Judgments

Dana Gas PJSC v Dana Gas Sukuk Ltd and others

[2018] EWHC 277 (Comm)

Queen's Bench Division, Commercial Court (Financial List)

Leggatt J

1 February 2018

Judgment

Richard Gillis QC, Daniel Hubbard and Maximilian Schlote (instructed by **Squire Patton Boggs**) for the **Claimant**

William Edwards (instructed by **Fieldfisher LLP**) for the **1st Defendant**

David Allison QC and Ryan Perkins (instructed by **Allen & Overy**) for the **2nd Defendant**

Robert Anderson QC, Stephen Atherton QC, Andrew Scott and Rebecca Loveridge (instructed by **Weil, Gotshal & Manges (London) LLP**) for the **5th Defendant**

Hearing dates: 31 January and 1 February 2018

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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.

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MR. JUSTICE LEGGATT:

1. On 5 July 2017 His Honour Judge Waksman QC, sitting as a judge of the Commercial Court, gave directions for an expedited trial of this case. At paragraph 4 of his order for directions, Judge Waksman directed that:

"The trial shall deal with all questions of the alleged unenforceability of the Mudarabah and related agreements by reason of UAE law, as well as the particular claims made as to the unenforceability or invalidity as a matter of English law of the Purchase Undertaking. Any consequential claims shall be dealt with by way of a subsequent hearing before this court."

2. At the same time as giving that direction and further directions for the hearing of an expedited trial, Judge Waksman continued an injunction that had previously been obtained by Dana Gas to prevent the defendants until trial or further order from enforcing the Purchase Undertaking. At paragraph 6 of the order continuing the injunction, Judge Waksman further ordered that Dana Gas must:

"as soon as possible, and in any event by no later than 4 pm on Friday 21 July 2017, take all such steps as are necessary to discharge the injunction granted by the Sharjah court on 13 June 2017 and to stay the proceedings commenced by Dana Gas in the UAE on 13 June 2017."

That was a reference to another action which Dana Gas commenced in the UAE at or close to the same time that it commenced these proceedings, and to an injunction granted by the court in Sharjah to prevent enforcement of the Purchase Undertaking pending the resolution of the UAE proceedings.

3. Matters did not proceed in the way that Judge Waksman had planned. In the first place, in breach of the provision in the order which I have just read, Dana Gas made no attempt to discharge the injunction granted by the Sharjah court or to seek a stay of the proceedings in the UAE. Dana Gas also failed to comply with a further order of this court made on 31 July 2017 which required it to make an application to the UAE court to withdraw its claim there by 8 August 2017. When such an application was belatedly made by Dana Gas, it was opposed by three shareholders of Dana Gas and was rejected by the court in Sharjah.

4. In the meantime, the parties prepared for the speedy trial which Judge Waksman had ordered, for which two weeks of court time had been specially set aside in September 2017. The parties served reports from experts on the law of the UAE and those experts met in the usual way and prepared a joint report. The parties also served their written opening submissions for the trial which, in accordance with Judge Waksman's order, was intended to resolve both issues of English law and issues of the law of the UAE.

5. On the eve of the trial, however, the three shareholders of Dana Gas who had opposed its application to withdraw its claim in Sharjah obtained from the Sharjah court an anti-suit injunction to restrain all the then parties to these proceedings from proceeding with this litigation. As I have found in an earlier judgment, Dana Gas made no attempt to oppose that application and, in view of that fact and in view of its non-compliance with the orders of the English court, I found that Dana Gas by its conduct had significantly contributed to the situation in which it and the defendants were prevented from proceeding with the trial.

6. The order of Judge Waksman was not entirely frustrated, because in response to that anti-suit injunction BlackRock applied for and was granted permission to be joined as an additional defendant to the action and I gave directions for the trial to proceed as the trial of a preliminary issue to determine whether, assuming in favour of Dana Gas that the Mudarabah Agreement is invalid as a matter of UAE law, the Purchase Undertaking is nevertheless valid and enforceable (that being a matter of English law).

7. I followed that course, rather than proceeding with the trial as a whole, for a number of reasons. Those reasons included the fact that I thought it right to give Dana Gas time to attempt to set aside the anti-suit injunction granted by the Sharjah court to enable it to participate in the trial in this court, and the fact that this court had only a two-week window available in order to hear the trial. In those circumstances there simply was not sufficient time both to give Dana Gas an opportunity to seek to set aside the anti-suit injunction granted in Sharjah and to proceed with the hearing of all the issues that Judge Waksman had directed should be tried.

8. A second consideration was that it seemed to me that, whilst questions of English law could, if necessary, be decided with the benefit of the written submissions that Dana Gas had already filed and without hearing further oral argument, it would be particularly undesirable for the court to seek to decide questions of UAE law without hearing expert evidence from both experts and cross-examination of those experts.

9. A third consideration was that it seemed to me possible that, if it should prove to be the case that the preliminary issue was decided in favour of the defendants, it would then be unnecessary to decide any questions of UAE law.

10. The preliminary issue was decided in favour of the defendants and I have rejected, earlier this week, an application by Dana Gas to set aside the judgment. However, the hope that that decision might dispose of all the issues in the case, or at any rate make it unnecessary for the court to decide questions of UAE law, has proved to be over-optimistic.

11. Dana Gas maintains its case that the Mudarabah Agreement is invalid because it is said to contravene principles of *Shari'a* which are part of the law of the UAE. It intends to appeal against the decision that I reached on the preliminary issue and, if that appeal were to succeed, it would then be necessary to resolve the question of UAE law in order to determine the validity of the Purchase Undertaking. But, in addition, Dana Gas intends to advance a claim that under the relevant provisions of UAE law there must, at the end of the mudarabah, be a process of reconciliation by which, if the Mudarabah Agreement is found to be invalid, the parties are to be put in the position that they would have been in if the mudarabah had complied with UAE law.

12. Although that claim has not yet been pleaded in such terms in these proceedings it has been formulated in draft amendments to the claim made by Dana Gas in the UAE. The relevant part of the claim for relief in the statement of case served by Dana Gas in the UAE, as it is intended to be amended, asserts that what is called there a "clearing" but has been referred to here as a "reconciliation", must take place under UAE law. The central principle of that reconciliation is to determine what amount each party has contributed and the value of the Mudarabah Assets, and then at the end of that process to determine:

"... the amount of money, if any, which the claimant [that is, Dana Gas] is liable to pay to the first and/or second defendant [that is to say, the Trustee and the Delegate] or alternatively the amount of money which the first and/or second defendant is liable to pay to the claimant and in either case to order payment of the same."

13. It has been made clear in argument on behalf of Dana Gas at this hearing that its intention is to argue in the UAE that, if the Mudarabah Agreement is found to be invalid, the result of that process of reconciliation must be that Dana Gas is put in the same position financially that it would have been in had the mudarabah complied with relevant principles of UAE law, and that as part of that process of accounting any sums which Dana Gas has paid or is liable to pay to the Trustee under the Purchase Undertaking must be taken into account and will need to be reversed by a corresponding order for payment in favour of Dana Gas.

14. It is in these circumstances that Dana Gas has applied for an order to vary the direction given by Judge Waksman that the trial in this action should deal with issues of both UAE law and English law. Dana Gas invites the court to stay these proceedings insofar as they are concerned with issues of UAE law and to allow it to litigate those issues in the UAE. The three represented defendants – the Trustee, the Delegate and BlackRock – all oppose that application and support an application made by BlackRock for an anti-suit injunction to prohibit Dana Gas from pursuing its claim in the UAE.

15. The position that all issues should be tried in this court and not in the UAE was the position reached following the hearing before Judge Waksman. But it is the contention of Dana Gas that there has since then been a material change of circumstances and that in the circumstances which now obtain the variation which it seeks is appropriate. In particular, Mr Gillis QC on behalf of Dana Gas has argued that at the time of the hearing before Judge Waksman it was thought necessary to decide the question of whether the Mudarabah Agreement is valid in order to decide whether the Purchase Undertaking is valid. Accordingly those two questions, it was considered, had to be tried together. However, since then the court has concluded in deciding the preliminary issue that the Purchase Undertaking is valid and enforceable even on the assumption that the Mudarabah Agreement is invalid. In these circumstances it is said that there is no reason why the issue of validity of the Mudarabah Agreement and the questions of UAE law governing the reconciliation which Dana Gas asserts should be carried out at the conclusion of the mudarabah should not be tried in the UAE.

16. Secondly, it is said that there is every reason why those issues should be tried in the UAE, not only because the court in the UAE is naturally best placed to decide questions of its own law but because the issues raised are not just run of the mill issues of foreign law but include issues of fundamental importance which relate to matters of public policy in the UAE. That, it is suggested, was not apparent at the time of Judge Waksman's order but has come into focus as a result of the exchange of expert evidence in these proceedings.

17. An important issue between the experts on UAE law arises from the fact that the claim asserted by Dana Gas in the UAE is governed by the Commercial Code in the UAE. The experts are agreed that the application of the Commercial Code nevertheless cannot displace requirements of UAE law which go to public order. The opinion of the expert of Dana Gas is that the principles on which Dana Gas relies to argue that the Mudarabah Agreement is invalid are such fundamental principles, such that they take precedence over the Commercial Code. Mr Gillis has submitted that it would be particularly inappropriate for an English court to seek to decide issues of that nature.

18. I am sensitive to the point that it is always preferable, other things being equal, for questions about the law of another country to be decided by the courts of that country. That is particularly so where there are substantial differences between the jurisprudence of the two systems, as there are between English common law and the principles of UAE law that are relevant in this case. I also agree with Mr Gillis that the issues of UAE law raised in this case do include questions of public policy which it would be particularly desirable to have decided by the courts of the UAE rather than by this court, if other things were equal. But that said, other things are very far from being equal in this case and there are three main reasons why I am satisfied that it remains appropriate for these proceedings to continue and why, in the interests of justice, the court should refuse the application for a stay.

19. The first reason is that there remain issues of English law to be decided which are intertwined with the issues of UAE law, and which have the effect that the issues of UAE law cannot sensibly, as it seems to me, be tried separately and independently from the issues of UAE law.

20. The first point that may be made is that, as I have mentioned already, Dana Gas intends to pursue an appeal on the preliminary issue and it may yet prove to be the case, if the Court of

Appeal reaches a different decision from this court, that it is necessary to decide the question of whether the Mudarabah Agreement is valid in order to decide whether the Purchase Undertaking is a valid agreement. How that could be done if the Court of Appeal reached that conclusion but proceedings were then being carried on in the UAE is very difficult to contemplate.

21. But secondly, and leaving that aside, the claim as formulated by Dana Gas in its statement of case in the UAE is not simply formulated as a claim under the Mudarabah Agreement. In paragraph 10 of its statement of case the contention advanced is that the relevant clauses of the Mudarabah Agreement when read together with other agreements, including in particular the Purchase Undertaking and the Declaration of Trust, include terms and conditions which violate what are said to be imperative rules set out in the UAE Civil Code. The relevant terms and conditions are then set out, which are in fact not solely to be found in the Mudarabah Agreement itself: critical provisions are contained in the other agreements, namely the Purchase Undertaking and Declaration of Trust, which are governed by English law. It is difficult, if not impossible, in those circumstances to see how questions of UAE law can be separated from questions about the effect of agreements which are governed by English law.

22. A further way in which the claims under UAE law and those governed by English law are interwoven is that both the Delegate and the Trustee have the benefit, in the Declaration of Trust, of clauses which limit their liability and give them a right to be indemnified by Dana Gas against payments which they are required to make. It is said on behalf of the Delegate and the Trustee that those clauses give them a defence to the claim for payment which Dana Gas intends to assert pursuant to the reconciliation process under UAE law. As I mentioned earlier, the draft amended statement of case of Dana Gas in the UAE proceedings includes a money claim and it seems to me that, in order to decide whether Dana Gas is entitled to be paid money by the Delegate or the Trustee pursuant to the reconciliation, it will be necessary for the court to consider the arguments which the Delegate and Trustee would advance that they have a defence to such a claim under the Declaration of Trust.

23. There are also provisions in the Declaration of Trust referred to as allocation arrangements which provide for the order of priority of distribution of any money received by the Trustee. It is said on behalf of the Trustee that the effect of those provisions is to prevent the Trustee from paying any money, including any money received from Dana Gas if it is required to pay the Exercise Price under the Purchase Undertaking to Dana Gas, unless there be any residue after the certificateholders and others have received the monies to which they are entitled under the Declaration of Trust. That gives rise to a further line of argument which would have to be considered by any court which is deciding whether money is payable to Dana Gas in any reconciliation process.

24. It therefore seems to me that, for those reasons, the issues of UAE law cannot realistically or sensibly be disentangled from the related issues of English law which arise out of the claim made by Dana Gas, and it is therefore not appropriate or sensible to make an order which seeks to have the English law and UAE law issues decided by different courts in different jurisdictions.

25. My second main reason for refusing a stay is that neither the Delegate nor the Trustee has submitted to the jurisdiction of the Sharjah court. I am told that they have not yet even been served with proceedings. If they are served with proceedings the Delegate has indicated that it will seek to argue, and the Trustee has indicated that it may seek to argue, that the courts of the UAE do not have or should not exercise jurisdiction over them.

26. In that regard the point is made that not only does the Declaration of Trust contain a clause conferring jurisdiction on the English courts, but the Purchase Undertaking includes at clause 9.1 a clause which provides:

"The courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Undertaking (and any disputes relating to any non-contractual obligations arising out of or in connection with this Undertaking) (each a 'Dispute') and accordingly any legal action or proceedings arising out of or in connection with this Undertaking… ('Proceedings') may be brought in such courts. The Obligor [Dana Gas] irrevocably submits to the jurisdiction of such courts and waives any objection to Proceedings in such courts on the ground of venue, or on the ground that the Proceedings have been brought in an inconvenient forum. These submissions are made for the benefit of the Trustee and the Delegate and shall not affect their rights to take Proceedings in any other court of competent jurisdiction, nor shall the taking of Proceedings in one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction (whether concurrently or not)."

27. It is submitted by Mr Edwards on behalf of the Trustee that that clause amounts to an exclusive English jurisdiction clause as regards claims made by the Obligor, that is to say Dana Gas. The correctness of that interpretation is confirmed by a line of authorities in which similarly worded clauses have been held to have that effect. Those include the decision of the Court of Appeal in the case of *Continental Bank v Aeakos SA* [1994] 1 WLR 588, a decision which is binding on this court. In those circumstances it is submitted that the courts in the UAE would have no jurisdiction to decide the claims which Dana Gas is seeking to pursue in the UAE in circumstances where those claims are, in the way I have described, connected with the Purchase Undertaking.

28. On behalf of Dana Gas, Mr Gillis does not dispute that the effect of the clause is to confer exclusive jurisdiction for the claims made by Dana Gas on the English courts. But he says that this is not the end of the matter. In the case of *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 All ER (Comm) 237, Mr Justice Rix reached a similar conclusion in relation to a similarly worded clause. But he then went on to consider whether, nevertheless, a claim should more appropriately proceed in another jurisdiction in circumstances where there was another non-exclusive jurisdiction clause covering the dispute in favour of that other jurisdiction. A similar approach was taken by the Court of Appeal in another authority on which Mr Gillis relied, namely *UBS v Nordbank* [2009] 2 Lloyd's Rep 272. In that regard Dana Gas relies on the fact that the Mudarabah Agreement contains a clause stating that it is governed by and shall be construed in accordance with the laws of the United Arab Emirates and that the courts of the UAE shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with the agreement.

29. The point was made that the Delegate is not a party to the Mudarabah Agreement. Therefore in the case of the Delegate there is not even any non-exclusive jurisdiction clause in favour of the UAE but there is, as is now accepted, an exclusive jurisdiction clause in favour of England. The response of Dana Gas to that point was to offer an undertaking that it will not pursue in the UAE a claim against the Delegate. That only serves, however, as it seems to me, to indicate the inappropriateness of the UAE as the forum for resolving these issues since the Delegate is entitled to pursue claims under the Purchase Undertaking and it would be wholly unsatisfactory for a judgment to be arrived at which did not take account of the Delegate's claim. In any event, although I accept that, as regards the Trustee, the existence of an exclusive jurisdiction clause in favour of England is not necessarily a conclusive factor, it is a very strong factor in favour of its claims being dealt with in England and one which, in the circumstances of this case, seems to me to outweigh any corresponding interest arising from the non-exclusive jurisdiction clause in the Mudarabah Agreement.

30. My third main reason for refusing a stay relates to the nature of these proceedings and the way in which they have progressed. Importantly, this is not a case, such as one typically finds, where the party seeking a stay in favour of foreign proceedings is a reluctant defendant to English proceedings. One should not forget that Dana Gas is the claimant in these English proceedings. It is said by Mr Gillis that Dana Gas initially commenced these proceedings and

applied for an injunction here to prevent enforcement of the Purchase Undertaking only because the Trustee and the Delegate had not, at that stage, confirmed that they would abide by the similar injunction granted by the Sharjah court. Be that as it may, Dana Gas did not confine its claim here to seeking an injunction in aid of a claim which it wished to bring in Sharjah. Instead it pursued a substantive claim for relief in this jurisdiction. That claim raised issues of UAE law as to the validity of the Mudarabah Agreement as well as issues of English law. Dana Gas sought declarations including a declaration that the Purchase Undertaking is unenforceable. Its argument that the Purchase Undertaking is unenforceable depended upon a contention that the Mudarabah Agreement is invalid as a matter of UAE law.

31. Dana Gas sought to finesse that point in its particulars of claim by including at paragraph 9 a statement that:

"Nothing in these particulars of claim or proceedings is intended to be a submission by Dana Gas to the jurisdiction of the English courts with regard to any issue as to the construction, meaning, effect, validity and enforceability of the Mudarabah Agreement as a matter of UAE law, or as to any issue of UAE law arising for determination in the UAE proceedings."

Dana Gas then went on to plead, as it necessarily had to do, in support of its claim propositions of UAE law, whilst seeking to maintain the position that the correctness of those propositions should be decided in the UAE.

32. It is not, in my view, open to a party which brings a claim in this court, which it invites this court to decide, to on the one hand ask the court to give a judgment in its favour but on the other hand to ask the court not to decide certain issues which it is necessary to decide if the claim is to succeed. At all events Judge Waksman took the view that that was an untenable position and put Dana Gas to an election as to whether it wished to have its claim – including the issues of UAE law which had been raised – decided in this court or not. It is clear that Dana Gas chose at that point, if it had not already done so, to invite this court to decide issues of UAE law. It did so by continuing to pursue its claim in this court right up to and with a view to trial, after Judge Waksman had directed that any such trial must include issues of UAE law. If Dana Gas had wished to preserve its right to contend that those issues should more appropriately be decided in a different jurisdiction it should, as it seems to me, have abandoned its claim here once Judge Waksman had made it plain that pursuing its claim here would necessarily involve determination here of the issues of UAE law raised by Dana Gas.

33. If anything, the case for those issues being tried here seems to me to be stronger now than it was when Judge Waksman gave directions because the parties have since prepared for a trial of the issues of UAE law. They have served expert evidence and are ready for trial, or at least they were ready for trial in September.

34. I also cannot disregard the fact that I have found that Dana Gas bears a significant degree of responsibility for the fact that the trial did not take place as planned in September, and it does seem to me to be a relevant consideration of justice that Dana Gas should not be permitted to turn the fact that the trial did not then take place to its own procedural advantage.

35. For these reasons, I do not consider that the changes in circumstances that have taken place since Judge Waksman's order was made are material or that there is any reason to depart from his decision that all the issues in this case should be tried here.

36. In saying that I do not pre-judge the question of the order in which it is now appropriate for issues to be tried. None of the parties has asked me to give directions today for a further trial or for a further part of the trial to be heard. It is recognised that the claim for a reconciliation has not so far been properly pleaded by Dana Gas in these proceedings, nor have the various prospective defences to that claim to which I have referred been pleaded. It is com-

mon ground that the appropriate course at this stage is to give directions for amended statements of case to be served and that there should then be a case management conference to decide the appropriate future course of the proceedings. It will be for the judge who deals with that case management conference -- it will not be me -- to decide whether the appropriate course is to hold a single trial of issues of English law and UAE law or whether to adopt a split process which would again postpone determination of the question of validity of the Mudarabah Agreement until other issues have been decided.

37. Whatever course may be taken, I am satisfied that there should not be any stay ordered of any part of the English proceedings.

38. That leaves the application of BlackRock for an anti-suit injunction. It has been argued on behalf of Dana Gas that, even if its own application is refused so that there will be no stay of any part of the English proceedings, the court should nevertheless not grant an anti-suit injunction and should allow Dana Gas instead to pursue its claim in the UAE concurrently with these proceedings even though the claim in the UAE raises exactly the same issues, or at any rate a subset of the issues, raised by the claim here.

39. I think it clear that to permit Dana Gas to advance the same claim at the same time in two different jurisdictions would be vexatious and oppressive. Having concluded that England is the appropriate forum for determination for all the issues raised by the English proceedings, it must follow that this is a case in which it is in the interests of justice to grant an anti-suit injunction in order to prevent the vexation and oppression that would otherwise arise from defendants having to defend the same claim simultaneously elsewhere.

40. Mr Gillis relied on the case of *Deutschebank AG v Highland Crusader Partners LLP* [2010] 1 WLR 1023, in which parallel proceedings had been brought in Texas and in England. There was little to connect the relevant claims with England apart from the fact that they involved a dispute under a contract which contained a non-exclusive English jurisdiction clause. In those circumstances the court came to the conclusion that it was not right to grant an anti-suit injunction and that the English claim should proceed in parallel with the claim that had been brought in Texas. In that case, however, the claim in England raised contractual issues whereas the claim in Texas was a claim to set aside the contract on the basis of misrepresentation. There was not therefore the same degree of overlap of issues as there is in this case. Even more importantly, in the *Deutschebank* case there was, as I have said, little connection with England apart from the non-exclusive jurisdiction clause. That is very far from being the case here where there are numerous connections with this country and where, very importantly, as I have already emphasised, Dana Gas itself has chosen to bring and pursue its claim here.

41. Accordingly, subject to any question about the precise terms, I will grant an anti-suit injunction.

2nd Judgment

1. An application is now made by Dana Gas to continue the injunction granted by Judge Waksman which restrains the defendants until further order from declaring any event of default under the Purchase Undertaking and exercising rights under the Purchase Undertaking which would include the delivery of an Exercise Notice. That in turn, on the findings that I have made on the preliminary issue, would trigger an obligation on the part of Dana Gas to pay the Exercise Price.

2. It is said on behalf of Dana Gas that, unless the injunction is continued pending first of all the determination of its proposed appeal against the decision on the preliminary issue, and

secondly the determination of its claim in these proceedings including in particular its claim that it is entitled to a reconciliation at the end of the mudarabah, it will suffer irremediable prejudice.

3. Insofar as the prejudice would take the form of an inability to recover money after it has been distributed to the certificateholders, that point is accepted by the defendants who do not oppose an order of the court which would prevent, for the time being, any distribution to certificateholders of money received by the Trustee.

4. It is further said, however, on behalf of Dana Gas, that it would suffer irremediable prejudice if the Trustee were allowed to enforce its rights under the Purchase Undertaking at this stage. The evidence in support of that contention is contained in a witness statement of Mr Rangarajan Krishnakishore who states that, if the Trustee were permitted to enforce its security in relation to obligations under the Purchase Undertaking, Dana Gas would stand permanently to lose assets which are subject to that security. In addition, there is evidence in an earlier affidavit made by Mr Gareth Timms that enforcement of part of the security which relates to the group's Egyptian operations would create a risk that it would give rise to a right on the part of the Egyptian government to cancel valuable concession agreements.

5. It is said that, on the other hand, the Trustee would suffer no irremediable prejudice if it is prevented from enforcing the Purchase Undertaking at this stage because the value of the security which it has is said to be some $770 million, as compared with the amount of the Exercise Price which would be payable following delivery of an Exercise Notice, which is said to be some $727 million.

6. I do not accept in the first place that no prejudice at all will be suffered by the Trustee if it is prevented from exercising rights which I have held that it has under the Purchase Undertaking. The longer it has to wait before it is permitted to exercise those rights, the more potentially difficult the claim may be to enforce.

7. It is also said on behalf of Dana Gas that the Trustee would not be prejudiced because, even if the security were insufficient, Dana Gas is in any event a company with huge assets amounting to over $3 billion, including cash on hand which currently stands at some $562 million.

8. That latter point seems to me to be two-edged, because there is no evidence which asserts that Dana Gas would not be in a position to pay the Exercise Price out of cash and other realisable assets without necessitating the enforcement of security which, as I accept on the evidence, could result in substantial prejudice to Dana Gas.

9. It seems to me that the relevant considerations are different in relation to the proposed appeal and to the claim under the reconciliation.

10. As regards the proposed appeal, I regard it as a relevant consideration that I have taken the view, rightly or wrongly, that an appeal is most unlikely to succeed. Taking that and the other relevant circumstances into account, I am not persuaded that the overall interests of justice require the injunction to be continued pending determination of the appeal. I take the view that any such application would need to be considered by the Court of Appeal at the same time as an application to the Court of Appeal for permission.

11. In relation to the argument that the injunction should be continued pending the end of these proceedings and determination of the claim under the reconciliation, Dana Gas faces the difficulty not only that there is insufficient material to form a realistic view about the prospects of success of that contention, but that there is in any event in the Purchase Undertaking a 'no set-off' clause, at clause 7.4, which states:

"The obligor shall make all payments to be made by it under or in connection with this Undertaking into the Transaction Account without any set-off or counterclaim, and without any deduction or withholding for or on account of any Tax, or other charge or withholding of a similar nature, unless required by law."

That clause on the face of it entitles the Trustee to enforce the Purchase Undertaking immediately, irrespective of any cross-claim which Dana has in the form of its claim for a reconciliation. It is true that the court retains a residual discretion to grant a stay of execution or as an equivalent to grant an injunction, even in the face of a no set-off clause. However, as the decision of the Court of Appeal in *The "Fedora"* [1986] 2 Lloyd's Rep 441 at 445 makes clear, it is only in exceptional circumstances that the court should exercise that discretion to grant a stay or injunction. In that case, it was suggested that a combination of showing that there was a counterclaim which was likely to succeed, although that by itself would not be enough, along with cogent evidence that the bank would, if paid, be unable to meet a judgment on the counterclaim might have been sufficient. Nothing of that sort has been shown here. Nor, in my view, are there any other exceptional circumstances which are sufficient to justify granting an injunction in relation to the claim for a reconciliation.

12. I therefore refuse the application to continue the injunction in its present form. However, I will in place of it make an order which prohibits the Trustee from distributing to the certificate-holders any funds which it receives by way of enforcement of the Purchase Undertaking pending the final determination of these proceedings or any earlier order of the court.

Ruling on summary judgment application

1. I have been shown that my understanding that the validity of the other three agreements was not in issue in these proceedings is mistaken and that the issue of their validity has been raised by Dana Gas itself asserting them to be invalid.

2. Since no argument has been advanced to support that contention in response to the summary judgment application, separate from the arguments that were raised in relation to the Purchase Undertaking, it seems to me that the court is in a position to hold that the other three agreements are also valid and enforceable and I see no reason why the court should not make a declaration to declare that fact. Accordingly, such a declaration will be made, as well as one which adds the further Dissolution Event.

Ruling on costs

3. I think that in circumstances where I have not made any finding of collusion, albeit that I found there was fault on the part of Dana Gas, I do not go so far as to say that its conduct makes it appropriate for that reason to award indemnity costs. The matter has not been further explored at this hearing, but that in itself is just as well, because it only would have incurred a lot more cost.

4. On the other point taken, although I see the force on a common sense level of the complaint that BlackRock should not have had to participate in the proceedings, I think Mr Gillis is right that that does not in itself entitle BlackRock to seek costs over and above the normal rate which it could never have recovered, simply because there is a contractual agreement which would have enabled another party to do so. Therefore I am going to confine costs to the usual standard basis.

Ruling on permission to appeal

5. The anti-suit injunction at the end of the day turned principally on an assessment of the appropriate forum for resolution of issues on which I apprehend the Court of Appeal would be likely to give a wide margin to the judge and I am not persuaded that there is a realistic prospect of the decision to grant the injunction being overturned. The question of whether to continue the English injunction is similarly a discretionary matter.

6. I refuse permission to appeal against the refusal to set aside the November order, if it is necessary, but it seems to me that really your recourse now is to pursue permission to appeal against the original judgment.