



Neutral Citation Number: [2020] EWCA Civ 821

Appeal No: A4/2019/2463

Case No: 1236/5/7/15

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT
HHJ PELLING QC sitting as a deputy judge of the High Court

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 30/06/2020

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE MALES
and
LORD JUSTICE ARNOLD

B E T W E E N:

LAMESA INVESTMENTS LIMITED

Claimant/Appellant

-and-

CYNERGY BANK LIMITED

Defendants/Respondents

Mr Jonathan Crow QC, Ms Maya Lester QC and Mr Henry Moore (instructed by Elborne Mitchell LLP) for the Appellant

Ms Dinah Rose QC, Mr Brian Kennelly QC and Mr Jason Pobjoy (instructed by Sidley Austin LLP) for the Respondent

Hearing date: 16th June 2020

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 11.00am on 30 June 2020.

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. The question in this appeal is whether HHJ Pelling QC was right to hold that Cynergy Bank Limited (“Cynergy”) was justified in refusing to pay interest to Lamesa Investments Limited (“Lamesa”) under a Facility Agreement between them dated 19 December 2017 (the “Facility Agreement”). Cynergy, an English retail bank, had borrowed £30 million from Lamesa, a company registered in Cyprus, as Tier 2 Capital for a term of 10 years, with interest payable at half yearly intervals on 21 June and 21 December. The Facility Agreement provided for English governing law and exclusive English jurisdiction.
2. Lamesa is wholly owned by Lamesa Group Incorporated (“LGI”), a British Virgin Islands company, and LGI is wholly owned by Mr Viktor Vekselberg (“Mr Vekselberg”), a Russian national.
3. Some 3½ months after the Facility Agreement, the US Department of the Treasury Office for Foreign Assets Control (“OFAC”) placed Mr Vekselberg on a list of Specially Designated Nationals¹ under US legislation.² As a result of Mr Vekselberg’s indirect ownership, Lamesa thereby became a blocked person, so that persons dealing with it became subject to the provisions of US secondary sanctions legislation.
4. It is common ground that US legislation allows the imposition of secondary sanctions affecting property subject to US jurisdiction belonging to non-US persons even if they are not themselves operating in the US. Cynergy is such a non-US person because it carries on its US\$ denominated business by maintaining a US\$ correspondent account with a US bank.
5. Cynergy refused to pay Lamesa on the ground that the proviso to clause 9.1 of the Facility Agreement justified its refusal to do so. Clause 9.1 provided that Cynergy should not be in default if “during the 14 days after [Lamesa’s notice requiring payment] it satisfies [Lamesa] that such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction”.
6. The “mandatory provision of law” relied upon by Cynergy was section 5(b) of the Ukraine Freedom Support Act 2014 (as amended)³ (“UFSA”), which provided that the President of the USA “shall impose, unless the President determines that it is not in the national interest of the United States to do so, the sanction prescribed in (c) with respect to a foreign financial institution if the President determines that the foreign financial institution has ... knowingly facilitated a significant financial transaction on behalf of any ... person included on the list of specially designated nationals and blocked persons maintained by [OFAC] ...”.⁴ The sanction prescribed by section 5(c) of UFSA was “a

¹ By Executive Order No. 13662.

² The International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.).

³ It was amended by section 226 of the Countering America's Adversaries Through Sanctions Act.

⁴ Cynergy relied on other provisions of US law, but it was common ground that they did not, for our purposes, add anything to the provisions of UFSA.

prohibition on the opening, and a prohibition or the imposition of strict conditions on the maintaining, in the United States of a correspondent account or a payable through account by the foreign financial institution”.

7. Accordingly, against this background, we have to determine whether Cynergy’s non-payment was “in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction” within the meaning of clause 9.1.
8. The judge held that it was. He held that the words “mandatory provision of law” in clause 9.1 meant “a provision of law that the parties cannot vary or dis-apply”.⁵ English lawyers would, at the time of the Facility Agreement, have “understood a mandatory law to be one that could not be derogated from”. That was supported by the fact that the same words had that meaning in Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (“Rome 1”) and its predecessor, the Rome Convention 1980. It was, of course, not open to either party, by their agreement, to dis-apply the secondary sanctions legislation in question.
9. The judge rejected Lamesa’s submission that a distinction was to be drawn between a statute which required or prohibited something on the one hand, and one that created the risk of a penalty or sanction if something is done or not done, on the other hand. He held instead that Cynergy was acting “in order to comply” with a statute when either (i) that statute expressly prohibited payment on pain of the imposition of a sanction, (ii) a party acted or refrained from acting in a manner that would otherwise attract a sanction under the statute, or (iii) a party acted or refrained from acting in a manner that would otherwise attract the possible imposition of a sanction under the statute.⁶ The judge said that it had long been recognised in English law in the context of whether a contract was to be held void for illegality that a contract could be prohibited by implication. If a statute imposed a penalty, that would be treated as an implied prohibition because the imposition of a penalty implied prohibition.⁷
10. The judge said that it was unlikely that the parties would have intended to limit the meaning of the words “in order to comply” to an express statutory prohibition because the parties were aware at the time of the Facility Agreement (i) that it was possible but not likely that US sanctions would be imposed on Lamesa, (ii) of the ruinous impact that the imposition of secondary sanctions would have on Cynergy’s business, and (iii) that Cynergy could only ever be exposed as a non-US person to the risk of secondary sanctions, as opposed to primary sanctions, making it improbable that the parties would have intended clause 9.1 to protect it from a risk it did not face. Moreover, the parties had no material available to them at the time to make them think that the US Government would not regard payments by Cynergy to Lamesa as a “significant financial transaction” within section 5(b) of UFSA, or that there was any realistic

⁵ Judgment at [22].

⁶ Judgment at [25].

⁷ See *Cope v. Rowlands* [1836] 2 M & W 150 (“*Cope*”) at page 157, approved by the Court of Appeal in *Phoenix General Insurance Co of Greece SA v. Halvanon Insurance Company Limited* [1988] 1 QB 216 per Kerr LJ at page 268 C-G (“*Halvanon*”).

possibility that the President might conclude that it would not be in the national interest to impose sanctions on Cynergy under section 5(d) of UFSA.⁸

11. The judge's order dated 30th September 2019 provided that "[Cynergy] is entitled to rely upon Clause 9.1 of the Facility Agreement and shall not be in default of any payment obligation under the Facility Agreement for as long as [Lamesa] remains a Blocked Entity".
12. Lamesa contended that the judge was wrong essentially because section 5(b) contained no express legal prohibition on payment, and Cynergy cannot say that it refused to pay "in order to comply with [a] mandatory provision of law", when section 5(b) does not even purport to bind Cynergy to act or not to act in a particular way. Moreover, Lamesa submitted that the judge was wrong to construe clause 9.1 as if it were a one-off negotiated provision when in fact it was common ground that it was a standard form of wording which appeared in many credit-linked notes and financing agreements.
13. Mr Jonathan Crow QC, leading counsel for Lamesa, made two overarching submissions. First that it would require clear wording in a contract of loan to enable the debtor to escape its payment obligations, and secondly, that the court had to take account of the commercial interests of both parties in interpreting the contract. There was, at best, ambiguous wording that might be construed as excusing payment. Such a clause cannot relieve Cynergy from complying with its fundamental payment obligations. Mr Crow made clear that the purpose of Lamesa's application for declaratory relief was to clarify the legal position going forward. Lamesa accepted that, in respect of past interest payments,⁹ Cynergy has satisfied the final sentence of clause 9.1 which provided that "[w]here there is doubt as to the validity or applicability of any such law, regulation or order, [Cynergy] will not be in default if it acts on the advice given to it during such 14 day period by its independent legal advisers".
14. Cynergy originally submitted that the judge was right for the reasons he gave.¹⁰ It relied particularly on the definition of "regulation" in clause 1.2(a)(iv) of the Facility Agreement as including "any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental, or supranational body, agency, department or of any regulatory, self-regulatory, or other authority or organisation". This provision made clear that it was agreed that Cynergy could withhold payment in order to comply with a broad range of official directives, requests or guidelines, even if they lacked the force of law. The fact that clause 9.1 was standard form wording did not prevent the court taking admissible factual matrix into account as the judge did in this case.
15. In oral argument, however, Ms Dinah Rose QC, leading counsel for Cynergy, changed tack. She submitted that the judge had been wrong to focus on whether the imposition of a penalty was a possible or an automatic consequence of Cynergy's conduct, because even where a statute expressly prohibits conduct, there is always the question of

⁸ Section 5(d) provides that: "[t]he President may waive the application of sanctions under this section with respect to a foreign financial institution if the President – (1) determines that the waiver is in the national security interest of the United States; and (2) submits to the appropriate congressional committees a report on the determination and the reasons for the determination".

⁹ At least before these proceedings were issued.

¹⁰ And filed a Respondents' Notice.

whether or not the statute will be enforced. Ms Rose submitted that the “focus of compliance with a mandatory provision of law [was] on the conduct of the individual, not the reaction of the authorities”. That was why Cynergy’s non-payment was “in order to comply with [a] mandatory provision of law”, whether or not the pre-conditions to the actual imposition of sanctions, namely knowing facilitation of a significant transaction with a blocked person, were actually satisfied.

16. Cynergy argued that the language used in article 5 (“article 5”) of the EU Blocking Regulation¹¹ (the “Blocking Regulation”) was strikingly similar to that used in clause 9.1. Article 5 provided that “[n]o person ... shall comply, whether directly or [indirectly] with any requirement or prohibition ... based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom”. The Blocking Regulation treats that wording as applicable to US legislation referred to in its Annex, including the Iran and Libya Sanctions Act 1996 (“ILSA”) and the National Defence Authorisation Act to the fiscal year 2012.¹² ILSA provided that “the President shall impose 2 or more of the sanctions ... if the President determines that a person has, with actual knowledge, ... made an investment ... that directly and significantly contributed to the enhancement of Iran’s ability to develop petroleum resources of Iran”. Ms Rose, therefore, argued that it was to be inferred that parties using language similar to article 5 would reasonably conclude that it applied to US legislation in that form.

The Facility Agreement

17. I have already mentioned the critical terms of the Facility Agreement, but it is useful to record the relevant terms in one place as follows:-

“1.2 Construction

(a) Unless a contrary indication appears, any reference in this [Facility Agreement] to: ...

(iv) a “regulation” includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental, or supranational body, agency, department or of any regulatory, self-regulatory, or other authority or organisation; ...

9. ENFORCEMENT

9.1 Non-payment

In the event that any principal or interest in respect of the Tier 2 Loan has not been paid within 14 days from the due date for payment and such sum has not been duly paid within a further 14 days following written notice from [Lamesa] to [Cynergy]

¹¹ Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

¹² Added to the Annex of the Blocking Regulation in 2018.

requiring the non-payment to be made good, [Lamesa] may institute proceedings in a court of competent jurisdiction in England for the winding up of [Cynergy] and/or prove in its winding-up and/or claim in its liquidation or administration; provided that [Cynergy] shall not be in default if during the 14 days after [Lamesa's] notice it satisfies [Lamesa] that such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction. Where there is doubt as to the validity or applicability of any such law, regulation or order, [Cynergy] will not be in default if it acts on the advice given to it during such 14 day period by its independent legal advisers.”

9.2 Limited remedies for breach of other obligations

[Lamesa] may institute such proceedings against [Cynergy] as it may think fit to enforce any term, obligation or condition binding on [Cynergy] under this Tier 2 Loan (other than any payment obligation of the Issuer¹³ under or arising from the Tier 2 Loan, including, without limitation, payment of any principal or interest) (a “Performance Obligation”); provided always that [Lamesa] may not enforce, and shall not be entitled to enforce or otherwise claim against [Cynergy], any judgment or other award given in such proceedings that requires the payment of money by [Cynergy], whether by way of damages or otherwise (a “Monetary Judgment”), except by proving such Monetary Judgment in a winding-up of [Cynergy] and/or claiming such Monetary Judgment in an administration of [Cynergy].”

Principles of contractual interpretation

18. The judge’s statement of the applicable principles of statutory interpretation at [12] are not in dispute between the parties:
 - i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions – see *Arnold v. Britton* [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

¹³ The use of the term “issuer”, which is an obvious error for “the Bank” (namely Cynergy), would seem to confirm that clause 9 is a standard term clause that the drafter copied from elsewhere.

ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 20;

iii) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 17;

iv) Where the parties have used unambiguous language, the court must apply it – see *Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900* per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties’ actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see *Rainy Sky SA v. Kookmin Bank* (ibid.) per Lord Clarke JSC at paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see *Wood v. Capita Insurance Services Limited [2017] UKSC 24* per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 13; and

viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 20 and *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 11.”

19. The parties also referred to the decision of this court (CHC, Longmore and Asplin LJ) in *State of Netherlands v. Deutsche Bank AG* [2019] EWCA Civ 771, where it was considering the proper interpretation of the standard form Credit Support Annex to the International Swaps and Derivatives Association Inc’s Master Agreement. It said this at [49]-[53]:

“49. The parties referred to only two authorities on interpretation. It is worth citing them both relatively briefly. Hildyard J in *Re Lehman Brothers (No 8)* [2016] EWHC 2417 (Ch) [2017] 2 All ER (Comm) 275 (“*Lehmans*”) said the following at paragraph 48 in relation to the interpretation of ISDA Master Agreements:-

“In the context of the ISDA Master Agreements, and having regard to their intended and actual use as standard agreements by parties with such different characteristics in a multiplicity of transactions in a plethora of circumstances, the following principles are also relevant:

(1) It is “axiomatic” that the ISDA Master Agreements should, “as far as possible be interpreted in a way that achieves the objectives of clarity, certainty and predictability, so that the very large number of parties using it know where they stand”: *Lomas v FJB Firth Rixson* [2010] EWHC3372 (Ch.) at [53] per Briggs J.

(2) Although the relevant background, so far as common to transactions of such a varied nature and reasonably expected to be common knowledge amongst those using the ISDA Master Agreements, is to be taken into account, a standard form is not context-specific and evidence of the particular factual background or matrix has a much more limited, if any, part to play: see *AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94.

(3) More than ever, the focus is ultimately on the words used, which should be taken to have been selected after considerable thought and with the benefit of the input and continuing review of users of the standard forms and of knowledge of the market: see *The Joint Administrators of Lehman Brothers International (Europe) v Lehman Brothers Finance* [2013] EWCA Civ 188 at [53] and [88].

(4) The drafting of the ISDA Master Agreements is aimed at ensuring, among other things, that they are sufficiently flexible to operate among a range of users in an infinitely variable combination of different circumstances: *Anthracite Rated Investments (Jersey) Limited v Lehman Brothers Finance S.A* [2007] EWHC 1822 (Ch) *per* Briggs J (at [115]): particular care is necessary not to adopt a restrictive or narrow construction which might make the form inflexible and inappropriate for parties who might commonly be expected to use it”.

50. In *Wood v. Capita Insurance Services Limited* [2017] 2 WLR 1095 (“*Wood v. Capita*”), Lord Hodge JSC explained the latest authorities as follows at paragraphs 10-14:-

“10. The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. ...

11. ... Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case [[2011] 1 WLR 2900] (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause ...

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case [2015 UKSC 36], para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571 , para 12, per Lord Mance JSC. ...

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. ...”. ...

53. In the circumstances, the passage from Hildyard J’s judgment in *Lehmans* on which the State particularly relied does

not take the matter much further. Hildyard J was undoubtedly right to say, in an ISDA context, that the focus should be on the words used “which should be taken to have been selected after considerable thought and with the benefit of the input and continuing review of users of the standard forms and of knowledge of the market”. We are here, however, more in the territory of paragraph 10 of Lord Hodge’s judgment in *Wood v. Capita*, emphasising the need to consider the contract as a whole, and paragraph 11, where he said that:-

- i) interpretation was a unitary exercise, so that “where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense”, and
- ii) “in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause”.

20. Bearing these *dicta* in mind, it seems that the judge may have overlooked certain factors that are relevant to the proper interpretation of clause 9.1.
21. First, it was common ground that clause 9 was a standard term in common usage at the time of the Facility Agreement.¹⁴ As explained by Hildyard J in *Lehmans*, that meant that “a standard form is not context-specific and evidence of the particular factual background or matrix has a much more limited, if any, part to play” in the process of interpretation, and that “[m]ore than ever, the focus is ultimately on the words used, which should be taken to have been selected after considerable thought and with the benefit of the input and continuing review of users of the standard forms and of knowledge of the market”.
22. This first problem feeds into a second. The judge’s focus seems to have been on the probabilities of what these parties may or may not have intended by the use of the words in clause 9.1. Whilst it is relevant to consider the context of the Facility Agreement that led to the inclusion of this standard term, that consideration has to be against the background of two more general considerations: (i) that it would take clear words to abrogate a repayment obligation in a loan agreement (see Teare J’s eloquent exposition of this point in an insurance context at [49] in *Mamancochet Mining Limited v. Aegis Managing Agency* [2018] EWHC 2643 (Comm)), and (ii) that, in construing a commercial contract, the court must always take into account the commercial interests of both parties. There are indications in his judgment that the judge was rather more focused on the commercial interests of Cynergy than of Lamesa. For example, he said at [29] that clause 9.1 was “drafted in wide terms in order that it could effectively protect [Cynergy] from the risk of breaching an express or implied prohibition against

¹⁴ We were shown similar clauses used by Barclays Bank and Standard Chartered Bank. Though those clauses themselves actually post-dated the Facility Agreement, there was no doubt that clause 9 was a standard form.

payment that exposed it to potentially severe penalties or sanctions as a result of making a payment” to Lamesa.

23. In the context of this appeal, and in addition to what I have said about standard forms, I would emphasise that the process of interpretation required here is a unitary exercise. It starts with the words and relevant context, and moves to an iterative process checking each suggested interpretation against the provisions of the contract and its commercial consequences. The court must consider the contract as a whole and give more or less weight to elements of the wider context in reaching its view as to its objective meaning.

The relevant context

24. The relevant context here is that the court is considering a standard provision in a loan agreement used for the provision of Tier 2 Capital¹⁵ to an international bank. The Facility Agreement makes clear that the capital was required under “Capital Regulations” including CRD IV¹⁶ and related technical standards.
25. Non-payment provisions of a loan of Tier 2 Capital are neither generally, nor in this case, of the kind seen in ordinary loan agreements. The loan is subordinated and can only be enforced by winding up the borrower. Repayment events are controlled (see clause 5). Those competing at the end of the process to provide the Tier 2 Capital in question were both shareholders in the borrower’s ultimate parent company. The borrower at inception was Bank of Cyprus UK Limited, which was then ultimately owned by Bank of Cyprus Holdings PLC, an Irish company. On 23 November 2018, after the Facility Agreement was concluded, the borrower was sold to Cynergy Capital Limited, which is unrelated to the Bank of Cyprus group.
26. The court has not been provided with any context as to the origins of clause 9 as a standard term. It is obvious, however, that it was drafted to deal with possible future events that go far beyond sanctions in general and US sanctions in particular. It seems to me, at least, that the judge’s interpretation of clause 9.1 lost sight of this important reality. He seems to have treated clause 9.1 as if it must have been inserted to deal only with prospective possible US sanctions affecting Lamesa specifically because the evidence acknowledged that the parties regarded such a future event as possible, if not likely.
27. In my judgment, one of the most important pieces of context to clause 9 is that it does not extinguish the entitlement to be paid interest and to be repaid capital under the Facility Agreement. That much is common ground. The proviso to clause 9.1 merely says that, if it is engaged, Cynergy shall not be in default, so that it would not be open to Lamesa to seek to enforce payment by presenting a winding up petition. It is to be noted also that clause 9.2 anyway prevents a normal debt action against Cynergy in respect of principal or interest, as part of the regime of a Tier 2 Capital loan. Thus, the argument about whether or not the proviso to clause 9.1 is engaged will normally be about the timing of payments rather than about whether those payments will ever be

¹⁵ As defined in Clause 1.1 of the Facility Agreement.

¹⁶ Directive 2013/36/EU of the European Parliament and of the Council of 23 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, and Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms.

made. This is an important factor when considering Lamesa's submission that clear words are needed to abrogate a payment obligation. In short, the proviso to clause 9.1 does not abrogate a payment obligation, it abrogates a default and delays the obligation itself. Admittedly, that delay might be for a prolonged period.

28. In essence, the context to clause 9.1 is a balance between the desire of the lender to be paid timeously and the desire of the borrower not to infringe mandatory provisions of law, regulation or court orders. The last sentence of clause 9.1 reinforces that balance in the case of doubt, by allowing the borrower to escape default on the basis of advice from its own independent lawyers. Likewise, the part of clause 9.1 that applies the proviso only if the borrower "satisfies" the lender that it is engaged emphasises the balance between the parties within the provision itself.

The competing meanings of the words

29. Both sides accept that the proviso to clause 9.1 is capable of more than one meaning, but they do not agree as to what those meanings are.
30. I can start with the part that I consider most straightforward. The word "mandatory" must be taken to govern each of "provision of law", "regulation" and "order of any court of competent jurisdiction". As Mr Crow submitted, it thus limits the wide definition of "regulation" that I have mentioned. The definition in clause 1.2(a) is expressed to apply "unless a contrary indication appears". And it is noteworthy that the word "regulation" is used elsewhere¹⁷ in the Facility Agreement in its broadly defined sense. The word "mandatory" is commonly and intelligibly used to describe "an order of any court of competent jurisdiction".
31. The next question is as to the competing meanings of the provision that allows Cynergy to escape a default if "it satisfies [Lamesa] that such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction".
32. Lamesa submits that these words, in effect, mean that the reason for non-payment must be in order to comply with a statute that binds Cynergy and directly requires Cynergy not to pay the sums in question.
33. Cynergy submits, as the judge held, that a "mandatory provision of law" for this purpose means "a provision of law that the parties cannot vary or dis-apply", and that the proviso means that the reason for Cynergy's non-payment must be to comply with an actual or implied prohibition on making such payments in legislation (or presumably a regulation or order) that affects Cynergy. Cynergy relies on the Blocking Regulation in this context, as I have said, because it uses similar language to prevent compliance with US statutes imposing secondary sanctions.
34. In my judgment, the proviso to clause 9.1 is indeed capable of both these meanings.
35. I should say at once, however, that I do not accept Cynergy's interpretation of the word "mandatory". I quite understand that it can mean a provision from which the parties cannot derogate, as for example in Rome 1, but I do not think that is the meaning here.

¹⁷ See clauses 5.3(a), 7.1(c), 15.2(b)(i), and 15.4.

Mandatory simply means compulsory or required. A provision is mandatory if it imposes a “requirement or prohibition”, the terms used in article 5 of the Blocking Regulation to describe a provision which requires a person to do or to refrain from doing a specified act.

The unitary process

36. If one looks only at the black letter meaning of the words of the proviso, I would accept that one might think the Facility Agreement was only intended to excuse default where the non-payment was mandated or required by a statute, regulation or order directly binding on the borrower. Accepting, however, that the words are ambiguous, it is relevant to consider admissible context and commercial common sense.
37. There are three aspects of admissible context that I consider of great importance: first, the terms employed by the Blocking Regulation that must be taken to have been known to the parties and to the drafters of this standard clause; secondly, the fact that clause 9.1 is a standard clause; and thirdly, that US secondary sanctions would have been at the relevant time one (but certainly not the only) potential problem affecting parties to agreements for the provision of Tier 2 Capital within the EU. US secondary sanctions would have been far more likely to be a potential problem than US primary sanctions for the reasons the judge gave.
38. The competing interests of the parties to a Tier 2 Capital facility agreement including clause 9.1 are the lender’s interest in being paid timeously, as against the borrower’s interest in being able to delay payment if, put broadly, payment would be illegal, not only under English law but under any system of law which would affect the borrower’s ability to conduct its ordinary business.
39. There was much focus in argument on the conditionality of the provisions of section 5(b) itself. In the end, however, I do not think that conditionality is of much assistance. I note also that in the List of Issues and Common Ground agreed by the parties, conditionality was not considered to be material. On the contrary, the parties agreed that the decisive question was whether non-payment on the basis of US secondary sanctions provisions constituted compliance with a mandatory provision of law within the meaning of clause 9.1.
40. It is true that it is not certain that payment under the Facility Agreement would attract the imposition of a sanction on Cynergy. But it is also clear that the imposition of a sanction is mandatory (“The President shall impose the sanction”), and that as a matter of US law this would only be avoided if the payment was deemed not “significant” or if the President otherwise decided it was not in US interests to impose it. As Ms Rose submitted, these possibilities are equivalent to a possibility that a person investigated for a criminal offence will not be prosecuted or will be acquitted. What matters here is Cynergy’s *reason* for the non-payment, not whether Cynergy is certain or only likely to be sanctioned if it makes the payment.
41. There was no issue before us or before the judge as to whether the payments in this case were “significant”, but it is not difficult to imagine a case where that would be in issue. In that event it would be for the borrower in the first instance to seek to satisfy the lender within the 14-day period referred to in the clause that the payment was significant, so that the borrower would be liable to be sanctioned if the payment was

made. If the lender was not satisfied, it would be for the borrower's independent lawyers to advise as to the "applicability" of US secondary sanctions to the payment in question in accordance with the final sentence of clause 9.1.

42. Mr Crow's main argument was that, once one accepted that the proviso was ambiguous, it could not be clear enough wording to excuse something so crucial to the agreement as non-payment. As I have said, this assumes that payment is abrogated rather than delayed by the engagement of the proviso. Moreover, undertaking the unitary exercise that the authorities demand, it needs to be considered that the utility of clause 9.1 would be badly dented by Lamesa's interpretation.
43. The clause was intended to be used by international banks. One of the risks facing international banks is that they will be faced with the problem of dealing with the prospect of US secondary sanctions. Tier 2 lending is an EU concept, and the parties were EU financial institutions. If a "mandatory provision of law" only referred to one that directly bound the borrower not to pay, it would have almost no possibility of taking effect.
44. Here, it seems to me, the drafter of clause 9.1 must have intended the borrower to be capable of obtaining relief from default if its reason for non-payment was to "comply" with a foreign statute that would otherwise be triggered. The drafters knew that the Blocking Regulation regarded US secondary sanctions legislation as imposing a "requirement or prohibition" with which EU parties were otherwise required to "comply". That is a compelling argument in favour of Cynergy's interpretation of the proviso to clause 9.1. I do not think that the fact that the language of article 5 of the Blocking Regulation is broader than the language of clause 9.1 affects this argument. It refers to compliance "whether directly or [indirectly] with any requirement or prohibition ... resulting directly or indirectly from the laws specified ...". But the important point is that its language refers to the provisions of US secondary sanctions legislation (in substantially the same terms as section 5 of UFSA) as imposing a "requirement or prohibition" on EU entities. That is the reality of the position. An EU entity cannot ignore such legislation, because if it does so, its business will be disrupted (albeit that, in the case of the particular legislation referred to in the Annex to the Blocking Regulation, article 5 prohibits such compliance).
45. It is true also that the US legislation cannot prohibit, and does not purport to prohibit, a payment by Cynergy to Lamesa. But its effect is clearly one of prohibition as the Blocking Regulation makes clear. Moreover, whilst it can be argued that Cynergy is not "complying" with section 5, but only with the policy of the US secondary sanctions legislation, that as it seems to me, is a semantic difference. Once the US legislation is seen, as it must be, as an effective prohibition, Cynergy's reason for non-payment is indeed to comply with it.
46. Overall, therefore, the balance between the interests of the parties to this type of Facility Agreement in respect of Tier 2 Capital favours the application of the proviso to clause 9.1 to the standard form of US secondary sanctions legislation. I reiterate this is not a parochial loan agreement. It is an international facility entered into in the context of international banks, and of the provisions of the Capital Regulation and of CRD IV.

Conclusion

47. For these reasons I have concluded that the order that the judge made was the correct one, although I do not agree entirely with his reasons. I would dismiss the appeal.

Lord Justice Males:

48. I agree.

Lord Justice Arnold:

49. I have not found this case easy. I agree without reservation with much of the Chancellor's reasoning. The point which troubles me is the effect of the words "in order to comply with".

50. It is important to bear in mind that this is a Part 8 claim to determine the correct interpretation of the proviso to clause 9.1. The parties sensibly agreed a statement of agreed facts and a list of issues for the purposes of the hearing before the judge. This recorded at paragraph 30 that it was "common ground that ... (a) OFAC could impose secondary sanctions on Cynergy under section 5 of USFA ... if OFAC were to determine that the payment of interest by Cynergy to Lamesa was 'significant' ... (b) The President has the power to waive the application of sanctions under section 5 of USFA ...". It also recorded at paragraph 27:

"OFAC guidance (FAQ 542) states that assessment of whether a transaction is "significant" requires an assessment of *'the totality of the facts and circumstances'* of the transaction, including: (1) the size, number, and frequency of the transaction(s); (2) the nature of the transaction(s); (3) the level of awareness of management and whether the transaction(s) are part of a pattern of conduct; (4) the nexus between the transaction(s) and a blocked person; (5) the impact of the transaction(s) on statutory objectives; (6) whether the transaction(s) involve deceptive practices; and (7) such other factors that the US Secretary of the Treasury deems relevant on a case-by-case basis."

51. It follows that the judge was correct to proceed on the basis that, if Cynergy made interest payments in accordance with the Facility Agreement while Lamesa was a blocked person, there was "a risk" that Cynergy would be sanctioned. Although the judge did not attempt to quantify the risk, it is apparent from his judgment that he proceeded on the basis that the risk was a significant one. There is no challenge by either party to this aspect of his judgment. As counsel for Lamesa pointed out, it follows that it cannot be assumed that, if Cynergy made the payments in question, it would be sanctioned. Indeed, there has been no finding (nor is there any evidential basis for a finding) that the imposition of a sanction is more probable than not.
52. In these circumstances Lamesa contends that Cynergy is declining to pay interest not "in order to comply with" section 5 of USFA, but in order to avoid the risk of being sanctioned; and that clearer words would be needed to excuse Cynergy from paying in such circumstances.

53. Counsel for Cynergy argued that there would always be some uncertainty as to whether non-payment was strictly necessary to comply with a mandatory provision of law: even if the law in question clearly and expressly prohibited the payments, the competent authority might, for example, exercise a prosecutorial discretion not to bring proceedings against Cynergy. Counsel for Lamesa argued that what matters is whether, objectively considered, the relevant law, regulation or court order prohibits payment by Cynergy; and not whether, in practice, Cynergy could get away with non-compliance with such a prohibition.
54. The Chancellor's conclusion is that it is sufficient for the purposes of the proviso that Cynergy's *reason* for non-payment is in order to comply with section 5 of USFA. Although I have doubts about this, in the end I do not dissent.