



In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL LIST
2015: No. 255

BETWEEN:-

CORNHILL NATURAL RESOURCES FUND LIMITED

Plaintiff

-and-

**(1) LIBYAN INVESTMENT AUTHORITY
(2) HSBC SECURITIES SERVICES (LUXEMBOURG) SA**

Defendants

-and-

THE ATTORNEY GENERAL

Interested Party

JUDGMENT
(In Court)

Date of hearing: 25th November 2015

Date of judgment: 29th January 2016

Mr Ben Adamson, Conyers Dill & Pearman, for the Plaintiff

Mr John Wasty and Mr Henry Tucker, Appleby (Bermuda) Limited, for the First Defendant

Ms Jessica Faiella, MJM Limited, for the Second Defendant

Mr Bryan Myrie and Mr Kevin Simpson, Attorney General's Chambers, for the Interested Party

Introduction

1. The Plaintiff, Cornhill Natural Resources Fund Limited (“the Fund”), is an investment fund. Its sole investor is the Second Defendant, HSBC Securities Services (Luxembourg) SA (“HSBC”). On 8th April 2008 HSBC applied to subscribe for investment shares in the Fund to the value of US\$ 100 million and on 1st May 2008 was accordingly allotted 926,482 investment shares (“the Investment Shares”). All these shares are held by HSBC as a nominee for the First Defendant, the Libyan Investment Authority (“LIA”), which is the sovereign wealth fund of the State of Libya. The Fund’s investment manager is Cornhill Capital Limited in England (“the Manager”) and the Fund’s administrator is Argonaut Limited in Bermuda (“the Administrator”).
2. On 9th April 2011 The Libya (Restrictive Measures) (Overseas Territories) Order 2011 (“the OT Order”) came into force. References in this judgment to the OT Order are to the OT Order in its unamended form. Although this was a UK statutory instrument, Part 1 of the OT Order, which included a provision freezing¹ the funds and economic resources of designated persons, was extended to Bermuda by article 1(2) of the OT Order read in conjunction with Schedule 1. Designated persons included the LIA and the assets frozen included the Investment Shares.
3. On 18th November 2011 The Libya (Restrictive Measures) (Overseas Territories) (Amendment) Order 2011 (“the OT Amendment Order”) came into force. It amended the OT Order including the asset freezing provisions

¹ “Freezing” is convenient shorthand for saying that the Order prohibited any persons from dealing with the funds or economic resources of designated persons. Thus the Order was *in personam* not *in rem*.

imposed on the LIA. There have been further amendments to the OT Order but they are not material.

4. The OT Order was made pursuant to United Nations Security Council (“the Security Council”) resolutions 1970 (2011) (“S/RES/1970 (2011)”) adopted on 26th February 2011 and 1973 (2011) (“S/RES/1973 (2011)”) adopted on 17th March 2011. These resolutions called upon all member States of the United Nations to apply certain measures to give effect to decisions of the Security Council in relation to Libya. Those measures included a freeze of assets held by individuals or entities listed in Annex to II to S/RES/1970 (2011) and Annex II to S/RES/1973 (2011). The LIA was listed in the latter Annex.
5. Paragraph 17 of S/RES/1970 (2011) contained the asset freeze. However the resolution contained certain exceptions. Eg paragraph 20 provided in material part:

“... that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 17 above of ... payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;”.
6. The OT Amendment Order was made pursuant to Security Council Resolution 2009 (2011) (“S/RES/2009 (2011)”) adopted on 16th September 2011. This modified the asset freezing measures contained in S/RES/1970 (2011) and S/RES/1970 (2011) insofar as they applied to certain entities, including the LIA.
7. On 4th October 2013 HSBC wrote to the Administrator requesting the redemption of all of its shares in the Fund. The cash proceeds of the redemption were to be paid by wire transfer to a bank account in the UK held by the LIA. The UK bank account was frozen pursuant to Council Regulation (EU) No 204/2011 of the Council of the European Union, as amended by Council Regulation (EU) No 233/211, which gave effect to S/RES/1970 (2011) and S/RES/1973 (2011). There was therefore no risk that the proceeds would be dissipated.

8. The Fund replied to HSBC by a letter dated 17th October 2013, in which it noted that completing the redemption request would require the Fund to approach a number of regulatory authorities in order to gain approvals and licences so as to ensure that the Fund did not breach relevant sanctions restrictions. The Fund was concerned to ensure, *inter alia*, that it did not breach the OT Order. The letter stated that the notice period for any redemption would need to be extended in order to provide time to seek legal advice and, if appropriate, regulatory approvals and licences.
9. I was referred to various items of correspondence. These included a letter dated 23rd March 2015 from the Governor to the LIA's Bermudian attorneys:

"I refer to your letter of 18 December 2014 asking for my agreement in principle to Redemption Proceeds being paid into a frozen account in the UK. As you suggested, my office was in touch with HM Treasury who confirmed their earlier advice that there may be a reasonable basis for the Libyan Investment Authority to conclude that redemption of shares into the frozen account be exempted from restrictions imposed under EU regulation 204/2011 by engaging Article 9(1)(b) [which is analogous to article 12(1)(b) of the OT Order as amended].

I also took legal advice locally which did not dissent from the view that the deposit of monies into the frozen account was provided for under the Libya OT Order. ...

So, whilst it is not entirely certain that you need my agreement, insofar as it is necessary, I can confirm that I have no objection to what is proposed."
10. It is of course the courts, and not the Governor or HM Treasury, which are the arbiters of the meaning of these instruments.
11. The parties have reached an impasse and the Fund has issued a summons seeking the guidance of the Court. The Fund submits that it cannot process the redemption request without a licence from the Governor, for which it has not been instructed to apply. The LIA disputes that a licence is necessary and contends that as a result of the amendments the Investment Shares are no longer frozen, if indeed they ever were. HSBC and the Attorney General have taken a neutral position and did not make any submissions to the Court.

The statutory regime

12. Article 2 of the OT Order as amended by the OT Amendment Order (together, “the Amended OT Order”) is headed “*Interpretation*”. The following definitions, which are contained in article 2(1), are relevant.

13. The OT Amendment Order amended article 2(1) of the OT Order:

“(b) by deleting the definition of ‘designated person’ and replacing it with the following definition—

“‘designated person’ means any person listed in Annex II of Security Council resolution 1970 (2011) or listed in Annex II of Security Council resolution 1973 (2011) or designated under either of these resolutions, excluding the Libyan National Oil Corporation and Zueitina Oil Company and excluding the persons referred to in paragraph 15 of Security Council resolution 2009 (2011);’

.....
(d) by inserting the following definition ... —

“‘person referred to in paragraph 15 of Security Council resolution 2009 (2011)’ means any of the Central Bank of Libya, the Libyan Arab Foreign Bank, the Libyan Investment Authority and the Libyan Africa Investment Portfolio;”.

14. By contrast, article 2(1) of the OT Order defined “*designated person*” as follows:

“‘designated person’ means any person listed in Annex II of Security Council resolution 1970 (2011) or listed in Annex II of Security Council resolution 1973 (2011) or designated under either of those resolutions;”.

15. Thus the LIA is expressly excluded from the definition of “*designated person*” under the Amended OT Order whereas it was caught by the definition of “*designated person*” in the OT Order as it was listed in Annex II of S/RES/1973 (2011).

16. There is one further relevant definition. “*Funds*” are defined as follows in article 2(1) of the Amended OT Order:

“‘funds’ means financial assets and benefits of every kind, including (but not limited to)—

.....

(c) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivative contracts;”

17. Article 10 of the Amended OT Order is headed “*Freezing funds and economic resources*”. It provides in material part:

“(1) Subject to article 12, unless they do so under the authority of a licence granted under article 15, a person (including a designated person or person referred to in paragraph 15 of Security Council resolution 2009 (2011)) shall not deal with funds or economic resources

which—

(a) are owned, held or controlled, directly or indirectly, by a designated person or persons acting on their behalf or at their direction or by persons owned or controlled by them; or

(b) on 16th September 2011—

(i) were owned, held or controlled, directly or indirectly, by a person referred to in paragraph 15 of Security Council resolution 2009 (2011);

(ii) were located outside Libya; and

(iii) were frozen under the asset freeze imposed under paragraph 22 of Security Council resolution 1973 (2011) read with paragraph 17 of Security Council resolution 1970 (2011).

(2) A person who contravenes the prohibition in paragraph (1) shall be guilty of an offence under this Order.

.....

(4) In this article, ‘to deal with’ means—

(a) in respect of funds—

(i) to use, alter, move, allow access to or transfer;

(ii) to deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or

(iii) to make any other change that would enable use, including portfolio management;”.

18. Article 11 of the Amended OT Order is headed “*Making funds and economic resources available*”. It provides in material part:

“(1) A person (including a designated person) shall not make funds or economic resources available, directly or indirectly, to or for the benefit of a designated person, subject to article 12, unless they do so under the authority of a licence granted under article 15.

(2) A person who contravenes the prohibition in paragraph (1) shall be guilty of an offence under this Order.”

19. Article 12 of the Amended OT Order is headed “*Exceptions*”. It provides:

“(1) A person is not guilty of an offence under articles 10 or 11 if they credit a frozen account with—

(a) interest or other earnings due on the account; or

(b) payments due under contracts, agreements or obligations that were concluded or arose prior to the date on which an account holder became a designated person.

(2) It is not an offence under article 11 for a person to credit a frozen account which is in receipt of funds transferred by a third party to a frozen account.

(3) In this article ‘third party’ means a person other than the account holder or the person with which the account is maintained.”

20. Article 14 of the Amended OT Order is headed “*Governor’s powers to give directions*”. It provides in material part that:

“(1) Where the Governor has reasonable grounds for suspecting that a person is a designated person or a person referred to in paragraph 15 of Security Council Resolution 2009 (2011), the Governor may give a direction that such person is to be treated as a designated person or a person referred to in paragraph 15 of Security Council Resolution 2009 (2011) for the purposes of this Order.”

21. Article 15 is headed “*Licences*”. It provides in material part:

“(1) The Governor may grant a licence to disapply the prohibition in articles 10(1) or 11(1) in relation to the acts specified in the licence.”

22. The rest of article 15 contains further provisions relating to the grant of a licence. The circumstances in which a licence may be granted in relation to the assets of a designated person are not coextensive with the circumstances in which a licence may be granted in relation to the assets of a person referred to in paragraph 15 of S/RES/2009 (2011). However there is some overlap between them. Eg article 15(2)(f) provides that a licence may relate to:

“payment by a designated person or by a person referred to in paragraph 15 of Security Council resolution 2009 (2011) under the conditions specified in article 10(1)(b) of this Order of sums due under a contract entered into prior to the date on which the person was so designated, provided that the payment is not directly or indirectly received by another designated person and the Sanctions Committee has been notified of the intention to make or receive such payments or has been notified 10 working days in advance of the intention to authorise the unfreezing of funds, other financial assets or economic resources for the payment of the sums due.”

23. Articles 10(1), 14(1) and 15(2) of the OT Order were amended by the OT Amendment Order. It is the amended text which is set out above. The OT Amendment Order did not amend articles 10(2), 10(4), 11, 12 or 15(1). The text of those articles remains as contained in the OT Order.

Discussion

24. Submissions focused on the correct interpretation of article 12(1) of the Amended OT Order. The article permits a person to deal with funds that have been frozen under article 10(1) by crediting them to a frozen account – provided that the funds fall within the rubric of article 12(1)(a) or (b). That much was not controversial.
25. The issues between the parties were: (i) whether, if the Investment Shares were redeemed, the proceeds of redemption would be frozen under article 10(1) of the Amended OT Order (“the frozen funds issue”); and (ii), if so,

whether payment of the redemption proceeds to a frozen account would qualify as an exception under article 12(1).

26. Issue (ii) breaks down into three discrete sub-issues: (a) whether the exceptions in article 12(1)(b) cover the redemption of shares as well as the payment of the redemption proceeds (“the redemption issue”); (b) whether there was a date on which the LIA became a designated person (“the designated person issue”); and (c) whether payment of the redemption proceeds would be a payment under a contract that was concluded prior to that date (“the date issue”).

The frozen funds issue

27. Counsel for the LIA, Mr Wasty, submits that if the Investment Shares are redeemed the redemption proceeds will not be frozen. The argument goes like this. Article 10(1) of the Amended OT Order provides that a person shall not deal with funds or economic resources which on 16th September 2011 were *inter alia* frozen under the asset freeze imposed by S/RES/1970 (2011) and S/RES/1973 (2011). The redemption proceeds would not be caught by this definition because on 16th September 2011, immediately prior to the adoption of S/RES/2009 (2011), the LIA was a designated person and would therefore have been able to deal with the redemption proceeds under the exception in article 12(1)(b), which gave effect to paragraph 20 of S/RES/1970 (2011). The way in which the argument was put is more complicated, but that is what it boils down to.
28. The problem with this submission is that article 12(1) does not remove the restrictions on dealing with assets frozen under article 10(1) altogether but merely varies those restrictions so as to permit the frozen assets to be dealt with in certain ways. Thus the fact that an asset could be dealt with under article 12(1) (whether before, on, or after 16th September 2011) does not mean that it has ceased to be a frozen asset within the meaning of article 10(1). Likewise, the fact that a Member State has given permission to deal with an asset pursuant to paragraph 20 of S/RES/1970 (2011) does not mean

that such asset has ceased to be frozen under the asset freeze imposed by Security Council resolutions S/RES/1970 (2011) and S/RES/1973 (2011).

29. Article 10(1) of the Amended OT Order is analogous to article 5(1) of EU regulation 204/2011. In Maud v Libyan Investment Authority [2015] EWHC 1625 (Ch); [2015] BPIR 858 at para 43, Rose J stated of article 5(1):

“... the payment of a frozen obligation into a frozen bank account does not amount to unfreezing it for the purpose of article 5(1)...”

Her analysis of article 5(1) of EU regulation 204/2011 provides support for my analysis of article 10(1) of the Amended OT Order.

30. The upshot is that on 16th September 2011, assuming that the Investment Shares had been redeemed, the redemption proceeds would have been frozen under the asset freeze imposed by S/RES/1970 (2011) and S/RES/1973 (2011). Such proceeds would therefore be frozen if the Investment Shares were redeemed today.

The redemption issue

31. It will be helpful to consider the provisions of the Bye-Laws which deal with the redemption of shares.
32. Bye-Law 12.1 provides that a Redemption Request² must be in writing in such form as the Board may from time to time determine and be signed by the holder of Investment Shares as appearing on the Register of Shareholders giving it.
33. Bye-Law 12.2 provides that a Redemption Request must be received by the Administrator not less than forty business days before the Redemption Day on which the Investment Shares which are the subject of that Redemption Request are to be redeemed. Provided that the Board may, either generally or in any particular case and after having received a Redemption Request, extend the notice period within which that or any other Redemption Request

² When summarising the relevant Bye-Laws I have followed their usage of upper case letters for certain terms.

must be received to such notice period of greater duration as the Board may determine if the Board (in consultation with the Manager) in its discretion deems such an extension as being in the best interests of the Company and its non-redeeming Shareholders.

34. Bye-Law 13.1 of the Fund provides that subject to the provisions of the Companies Act 1981 and the Bye-Laws, the Fund shall on receipt by the Administrator of a duly completed and validly given Redemption Request, redeem the Investment Shares which are the subject of the Redemption Request on the relevant Redemption Day at the Redemption Price determined in accordance with the Bye-Laws. This requirement is subject to certain qualifications which for present purposes are not material.
35. Bye-Law 14.1 provides that the Redemption Price for the Investment Shares of each Class or each Series (if any) of a Class shall be calculated by reference to the Net Asset Value Per Investment Share of that Class or Series (as determined in accordance with the Bye-Laws) as at the close of business on the Redemption Day on which the redemption is effected.
36. Bye-Law 15.1 provides that the relevant Redemption Price shall: (i) be in dollars or, subject as provided in the Bye-Laws, in securities in kind; and (ii) subject to the Fund's rights to establish reserves, generally be payable as set out in the Information Memorandum or as determined by the Board, provided that in circumstances where the Company is unable to liquidate its Investments in an orderly manner so as to fund the Redemption Price, or where the value of the assets and liabilities of the Fund cannot reasonably be determined, payment of the Redemption Price may be made later than the aforesaid time period(s).
37. Bye-Law 16.1 provides that upon the redemption of an Investment Share pursuant to the Bye-Laws, the relevant Shareholder shall cease to be entitled to any rights in respect of that Investment Share (save for the right to receive a dividend which has been declared in respect of that Investment Share prior to the redemption or purchase) and accordingly his name shall be removed from the Register of Shareholders with respect to that Investment Share.

38. Counsel for the Fund, Mr Adamson, submits that under the Bye-Laws redemption and the payment of the redemption proceeds are separate and distinct. Eg, he submits, if redemption takes place but payment does not the redeeming shareholder ceases to be a shareholder and becomes a creditor. He relies on the judgment of Bell J (as he then was) in BNY AIS Nominees Ltd v Stewardship Credit Arbitrage Fund Ltd [2008] Bda LR 67 SC at paras 52 – 55. The learned Judge concluded at para 55:

“Quite apart from the authorities upon which Mr Potts relied, it seems to me both sensible and obvious to find that a failure on the part of the Company to discharge its redemption obligations puts the Gottex Funds in the position of creditor, and I so find.”

39. Mr Wasty referred me to Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited [2010] UKPC 33, which was an appeal from the Cayman Islands. The appellant gave notice to redeem its shares in the respondent. The respondent failed to pay the appellant any part of the redemption price. The appellant’s response was to issue a petition to wind up the respondent. The Court of Appeal of the Cayman Islands held that the respondent had power to suspend the payment of redemption proceeds after the redemption date but before payment of those proceeds. Whether the petition was an abuse of process depended upon whether the appellant was a current creditor of the respondent, with standing to issue it, or alternatively at best a prospective creditor, in which case it would have no such standing. The Board held that the appellant was a current creditor.

40. The Board’s decision, which was delivered by Lord Mance, turned on an analysis of the bye-laws in question. Parts of this analysis at least are applicable to the bye-laws in the instant case:

“15. The Board turns in the light of these provisions to the issue whether ‘the Company had power to suspend the payment of redemption proceeds after the Redemption Date but before payment of those proceeds’ ...

16. ... The issue is not to be approached on the basis of any a priori view that, until payment of the redemption proceeds, a shareholder must or should necessarily remain a member of a company which is (as the Respondent was) due to make such payment upon or after a certain redemption date; and the fact that a person's name continues to remain on a company's register as member does not mean that it should have done so under the

provisions of the Articles: see e.g. Reese River Silver Mining Company Ltd v Smith (1869) 4 HL 64 , 80; Michaels v Harley House (Marylebone) Ltd [1997] 2 BCLC 166, 174.

.....

20. *The focus of these provisions is on the Redemption Date by reference to which the Redemption Price payable is crystallised and from which the Price is deemed to be a liability of the Respondent; the remittance of the “redemption proceeds” is treated as a matter of supplementary procedure, although it may be refused on in particular money-laundering grounds. Both stages may be said to be part of a continuing process, but it does not follow that “redemption” within the meaning of articles 55 and 32 only occurs at the conclusion of that whole process.”*

41. Lord Mance considered at para 40 BNY AIS Nominees Ltd v Stewardship Credit Arbitrage Fund Ltd and other recent authorities along similar lines:

“The Appellant, on the other hand, has referred to a series of recent first instance decisions, in which it has been held or contemplated that redemption of redeemable shares issued in various investment vehicles took place at the expiry of the relevant notice to withdraw, converting the member into a simple creditor as from that date, even though payment had not yet been received: Basis Capital Funds Management Ltd v BT Portfolio Services Ltd [2008] NSW SC 766 , Western Union International Ltd v Reserve International Liquidity Fund Ltd (Claim No. BVIHCV 2009/322, unrep'd, judgment dated 26 January 2010), SV Special Situations Fund Ltd v Headstart Class F Holdings Ltd (Claim No. BVIHCV 2008/239, unrep'd, judgment dated 25 November 2008), BNY AIS Nominess Ltd v Stewardship Credit Arbitrage Fund, Ltd (Sup. Ct. Bermuda, judgment dated 27 November 2008), In re Livingston International Fund Ltd (in liquidation) (Claim No. BVIHCV 2002/0197) and In re New Stream Capital Fund Ltd (Sup. Ct. Bermuda, judgment dated 18 December 2009). These decisions all turn on the particular statutory and contractual provisions in question in them, and they are as stated first instance decisions. They do no more than lend some comfort that the view which the Board takes of the present contractual scheme is unlikely to be regarded as unusual or surprising.”

42. Mr Adamson submits that article 12(1) is drafted narrowly and does not permit the Fund to process redemption requests. Consequently, he submits, the question of payment of the proceeds of redemption does not arise. I disagree. Under the Bye-Laws the Fund is obliged to process the redemption request and pay out the redemption proceeds. This obligation remains notwithstanding that the Fund: (i) has extended the notice period for redeeming the Investment Shares and (ii) may (depending upon how this

application is decided) be prohibited by the Amended OT Order from complying with the obligation.

43. It is trite law that the memorandum and bye-laws of a company are a statutory contract between the company and its members.³ See, eg, BNY AIS Nominees Ltd v Stewardship Credit Arbitrage Fund Ltd at para 53, where Bell J considered passages from the seventh edition of Principles of Modern Company Law by Gower and Davies, “*where the authors consider the remedies of a shareholder if a company did not perform the contract to redeem or purchase his shares*”. Provided that the other requirements of article 12(1)(b) are satisfied, therefore, the Investment Shares can be redeemed and the redemption proceeds credited to a frozen account.

The designated person issue

44. The LIA is not a designated person as defined by article 2(1) of the Amended OT Order. However Mr Wasty submits that for purposes of article 12(1) the applicable definition of “*designated person*” is the one in article 2(1) of the OT Order. It would, he submits, be surprising if amendments designed to relax the sanctions regime with respect to the persons referred to in paragraph 15 of S/RES/2009 (2011) had the effect of tightening those sanctions with respect to those persons.
45. True, Mr Wasty accepts, the Amended OT Order could have amended article 12(1)(b) so as to clarify any such intention by reading:

“(b) payments due under contracts, agreements or obligations that were concluded or arose prior to the date on which an account holder became a designated person or a person referred to in paragraph 15 of Security Council resolution 2009 (2011);”.

He submits that it is reasonable to infer that the reason why article 12(1)(b) was not amended in this way is that such an amendment would have meant that the relevant date for a person referred to in paragraph 15 of S/RES/2009

³ Thus section 16 of the Companies Act 1981 provides: “*Subject to this Act the memorandum of association when registered and the bye-laws when approved shall bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the bye-laws.*”

(2011) was 16th September 2011, ie the date on which the Security Council adopted that resolution, rather than the date on which the person had become a designated person, which in the case of the LIA was 17th March 2011, when the Security Council adopted S/RES/1970 (2011). Although the LIA is not a designated person under the OT Amendment Order, it used to be one under the OT Order. The date on which it became a designated person under the OT Order, it is submitted, is for purposes of article 12(1)(b) the relevant date with respect to the LIA.

46. I do not find this argument persuasive. The LIA is not a designated person within the meaning of the Amended OT Order, and hence within the meaning of article 12 of that Order, as the definition of “*designated person*” in the Amended OT Order expressly excludes the LIA. If it had been the legislative intent that “*designated person*” should have a different meaning in article 12 to the meaning which it bears in the rest of the Amended OT Order then the Order would no doubt have provided for this. I find the suggested explanation of why the Amended OT Order did not do so unconvincing. In light of the reference to 16th September 2011 in article 10(1)(b) of the Amended OT Order it is not clear to me why that date should be objectionable for purposes of article 12(1)(b). If it was objectionable, then the Amended OT Order could have provided that for purposes of article 12(1)(b) a designated person would be deemed to include a person referred to in paragraph 15 of S/RES/2009 (2011).
47. My interpretation of article 12(1)(b) of the Amended OT Order is consistent with the analysis by Rose J in Maud v Libyan Investment Authority at para 44 of the analogous terms of article 9 of EU regulation 204/2011:
- “I do not accept that the construction proposed by Mr Maud is inconsistent with the aim of UN 2009 (2011) being to relax sanctions against the four named entities. Although those entities do not benefit from the derogation in what became article 9 of Regulation 204/2011, they have the far greater benefit of no longer being subject to the ‘making available’ prohibition and having their assets within Libya or dating from 16th September 2011 unfrozen.”*
48. For these reasons I am satisfied that for purposes of article 12(1)(b) of the Amended OT Order the LIA is not a designated person.

The date issue

49. HSBC became a member of the Fund, and therefore bound by its Bye-Laws, when, having agreed to become a member, its name was entered on the register of members. See section 19(2) of the Companies Act 1981. I infer that registration probably took place on or about 1st May 2008 when the Fund accepted HSBC's subscription request and allotted to HSBC the Investment Shares. Mr Adamson did not suggest otherwise. Mr Wasty submits that as the redemption of shares in the Fund is governed by the Bye-Laws, payment of the proceeds of redemption would be a payment due under a contract, namely the Bye-Laws, that was concluded prior to 9th April 2011, the date on which, under the OT Order, the LIA became a designated person. I agree, notwithstanding that, as Mr Adamson submits, the proximate cause of the repayment was not the Bye-Laws but the redemption request.

Summary

50. The issues before the Court are resolved as follows. (i) If the Investment Shares were redeemed, the proceeds of redemption would be frozen under article 10(1) of the Amended OT Order. (ii) I accept that article 12(1)(b) of the Amended OT Order covers the redemption of the Investment Shares as well as the payment of the redemption proceeds. I also accept that payment of the redemption proceeds would be a payment under a contract that was concluded prior to the date on which, under the OT Order, the LIA became a designated person. However the LIA is not a designated person for the purposes of article 12(1)(b). For this reason payment of the redemption proceeds to a frozen account would not qualify as an exception permitted by that article.
51. I appreciate that this outcome will be frustrating for the LIA. The remedy is to apply for a licence under article 15 of the Amended OT Order. The Governor's letter of 23rd March 2015 gives cause for optimism that such a licence would likely be forthcoming.

52. I shall hear the parties as to costs.

Dated this 29th day of January, 2016

Hellman J