capital contributed by the Trustee to be invested by Dana Gas in accordance with an investment plan contained in a schedule to the agreement. The assets of the *mudarabah* are referred to in the Mudarabah Agreement and other transaction documents as the "Mudarabah Assets". Clause 5 of the Mudarabah Agreement provides for profits generated by the Mudarabah Assets to be distributed quarterly in a ratio of 99% to the Trustee as *rab-al-maal* and 1% to Dana Gas as the *mudarib*.

12. The expectation (warranted by Dana Gas in clause 6.2 of the Mudarabah Agreement) was that the Mudarabah Assets would generate sufficient cashflows to fund the payment of the Periodic Distribution Amounts to the Certificateholders throughout the term of the *mudarabah*. If in any quarter the distributable profit from the *mudarabah* exceeded the Periodic Distribution Amount, the excess was to be credited to a Reserve Account maintained by Dana Gas in accordance with clause 5.2 of the Mudarabah Agreement. If in any quarter the distributable profit was insufficient to pay the Periodic Distribution Amount, the shortfall was to be met, so far as possible, from the Reserve Account. Any surplus left in the Reserve Account at the end of the *mudarabah* may be retained by Dana Gas.

13. The Mudarabah Agreement also provides (in clause 2) for the liquidation of the Mudarabah Assets and the return of capital to the Trustee at the end of the *mudarabah* provided that the value of the Mudarabah Assets (when aggregated with any amounts standing to the credit of the Transaction Account and the Reserve Account) is at least equal to the "Redemption Required Amount" – which for all present purposes is equivalent to the Standard Redemption Amount. If that condition is met, Dana Gas is required two business days prior to the Scheduled Redemption Date of the certificates to liquidate the Mudarabah Assets and pay the Redemption Required Amount into the Transaction Account (being an account into which all payments by Dana Gas to the Trustee for the Certificateholders under the transaction documents are to be deposited.) Again, any surplus is to be retained by Dana Gas.

14. These arrangements are unproblematic so long as the *mudarabah* generates sufficient profits to enable the Periodic Distribution Amounts to be paid to the Certificateholders each quarter and provided that, when the time comes for the certificates to be redeemed, the value of the Mudarabah Assets (and any surplus profits which they have generated) are sufficient to return to the Certificateholders the principal amount of their investment. The dispute in the present case relates to the contractual arrangements which apply where – as is said to have happened – the profits and value of the Mudarabah Assets prove insufficient to fund these payments. To protect the Certificateholders against that eventuality, Dana Gas entered into the Purchase Undertaking.

The Purchase Undertaking

15. The Amended and Restated Purchase Undertaking was executed as a deed on 8 May 2013 by Dana Gas as Obligor in favour of the Trustee and the Delegate. The Purchase Undertaking is governed by English law (see clause 8). Pursuant to clause 2.1, Dana Gas irrevocably granted to the Trustee rights to oblige Dana Gas to buy "all of the Trustee's rights, benefits and entitlements in and to the Mudarabah Assets" on an "as is" basis at the relevant "Exercise Price". Clause 3.1 provides that the Trustee may exercise these rights following the occurrence of certain specified events. The events relevant for present purposes are a "Mudarabah Event" and a "Dissolution Event". Where the Trustee exercises its rights under clause 2.1 following such an event, the relevant Exercise Price is the Standard Redemption Amount.

16. A "Mudarabah Event" is defined in the Mudarabah Agreement (clause 12) to mean a failure to liquidate the Mudarabah Assets for an amount which (when aggregated with any amounts standing to the credit of the Transaction Account and the Reserve Account) is at least equal to the Redemption Required Amount and to pay this sum into the Transaction Account two business days prior to the Scheduled Redemption Date.

17. "Dissolution Events" are defined in the Conditions. They include a default in the payment of any Periodic Distribution Amount and also various "Events of Default" which are specified in clause 5 of the Purchase Undertaking.

18. The exercise of the rights granted to the Trustee by clause 2.1 of the Purchase Undertaking is governed by clause 3. Clause 3.1 provides that the Trustee may exercise those rights following the occurrence of a Mudarabah Event or a Dissolution Event by delivering an Exercise Notice to the Obligor. Clauses 3.2 and 3.3 state:

> "3.2 Following delivery of an Exercise Notice pursuant to clause 3.1, the Obligor shall be obliged to purchase all or, as applicable, part of the Trustee's rights, benefits and entitlements in and to the Mudarabah Assets on an 'as is' basis at the relevant Exercise Price by:
>
> 3.2.1 paying the Exercise Price (or the part thereof which is payable in cash) into the Transaction Account …"
>
> 3.3 Promptly following such payment …, the transfer of all or, as applicable, part of the Trustee's rights, benefits and entitlements in and to the Mudarabah Assets shall occur by the Obligor and the Trustee executing a Sale Agreement."

19. A "Sale Agreement" is defined to mean an agreement in the form set out in Schedule 2 to the Purchase Undertaking. The form of agreement set out in Schedule 2 contains a recital that:

> "The parties are entering into this Agreement to transfer the Mudarabah Assets described herein to Dana Gas."

Clause 2.1 of the specified form of Sale Agreement states:

> "Pursuant to the terms and conditions of the Purchase Undertaking and the Exercise Notice referred to in Recital A, Dana Gas buys [all] [insert percentage] of the Trustee's rights, benefits and entitlements in and 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."

Clause 5.1 states that the Sale Agreement is governed by the laws of the UAE.

Security

20. Dana Gas has, directly and through subsidiaries, provided security to the Trustee for the performance of its obligations under the Purchase Undertaking. This security includes assets situated in Egypt and also a fixed charge over shares of Dana LNG Ventures Ltd, a company registered in the British Virgin Islands.

The complaint of Dana Gas

21. The complaint made by Dana Gas which underpins its claim in these proceedings is that the Purchase Undertaking has the effect of guaranteeing to the Certificateholders the return from their investment by removing the risk of a loss of capital. This is said to be inconsistent with the prohibition of *riba* (essentially, compensation for the use of money), which is a principle of *Shari'a*, and with laws of the UAE which give effect to that principle.

Background to the proceedings

22. At the time when the transaction was restructured in 2013, Dana Gas obtained legal opinions confirming that the transaction complied with *Shari'a*, UAE law and English law.

23. Until 30 April 2017, Dana Gas made quarterly distributions under the Mudarabah Agreement in accordance with the terms of that agreement which were used by the Trustee to pay the Periodic Distribution Amounts. On 3 May 2017, however, Dana Gas issued a press release announcing that "due to continued challenges it faces around cash collections and the resulting need to focus on short to medium cash preservation", the company would commence restructuring discussions with the Certificateholders.

24. In a further press release issued on 12 June 2017 Dana Gas announced:

> "Due to the evolution and continual development of Islamic financial instruments and their interpretation, the Company has recently received legal advice that the Sukuk in its present form is not *Shari'a* compliant and is therefore unlawful under UAE law. As a result, a restructuring of the current Sukuk is necessary to ensure that it conforms to the relevant laws for the benefit of all stakeholders."

On 13 June 2017 Dana Gas issued proceedings in England and in the UAE, having already on 12 June 2017 issued an application for an injunction in the BVI.

The proceedings

25. In the English proceedings Dana Gas seeks declarations that obligations under the Purchase Undertaking are unenforceable. As well as resisting the claim, the Delegate has filed a counterclaim seeking declarations to opposite effect. As I will explain soon, the grounds relied on by Dana Gas are all based on allegations that part or all of the transaction is unlawful or invalid or cannot lawfully be performed as a matter of UAE law.

26. In the UAE, Dana Gas has sought an order for the avoidance of the Mudarabah Agreement and the Purchase Undertaking and all related agreements. The proceedings in the UAE have been brought before the Sharjah Federal Court of First Instance against nine defendants who include the first four defendants to the English proceedings. When those proceedings were commenced on 13 June 2017, Dana Gas obtained from the Sharjah court an interim injunction which (among other things) prohibited the Trustee and the Delegate from "taking any action of any kind either within the state or outside it" under the Mudarabah Agreement or the Purchase Undertaking.

27. Also on 13 June 2013, Dana Gas obtained an interim injunction from the BVI Commercial Court restraining Dana LNG Ventures Limited from registering any transfer of shares in the company. This effectively prevents the security interest in these shares from being enforced.

28. On 16 June 2017 Dana Gas applied without notice to the English court and obtained an interim injunction preventing the defendants from exercising rights under the Purchase Undertaking. This injunction was continued by order of HHJ Waksman QC on 5 July 2017 until trial or further order. Judge Waksman also gave directions for a speedy trial of the issues of UAE and English law raised by the claim. To prevent the oppression that would result if Dana Gas were permitted simultaneously to pursue claims raising the same issues in two different jurisdictions, Judge Waksman ordered Dana Gas, as soon as possible and in any event by no later than 21 July 2017, to take all such steps as were necessary to discharge the injunction granted by the Sharjah court and to stay the proceedings in the UAE.

29. Dana Gas failed to comply with that order. Nor did it comply with a further order of this court made on 31 July 2017 which specifically required Dana Gas to make an application to the Sharjah court by 8 August 2017 for the discharge of the Sharjah injunction. Dana Gas eventually filed such an application on 17 August 2017. The Sharjah court dismissed the application at the behest of three shareholders of Dana Gas who intervened in the UAE proceedings.

30. The speedy trial ordered by Judge Waksman had been listed to commence on 18 September 2017. In preparation for the trial, Dana Gas and the Delegate (which was the only defendant intending to be represented at the trial) each served witness statements, reports from experts on UAE law (who in turn met and prepared a joint report) and written opening submissions.

31. On 17 September 2017, the day before the trial was due to start, the Sharjah court, on the application of the intervening shareholders and without any opposition from Dana Gas itself, granted an interim anti-suit injunction prohibiting parties who include the first four defendants to the English proceedings and Dana Gas from proceeding with the litigation before the English court until such time as the Sharjah court has decided the substantive action in the UAE. I will refer to this order as the "Sharjah anti-suit injunction".

32. BlackRock was not at that time a party to any of the proceedings and was therefore not bound by the Sharjah anti-suit injunction. To prevent the trial from being aborted, BlackRock applied to be joined as an additional defendant to the English proceedings and also applied to this court without notice on 18 September 2017 for an interim anti-suit injunction prohibiting Dana Gas and its shareholders from pursuing or taking any further step for the time being in the Sharjah proceedings (other than to seek permission from the Sharjah court to participate in the trial before the English court). Such an injunction was issued and has since been continued until an order is made following the handing down of this judgment (or until further order).

33. Despite the apparently wide wording of the Sharjah anti-suit injunction, Dana Gas has felt able to continue to participate in the English proceedings for the purposes of opposing the joinder of BlackRock and seeking adjournments of the trial, although not for the purpose of making any submissions on the substantive issues raised by the claim and counterclaim.

34. Following hearings on 19 and 21 September 2017, I gave a judgment and made an order on 22 September 2017 which added BlackRock as a defendant and gave directions for how the trial should proceed. These included a direction that the trial

would proceed on 25 September 2017 as a trial of a preliminary issue or issues of English law only and would not include any issue of UAE law. On that day the court heard oral submissions on behalf of BlackRock. As mentioned, detailed written opening submissions had already been filed by Dana Gas and by the Delegate. Dana Gas and the other defendants did not appear, being still subject to the Sharjah anti-suit injunction.

35. The order of 22 September 2017 also directed that the trial would be listed for a further hearing on 12 October 2017, subject to two conditions: (1) the court receiving an undertaking by 1pm on 26 September 2017 that Dana Gas would use its best endeavours to seek to vacate a hearing in the Sharjah proceedings which had been listed for 3 October; and (2) the court reserving the right to vacate any hearing listed for 12 October and proceed directly to give judgment if there was any development which in the court's opinion warranted doing so. The date of 12 October 2017 was set having regard to the fact that one of the defendants to the UAE proceedings, Deutsche Bank Abu Dhabi, and Dana Gas had on 18 and 20 September 2017 respectively lodged appeals in the UAE against the Sharjah anti-suit injunction and that it was expected that those appeals would be listed for a hearing on 8 October 2017. The purpose of listing the trial for a further hearing on 12 October 2017 was to give Dana Gas an opportunity to make oral submissions on that date, if the Sharjah anti-suit injunction had by then been lifted.

36. In the event, Dana Gas did not give the required undertaking by 1pm on 26 September 2017 but instead, on 3 October 2017, belatedly issued an application asking the court to dispense with the requirement. The hearing in the Sharjah proceedings took place on 3 October 2017 but the court adjourned the proceedings until 25 December 2017 on the ground that certain parties had not been summoned due to defects in the procedure followed for effecting service through diplomatic channels. On 8 October 2017 the hearing of the appeals against the Sharjah anti-suit injunction was adjourned by the Sharjah Court of Appeal on the basis that not all parties had yet been duly served.

37. On 11 October 2017 Dana Gas issued an application in this court seeking a further adjournment of the present trial pending the resolution of the appeals in the UAE. Based on the advice of its UAE lawyers, Dana Gas informed the court that the appeals were likely to be re-listed within three to four weeks. At a hearing on 13 October 2017 I granted a further adjournment until 13 November 2017 and directed that the trial would be listed on that date to give Dana Gas a further opportunity to make oral submissions. In my judgment I made it clear that this was to be a final opportunity and that, in all the circumstances, which included the need for a speedy decision, the court's availability and my finding that Dana Gas bears a significant degree of responsibility for the situation in which it has been prohibited from proceeding with this action by the Sharjah court, no further delay could be contemplated.

38. Following a further adjournment on 6 November 2017, the appeals in the UAE were finally heard on 13 November 2017. However, the Sharjah Court of Appeal did not announce its decision on that day and instead reserved judgment until 29 November 2017.

39. Later on 13 November 2017 the trial was again listed for hearing in this court. Anticipating that the Sharjah Court of Appeal would by then have given its decision

and that the appeals would succeed, Dana Gas had issued an application for a very short adjournment to a date not before 15 November 2017. In the event, Mr Gillis QC on behalf of Dana Gas requested an adjournment until a date after 29 November 2017. I rejected that application and indicated that I will now proceed to give judgment.

40. The reasons for the procedural course followed have been set out in the judgments given on 19 September, 22 September, 13 October and 13 November 2017. In essence I have concluded that, weighing all the competing considerations of fairness, dealing with this case justly requires that the court should delay no longer before giving its decision in a matter which has proceeded on the basis that a decision was needed by the end of October or very shortly afterwards.

The preliminary issue

41. The starting point for the claim made by Dana Gas in these proceedings is its contention that the transaction is unlawful and all the relevant contractual obligations are unenforceable as a matter of UAE law. This contention is supported by the opinion of Mr Aidarous, an expert on UAE law instructed by Dana Gas. It is disputed by the defendants, who have relied on a report from Mr Alulama, an expert on UAE law instructed by the Delegate. A central point of disagreement between the experts is whether the provisions of the UAE Civil Code which, according to Dana Gas and Mr Aidarous, render the transaction unlawful apply to a commercial transaction of the present kind which, as both experts agree, is governed (so far as UAE law is applicable) by the UAE Commercial Code.

42. In accordance with the order made on 22 September 2017, this judgment deals only with questions of English law and does not seek to decide any issue of UAE law. For present purposes I am assuming in favour of Dana Gas that its case on UAE law is correct and that, as a matter of UAE law, all the relevant contractual obligations are unlawful and unenforceable. The essential question to be decided as a preliminary issue is whether or not, on this assumption, the Purchase Undertaking is valid and enforceable as a matter of English law.

43. The preliminary issue in its final form is set out in an appendix to this judgment.

English private international law

44. In general, questions about whether a contract is valid and enforceable are decided in the English courts by applying the law which governs the contract. Furthermore, the parties are generally free to choose the law which is to govern their contract. That was the general rule at common law and it remains the position under Regulation (EC) 593/2008 of June 17, 2008 (the "Rome I Regulation").

45. Thus, if the contract is (or would, if valid, be) governed by the law of a foreign country, the court will apply that country's law to determine its validity: see article 10(1) of the Rome I Regulation. Accordingly, because the Mudarabah Agreement is (or would, if valid, be) governed by the law of the UAE, the English courts will not enforce the Mudarabah Agreement if it is shown to be invalid under the law of UAE. The same would apply if a Sale Agreement executed by the parties pursuant to clause 3.3 of the Purchase Undertaking was found to be invalid under the law of the UAE. The English court would not in those circumstances enforce the Sale Agreement.

46. On the same principle, where the contract is (or would, if valid, be) governed by English law, it is English law which determines whether the contract is valid and enforceable. The fact that the contract or its performance would be regarded as invalid or unlawful under the law of some other country (for example, a country where one of the parties is domiciled or carries on business) is generally speaking irrelevant: see e.g. *Kleinwort, Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678.

47. As mentioned earlier, the Purchase Undertaking is governed by English law and so (as Dana Gas is constrained to accept) it is English law which determines whether the Purchase Undertaking is a valid and enforceable contract. It is perfectly lawful in English law to guarantee the return from an investment and to pay and receive compensation for the use of money. *Prima facie*, therefore, the Purchase Undertaking is a valid and enforceable contract whatever view would be taken of its validity and enforceability if UAE law were applicable.

The case of Dana Gas

48. In its amended particulars of claim and written opening submissions for the trial Dana Gas has relied on three grounds for disputing this conclusion and arguing that the obligations in clauses 2 and 3 of the Purchase Undertaking to purchase the Trustee's rights, benefits and entitlements in and to the Mudarabah Assets and to pay the Exercise Price are unenforceable as a matter of English law. In summary, these grounds are:

    i) On a proper interpretation of the Purchase Undertaking, the obligation of Dana Gas to pay the Exercise Price is conditional on the parties being able lawfully and effectively to transfer the Trustee's rights to the Mudarabah Assets by entering into a valid Sale Agreement – which they cannot do.

    ii) The Purchase Undertaking is void for mistake, because the parties entered into it on the basis of the mistaken common assumption and understanding that:

        a) the Mudarabah Agreement is lawful and enforceable under UAE law;

        b) any Sale Agreement entered into in accordance with clause 3.3 of the Purchase Undertaking would be valid under UAE law; and

        c) the Trustee had rights, benefits and entitlements in and to the Mudarabah Assets that could be the subject matter of a Sale Agreement.

    iii) As a matter of English public policy, the English courts will not enforce any Sale Agreement and, in consequence, will not enforce the obligations under the Purchase Undertaking, including the obligation of Dana Gas to pay the Exercise Price.

49. Making the assumptions in favour of Dana Gas which are set out in the appendix to this judgment, I will consider these three grounds in turn.

(1) The construction argument

50. The first argument made by Dana Gas is that, on a proper interpretation of the Purchase Undertaking, its obligation under clause 3.2 to pay the Exercise Price is dependent on the parties being able to enter into a Sale Agreement pursuant to clause 3.3 which will have the effect of transferring the Trustee's rights to the Mudarabah Assets to Dana Gas. In support of this interpretation, Dana Gas has pointed out that the Purchase Undertaking is not just an undertaking to pay a sum of money. Rather, as its terms (e.g. clauses 2.1 and 3.2) make clear, it is an undertaking to purchase the Trustee's "rights, benefits and entitlements in and to the Mudarabah Assets". Dana Gas argues that such a purchase requires Dana Gas to receive the Trustee's rights to the Mudarabah Assets in exchange for payment of the Exercise Price. Pursuant to clause 3.3 of the Purchase Undertaking, the transfer of those rights to Dana Gas is to be effected by entry into a Sale Agreement. Dana Gas maintains (and for present purposes I am assuming) that any Sale Agreement executed by the parties would be void as a matter of UAE law. It follows, Dana Gas argues, that no valid transfer of the Trustee's rights to Dana Gas can take place and hence no obligation to pay the Exercise Price can arise. Alternatively, Dana Gas contends that no obligation to pay the Exercise Price can arise because the Mudarabah Agreement is void, with the consequence that the Trustee never acquired any rights to the Mudarabah Assets which it is able to sell under the Purchase Undertaking.

51. In my view, the interpretation of the Purchase Undertaking contended for by Dana Gas is untenable and flatly inconsistent with its express wording.

52. It is correct that the Purchase Undertaking provides for the purchase by Dana Gas of the Trustee's rights to the Mudarabah Assets and for a transfer of those rights to Dana Gas to occur by the parties executing a Sale Agreement. The Purchase Undertaking does not, however, provide for an exchange to take place such that Dana Gas is obliged to pay the Exercise Price only in return for the transfer the Trustee's rights to the Mudarabah Assets. In terminology that is sometimes used,[2] the two performances are not concurrent conditions. Instead, the process by which the purchase is to take place has been split into two separate stages, of which the first stage is payment of the Exercise Price. It is clear from the wording of clause 3.2 that the obligation of Dana Gas to pay the Exercise Price arises upon delivery of a (valid) Exercise Notice. There is no other condition which has to be satisfied in order to trigger the payment obligation.

53. The second stage of the process is for the Trustee's rights to the Mudarabah Assets to be transferred to Dana Gas "by the Obligor and the Trustee executing a Sale Agreement". Clause 3.3 expressly provides that this obligation arises "following" payment of the Exercise Price. Logically, the existence of the obligation to pay the Exercise Price cannot depend on the performance of an obligation which only arises if and when the obligation to pay the Exercise Price is performed.

54. I think it plain that the Purchase Undertaking has not been structured in this way by accident. Not only does the front page of the document confirm that it has been professionally drafted but, as discussed below, it is apparent from its terms that the risks against which the Purchase Undertaking is intended to protect the

---

2 See e.g. Chitty on Contracts (32nd Edn, 2015), para 13-029.

Certificateholders include the risk that the *mudarabah* and the transaction documents governed by UAE law will turn out to be invalid. I think it clear that the Purchase Undertaking has been deliberately framed to ensure that in this event any consequences or potential consequences of such invalidity – including any arguments that the Trustee's rights to the Mudarabah Assets cannot lawfully and effectively be transferred to Dana Gas or that no such rights exist or that it is impossible to execute a valid Sale Agreement – do not affect the obligation of Dana Gas to pay the Exercise Price.

55. Accordingly, I reject the first ground relied on by Dana Gas.

(2) Mistake

56. The second ground advanced is that the Purchase Undertaking is void for mistake.

The relevant law

57. When the parties to a contract enter into it on the basis of an assumption about its subject-matter which turns out to have been mistaken, English law will in certain circumstances treat the contract as void. But those circumstances are wholly exceptional and contracts which have been found to be void for mistake are few and far between.

58. In the leading case of *Bell v Lever Bros* [1932] AC 161 at 225, Lord Atkin accepted a proposition formulated by counsel, Sir John Simon, that:

> "Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption and that assumption is not true, the contract is avoided: i.e. it is *void ab initio* if the assumption is of present fact and it ceases to bind if the assumption is of future fact."

Lord Atkin went on to make it clear (at 226) that, for the purpose of this proposition, a particular assumption cannot be said to be the basis of the contract "unless the new state of facts makes the contract something different in kind from the contract in the original state of facts."

59. On this formulation the question whether a contract is void for mistake is a question of construction of the contract: if the contract expressly or impliedly makes a particular assumption a condition of its validity, there is no valid contract if the assumption is false. There are other passages in the judgments in *Bell v Lever Bros*, however, which suggest that establishing the existence of an operative common mistake is not based solely on inference from the terms of the contract and the surrounding circumstances but involves an inquiry into the subjective beliefs of the parties. For example, Lord Atkin said (at 218) that:

> "a mistake [as to quality of the thing contracted for] will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without

> the quality essentially different from the thing as it was believed to be." [emphasis added]

Even more starkly, Lord Thankerton who reached the same conclusion as Lord Atkin said (at 237) that a common mistake would not avoid the contract unless it related to something that both the parties "must necessarily have accepted in their minds as an essential and integral element of the subject matter".

60. The suggestion that the existence of contractual rights and obligations depends on the parties' subjective states of mind is not consistent with the objective approach which is fundamental to the modern English law of contract. It is therefore not surprising that the conception of the doctrine of mistake which treats the subjective beliefs of the parties as relevant has not been accepted. In the leading modern authority of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, para 61, the Court of Appeal regarded as "a more solid jurisprudential basis for the test of common mistake that Lord Atkin was proposing" the implication of a term of the contract of the same nature as was understood to underpin the doctrine of frustration when *Bell v Lever Bros* was decided. Lord Phillips MR (who gave the judgment of the court) went on, however, to trace the subsequent history of the doctrine of frustration in which the implied term explanation was ultimately rejected. From this, Lord Phillips derived the following lesson (at para 73):

> "Where a fundamental assumption upon which an agreement is founded proves to be mistaken, it is not realistic to ask whether the parties impliedly agreed that in those circumstances the contract would not be binding. The avoidance of a contract on the ground of common mistake results from a rule of law under which, if it transpires that one or both of the parties have agreed to do something which it is impossible to perform, no obligation arises out of that agreement."

He added (at para 74):

> "In considering whether performance of the contract is impossible, it is necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances. In some cases it will be possible to identify details of the 'contractual adventure' which go beyond the terms that are expressly spelt out, in others it will not."

Lord Phillips also said (at para 75) that "[j]ust as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake".

61. Where this leaves the common law doctrine of mistake, as it seems to me, is as follows. First, the doctrine is not based on an inquiry into the subjective beliefs of the parties but on an objective analysis of what they agreed. Second, the doctrine does not rest on the notion that the parties have impliedly agreed what is to happen in the event that an assumption underlying the contract proves to be false. It does, however,

involve a question of construction of the contract. It is only where it is to be inferred from the terms of the contract or the surrounding circumstances that the contract was never intended to apply in the situation which in reality existed when the contract was made that the doctrine will apply. Such an inference will be drawn only if the difference between the state of affairs on which the contract was premised and the actual state of affairs is sufficiently fundamental.

62. Thus, the doctrine of mistake can only apply if there is a gap in the contract. If the parties have expressly or impliedly agreed what is to happen if they turn out to have been mistaken about the matter in question – in other words, if the risk of the mistake has been allocated by their contract – there is no scope for the doctrine. As Steyn J said in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255 at 268:

> "Logically, before one can turn to the rules as to mistake … one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary."

63. One way – although not the only way – in which the risk of a mistake may be contractually allocated is by one party warranting that the relevant state of affairs exists. So, for example, in *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 337 the defendant sold to the claimant the wreck of an oil tanker, stated to be lying on a certain reef. Unknown to either party, the tanker did not actually exist (nor did the reef). Before the High Court of Australia an argument that the contract was void for mistake failed because the court held that the defendant had impliedly warranted that there was a shipwrecked tanker. The non-existence of the tanker was not therefore a state of affairs for which the contract failed to provide.

64. The main reason why pleas of mistake seldom succeed is that the risk of a mistake is usually allocated by the contract to one of the parties. Plainly, there is no room for the doctrine to operate if the contract states expressly what is to happen if the relevant assumption proves to be false. It may be harder to determine whether the contract impliedly allocates the risk. To take one of the examples given by Lord Atkin in *Bell v Lever Bros* [1932] AC 161 at 224: "A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy." In practice in such a case the answer is likely to be found through construction of the contract. If the authorship of the picture is part of the description of the goods so that the seller has impliedly warranted its attribution, the risk will lie with the seller. If on the other hand there is no such warranty, the ordinary inference based on the principle of *caveat emptor* would be that the buyer is taking the risk.

65. The second reason why most arguments of mistake fail is that the doctrine only applies if the mistake is sufficiently fundamental. Two different formulations of this requirement have been approved. One is that the mistake in question has rendered the contract "impossible of performance". The other is that the mistake "must render the subject-matter of the contract essentially and radically different from the subject-matter which the parties believed to exist". The two approaches may essentially

amount to the same thing: see *Kyle Bay Ltd (t/a Astons Nightclub) v Underwriters subscribing under Policy No 019057/08/01* [2007] EWCA Civ 57, paras 24-25.

66. All three versions of the case of mistake advanced by Dana Gas in my view fail at the first hurdle.

(i) Invalidity of the Mudarabah Agreement

67. The first mistake alleged by Dana Gas and which I am assuming for present purposes is that, when they entered into the Purchase Undertaking, the parties to it mistakenly understood that the Mudarabah Agreement was lawful and enforceable.

68. The short reason why such a mistake cannot render the Purchase Undertaking void is that the possibility that the Mudarabah Agreement was unlawful and unenforceable was expressly contemplated and catered for in the Purchase Undertaking.

69. The Events of Default specified in clause 5 of the Purchase Undertaking include the following:

> "5.1.3 **Repudiation**: either the Obligor or the Mudarib repudiates or challenges the valid, legal, binding and enforceable nature of any, or any part of a, Transaction Document to which it is a party or does or causes to be done any act or thing evidencing an intention to repudiate or challenge the valid, legal, binding and enforceable nature of any Transaction Document to which it is a party; or
>
> 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 or all of its obligations under the Transaction Documents to which it is a party, or any of the obligations of either the Obligor or the Mudarib under the Transaction Documents are not, or cease to be legal, valid, binding and enforceable."

As defined in clause 1.1 of the Purchase Undertaking, the "Transaction Documents" include the Mudarabah Agreement.

70. As mentioned earlier, an Event of Default constitutes a Dissolution Event, and a Dissolution Event is one of the circumstances which entitles the Trustee to exercise its rights under clause 2 of the Purchase Undertaking. The Dissolution Events, which are set out in Condition 13.1, also include the situation where:

> "at any time it is or will become unlawful for the Trustee to perform or comply with any of its obligations under the Transaction Documents to which it is a party or any of the obligations of the Trustee under the Transaction Documents to which it is a party are not, or cease to be, legal, valid, binding and enforceable".

Accordingly, if (as Dana Gas alleges) the Mudarabah Agreement is unlawful and unenforceable and has not given rise to any valid obligations, the consequence is that

there has been a Dissolution Event which entitles the Trustee to enforce the Purchase Undertaking. Indeed, even if the Mudarabah Agreement is in fact lawful, the very fact that Dana Gas has challenged its validity is itself a Dissolution Event which entitles the Trustee to exercise its rights under clause 2 of the Purchase Undertaking. Hence there can be no operative mistake as the contract expressly provides for the situation which has (or has allegedly) arisen.

71. In its written opening submissions for the trial Dana Gas sought to counter this objection by arguing that clauses 5.1.3 and 5.1.4 of the Purchase Undertaking are unenforceable as a matter of English public policy. Dana Gas submitted that it is contrary to English public policy to prohibit parties from alleging that a contract is unlawful under its governing law or to impose a contractual penalty for doing so. I see no reason to accept this proposition. Even if it is correct, however, it does not apply because the Purchase Undertaking does not prohibit Dana Gas from alleging that the Mudarabah Agreement is unlawful under its governing law: it merely provides that certain contractual consequences will ensue in the event that such an allegation is made. Nor is it arguable that those consequences involve the imposition of a contractual penalty, as alleging that the Mudarabah Agreement is unlawful is not a breach of contract and the rule against penalties only applies to sums payable on breach: see *Cavendish Square Holding BV v Makdessi* [2016] AC 1172. In any case this argument only engages clause 5.1.3 of the Purchase Undertaking, which makes it an Event of Default to challenge the validity or legality of any Transaction Document. It does not affect clause 5.1.4 or the other provisions referred to above, which entitle the Trustee to enforce the Purchase Undertaking if the Mudarabah Agreement is in fact unlawful or unenforceable. I see no possible basis for suggesting that those provisions are contrary to English public policy.

72. In short, the parties have expressly agreed that, if the Mudarabah Agreement turns out to be – or is alleged by Dana Gas to be – unlawful or unenforceable, the Trustee can rely on the Purchase Undertaking to require Dana Gas to pay the Exercise Price into the Transaction Account in London. As a matter of law, Dana Gas cannot rely on circumstances which trigger rights under the Purchase Undertaking as a basis for arguing that the Purchase Undertaking is void for common mistake.

(ii) Unenforceability of any Sale Agreement

73. The next mistake alleged by Dana Gas is that the parties mistakenly understood when they entered into the Purchase Undertaking that the Trustee's rights to the Mudarabah Assets could be transferred to Dana Gas by the execution of a Sale Agreement. As previously discussed, Dana Gas maintains (and I assume for present purposes) that no such transfer is in fact possible because any Sale Agreement executed by the parties would be unlawful and void under UAE law.

74. The defendants argue that the rights conferred on the Trustee by the Mudarabah Agreement are purely contractual in nature and that it was never intended that the Trustee should have any proprietary interest in the Mudarabah Assets. Hence, if the Mudarabah Agreement is invalid, there is no need for any rights to be transferred to Dana Gas, since in that event the Trustee would have no rights to the Mudarabah Assets. The fact that a valid Sale Agreement could not be executed is therefore immaterial.

75. Be that as it may, the short answer to the contention that the Purchase Undertaking is void for mistake is again that it is untenable because the risk of the relevant mistake has been contractually allocated. This follows from my earlier holding, in addressing the construction argument, that the Purchase Undertaking has been deliberately structured to ensure that any difficulty in effecting the transfer of the Trustee's rights to the Mudarabah Assets, including any arguments that no such rights exist or that it is impossible to execute a valid Sale Agreement, do not affect the obligation of Dana Gas to pay the Exercise Price. On the proper interpretation of the Purchase Undertaking, the risk that there cannot be a lawful and valid transfer of the Trustee's rights to the Mudarabah Assets is one that has been allocated to Dana Gas.

(iii) No rights to the Mudarabah Assets

76. The third alleged mistake is based on an assumed state of affairs for which neither party in fact contends. The case on UAE law put forward by Dana Gas is that the Mudarabah Agreement is void but the Trustee nevertheless has rights to the Mudarabah Assets. The defendants dispute that the Mudarabah Agreement is void but, in the opinion of the Delegate's expert on UAE law, a consequence of the Mudarabah Agreement being void would be that the Trustee never acquired any rights to the Mudarabah Assets. For present purposes I will assume that the Mudarabah Agreement is void as alleged by Dana Gas, that this has the consequence asserted by the Delegate's expert, and that the parties entered into the Purchase Undertaking on the mistaken understanding that the Trustee had rights to the Mudarabah Assets.

77. It seems to me that this hypothesis adds nothing to those already considered. I have already noted that under the terms of the Purchase Undertaking the risk of the Mudarabah Agreement being invalid has been expressly allocated to Dana Gas. It is implicit in that allocation that Dana Gas will also bear the consequences of such invalidity. One circumstance in which it would not be possible to effect a lawful and valid transfer of the Trustee's rights to the Mudarabah Assets is a situation where such rights do not exist in consequence of the Mudarabah Agreement being void. I have already concluded, however, that under the terms of the Purchase Undertaking the risk that there cannot be a lawful and valid transfer of the Trustee's rights to the Mudarabah Assets has been allocated to Dana Gas.

78. It follows that the second ground relied on by Dana Gas also fails.

(3) Public policy

79. As discussed earlier, the validity and enforceability of a contract governed by English law is not generally affected by considerations of whether the contract would be regarded as valid or whether its performance would or would not be lawful under the law of another country. There are exceptions, however, which potentially apply where the performance of the contract would be unlawful in the place of performance. First of all, there is a principle – often referred to as the *Ralli Brothers* principle after the case in which it was first established – that the English court will not enforce an obligation which requires a party to do something which is unlawful by the law of the country in which the act has to be done: see *Ralli Brothers v Cia Naviera Sota y Aznar* [1920] 1 KB 614; *Kahler v Midland Bank Ltd* [1950] AC 24 at 48; *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98; *Dicey, Morris and Collins on The Conflict of Laws* (15th

Edn) vol 2, para 32-098. I accept the view expressed by *Dicey, Morris and Collins* at para 32-102 that this principle is best understood as a principle of English domestic law. A similar but not identical principle of private international law (which applies irrespective of the governing law of the contract) is established by article 9(3) of the Rome I Regulation. This provides:

> "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…"

80. When it began the present action and applied for an interim injunction, Dana Gas relied on the *Ralli Brothers* principle and on article 9(3) of the Rome I Regulation as its main grounds for arguing that its obligation under the Purchase Undertaking to purchase the Trustee's rights to the Mudarabah Assets is unenforceable. However, those rules of law are only applicable if and in so far as the obligations in question have to be performed in the UAE. It does not appear that any of the obligations that the defendants wish to enforce require Dana Gas to do anything in the UAE. In particular, the obligation which arises where the Trustee exercises its rights under the Purchase Undertaking by delivering an Exercise Notice is an obligation to pay the Exercise Price into the Transaction Account. The Transaction Account is an account maintained by the Trustee with Deutsche Bank in London. Performance of this obligation, therefore, is to take place in England.

81. In its amended particulars of claim and written opening submissions for the trial, Dana Gas has abandoned its reliance on the *Ralli Brothers* principle and on article 9(3) of the Rome I Regulation, no doubt recognising that they do not assist its case. Instead, Dana Gas has relied on a principle that, as matter of public policy, the English courts will not enforce a contract which is entered into for a purpose which is unlawful under the law of a friendly foreign state. I understand the argument to be that, applying this principle, the Purchase Undertaking is unenforceable because it has as its object, on the exercise of the rights granted to the Trustee by clause 2.1, entry into a Sale Agreement which would be unlawful under the laws of the UAE.

82. The principle relied on by Dana Gas derives from *Foster v Driscoll* [1929] 1 KB 470, where the Court of Appeal held that a contract which had as its object smuggling a cargo of whisky into the United States at a time when the sale of alcohol was prohibited in that country was contrary to public policy and void. The principle was applied by the House of Lords in *Regazzoni v Sethia* [1958] AC 301, which involved a contract for the sale of jute bags which were to be manufactured in India and shipped to Genoa for resale in South Africa in violation of an embargo under Indian law. In both cases it was intended that acts prohibited by the laws of the relevant friendly foreign country (the United States and India, respectively) should be carried out within the country's own territory; and in *Ispahani v Bank Melli Iran* [1998] Lloyds LR (Banking) 133, 139-140, the Court of Appeal decided that this is an essential and necessary ingredient of the principle. Accordingly, it is only if a contract has as its object and intention the performance in a friendly foreign country of an act which is illegal under the law of that country that the contract will be considered contrary to English public policy.

83. In the present case there is nothing to indicate that the Purchase Undertaking has as its object and intention the doing of anything in the UAE which is alleged by Dana Gas to be unlawful under the laws of the UAE. In particular, even if the object of the Purchase Undertaking can be said to include the execution of a Sale Agreement, there is nothing in the terms of the Purchase Undertaking or the surrounding circumstances to suggest that it was intended, either as a contractual or as a practical requirement, that any Sale Agreement should be executed in the UAE. In any event, even if this could be said to be the object or intention, I see no reason why it should be regarded as invalidating the entire contract. I have already held that on the proper interpretation of the Purchase Undertaking the inability to enter into a valid Sale Agreement would not affect the obligation of Dana Gas to pay the Exercise Price upon delivery of an Exercise Notice. I cannot see why a finding that the execution of a Sale Agreement would be invalid for the additional reason that it would be contrary to English public policy to do an act which is unlawful in a friendly foreign country should have any greater or different effect.

84. I conclude that this ground relied on by Dana Gas is also unfounded.

Other arguments

85. A number of other grounds for contending that its payment obligation under the Purchase Undertaking is invalid or unenforceable were pleaded by Dana Gas in its particulars of claim but were not maintained in its written opening submissions for the trial. I am satisfied that Dana Gas was right not to pursue these further grounds and that they were totally without merit.

Conclusion

86. I conclude that, even on the assumptions made for the purpose of the preliminary issue, all the grounds on which Dana Gas has sought to challenge the validity and enforceability of the Trustee's rights under the Purchase Undertaking to oblige Dana Gas to pay the Exercise Price are unfounded. Accordingly, I will make a declaration that the Purchase Undertaking is valid and enforceable in accordance with its terms. I invite submissions in writing on whether the defendants are entitled to any further relief in the light of this conclusion and on any other consequential matters.

APPENDIX

1. The issue to be determined as a preliminary issue is as follows:
"Whether on the assumptions set out in paragraph 2 below the Purchase Undertaking dated 8 May 2013 is valid and enforceable in accordance with its terms."

2. The assumptions are that:

   (a) At the time when they entered into the Purchase Undertaking, the parties thereto (i.e. the Trustee, the Delegate and Dana Gas) believed that under UAE law:

      (i) the Mudarabah Agreement dated 8 May 2013 was or would when executed be lawful and enforceable; and

      (ii) the Trustee had or would on execution of the Mudarabah Agreement acquire rights, benefits and entitlements in and to the Mudarabah Assets; and

      (ii) a Sale Agreement in the form set out in Schedule 2 to the Purchase Undertaking could lawfully be made and, if made, would be valid and effective to transfer to Dana Gas the Trustee's rights, benefits and entitlements in and to the Mudarabah Assets.

   (b) Each of these beliefs was mistaken in that under UAE law:

      (i) the Mudarabah Agreement was unlawful and unenforceable and contrary to mandatory rules of public policy;

      (ii) any Sale Agreement would be unlawful and unenforceable and contrary to mandatory rules of public policy under UAE law;

      (iii) the Trustee did not have and could not lawfully acquire any rights, benefits and entitlements in and to the Mudarabah Assets.