Neutral Citation Number: [2021] EWHC 1502 (QB)

Case No: QB-2020-001937

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/06/2021

Before:

MR JUSTICE FREEDMAN

- -

Between:

BILAL KHALIFEH

Claimant

- and -

BLOM BANK S.A.L.
(a Société Anonyme Libanaise incorporated under the laws of Lebanon)

Defendant

- -
- -

Hugh Mercer QC and Zahler Bryan (instructed by **Rosenblatt Ltd**) for the **Claimant**
Ian Wilson QC and Ryan Ferro (instructed by **Dechert LLP**) for the **Defendant**

Hearing dates: 23 March, 12, 19 & 27 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be Friday 4 June 2021 at 10.00am.

MR JUSTICE FREEDMAN:

I Introduction

1. This is an application for an anti-suit injunction ("ASI") requiring the Defendant to discontinue proceedings issued in Lebanon in February 2021 and to be restrained from commencing or prosecuting any further such proceedings until further order. The Claimant applies for this anti-suit injunction on two grounds, namely:

    (1) the Claimant uses his legal right as a consumer not to be sued in respect of matters relating to his contract with the Defendant pursuant to Article 18(2) of Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels Recast"). He seeks to apply two Court of Appeal cases to say that this gives rise to an enforceable right to restrain foreign proceedings inconsistent with that right; and

    (2) the vexatious or oppressive nature of the Lebanese proceedings.

2. The position of the Defendant can be summarised as follows. As to the first ground, it submits that Brussels Recast does not create rights enforceable by an injunction not to be sued in a foreign court. As to the second ground, it denies that the Lebanese proceedings are vexatious or oppressive. On the contrary, the intended purpose and effect of the ASI would be to deprive the Defendant of a substantive defence in ongoing English proceedings in circumstances where there is no risk of the Claimant having to face ongoing parallel substantive litigation in a foreign jurisdiction.

3. On 8 September 2020, Master Davison gave judgment ([2020] EWHC 2427 (QB)) on an application of the Claimant for summary judgment and of the Defendant on a jurisdictional challenge. He related that the applications had been heard over two days and had generated 9 lever-arch files of documents, six lever-arch files of authorities and skeleton arguments running together to more than 100 pages. However, he said that some pivotal issues were relatively short. This Court finds itself facing almost as many files of documents and authorities as well as skeleton arguments running together to about 70 pages.

4. In fact, the scope of the applications has been greatly reduced because of the undertakings which have been provided rather late in the day and in the face of the application: see Claimant's skeleton argument at para. 59.4. It is useful to summarise the scope of the order sought and the undertakings which have been offered. That which has been sought is as follows:

> "2. Pursuant to section 37 of the Senior Courts Act 1981 the Defendant, whether by itself, its servants, agents or otherwise:
>
> > 2.2 be restrained until further order from commencing or prosecuting or continuing or taking any steps to initiate proceedings in any court or tribunal in Lebanon, or in any

> other court or tribunal other than in England and Wales, against the Claimant in respect of any dispute relating to or arising out of the General Agreement for Opening and Operating Creditor Accounts dated 14 October 2016, including the Lebanese proceedings or at all.
>
> 2.3 withdraw the tender and deposit made with the notary public on 25 January 2021 and take any and all steps necessary to cease the Article 822 procedure initiated by that tender and deposit including all steps necessary to discontinue and/or withdraw the Lebanese proceedings."

5. The scope of the undertakings offered by the Defendant (subject to a cross-undertaking required) is as follows:

> "the Defendant undertaking that it shall not, subject to further order of the Court, prosecute or continue to take any further steps in the Lebanese Proceedings, and shall not serve them on the Claimant, and shall not commence or initiate any other proceedings other than in England and Wales in respect of the dispute relating to or arising out of the General Agreement for the Opening and Operating Creditor Accounts.
>
> the Claimant cross-undertaking that he shall not, subject to further order of the Court, prosecute or continue to take any steps in the Lebanese Proceedings and shall not commence or initiate any other proceedings other than in England and Wales in respect of the dispute relating to or arising out of the General Agreement for the Opening and Operating Creditor Accounts."

6. The undertaking offered effectively concedes paragraph 2.2 of the application. Further, the Claimant has withdrawn the opening words of paragraph 2.3 of the application, that is to say the application to compel the Defendant to "withdraw the tender and deposit made with the notary public on 25 January 2021": this is in the face of the objection of the Defendant that an ASI would not normally restrain taking a step short of an action in proceedings. It follows that that which is outstanding is the remainder of paragraph 2.3, the contentious part of which is as follows:

> "[that the Defendant] take any and all steps necessary to cease the Article 822 procedure initiated by that tender and deposit including all steps necessary to discontinue and/or withdraw the Lebanese proceedings."

7. That leaves a relatively narrow issue, albeit one of significance to the parties. The Claimant is seeking in effect a mandatory order against the Defendant to cease the

proceedings in Lebanon on the basis that the Claimant does not regard it as sufficient for the Defendant not to take any further steps in those proceedings.

II Factual background

8. On or around 14 October 2016 the Claimant opened two US dollar accounts with the Defendant, a Lebanese bank. These accounts were a US dollar current account and a US dollar time deposit account (together "the USD Accounts"), both of which were opened pursuant to an agreement between the parties ("the Banking Contract"). The Claimant transferred his savings in US dollars into the USD Accounts.

9. Due to an ongoing financial and economic crisis in Lebanon, the Claimant requested the repayment of his accounts. He made a series of demands for repayment in May and June 2020 as set out more fully at paragraph 11 of the Particulars of Claim. The Defendant's response was to offer a US dollar banker's cheque drawn on the Banque du Liban ("the BdL") in repayment of the funds held. The Claimant repeatedly declined these offers, explaining that it was in practice worthless, as he would not be able to convert such a cheque into funds which he could use. The Claimant says that the amounts owed by the Defendant remain unpaid.

10. In its skeleton argument for this application, the Defendant submits at para. 16 that "The Claimant is well aware of the economic and liquidity issues with which Lebanon and its banking institutions are presently confronted…The Bank faces extraordinary economic conditions. By these proceedings, the Claimant is trying to put himself into the position of a preferential (and, effectively, secured) creditor of the Bank at the expense of its other customers."

11. The claim is for the return of moneys comprising a sum before interest of US$1,439,891.20 and also for consequential loss resulting from the moneys not having been paid. There has been no appeal against the dismissal of the challenge to jurisdiction. The Defendant filed an Acknowledgment of Service accepting the jurisdiction of the English Court. To the level required on a refusal to accede to the jurisdictional challenge, Master Davison accepted that (i) the Personal USD Accounts were accounts opened by the Claimant in circumstances that *"place him squarely in the category of consumer"* (para. 24); (ii) the Claimant was domiciled in the UK in October 2016 when the Banking Contract was concluded (para. 28), (iii) the Defendant directed its professional activities to the UK in 2016 (para. 29), and (iv) the Banking Contract fell within the scope of the Defendant's professional activities directed to the UK (para.29).

12. There has been a clear joinder of issue on the pleadings. On 17 December 2020, the Defendant served a Request for Further Information in respect of the RAPC, seeking clarification *inter alia* as to whether it was the Claimant's case that the Defendant was not entitled to effect payment of the debt by a banker's cheque drawn in US dollars on the BdL. The Claimant's response served on 24 December 2020 was that he was not obliged to accept an offer of such a cheque as payment of the debt regardless of whether the applicable law was English law or Lebanese law.

13. The Defendant served its Defence on 11 January 2021. The Defence accepted that there was an existing debt that was payable on demand, but:

> (1) claimed that Lebanese law is applicable in that the contract entered into in 2016 contained a clause conferring jurisdiction on the court of Beirut and is governed by Lebanese law. It was not a consumer contract for the purposes of Article 6 of Rome I: see Amended Defence paras. 6 - 15 and para. 23. Even if it were a consumer contract, Lebanese law would still apply by virtue of Article 6(2) of Rome I, because the Bank and the Claimant chose Lebanese law as its applicable law.
>
> (2) denied that the debt was due on the alleged basis that no valid demand had been made, whatever the applicable law. The format and content of a valid and effective demand, and the payment method(s) by which the Defendant is entitled and obliged to effect repayment, under English law are aspects of the *"manner of performance"* and therefore fall to be determined having regard to Lebanese law: Article 12(2) of Rome I: Amended Defence paras, 26.3 and 27.3
>
> (3) claimed that the Defendant was entitled under Lebanese law to effect repayment of the debt by BdL cheque and that the Claimant had *"wrongly refused"* to accept this manner of payment: see Defence para. 32.3 and paras. 38 - 39; and
>
> (4) again offered to pay the debt by means of a BdL cheque: see Defence para. 40.1.

14. The Claimant filed his Reply on 25 January 2021, which pleaded that:

> (1) the Defendant is and was not entitled to repay the debt in the form of a BdL cheque: see Reply para. 34b and para. 39 - 40; and
>
> (2) the Defendant was not entitled to (purport to) close the Personal USD Accounts and unilaterally issue a BdL cheque for the balance, and that such actions did not constitute repayment of the debt: see Reply paras. 42 - 44.

15. In the meantime, on 13 January 2021, the Defendant unilaterally closed the USD Accounts. The Claimant found out about it when he logged on to his online account on 18 January 2021. The Claimant's solicitors immediately wrote to Dechert LLP ("Dechert"), solicitors for the Defendant seeking an explanation for its unilateral actions and requiring that the balance of the USD Accounts be restored.

16. When the Claimant's solicitors made their challenge, the Defendant's Assistant CEO Charles Haddad called first the Claimant's mother (a former employee of the Defendant), and then the Claimant, in an attempt to persuade the Claimant to drop the Claim. The Claimant says that Mr Haddad informed the Claimant's mother that the Claimant was *"committing suicide"* by continuing the Claim and that he had *"no hope of winning"*. In Mr Haddad's subsequent call to the Claimant he stated that the Defendant intended to issue proceedings against the Claimant in Lebanon. He

stressed that the Defendant was able to outspend the Claimant. He claimed that even if the English Court were to find in the Claimant's favour, the Defendant would not pay him his money and he would be unable to enforce any judgment in Lebanon: see Mr McCormick's fifth witness statement at para. 12 and paras. 48 - 49.

17. On 21 January 2021, the Claimant's solicitors sought confirmation that "no proceedings will be initiated by the Bank against our client in Lebanon."

18. On 22 January 2021, Dechert responded to the Claimant's enquiries, stating that the Defendant *"does not intend to initiate proceedings in Lebanon at this time"* and that any application by the Claimant to the English Court would be *"inappropriate, and in any event precipitous and unnecessary"* (though it refused to confirm that the Defendant would not issue proceedings in Lebanon). Despite this, on 25 January 2021, the Defendant deposited the BdL cheque with the notary public under the 'offer and deposit' process governed by Articles 822 - 826 of the Lebanese Code of Civil Procedure ("LCCP"), hereafter called "the Article 822 Procedure". It initiated the process by which formal written notice of the offer could be served on the Claimant: see McCormick 7 paras. 42 and 43.14.

19. On 3 February 2021, nine days later, Dechert (i) informed the Claimant that the Defendant had taken these steps, thus initiating the Article 822 Procedure, and (ii) provided an untranslated copy of the Formal Notice in Arabic. On Friday 5 February 2021, the Claimant's solicitors put the Defendant on notice that, unless an undertaking was provided not to issue proceedings in Lebanon, the Claimant would have no choice but to issue an application for an anti-suit injunction: see McCormick 7 para. 43.16. The next working day, Monday 8 February 2021, the Defendant issued the Lebanese proceedings pursuant to Article 824 of the LCCP ("the Lebanese proceedings"). The submission of the Claimant is that the Defendant did so in response to the request for a suitable undertaking "in order to steal a march" on any order which this Court may make on this application and in the absence of the formal notice having been served on the Claimant: see Claimant's skeleton argument at paras. 23 and 68.5.

20. The process is described in the Amended Defence in the following terms, namely

> "32B. Pursuant to Articles 294 to 298 of the LCOC and Articles 822 to 826 of the Lebanese Code of Civil Procedure (the "LCCP") (which establish a procedure ("offre réelle et consignation" or "actual tender and consignment") that entitles a willing debtor to discharge its obligations towards a creditor in case (inter alia) the creditor refuses to accept payment):
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> 32B.1. Upon (relevantly) closure of a bank account, the (bank) debtor may offer the creditor, through the notary public, an amount equal to the outstanding debt in legal tender. Such an offer is made by depositing (typically) a bankers' cheque to the order of a notary public with the same notary public. Such a cheque may be drawn on the Central Bank of Lebanon in any agreed currency of account or Lebanese pounds.

32B.2. Once the cheque has been deposited with the notary public: (a) the debtor's debt obligation is discharged (provisionally, pending the final ruling of the relevant Lebanese court on the validity of the deposit procedure as pleaded below); and (b) the notary public serves the creditor with a letter confirming that the debtor has settled its debt obligation to the creditor.

32B.3. The creditor may either accept or reject the actual tender and consignment. Such acceptance or refusal must be communicated to the notary public within 48 hours following the creditor's receipt of the letter just referred to in paragraph 32B.2 above. If the creditor fails to communicate such acceptance or refusal within this prescribed period, then such failure shall be construed as an acceptance of the actual tender and consignment, and the debtor is discharged.

32B.4. If the creditor refuses the actual tender and consignment, the notary public notifies the debtor of such refusal. Further as to this:

> 32B.4.1. Within 10 (calendar) days of being notified of such refusal, the debtor must file a claim with the Lebanese Court having jurisdiction (namely, in the present case, the Beirut First Instance Court), seeking a declaration as to the validity of the actual tender and consignment, and within 10 calendar days as of his refusal of the actual tender and consignment, the creditor has the right, but not the obligation, to file a lawsuit (referred to as a validation action) to request that the Lebanese court annuls the tender and consignment.
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> 32B.4.2. The filing of such a validation action is mandatory: if the debtor fails to file such a validation action, the discharging powers of the actual tender and consignment lapse (pending any further actual tender and consignment by the (revived) debtor).
>
> 32B.4.3. The Lebanese Court, as the only Court to which a validation action can (and must) be made pursuant to the "offre réelle et consignation" procedure, has exclusive jurisdiction to determine the validity of the actual tender and consignment.
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> 32B.4.4. In such a validation action, if the Lebanese Court determines that the actual tender and consignment is valid, it grants a declaration that the debt was effectively and irrevocably discharged as of the date of the deposit of the cheque with the notary public. If the Lebanese Court determines that the actual tender and consignment is invalid, the debt is retroactively revived."

21. This is not all agreed. There are reports of respective experts in Lebanese law which have been served. Professor Obeid is the Claimant's expert and Mr Moghaizel is the Defendant's expert. It is not necessary for the purpose of this application to set out the contentions in detail. These are matters for trial. A central point of dispute which is material to this application is that Mr Moghaizel says that in order to run the defence of offer (or tender) and deposit in the English Court, the tender process to the notary public must be carried out and Lebanese proceedings need to be commenced. Otherwise, the offer would lapse. The Claimant's submission is that the effect of Professor Obeid's opinion is that if and to the extent that Lebanese law applies, the defence of offer (or tender) can be brought in the English Court without commencing proceedings in Lebanon. This is because a bank in such a case has options, one of which is simply to use it as a defence without the need to commence proceedings in Lebanon: see Obeid paras. 9.2 and 15 – 17 and see also Moghaizel paras. 20 - 22. Indeed, in the first iteration of the case for the Defendant as interpreted by the Claimant, the Defendant relied upon this defence simply as a defence in the English proceedings, and only subsequently changed its case to contend that proceedings had to be commenced in Lebanon in order to maintain the discharge of the debt: see Defence (in its original form) para. 40.

22. On 9 February 2021, the Claimant issued the application for an ASI. On the same date, the Defendant issued its application to amend the Defence to plead the closure of the account and the commencement and legal effect of the Article 822 process, and the commencement of the Lebanese validation action on 8 February 2021. The plea of the Defendant is that its deposit of the BdL cheque with the notary public provisionally discharged the debt, pending the determination of the Lebanese proceedings (Amended Defence, para. 32B.2); and the Claimant's failure to respond to the offer of the BdL cheque was to be treated as having accepted the BdL cheque, thereby discharging the debt (Amended Defence, para. 43A.5).

23. The submission of the Claimant is as follows:

> "The Defendant's case is therefore that, as a result of the steps taken pursuant to the Article 822 procedure immediately following service of its Defence, it has removed the Claimant's cause of action in the Claim (Silver 4 §59). Having failed to persuade the English Court that it did not have jurisdiction to hear the Claim, the Defendant chose to circumvent that jurisdiction by taking steps in Lebanon designed to render the English proceedings futile. Notably, the Defendant's case is that precisely the same substantive issues squarely before the English Court in the Claim are to be determined in the Lebanese proceedings (Moghaizel §§44-46)."

24. At the CCMC on 12 February the Claimant consented to the Defendant's application to amend its Defence on the usual terms. Master Davison gave expedited directions to trial, including provision for the Application to be determined prior to the finalisation of pleadings.

III Anti-suit injunctions

25. Section 37(1) of the Senior Courts Act 1981 provides that "[t]he High Court may by order (whether interlocutory or final) grant an injunction […] in all cases in which it appears to the Court to be just and convenient to do so." This includes the power to grant an ASI. An ASI "is not directed at a foreign court, it does not call into question the jurisdiction of a foreign court, and it is granted under the in personam jurisdiction of a court of equity" (Gee on Commercial Injunctions at [14-004]). The underlying principle is that the jurisdiction is exercised to restrain a defendant from commencing or continuing foreign proceedings where it is appropriate to avoid injustice (Dicey & Morris at [12-080]; Gee at [14-004]). As the authors of Dicey & Morris note, judges "have deliberately refrained from marking the outer extent of their power to act to restrain conduct which may give rise to injustice" (at [12-084]).

26. In *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 Lords Sumption and Toulson cited Lord Cranworth LC's 3-fold categorisation in Carron Iron Co Proprietors v Maclaren 10 ER 961 "which, without necessarily being comprehensive or mutually exclusive, have served generations of judges as tools of analysis" at [18]:

> (1) Simultaneous proceedings in England and in a foreign jurisdiction on the same subject matter: *"[i]f a party to litigation in England, where complete justice could be done, began proceedings abroad on the same subject matter, the court might restrain him on the ground that his conduct was a "vexatious harassing of the opposite party"."*
> (2) Cases in which foreign proceedings were brought in an inappropriate forum to resolve questions which could more naturally and conveniently be resolved in England.
> (3) Cases in which foreign proceedings are restrained because they are *"contrary to equity and good conscience"*.

27. Further to Lord Cranworth's first category above, an ASI may be granted not only to prevent foreign proceedings which seek to undermine or frustrate the enforcement of an English judgment following an action in which the respondent participated (*Masri v Consolidated Contractors International Co SAL (No.3)* [2008] EWCA Civ 625, [2009] QB 503 (*"Masri"*); *Gee* at [14-094]-[14-095]) but also to protect the effectiveness of domestic proceedings by restraining a party from bringing proceedings abroad, the object of which is to prevent the applicant from recovering on a judgment that he may obtain from the English court (*Dicey & Morris* at [12-084], citing *Ardila Investments NV v ENRC NV* [2015] EWHC 1667 (Comm), [2015] 2 BCLC 560)). Anti-suit injunctions are most often necessary either (a) to protect the jurisdiction of the enjoining court or (b) to prevent the litigant's evasion of the important public policies of the forum (*Masri* per Lawrence Collins LJ at [86]).

28. In *Deutsche Bank AG and another v Highland Crusader Offshore Partners LLP* [2010] 1 WLR 1023, Toulson LJ gave the following guidance in respect of the grant of an anti-suit injunction on the grounds of vexation and oppression:

> "… (2) It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English and a foreign court, the party

> seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive.
>
> (3) The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that (a) England is clearly the more appropriate forum ("the natural forum"), and (b) justice requires that the claimant in the foreign court should be restrained from proceeding there.
>
> (4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity.
>
> (5) An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court… In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.
>
> (6) The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive…
>
> (8) The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility."

29. Parallel proceedings are not of themselves regarded as unacceptable: *Airbus Industrie GIE v Patel* [1999] 1 AC 199, paras.132 - 133; *Deutsche Bank AG*, para.63; *Seismic Shipping Inc Total E&P UK plc (The Western Regent)* [2005] 2 Lloyd's Rep 359, paras. 44 - 45 and see also Gee on Commercial Injunctions 7th Ed. para. 14-20. In Raphael on The Anti-Suit Injunction (2nd Ed.,), it is stated as follows:

(i) "The existence of concurrent proceedings on the same or substantially similar subject matter in England, does not in itself mean that the pursuit of the foreign action is vexatious or oppressive, and is not a sufficient condition to justify the grant of an injunction" at para. 5.03;

(ii) parallel proceedings *may* be vexatious, but the authorities in which such stays have been granted are those where the foreign claim was hopeless, or where England (and not the foreign jurisdiction) was the natural forum at para. 5.07

(iii)"the mere inconvenience arising from the pursuit of the parallel foreign proceedings will not suffice to justify a finding of vexation or oppression, even if the inconvenience is significant, unless there is some aspect of the inconvenience which would amount to an injustice. This is so even if both sets of proceedings are likely to be tried at around the same time, with hearings and judgments overlapping" at para.5.11.

30. Thus, account must be taken not only of injustice to the injunction claimant but also the injustice to the injunction defendant if he is not allowed to pursue the foreign claim, including the deprivation of legitimate advantages in the foreign forum: see Raphael at paras. 4.73, 4.75.

IV Grounds of application

31. The Claimant applies for an injunction on the facts of this case on two alternative grounds:

(1) The Claimant's right not to be sued in Lebanon pursuant to Article 18(2) of Brussels Recast; and

(2) The vexatious or oppressive nature of the Lebanese proceedings.

32. The Claimant has characterised the first ground (Article 18(2)) as its primary ground. It has characterised the second ground (vexatious or oppressive) as a secondary ground. This has led to a lengthy and complex debate as to whether the Claimant has a right in law to obtain an ASI ancillary to the establishment of jurisdiction under Article 18(2) in this court. The Claimant relies in particular on judgments of the Court of Appeal in *Samengo-Turner v J & H Marsh* [2007] 2 All ER (Comm) 813 ("*Samengo-Turner")* and *Petter v EMC Europe Ltd* [2015] CP Rep 47 ("*Petter*"). In those cases, concerning employees where it was held that the English court had jurisdiction under Articles 21 - 23 and 25(4) of Council Regulation 1215/2012 (Brussels I recast), anti-suit injunctions were ordered in the Court of Appeal on the basis that an employer ought ordinarily to be restrained from bringing proceedings outside the Member States. This was in order to protect the employee's rights and

disregarding an exclusive jurisdiction clause in the other state which would be the subject of the anti-suit injunction.

33. In *Petter*, Moore-Bick LJ at [31] said that an anti-suit injunction "should ordinarily be granted to restrain an employer from bringing proceedings outside the Member States in order to protect the employee's rights". At [33], Moore-Bick LJ said, "what is necessary in the interests of justice will depend on the particular facts of the case." In the judgment of Sales LJ at [56], the English court would weigh up the domestic public policy concerns in English law against the usual principle of party autonomy to favour England and Wales as the place to litigate despite a foreign exclusive jurisdiction clause. The public policy considerations were in favour of an employee who is assessed to be in a weaker social or economic position than an employer [57]. At [52], Sales LJ said that the English court may grant an ASI where necessary to prevent the litigant's evasion of the important public policies of the English forum: see *Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45, 58, per Robert Goff LJ, cited in *Masri v Consolidated Contractors International Co SAL* [2008] 1 CLC 887; [2009] QB 503, at [86].

34. The Claimant submits that just as the Court has given effect to employees' statutory rights to restrain overseas proceedings, so too the same ought to apply to the Claimant's statutory right as a consumer in a banking contract. The Claimant analyses the similarity of language and purpose in Brussels Recast between employees' rights and consumer rights, relying on extracts from *Samengo-Turner* and *Petter* to make good his case.

35. By contrast, the Defendant submits at paras 38 of its skeleton argument and following that the Claimant's reliance on Article 18(2) does not confer a "legal right" enforceable by injunction. In making that submission it says that the statutory right relied upon has never been applied to consumer rights under Article 18(2). It contends that *Samengo-Turner* and *Petter* have been doubted in academic literature: e.g. see Raphael *The Anti-Suit Injunction* 2nd edition para 4.43 and Raphael, *Do as you would be done by? System-transcendent justification and anti-suit injunctions* 2016 LMCLQ 256. In the very extensive arguments of the Defendant, it was suggested that *Samengo-Turner* (but not *Petter*) was decided per incuriam. It was submitted that both cases had been distinguished in *Gray v Hurley* [2019] EWHC 1972 (QB) and [2019] EWCA Civ 2222, especially per Peter Jackson LJ at paras 48, 50 and 52. For the moment, and without ruling on the points at this stage made by the Defendant, the Court of Appeal cases of *Samengo-Turner* and *Petter* appear to be binding on this Court. *Gray v Hurley* was distinguished because it concerned Article 4 of Brussels Recast (the general right of a defendant to be sued in the state where they are domiciled, which raises different issues from Article 22, or in the instant case Article 18(2).)

36. On the basis that *Samengo-Turner* and *Petter* are binding, they do not compel the Court to award an ASI. If the position of a consumer and an employee are analogous, as Moore-Bick LJ stated in *Petter* (see above), an ASI "should ordinarily be granted in order to protect the employee's or the consumer's rights." However, that would not necessarily be in every case: "what is necessary in the interests of justice will depend on the particular facts of the case." It is potentially an important distinction if the right can only be obtained through proceedings in the foreign court, as noted by Peter Jackson LJ in *Gray v Hurley* above.

37. In this case, the undertakings which the Defendant offers confer the equivalent to an ASI, save only that they do not go so far as to withdraw the proceedings in Lebanon. The argument for the Defendant is that the Lebanese proceedings have to be instituted in order for the defence of offer (or tender) and deposit not to be lost. If that argument is correct, then a mandatory injunction may have the effect of depriving the Defendant of a defence in the proceedings in this Court. It should be said that it is not established at this stage that the argument is correct: it is contradicted by the Claimant's expert, and, in any event, it is contrary to the earlier argument of the Defendant that the Lebanese courts had exclusive jurisdiction in Lebanon such that parallel proceedings had to be brought to judgment in Lebanon.

38. How then ought this Court to approach an application for an ASI? Does the Court have to make a binary decision at this stage? Is it simply whether to grant or to refuse an ASI? Or is there scope for a more nuanced decision which holds the ring?

39. In my judgment, it is possible to approach an application for an ASI at this stage as an application for an interim injunction pending trial. The Court takes into account the following:

(1) there is textbook support for the proposition that an ASI may be ordered as an interlocutory injunction. In Dicey, Morris and Collins 15th Ed. at para. 12-078 an ASI "may be granted on an interlocutory or final basis", with a footnote (n.362) in the following terms, namely "An interlocutory anti-suit injunction may require greater caution before it is granted than would otherwise be demanded by the principles of *American Cyanamid Co v Ethicon Ltd [1975] A.C. 396*: see *Apple Corps Ltd v Apple Computer Inc [1992] R.P.C. 70, 76*; *National Westminster Bank Plc v Utrecht-America Finance Co [2001] EWCA Civ 658, [2001] 2 All E.R. (Comm.) 7*."

(2) The need for caution is that the grant of an ASI may have an effect of depriving the other party of the benefits of proceedings in another jurisdiction in circumstances where the other party ought to have had an entitlement to bring the proceedings e.g. where the respondent is enjoined on the basis of an asserted breach of contract to proceed in another jurisdiction, where subsequently the existence of the relevant contract is not established. The problem which arises is that the interim decision might be critical in that by the time of the trial in this jurisdiction, the tactical advantages of foreign proceedings may have evaporated.

(3) Likewise, an interim refusal to grant an ASI pending a later stage may expose the applicant to an oppressive or other consequence from which it may subsequently be found that it ought to have been protected.

(4) The need for caution at the interim stage is particularly acute where the application is for a mandatory injunction, in this case to cause the respondent to withdraw proceedings already brought in the foreign court. Gee on Commercial Injunctions 7th Ed. at para. 2-041 states the following in respect of applications for interim mandatory injunctions, namely:

> "The principles stated in the case reflect these considerations. In summary:
>
> (1) the general principle is to take the course which involves the least risk of injustice if it turns out to be "wrong";
>
> (2) the court should keep in mind that ordering a positive step to be taken may involve an increased risk of injustice for the defendant if the decision turns out to be "wrong";
>
> (3) it is legitimate to consider whether the court does feel a "high degree of assurance" that the claimant will succeed at trial. This is because the greater the degree of assurance, the less the risk of injustice if the injunction is granted;
>
> (4) even where the court does not feel this high level of assurance there are still exceptional cases in which it is correct to grant an interim mandatory injunction because that course involves the least risk of injustice.
>
> Thus on an application for an interim mandatory injunction the court does pay attention to the relative strength of the apparent merits in exercising its discretion, and in this respect *American Cyanamid* principles do not apply."

(5) Irrespective of whether an ASI has been granted at an earlier stage, the Court at trial may wish to grant an ASI in order to enforce the judgment which it gives. This is referred to in Gee on Commercial Injunctions 7th Ed. at para. 14-094:

> "The English court may grant an injunction to prevent a party bound by the res judicata or issue estoppel effect of an English judgment relitigating the underlying dispute or issue abroad. […] The application can be made by application notice issued in the original proceedings. This is because the purpose of the anti-suit injunction is in effect to uphold and enforce the judgment given in the action. Proceedings to do this are within the scope of the original action for which both parties have submitted to the English jurisdiction."

40. How does this apply in the circumstances of the instant case? The injunction is sought to procure the withdrawal of the proceedings in Lebanon is an interlocutory mandatory injunction. The strictures in respect of such an injunction of a high degree

of assurance save in an exceptional case resonate. The least risk of injustice is a useful benchmark, that is to ask whether a greater risk of injustice may result to the Defendant from granting an interlocutory injunction or to the Claimant refusing an injunction.

41. As regards Lebanese law, the issues have become more focussed as a result of the written submissions since the hearing. They followed from a note from the Court asking a number of questions. The further submissions were provided as follows, namely by the Claimant on 1 April 2021, by the Defendant on 9 April 2021 and by the Claimant in reply on 15 April 2021. The position can be summarised as follows. The Claimant's case supported by evidence is that the Defendant has the same ability to prosecute its defence in these proceedings in this Court as it does through the use of the Article 822 procedure in Lebanon. However, on the Defendant's case, the Article 822 option alone enables the Defendant to discharge provisionally the debt as of the date of lodging the cheque with the notary public and in the absence of the same being accepted by the Claimant, the discharge becomes final in the event that the Court determines that the offer constitutes a proper discharge of the debt. It is only, says the Defendant, with the Lebanese proceedings in place that the defence of offer (or tender) and deposit can be maintained in this Court. The respective positions of the parties are now set out in more detail.

V The Claimant's position

42. The Claimant interprets paragraph 40 of the Defence (in its original form) as amounting to a defence justiciable in these proceedings based on not only an invalid demand, but also as relying on the offer of repayment and the drawing of the cheque. The Claimant says that the Defendant has now changed its position. Having apparently relied on the proffering of payment as a defence in this Court, once an application for an ASI was intimated by the Claimant, the Defendant issued proceedings in Lebanon and contended for the first time that the Article 822 process had to be issued in Lebanon which had exclusive jurisdiction to determine the offer and the deposit made: see Amended Defence para. 32B4.3 and 32B4.4. The Claimant says that this change shows the vexatious or oppressive nature of the Lebanese proceedings. The Claimant says that the Lebanese proceedings infringe the exclusive jurisdiction which has been established by the jurisdiction judgment of this Court.

43. The Claimant says that the Defendant's position has now changed again. When the proceedings in Lebanon were instituted in early February 2021, the Defendant said that this was so as to have the benefit of the Article 822 process (as to which the Lebanese courts had exclusive jurisdiction). In the face of the current application for the ASI, the Defendant now says that the Article 822 process had to be invoked by the commencement of the Lebanese proceedings without the need to have a final determination in Lebanon: see the Claimant's Additional Submissions dated 1 April 2021 at paras. 7 - 12. Since the Claimant's submission is that the effect of the evidence of Professor Obeid stating that the defence of offer (or tender) and deposit could be relied upon in the English court and that the jurisdiction was not exclusive to Lebanon, the Defendant's current case is that the Article 822 defence can be run in the English court, provided that proceedings were commenced and have not been withdrawn in Lebanon. The Defendant submits that failure to commence the

proceedings in Lebanon or their withdrawal will have the effect of discharging the provisional payment comprised in the offer (or tender) and deposit.

44. On the basis of the opinion of Professor Obeid, the Claimant says that there is no practical advantage to the Defendant by the Lebanese proceedings other than interest not running from the date of the deposit (which the Claimant will not seek in any event from that date): see the Claimant's Additional Submissions at paras.13 - 16 and 19. The fact that the Defendant still insists on proceeding in Lebanon at all makes the recently professed lack of intention to pursue the Lebanese proceedings ring hollow: see the Claimant's Additional Submissions at paras. 21 - 23.

45. Further, there is specific conduct by the Defendant relied upon by the Claimant as amounting to oppressive and vexatious behaviour. The Claimant relies in particular upon the following:

(1) The unilateral closure of the USD Accounts on 13 January 2021, that is, two days after the Defence was served. If and insofar as there is any contractual right to do so, the Claimant says that it has been exercised in bad faith.

(2) The Claimant says that the issue of a banker's cheque in Lebanon, at least in respect of the particular banker's cheque offered, has since 2019 been recognised as worthless. There is also Lebanese law on which the Claimant's expert relies to the effect that such a cheque will not be regarded as an offer for the purpose of the Article 822 procedure.

(3) On 22 January 2021, as stated above, Dechert stated that the Defendant "*does not intend to initiate proceedings in Lebanon at this time*". However, on the next business day, 25 January 2021, the Defendant initiated the Article 822 procedure and therefore (without casting aspersion on Dechert who may not have known of the Defendant's intention on sending its communication) must have known that the instructions it gave its solicitors were untrue. In other words, it must have had by then a settled intention to initiate proceedings in Lebanon. The Defendant's counsel mentioned that there was a possibility at that time that the Article 822 offer would have been accepted. When it was put to Mr Wilson QC that there was no realistic chance of this occurring due to the Claimant's belief, expressed to the Defendant, that a banker's cheque was worthless, he accepted realistically that the Defendant could not have had an expectation that the offer would be accepted.

(4) As soon as the Claimant's solicitors sought an undertaking from the Defendant on 5 February 2021 not to issue proceedings in Lebanon and threatened an application for an ASI in this country, the Defendant issued Lebanese proceedings under Article 824 on 8 February 2021. The Claimant says that the Defendant did so in order to "steal a march" on any order the English court may make.

(5) The Claimant also relies upon a conversation between Mr Haddad and the Claimant's mother and the Claimant referred to above as being calculated to force the Claimant to capitulate.

46. Bearing in mind the changes of position, the Claimant is concerned about what it characterises as the inability of the Defendant to identify the answer to the key question as to what advantage any potential provisional discharge of the debt would grant to the Defendant. The inference is, says the Claimant, that either there is nothing for the Defendant to protect, or there is an illegitimate advantage which should not be protected by the Court: see the Claimant's Reply Submissions dated 15 April 2021. This is exacerbated by the conduct of the Defendant said to be oppressive and vexatious, as a result of which the Claimant says that there is a suspicion reasonably based that this Defendant cannot be trusted either to observe its undertakings, or not to be setting a trap for the Claimant, in order again 'to steal a march' on the Claimant.

VI The Defendant's position

47. The Defendant has in large measure consented to the application for an ASI, save only that it refuses to withdraw the Lebanese Article 822 proceedings. However, it states that it does not intend to take any steps pursuant to those or any other proceedings, whilst the current action in this court is in progress. It also does not intend to take any steps to undermine or frustrate a judgment of the English court. It says that it does not wish to lose the benefit of what it contends is the effect of the Article 822 process, of having the debt extinguished by reason of the lodging of the cheque with the notary public and the commencement of proceedings in Lebanon.

48. The Defendant says that it was required to commence the Lebanese proceedings in order to preserve the discharging effect of the offer (or tender) and deposit. The effect of the advice which it has taken about Lebanese law advice is that whilst the defence of offer (or tender) and deposit can be raised in the UK by way of defence, it depends upon the Lebanese proceedings having been issued and not being withdrawn. It is said that the effect of withdrawal would be such as to prevent the defence from being run in the UK, and so a mandatory injunction to compel the Defendant to withdraw the proceedings would cause it irreversible prejudice.

49. Thus, the Defendant only relies upon the commencement of the Lebanese proceedings. The Defendant has disavowed any intention to prosecute parallel proceedings in Lebanon or elsewhere and has accordingly given undertakings to this Court short of withdrawing the Lebanese proceedings so that the substantive dispute may be adjudicated by the English court: see the Defendant's Supplemental Submissions dated 9 April 2021 at para. 3(3) and the undertaking contained in footnote 3. The Defendant contends that the Claimant wishes to take advantage of the removal of the Lebanese proceedings to restrict its ability to maintain the defence of the offer and deposit. The procurement of the removal of the Lebanese proceedings is being engineered by the Claimant in order to found an argument that the defence of

discharge by offer and deposit might also be removed: see the Defendant's Supplemental Submissions at paras. 17 - 19.

50. The Defendant denies that it has acted oppressively or vexatiously. It was simply seeking to preserve its position. It was not seeking to steal a march. This is evidenced by the undertakings which it has offered to provide. The Defendant submits that it was doing nothing to disrespect the English process and has acted properly at all times. In particular, it says the following:

(1) In issuing a cheque and not making an international bank transfer it was acting properly in that:
  (i) That was a legitimate form of offer under Lebanese law; and
  (ii) Any transfer may have been out of order or irregular.

(2) The Article 822 procedure is exclusive to Lebanon and the Defendant was therefore acting properly to protect itself through that process.

(3) The closure of the account was permitted under the Banking Contract.

(4) The conversation with Mr Haddad has been looked at selectively and Mr Haddad was entitled to engage with the Claimant's mother (a former employee of the Defendant) and with the Claimant in order to impress upon them what they believed to be the error of their ways.

51. The parties came close to agreeing the position. The Claimant would agree not to take any points against the Defendant arising from the withdrawal of the Lebanese proceedings. This was regarded as inappropriate by the Defendant because the dispute should not be determined "based upon a hypothetical construct (and the uncertainty that this would entail)": see the Defendant's Supplemental Submissions at para. 20. It is also suggested by the Defendant that the Claimant does not in its Supplemental Submissions undertake that the scope of the Defendant's substantive defence would not be affected by the discontinuance of the Lebanese proceedings.

VII Discussion and disposal

52. The battleground is therefore that the Defendant says that it needs to maintain the Lebanese proceedings in order to run the offer and deposit defence in this court. It says that there is no right to insist that there cannot be proceedings in Lebanon, particularly so where the proceedings are for such a limited purpose. The Claimant says that the Defendant's position is at best confused, and at worst it indicates that the Defendant has an intention to prosecute the Lebanese proceedings beyond that which it admits and for an illegitimate purpose.

53. The Court was concerned that the differences between the parties could have been resolved. The Defendant could have discontinued proceedings in Lebanon. Against this, the Claimant could give an undertaking not to take a point that this affected the defence of offer (or tender) and deposit. This may be difficult to achieve, even if it is well intentioned on all sides. It involves agreed facts and hypotheses in circumstances

where the Lebanese law may not be clear, and where the parties may not be able to impose the same by agreement, or where the agreement of the parties may be incomplete to have the desired effect. The concern about introducing hypotheses relating to uncertain Lebanese law into the proceedings in this Court is neither fanciful nor contrived. For so long as the Lebanese law is not clear, it may be too hazardous for the parties to agree appropriate undertakings about the discontinuance of the proceedings. If the undertakings do not do their intended job, the agreement may not be put into effect. Further, it may make the subsequent task of the Court in achieving justice between the parties more, rather than less, complicated. If in fact, the parties, having considered this aspect further, together recommend a practical way forward to obviate these difficulties, the Court would be willing to consider this aspect further.

54. In my judgment, based on the evidence as it now stands, there may be a risk that the Defendant may lose the benefit of a defence available to it if an ASI of the kind sought by the Claimant is now granted. Whether or not there is a real risk can only be assessed more definitively at trial. It may be, that at a trial, the Claimant is able to show that such risk is illusory for the following reasons or any of them. These include, but are not limited to, the following:

    (1) the possibility that the English court will hold, whether under English law or Lebanese law, that the debt is due and that the issue of a banker's cheque is no defence;

    (2) the English Court may find that the issue or withdrawal of proceedings in Lebanon is irrelevant to whether the defence of offer (or tender) and deposit succeeds or fails before it.

55. In order to establish these points, a trial in this Court would first have to take place. At that trial, it would be expected that there would be detailed consideration of Lebanese expert evidence, including meetings between the experts and cross examination of the experts on their reports. There would also be detailed consideration and a determination of such rights between the parties as could be established as a matter of English law and Lebanese law. There could then be a final consideration of what anti-suit injunction was required going forward and in particular whether the mandatory order sought to discontinue the Lebanese proceedings is justified.

56. At that point, the Court would be far more informed about the respective rights of the parties. Further, the Court would then be able to decide in a much lengthier hearing whether a final ASI was appropriate. If necessary, the competing contentions in relation to the Court of Appeal cases referred to above could be evaluated as well as the various provisions of Brussels Recast I.

57. There are reasons to be concerned about the Defendant's position. The Claimant has made out a prima facie case to follow the cases of *Samengo-Turner* and *Petter*. The distinctions and criticisms are of interest, but there is reason to doubt whether they are sufficient to prevent the Court at first instance from applying the same. Further, there is reason to be concerned about the allegations of vexatious and oppressive behaviour on the part of the Defendant referred to above. Further, the changes of position of the Defendant do not instil a confidence in its case moving from:

(1) stage 2, commencing the Lebanese proceedings and contending that the Lebanese court had exclusive jurisdiction as regards the offer issue, to:

(2) stage 3, relying on the issue of the Lebanese proceedings having been commenced and accepting that that would suffice to preserve the offer and deposit issue which would be determined by the English court.

58. Despite this, the Court is unable to rule out at this stage the possibility that a forced withdrawal of the Lebanese proceedings may deprive the Defendant of a defence to be run in the proceedings in this Court. The changes of position of the Defendant have not been explained fully, and especially how the case changed from exclusive jurisdiction in Lebanon as regards the offer (or tender) and deposit procedure to the current position, namely that the commencement of the Lebanese proceedings is sufficient. The current position is more developed in the fourth statement of Mr Silver, who is a partner of Dechert in this jurisdiction acting for the Defendant. It does not obviously emerge from the expert evidence of Fadi Moghaizel for the Defendant (albeit that some parts of his evidence are relevant to the point e.g. paras. 21(f) and 42 - 43). There is something to be said for the submission of the Claimant in its Reply Submissions at para.9 that "the Defendant's suggestion that all that is needed is the issue of Lebanese proceedings – and not their determination by a Lebanese court – requires a rewriting of its own expert evidence in the Supplemental Submissions." Footnote 9 of the Claimant's Reply Submissions refers to the re-reading of para. 43 of Mr Moghaizel's report (referred to in Mr Silver's fourth witness statement at paras. 86-87 and in the Supplemental Submissions generally and especially at paras. 11(5) and 14) as no longer being about exclusive jurisdiction, but instead only that proceedings in Lebanon had to be commenced so that the defence could be run in this Court.

59. Despite this, there is enough in the evidence at this stage to raise a concern that in the event that the Lebanese proceedings are withdrawn, the ability to rely on the offer (or tender) and deposit payment may no longer be capable of operating as a defence in this Court. There are sufficient uncertainties in Lebanese law (as advanced at this stage) for the Court to be unable to rule out the possibility that the objection to an interlocutory mandatory injunction may be valid.

60. If it is the case that it is necessary for the Defendant to have in place the Lebanese proceedings in order to run the defence of offer (or tender) in the English Court (contrary to the Lebanese law expert for the Claimant), then it is arguable that the cases of *Samengo-Turner* and *Petter* can be distinguished. This point was referred to by Peter Jackson LJ in *Gray v Hurley* above at para. 44 as follows:

> "In *Samengo-Turner* and *Petter* there was a choice of jurisdictions in which the parties could litigate about the same cause of action. They did not address a situation where the cause of action raised in the third State litigation could not be pursued in the country of the defendant's domicile. It is unclear whether the Judgments Regulation as a whole contemplates this situation. It is not addressed in the Regulation itself, which seems to proceed throughout on the assumption that there will be a choice of forum: and see Recital 15, which assumes that

> jurisdiction based on the defendant's domicile will always be available."

61. The most recent position of the Defendant is not that the Lebanese proceedings are an exclusive jurisdiction to determine the defence of offer (or tender) and deposit, but that they have to be in place for the defence to be run in this Court. It is arguable that it is not inconsistent with *Samengo-Turner* and *Petter* to keep alive the Lebanese proceedings solely in order to enable the defence of offer (or tender) and deposit to be run in the English Court. Further still, as noted above, in *Petter*, Moore-Bick LJ stated at [33] that "what is necessary in the interests of justice will depend on the particular facts of the case." If it is the case that the Lebanese proceedings need to be kept alive for the purpose of defence being capable of being run in the English Court, this militates against a mandatory injunction at this stage.

62. An adjournment at this stage of a mandatory form ASI with undertakings in the meantime in a prohibitory form, would not be contrary to *Samengo-Turner* and *Petter*: ordinarily, there would be such an order, but this must yield to the justice of the case. At this stage, an interim mandatory injunction will not be ordered, but rather the application will be adjourned to a later stage in the action with liberty to apply to reinstate the same in the meantime. At a later stage, it might be appropriate to make an ASI including a mandatory order to compel the Defendant to withdraw the Lebanese proceedings for any of the following reasons (which are not intended to be comprehensive), namely the possibilities that:

(1) the view of the Lebanese expert for the Claimant were to be preferred, such that the Lebanese proceedings were not required;

(2) upon further consideration of the evidence, it were to appear that the conduct of the Defendant was vexatious and/or oppressive such as to make a mandatory injunction appropriate in respect of the Lebanese proceedings;

(3) in the event that the Defendant were to be in breach of its undertaking (and a Lebanese bank such as the Defendant ought to be expected to honour its undertaking), an ASI (and other sanctions) might be considered;

(4) in the event that the Claimant were to succeed at trial, the ASI in the mandatory form might be required so that the success was not rendered nugatory by parallel proceedings in Lebanon or elsewhere. In this regard, the Claimant's opening at para.59.3 draws attention to the Defendant's failure to undertake not to pursue the Lebanese proceedings following the determination of the claim in this Court. It may be that matters have moved on since then in view of the recognition of the Defendant that the substantive dispute including the defence of offer (or tender) and deposit should be adjudicated by the English court: see the Defendant's Supplemental Submissions dated 9 April 2021 at para. 3(3)

and the undertaking contained in footnote 3. To the extent necessary, the ASI should be heard at the trial (subject to the liberty to apply).

63. How does the balance of injustice test apply at this stage? Would the potential injustice to the Defendant of the grant of an interim mandatory injunction at this stage outweigh the potential injustice to the Claimant of an adjournment of the application for a mandatory injunction? In my judgment, the potential injustice to the Defendant by a grant at this stage is greater than the potential injustice to the Claimant caused by not making an order. There are cases where unless an ASI is granted at the interim stage, the applicant will become enmeshed in foreign proceedings which would become, unless restrained, the dominant proceedings, and would or might frustrate for example the parties' agreement as to exclusive jurisdiction or employment or other criteria requiring this Court to be seized of the matter. In my judgment, the effect of the undertakings offered by the Defendant ought to obviate any of these considerations. The late undertakings provided by the Defendant have cut across much of the prejudice which is contended by the Claimant to arise from the Lebanese proceedings: see the Claimant's skeleton argument dated 22 March 2021, especially at para. 59. As regards the submission that the Claimant will be forced to litigate the issues again for a second time in Lebanon, the Defendant has stated its intention for this not to happen in clear and unequivocal terms by extensive admissions especially in its Supplemental Submissions dated 9 April 2021 at paras. 14-16. In any event, by adjourning the application for the ASI to trial with the undertakings operating in the interim, the Claimant will be able to seek a final ASI at trial so as to bar a second litigation of the issues.

64. The risk of injustice to the Claimant can be significantly mitigated by the following. *First*, by not refusing the mandatory injunction, but simply adjourning the same to an expedited trial as already ordered by Master Davison on 12 February 2021. By having an expedited trial, the focus is on bringing about an early resolution of the dispute in this Court and thereby ensuring that the order of Master Davison as regards jurisdiction will not be thwarted. *Second*, there is no adjudication against the Claimant at this stage, and the Claimant is free to seek the injunction at trial. There is likely to be much greater clarity as to the merits or otherwise of an ASI and an ability to address the arguments in the light of the facts and the expert evidence as to Lebanese law. A further ground for an ASI may be in the event of a judgment in favour of the Claimant in order not to expose the Claimant to having to litigate matters again. *Third*, provision can be made for an earlier hearing under a general liberty to apply to reinstate the injunction application prior to trial. Without limitation, that might be available if it were subsequently to appear that the Claimant would suffer irreversible prejudice by having to wait until trial before moving its ASI in the mandatory form. It might arise also if there were a breach of the undertaking provided to the Court by the Defendant pursuing the proceeding in Lebanon or elsewhere.

65. By contrast, if the Defendant's alleged legal position is correct, then it is possible that the Defendant would suffer irreversible harm if it had to withdraw the Lebanese proceedings. Although that is only a possibility, and one firmly denied by the Claimant and his expert witness on Lebanese law, it outweighs any prejudice caused to the Claimant by adjourning the application for a mandatory injunction to a speedy

trial. In my judgment, the overall justice of the case is served at this stage by adjourning the application to the expedited trial on the Defendant's undertakings and with liberty to apply in the meantime.

66. It is not necessary to adjudicate which party is correct at this stage. It is more convenient for any such adjudication to be at trial. It can then be considered with the benefit of the factual and legal dispute between the parties being determined. It will then be known to what extent Lebanese law applies. The Court will have the opportunity to determine the disputed propositions of Lebanese law following a joint experts' report and, if required, by hearing cross-examination of the experts. In view of the undertakings provided by the Defendant in the interim, and the ability of the Court to rule at trial about the application for an ASI, it seems that the Claimant ought not to be prejudiced by this outcome, whereas the grant of an injunction might cause irreversible prejudice to the Defendant.

67. In order to reduce the scope for prejudice, the Court will proceed on the following basis, namely

(1) The application for the ASI is adjourned, so that the arguments available to both parties remain available for a later stage.

(2) The time until adjudication is reduced by the order of an expedited trial. The Court will consider further directions to facilitate an early trial.

(3) In the meantime, if there emerge circumstances requiring the ASI to be dealt with prior to trial, there is liberty to apply for such an application.

(4) The Court is willing to consider providing an additional protection if this would assist in procuring compliance with the undertaking, namely the provision of any information required in order to facilitate the same. This is analogous to the provision of information in freezing injunction cases. The Claimant may wish to consider this, and/or the parties might consider a form of wording by an extension to the undertaking provided by the Defendant.

(5) The Court will consider any other related directions for the just disposal of this matter.

VIII Recent developments

68. The position has changed further since the circulation of this judgment in draft in the above form as a result of consequential submissions of the parties as elaborated upon at a hearing on 19 May 2021. First, it appeared from recent developments that the Bank was about to contend that in the face of a proposed anti-suit injunction, it had served the Claimant with a tender document which it would contend had not been rejected by the Claimant within 48 hours with the effect that the debt would be discharged. This appeared to be contended for in respect of service in Lebanon in early February 2021, and subsequently through diplomatic channels in London at the end of March 2021. On both occasions, it appeared that it would be contended that a failure to reject within 48 hours of service might have the effect that it would be too

late for the Claimant to reject, and the debt would be automatically discharged. The concern of the Claimant was that this was further evidence of the Defendant attempting "to steal a march on it". This fuelled a possible argument that in the interests of preventing these manoeuvres, a mandatory injunction would put an end to them. Alternatively, the Court ought to reconsider the decision in the event that the Defendant did not commit itself unequivocally to not taking a point that there had been a failure to give a refusal within 48 hours in the past, and that in the future no such point would be taken because a rejection had already taken place.

69. Further, the service through diplomatic channels was said to be made necessary because the Defendant had received advice to the effect that the service in Lebanon was ineffective. This then gave rise to concern on the part of the Claimant that the Defendant's contention that it had to issue the Lebanese proceedings in February 2021 had been misleading. It was submitted that the Defendant appeared to know that this was false. If that were the case, it followed that the Lebanese proceedings at the heart of the ASI application had been unnecessary, that the Defendant must have known that this was the case. A suggested inference was that the Lebanese proceedings must have been brought for some other purpose and in any event not for the reasons stated.

70. The Court required an explanation to be given. It has been provided in the fifth witness statement of Mr Silver dated 21 May 2021. It has been stated that the Defendant came to learn that there was a problem about service in Lebanon and in any event the service through diplomatic channels had been in the pipeline once the cheques had been provided to the notaries public. An undertaking would be given not to take any point about a failure to reject the tender either in the past or in the future.

71. In the meantime, a Re-amended Defence and Counterclaim has been served. This includes in particular that it is not necessary to wait for the creditor to be served with notification of the tender and consignment or for the creditor to refuse it before filing a validation action. The filing of the validation action will prevent the discharging powers of the actual tender and consignment from lapsing in the event that the creditor subsequently refuses the actual tender and consignment: see Re-amended Defence para. 32B.4.2.1 – 32B.4.2.2 (this is a second draft Re-amended Defence served on 21 May 2021). The point was made that the ability to bring the validation action prior to the service or refusal appeared in the fourth witness statement of Mr Silver at para. 65 dated 26 February 2021 and in the first report of Mr Moghaizel at para. 21.

72. The Re-amended Defence in its first draft served on 17 May 2021 at para. 32B4.3.1 – 32B4.3.4 set out how although there was an exclusive jurisdiction of the Lebanese court to determine the validity of the tender and consignment, this did not mean that provided the Lebanese proceedings had been issued, the English court could not determine the substantive dispute between the parties. This included all of the issues between the parties and to this effect the Defendant had given undertakings not to proceed in Lebanon and to not to relitigate the case in Lebanon if the Claimant succeeds before the English Court.

73. The Re-amended Defence - at para. 43A.5 referred to the nature of the service or attempts to serve on 3 February 2021 in Lebanon and on 31 March 2021 in London and has confirmed the undertaking to treat notifications of actual tender as rejected by the Claimant. The second draft of the Re-amended Defence - went on to provide at

paras. 43A.6.1 – 43A.6.5 that the Defendant had believed that the service in Lebanon had been validly effected, and that a validation action in Lebanon had been required so that any tender and consignment would not lapse.

74. It has been difficult to follow the position of the Defendant. Its position appears to have shifted over the last few weeks. There is a real question as to whether a Lebanese action was required when it was issued. There appears to be a reasonable basis for the concerns of the Claimant about the shifting actions and explanations given by the Defendant. I have considered whether this should alter the position taken in the draft judgment. In my judgment, the following matters are significant, namely

(1) on the information advanced by Mr Silver in his fifth witness statement of 21 May 2021 on instructions, it was available to the Defendant to file the validation action prior to notification of the tender and consignment or refusal. Whether or not there had been notification or refusal, there remains the possibility that the mandatory injunction would prevent the Defendant from relying upon a defence of tender and consignment. It is difficult to gauge the extent to which this is a concern, but at this stage, it cannot be ruled out. That difficulty is in part because of the disputes concerning the relevant Lebanese law. It therefore remains the case that a mandatory injunction would cause an irremediable prejudice, but at trial, and perhaps earlier if the matter comes back for consideration prior to trial, it might be possible to assess the nature and extent of the prejudice.

(2) the concern about 'stealing a march' by service without the opportunity to express a rejection has fallen away due to the undertakings;

(3) a further concern that the Defendant would contend that the exclusive jurisdiction of the Lebanese Court in respect of the validation action has led to the statement of the Defendant that the English court does have the jurisdiction to decide all the matters in issue, and that in the event that it decides the issues in favour of the Claimant, it will not relitigate these matters in Lebanon;

(4) there is a sufficient explanation for now as to the reason why the validation action was commenced. That does not mean that it is a good explanation. Whether or not it is may be revisited at trial or earlier.

75. In view of these matters, the undertakings have been extended, and there have been fuller explanations in order to address concerns expressed by the Claimant. They are adequate for the moment, but they can be explored at a later stage. In short, the intended conclusion in the draft judgment circulated remains the outcome of the interim application.

VIII Conclusion

76. For the reasons given in this judgment, on the basis of the undertakings given by the Defendant as extended since the circulation of the draft judgment and following the hearing of 19 May 2021, there will be no mandatory injunction to require the Defendant to withdraw the Lebanese proceedings at this stage. That application is adjourned to trial subject to any earlier application under the liberty to apply. The Defendant has disavowed any intention to prosecute parallel proceedings: see the Defendant's Supplemental Submissions at para. 3(3) and has offered suitable undertakings including not to take any further steps in the Lebanese proceedings or to prosecute or continue actions outside this jurisdiction. It has undertaken not to contend that there has been any tender or consignment without an immediate rejection on the part of the Claimant. There is also to be an order requiring the Defendant to provide information relating to the Lebanese proceedings. The liberty to apply allows for the earlier restoration of the application for the mandatory injunction.

77. In the draft judgment, it was stated that consideration must also be given to the form of the Amended Defence. In the light of the acknowledgment that the offer (or tender) and deposit defence can be determined by the English Court in these proceedings, para. 32B.4.3 needs to be reviewed, and this might affect para. 32B.4.4. It is essential that there is no dissonance between the pleadings and the presentation of the case to the Court on this application. This has led to extensive reamendments in the drafts provided of the Re-amended Defence served on 17 May and 21 May 2021. The parties are asked to agree a final form of order, and the Court will consider any other consequential matters.