IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURT

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

BEFORE CHIEF JUSTICE WAYNE MARTIN, H.E. JUSTICE SHAMLAN AL SAWALEHI AND JUSTICE MICHAEL BLACK KC

BETWEEN

(1) AMERICAN INTERNATIONAL GROUP UK LIMITED
(2) (AS TRANSFEREE OF AIG EUROPE LIMITED)
(3) MARKEL SYNDICATE MANAGEMENT LIMITED
(4) TALBOT UNDERWRITING LIMITED
(4) BERKSHIRE HATHAWAY INTERNATIONAL INSURANCE LTD
(5) LIBERTY MUTUAL INSURANCE EUROPE SE
(6) ANV CORPORATE NAME LIMITED
(7) ARCH INSURANCE (UK) LIMITED

Claimants/Appellants

and

QATAR INSURANCE CO. (BRANCH OF A FOREIGN COMPANY)

Defendant/Respondent

Hearing : **3 September 2024**

Counsel : Nicholas Craig KC instructed by Clyde & Co LLP for the Appellants
Zoe O'Sullivan KC instructed by Charles Fussell & Co LLP for the Respondent

Judgment : **20 September 2024**

JUDGMENT OF THE COURT OF APPEAL

UPON hearing Counsel for the Appellants and Counsel for the Respondent on 3 September 2024

AND UPON reviewing all relevant material added on to the Court file

IT IS HEREBY ORDERED THAT:

1. The Appeal is dismissed.

2. The Stay of Judgment on the Counterclaim granted by the former Chief Justice Zaki Azmi on 21 June 2024 is discharged.

3. The Appellants shall pay the costs of the Application to the Respondent on the standard basis, to be subject to immediate assessment.

4. The Respondent shall serve its written statement of costs within 7 days of the date of this Order and Appellants may serve any reply 7 days thereafter.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 20 September 2024
At: 11am

JUSTICE MICHAEL BLACK KC:

INTRODUCTION

1. This is an appeal by the Claimants, made with permission to appeal granted by the former Chief Justice Zaki Azmi on 21 June 2024, from the judgment of Justice Lord Angus Glennie ("the "Judge") given on 26 February 2024 (the "Judgment"), following a trial that took place between 7 and 9 November 2023 (the "Trial"), whereby he dismissed the Claimants' claim and gave judgment for the Defendant on the claim and counterclaim with costs.

2. The Claimants/Appellants are all UK-based insurance and reinsurance companies, each of whom is ultimately owned by a US corporation (the

"Reinsurers").

3. The Defendant/Respondent is an insurance company established in Qatar. It maintains a branch in Dubai and is licensed to operate as an insurer in the UAE (the "Insurer").

4. In November 2014 the Insurer entered into a policy of insurance ("the "Original Policy") with United Arab Bank PJSC, a bank licensed and carrying on business in Sharjah with a branch in Deira, Dubai (the "Bank"). The Original Policy was in the form *"Comprehensive Crime and Professional Indemnity Insurance"* and the period of cover was 30 November 2014 to 29 November 2015.

5. A customer of the Bank was Alpine Enterprises Trading Co Limited ("Alpine"). Alpine is incorporated in Hong Kong and is owned by three Iranian nationals ordinarily resident in Iran (the "Iranian nationals"). The nature and place of Alpine's business are unknown.

6. The Reinsurers together with various other regional and international reinsurers, participated on a facultative basis in the 100% reinsurance of the Original Policy. There was a Primary Layer Reinsurance Contract and four Excess Layer Reinsurance Contracts (collectively the "Reinsurance Contracts"). The Reinsurers participated in four of the contracts. The Judge recorded their interests and those of the other reinsurers in the Judgment in tabular form (see the Appendix to this judgment). Initially the Insurer retained 5% of the risk, but this was changed on all layers by endorsements dated December 2014.

THE ORIGINAL POLICY

7. Section 1 of the Original Policy incorporated standard wording in the form *"Bankers Blanket Bond"* which included:

> "Now We the Underwriters hereby undertake and agree, subject to the following terms, exclusions, limitations and conditions, to make good to the Insured, as stated in the Insuring Clauses, or In any amendatory endorsements attached thereto, in excess of the amounts of the deductibles stated to be applicable, such direct financial loss sustained by the Insured on or subsequent to the Retroactive Date and discovered by the Insured during the Policy Period and subject always to the Policy Limits as stated In the Schedule or In any amendatory endorsements attached thereto.
>
> .
>
> INSURING CLAUSES
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> 1. Fidelity
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> Loss resulting solely and directly from dishonest or fraudulent acts by Employees of the Insured committed with the manifest intent to cause the Insured to sustain such loss or to obtain a financial gain for themselves wherever committed and whether committed alone or in collusion with others, including loss or Property through any such acts by Employees.
>
> .
>
> 2. On Premises
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> Loss of Property resulting directly from
>
> (a) theft, larceny, false pretences, burglary, robbery or holdup committed by persons physically present on the premises where the Property ls located, or
>
> (b) mysterious unexplainable disappearance, or
>
> (c) being damaged, lost, destroyed or misplaced howsoever or by whomsoever caused, while such Property is within any of the Insured's premises or actually within any recognised place or sate deposit within the United Arab Emirates, or Is actually within the premises of any of the Insured's correspondent banks or is actually within the premises of any transfer or registration agent for the purpose of exchange, conversion, registration or transfer In the usual course of business.
>
> Loss of Property, through any of the perils specified in the preceding paragraph, in the possession of any customer of the insured, or any representative of such customer, within the premises of the Insured for the purpose of transacting banking business with the Insured, whether or not the Insured Is legally liable for the loss thereof subject always to General Condition 1, and excluding in any event loss caused by such customer or representative.
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> .
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> 14. 'Property" means cash (I.e. currency, coins and Bank Notes), bullion, precious metals of an kinds and In whatsoever form and articles made therefrom, gems (including uncut gem stones), precious and semi-precious stones, certificates of stock, bonds, coupons and all other types of securities, bills of lading, warehouse receipts, cheques, bills of exchange, acceptances, drafts, certificates of deposit, letters of credit, promissory notes, money orders, orders upon public treasuries, stamps, insurance policies, title deeds, certificates of title and all other negotiable and non-negotiable Instruments or contracts representing money or other property (real or personal) or Interests therein, and other valuable papers, including books of accounts and other records (but excluding records recorded electronically) used by the Insured
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> ln the conduct of their business, in which the Insured has an Interest, or which are held by the Insured for any purpose or in any capacity and whether so held
>
> gratuitously or otherwise and whether legally liable therefore or not. For the

avoidance of doubt this definition Includes customer's gold medallions in the strong room at the insured's Deira Branch, Dubai, UAE.

GENERAL CONDITIONS

1. Exclusive Policy Benefit

It is agreed that the Insurance granted hereunder shall be, for the exclusive benefit only of the first named Insured in the Schedule, and that in no event shall anyone other than the said Insured have any right of action under this Policy."

THE REINSURANCE CONTRACTS

8. The Reinsurance Contracts contained the following Reinsurance Conditions:

"PROPORTIONAL FACULTATIVE REINSURANCE SLIP CONTRACT

In consideration of the premium charged, and Subject to the terms and conditions of this Contract as set out in the slip and its attachments and/or endorsements applicable thereto, this Contract reinsures the Reinsured's interest in payments made within the terms and conditions of the Original Policy

.

The Underwriters, members of the Syndicate(s) referred to in the slip, hereby bind themselves severally and not Jointly, each for his own part and not one for another and therefore each of the Underwriters (his Executors and administrators) shall be liable only for his own share of his syndicate's proportion of any loss payable under this Contract. The identity of each of the Underwriters and the amount of his share may be ascertained by the

Reinsured or the Reinsured's representative on application to Lloyd's Policy Signing Office, quoting the Lloyd's Policy Signing Office number and date allocated to the slip

.

SANCTION LIMITATION & EXCLUSION CLAUSE

No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, United Kingdom or United States of America."

9. The First Excess Layer (in which the Reinsurers did not participate) did not reinsure the Professional Indemnity cover under the Original Policy but the succeeding layers did so.

THE RELEVANT SANCTIONS REGIME

10. The Judge summarised the general structure of the US sanctions regime against Iran in the following terms based on expert evidence adduced before him during the Trial. The US Department of the Treasury, Office of Foreign Assets Control ("OFAC") administers and enforces US sanctions. OFAC is empowered to enforce US sanctions issued under various statutory authorities, including the International Emergency Economic Powers Act ("IEEPA"), which underpins US sanctions against Iran. OFAC primarily administers US sanctions against Iran through the Iranian Transactions and Sanctions Regulations ("ITSR") at 31 C.F.R. Part 560, which generally prohibit US persons from exporting services to Iran, including where the benefit of such services is received in Iran. Separately, the ITSR also generally prohibit US persons from facilitating the export of services to Iran by non-US persons. Non-US entities owned or controlled by US persons are generally subject to the same prohibitions involving Iran that apply to US persons.

11. There are five sections of ITSR 31 C.F.R. Part 560 that are relevant for present purposes:

(1) **560.204 Prohibited exportation, reexportation, sale, or supply of goods, technology, or services to Iran**

Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, technology, or services to Iran or the Government of Iran is prohibited, including the exportation, reexportation, sale, or supply of any goods, technology, or services to a person in a third country undertaken with knowledge or reason to know that:

(a) Such goods, technology, or services are intended specifically for supply, transshipment, or reexportation, directly or indirectly, to Iran or the Government of Iran; or

(b) Such goods, technology, or services are intended specifically for use in the production of, for commingling with, or for incorporation into goods, technology, or services to be directly or indirectly supplied, transshipped, or reexported exclusively or predominantly to Iran or the Government of Iran.

(2) **560.208 Prohibited facilitation by United States persons of transactions by foreign persons**

Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, no United States person, wherever located, may approve, finance, facilitate, or guarantee any transaction by a foreign person

where the transaction by that foreign person would be prohibited by this part if performed by a United States person or within the United States.

(3) **560.410 Provision of services**

The prohibition on the exportation, reexportation, sale or supply of services contained in 560.204 applies to services performed on behalf of a person in Iran or the Government of Iran or where the benefit of such services is otherwise received in Iran, if such services are performed:

(1) In the United States, or

(2) Outside the United States by a United States person, including by an overseas branch of an entity located in the United States.

(4) **560.427 Exportation, reexportation, sale or supply of financial services to Iran or the Government of Iran**

(a) The prohibition on the exportation, reexportation, sale or supply of financial services to Iran or the Government of Iran contained in 560.204 applies to:

(i) The transfer of funds, directly or indirectly, from the United States or by a U.S. person, wherever located, to Iran or the Government of Iran; and

(ii) The provision, directly or indirectly, to Iran or the Government of Iran of insurance services .

(5) **560.417 Facilitation; change of policies and procedures; referral of business opportunities offshore.**

With respect to 560.208, a prohibited facilitation or approval of a transaction by a foreign person occurs, among other instances, when a United States person:

(a) Alters its operating policies or procedures, or those of a foreign affiliate, to permit a foreign affiliate to accept or perform a specific contract, engagement or transaction involving Iran or the Government of Iran without the approval of the United States person, where such transaction previously required approval by the United States person and such transaction by the foreign affiliate would be prohibited by this part if performed directly by a United States person or from the United States;

(b) Refers to a foreign person purchase orders, requests for bids, or similar business opportunities involving Iran or the Government of Iran to which the United States person could not directly respond as a result of the prohibitions contained in this part; or

(c) Changes the operating policies and procedures of a particular affiliate with the specific purpose of facilitating transactions that would be prohibited by this part if performed by a United States person or from the United States.

12. It is common ground that each of the Reinsurers is a *"United States person"*.

13. The former Chief Justice Zaki Azmi granted permission to appeal, not on the basis that the appeal enjoyed a real prospect of success, but on the alternative basis that there was some other compelling reason why the appeal should be heard (RDC 44.19). He noted that the Judge had observed that one of the problems he faced in reaching a conclusion on the legal issues was the absence of any judicial interpretation of the sanction legislation in the form of court judgments at first instance or at appellate level. The former Chief Justice Zaki Azmi considered that it was appropriate for the Court of Appeal to clarify the law and the interpretation of important statutory provisions.

THE FACTS

14. In about March 2015, the sum of AED 36,572,317.88 was misappropriated from Alpine's account with the Bank by one of the Bank's employees (Faisal Mohamed Khair Al Najar) acting in collusion with a third party (Abdulla Saeed Khalifa Al Meheiri). According to the judgment of the Dubai Court of Cassation dated 17 January 2022 in civil proceedings brought by the Bank, this was done by the use of an Ajman company owned by Al Meheiri with a name very similar to Alpine.

15. On 6 May 2015, Alpine complained to the Bank that substantial funds on its account had been fraudulently transferred away.

16. On 27 August 2015, the Bank notified the Insurer of a potential claim under the Original Policy.

17. In September 2015, Alpine issued civil proceedings against the Bank in the Sharjah Federal Court of First Instance to recover its loss consequent upon the misappropriation. The Bank initially defended those proceedings.

18. In about February 2016, Al Najar and Al Meheiri were arrested and subsequently charged (in Sharjah) in respect of the misappropriation. The Sharjah Federal Court of First Instance suspended the civil proceedings by Alpine against the Bank until the termination of the criminal proceedings.

19. On 29 August 2017, the Sharjah Penal Court convicted them both. Their appeals against conviction were dismissed by the Court of Appeal and finally by the Federal Supreme Court on 19 December 2019.

20. Following the convictions, the Bank agreed to settle the civil proceedings brought against it by Alpine by paying the sum of AED 38,526,305.50 to Alpine. That sum included the principal sum plus Alpine's legal fees, compensation and court fees.

21. The Bank sought an indemnity from the Insurer under the Original Policy. Before indemnifying the Bank, the Insurer sought an indemnity from the reinsurers. Three non-US owned reinsurers (Swiss Re, Zurich DIFC and AXA XL, all of whom are based in the EU), agreed that their contracts responded to the Insurer's claim. They paid their share of the loss amounting to AED 17,172,243.75.

22. The Insurer paid those sums to the Bank but it did not indemnify the Bank in the full amount demanded. The Bank therefore brought separate proceedings in Dubai against the insurer to recover the balance of the sums claimed. The Dubai Court of Cassation ultimately found in favour of the Bank by a judgment dated 17 January 2022 and the Insurer was found liable to indemnify the Bank in the amount of AED 18,623,154.13 (in addition to the sums already paid). The insurer has now paid that sum to the Bank.

23. While the non-US reinsurers have indemnified the Insurer under the relevant reinsurance contracts, the Reinsurers have declined to do so citing the Sanction Limitation & Exclusion Clause (the "Sanctions Clause") in the Reinsurance Contracts. The Reinsurers commenced proceedings on 1 November 2022 seeking a declaration of non-liability. After an unsuccessful challenge to the jurisdiction of the DIFC Courts, the Insurer served a Defence and Counterclaim denying the application of the Sanctions Clause and seeking indemnity under the Reinsurance Contracts.

THE TRIAL

24. While it may be divided into a number of sub-issues the question for the Judge at the Trial was whether, as US persons, the Reinsurers were exposed to sanctions, prohibitions or restrictions under the trade or economic sanctions, laws or regulations of the United States of America within the meaning of the Sanctions Clause by indemnifying the Insurer against a claim by the Bank in respect losses arising in connection with a customer wholly owned by the Iranian nationals. If so, the Reinsurers contended that the cover was void and it was not liable to pay any claim or provide any benefit under the Reinsurance Contracts.

25. The Judge noted that the Reinsurers submitted that the question before him could be sub-divided into two sub-issues, namely (a) the proper meaning and effect of the Sanctions Clause and (b) whether, as a matter of US law, the provision of cover or payment under the Reinsurance Contracts would expose the Reinsurers to any sanction, prohibition or restriction under ITSR.

26. As to (a), the Judge did not understand there to be any dispute as to the meaning and effect of the Sanctions Clause. That was not the case before this Court. Whether the clause excluded cover in respect of specific discrete perils or in toto was very much in issue. It was however agreed that the interpretation of the Sanctions Clause was to be undertaken in accordance with DIFC law principles.

27. As to (b), the Judge had the benefit of expert evidence from two senior US lawyers - an advantage not enjoyed by this Court. It is fair to say that they each came from opposite ends of the legal spectrum and the Judge did not find the evidence of either of the experts altogether satisfactory for reasons he explained in detail in the Judgment and which this Court is in no position to gainsay.

28. Mr Mortlock, the Reinsurers' expert witness, is an attorney admitted to the Bar in Washington DC and a partner and Chair of the Global Trade and Investment Group at the law firm of Willkie Farr & Gallagher LLP. In his practice, he deals primarily with compliance with US economic sanctions and the implementation and enforcement of sanctions by US government authorities. From October 2013 until November 2015, he was Director for International Economic Affairs for the White House National Security Council, where he was responsible for coordinating the US Government's implementation of economic sanctions and other programmes. Earlier in 2013, he was Deputy Coordinator for Sanctions Policy and before that, from mid-2009 until January 2012, he was the Attorney-Advisor for Sanctions and Terror Finance.

29. Mr Lawler, the Insurer's expert witness, is a partner in the law firm of Blank Rome LLP in Washington DC. He has been in practice just short of 40 years. He is co-chair of his firm's White Collar Defence & Investigations Practice Group. His practise focuses on government enforcement actions and his clients' response to and interactions with them. Areas of practice include foreign corrupt practises and international economic sanctions regimes, money laundering, criminal antitrust, public corruption and other white collar crime. He generally acts for defendants and others subject to US Government investigations and enforcement actions. He is an active trial lawyer, having taken more than 70 jury cases to verdict and conducted hundreds of grand jury and motions proceedings. In his early years, before joining private practice, he served as the assistant US Attorney for the District of Columbia.

30. The experts agreed:

(a) The Reinsurers are generally subject to the same prohibitions under ITSR as US persons - each of them is either a US person or is owned and controlled by a US person;

(b) ITSR prohibits the export of services to Iran directly or indirectly by a US or US owned person.

(c) ITSR prohibits the export of services by a US or US owned person to a third country where the benefits of those services are received in Iran;

(d) ITSR prohibits the export of reinsurance services to Iran by a US or US owned person where the benefits of the reinsurance are received in Iran;

(e) ITSR prohibits the facilitation by US or US owned persons of activities by foreign third parties that could not be performed by US persons themselves.

31. The experts disagreed as to whether coverage under the Reinsurance Contracts or a payment made thereunder was prohibited. In particular, they disagreed on:

(a) whether the benefit of the reinsurance cover or any payment by reinsurers would be considered to be received by an Iranian-owned person and its Iranian owners; and

(b) whether the Reinsurance Cover would be considered to facilitate business with an Iranian-owned person and its Iranian owners.

THE JUDGMENT

32. The Reinsurers summarise the Judge's material findings as follows:

(a) the question that he had to determine was whether payment by the Reinsurers to the Insurer under the Reinsurance Contracts was prohibited as a matter of US law;

(b) any payment made by the Reinsurers under the Reinsurance Contracts would be a payment only to the Insurer; and, equally, any payment by the Insurer under the Original Policy to the underlying insured, the Bank, would be a payment only to the Bank. Such payments would not be regarded as, respectively, a benefit or payment received by the Bank or the Bank's customer, Alpine, a company incorporated in Hong Kong wholly owned by the Iranian nationals;

(c) even if payment by the Reinsurer was to be regarded as a payment indirectly to Alpine there is no basis for saying that that payment was a payment to the Iranian nationals in Iran;

(d) accordingly, there was no prohibition under ITSR 560.204;

(e) under ITSR 560.208 it is necessary to show that a US person deliberately took steps to facilitate a transaction by a foreign person where such transaction would be prohibited if performed by a US person;

(f) as it could not be contended that (i) the Bank's relationship with Alpine was dependent upon or influenced in any way by the insurance or reinsurance cover; (ii) the existence of the insurance or reinsurance was in any way critical to the Bank's relationship with Alpine or its ability to reinstate Alpine's account; and (iii) the Reinsurers deliberately altered their position in arranging the reinsurance to avoid the prohibition on their own activities, there was no prohibition under ITSR 560.208.

THE GROUNDS OF APPEAL

33. The Reinsurers first applied to the Judge for permission to appeal on 18 March 2024. The Judge dismissed that application by an Order with Reasons dated 17 April 2024. The Reinsurers renewed their application to this Court on 9 May 2024. By an Order 21 June 2024 the former Chief Justice Zaki Azmi granted permission to appeal and stayed execution of the Judgment in favour of the Insurer under its Counterclaim.

34. The renewed Grounds of Appeal were in the following terms:

(a) The Judge erred as a matter of law in failing to consider the Reinsurer's case that they are not deemed to have provided cover under the Reinsurance Contracts. The Reinsurers advanced two distinct cases, namely (1) that they were not deemed to have provided cover under the Reinsurance Contracts and (2) that they were not liable to pay the claim made by the Insurer. The Judge considered the Reinuser's second case, but did not consider or determine their first case and should have done so. Had he done so, he would have been bound to find that there was a relevant prohibition ("The Cover Ground");

(b) The Judge erred as a matter of law in failing to give reasons for his conclusions. In particular, he failed to explain why: (a) the only person who benefited from the Reinsurance Contracts, both directly and indirectly, was the Insurer and the only person who benefited from the Original Policy, directly and indirectly, was the Bank which was the insured under the Original Policy; and (b) he accepted the evidence of Mr Lawler that OFAC would consider the benefit of the reinsurance cover to be received only by the Respondent in the UAE (the"Failure to Give Reasons Ground");

(c) The Judge erred as a matter of law in failing to determine whether the provision of cover under the Reinsurance Contracts was prohibited under 560.204 of ITSR. The Judge ought to have found that the provision of cover under the Reinsurance Contracts indirectly benefited the Iranian nationals, one of the Bank's customers and, therefore, there is a relevant prohibition. This is a repetition of both the Cover and the next Ground - it is a step in the reasoning that the Reinsurers were not deemed to have provided cover under the Reinsurance Contracts and/or any payment was prohibited because the cover and any payment made thereunder indirectly benefitted sanctioned persons;

(d) The Judge erred as a matter of law, alternatively of fact and/or law, in determining that the payment of the claim made by the Insurer under the Reinsurance Contracts benefited only the Insurer. The Judge ought to have found that the Iranian nationals, the customer of the Bank whose funds were stolen, would indirectly benefit from the payment and, therefore, there is a relevant prohibition. While there is a complete overlap in reasoning with the Cover Issue, the Reinsurers raise a separate ground as to the correctness of the Judge's finding that payment under Reinsurance Contracts to the Insurer was not prohibited (the "Payment Ground");

(e) The Judge erred as a matter of law, alternatively fact and/or law, in determining that the Reinsurers would not be regarded as facilitating either insurance services or banking services provided to Iran. The Judge ought to have found that the Reinsurers are prohibited from providing cover under the Reinsurance Contracts and from paying the claim made by the Insurer under it pursuant to 560.208 of ITSR because: (a) banking services and insurance services are being provided by non-US persons, respectively, the Bank and the Insurer, the benefit of which is received indirectly in Iran and (b) the Reinsurance Contracts facilitate the provision of those services (the "Facilitation Ground").

35. As a sub-issue of the Facilitation Ground Mr Nicholas Craig KC, for the Reinsurers, criticised the Judge for holding that deliberate conduct was a necessary ingredient of contravention of ITSR 560.208. Ms Zoe O'Sullivan KC, for the Insurer, complained that the argument was not open to the Reinsurers because, while the point had figured in the proposed grounds of appeal on the application for permission to appeal from the Judge, it did not figure in the grounds of appeal for which permission had been given by the former Chief Justice Zaki Azmi. Ms O'Sullivan was correct but she accepted that she was able to address the point. The Court therefore considers that it is right that it is addressed, particularly in the light of the former Chief Justice Zaki Azmi's reasons for granting permission to appeal.

THE STANDARD OF REVIEW

36. In general appeals are limited to a review of the decision of the lower Court (RDC 44.110). The Court of Appeal will only allow an appeal from a decision of the Court of First Instance where the decision of the lower Court was: (1) wrong; or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court (RDC 44.117).

37. In the present case the only evidence adduced before the Judge was that of the US law experts. In reviewing their evidence the Judge stated at paragraph 38 of his Judgment that ultimately what matters is the quality of the evidence and the cogency of the arguments advanced by each witness. He expanded on the point in giving his reasons for refusing permission to appeal on 17 April 2024:

> "Foreign law is a question of fact, and my findings as to the applicability and effect of that law are findings of fact. In coming to the conclusions in my judgment on issues of US Sanctions law, I had the benefit of hearing evidence from US lawyers. I did not in any blanket way prefer one or the other - as I made clear in the Judgment, I found difficulties with aspects of the evidence of each of them - but their evidence was both necessary and influential in helping me reach my decisions on the salient points. The approach to an appeal against findings of fact made by a judge after hearing evidence is well-known. The law on this is summarised in the DIFC Courts Practice, in the Notes to RDC Rule 44.117: it must be shown that the judge was "plainly wrong", that his decision was "outside the bounds with which reasonable disagreement is possible"."

38. This Court most recently reviewed the practice applicable to appeals on questions of fact generally in the case of *Gate MENA DMCC (formerly known as Huobi OTC DMCC) and Anor v Tabarak Investment Capital Limited and anor* [2023] DIFC CA 002 (13 June 2024) paragraphs 113 to 135 and reaffirmed that the test was whether the judgment could be said to be *"plainly wrong", "rationally insupportable"* or a decision *"that no reasonable judge could have reached"*. However, Mr Craig pressed us that the test was different where the evidence of fact was expert evidence of foreign law and in particular the law of a fellow common law jurisdiction.

39. He relied extensively on the decision of the English Court of Appeal in *MCC Proceeds Inc. v Bishopsgate Investment Trust plc & ors* [1999] CLC 417 (a case also dealing with issues of US law) in which our Founding Chief Justice, Evans LJ, noted that while issues of foreign law are issues of fact they are, nevertheless, issues *"of a peculiar kind"*. He asked the questions - what the court's approach should be when the trial judge has heard expert evidence as to foreign law and made findings which are challenged on appeal? What difference does it make that these are findings of fact but of a *`peculiar kind'* because they are concerned with issues of foreign law?

40. He gave his answer at [13]:

> "In our judgment, the answer varies according to the nature of the issue which arises in the particular case and the kind of decision which the trial judge and now the Court of Appeal is called upon to make. Sometimes the foreign law, apart from being in a foreign language, may involve principles and concepts which are unfamiliar to an English lawyer. The English judge's training and experience in English law, therefore, can only make a limited contribution to his decision on the issue of foreign law. But the foreign law may be written in the English language; and its concepts may not be so different from English law. Then the English judge's knowledge of the common law and of the rules of statutory construction cannot be left out of account. He is entitled and indeed bound to bring that part of his qualifications to bear on the issue which he has to decide, notwithstanding that it is an issue of foreign law. There is a legal input from him, in addition to the judicial task of assessing the weight of the evidence given. The same applies, in our judgment, in the Court of Appeal. When and to the extent that the issue calls for the exercise of legal judgment, by reference to principles and legal concepts which are familiar to an English lawyer, then the court is as well placed as the trial judge to form its own independent view."

41. He continued at [20]:

> "The question then arises, whether the judge is only entitled to reject the expert's opinion evidence as to the meaning of the statute when the witness has put forward an impossible' view; as a corollary to this, it might be said that the Court of Appeal is not entitled to substitute its own view when there is acceptable evidence to support the judge's finding. But, in our judgment, the trial judge's powers are not so limited, nor are the Court of Appeal's, in a case where the English court interprets the statute in accordance with English rules of construction, there being no evidence that different rules would govern the foreign court's interpretation, and where there is no suggestion that any of the words of the statute has a special meaning, different from its ordinary meaning, in the foreign context. Then, the trial judge's finding as to the meaning of the statute, which is distinct from his finding that the statute governs the issue before the court, is his interpretation of the words used. He was influenced, of course, by the factual `matrix' as he found it to be, and the Court of Appeal must have regard to the same circumstances. In the background throughout is the rule that, unless the evidence shows that the foreign rules of construction are different, the English court interprets the statute according to the English rules. To that extent, the trial judge's `finding' is essentially a conclusion as to statutory interpretation, and as such it should properly be regarded as an issue of law."

And at [26]:

> "The court was, and is, faced with the task of construing a small number of provisions in the New York Commercial Code. Those provisions have to be read against a background of common law which in all relevant respects is broadly similar to our own and in a commercial and mercantile setting which is international and not in any sense confined to a foreign state. The English judge can properly be informed of factors which the New York courts would be likely to find influential; of the sense in which words in the English language might be differently understood in New York (this does not appear to feature here); and of any special considerations which an English judge, applying English rules of statutory construction, might not take into account. That said, however, the judge's task is to interpret the statute, assisted by submissions from counsel."

42. I accept that, where the Court of Appeal is considering the findings of a Judge at First Instance based on expert evidence of foreign law, the standard of review to be adopted by this Court is not that generally to be applied to findings of fact, namely that the finding must be *"plainly wrong"* in the sense that it is one no reasonable judge could have reached, but rather it is the standard of review applicable to any decision on a point of law, namely whether the decision is wrong in the sense that the Court reaches the conclusion, properly informed of all the relevant considerations, that there is an error of law.

43. The position is, if anything, reinforced in the DIFC by the fact that the presumptive (albeit not inflexible) rule in the DIFC Courts is the "International Approach" to questions of non-DIFC law is to be followed - *"legal experts are to write briefs with their analysis of the relevant legal principles of the applicable or relevant law, and to make further submissions applying the legal principles to the facts as alleged by the respective parties, or to argue for a particular decision to be delivered by the Court"*: Fidel v Felicia & anor [2015] DIFC CA 002 (23 November 2015), [73] per Michael Hwang CJ.

INTERPRETATION OF THE SANCTIONS CLAUSE

44. As noted at paragraph 26 above an issue emerged in this Court as to the meaning of the Sanctions Clause.

45. It was Mr Craig's submission that the words *"No (re)insurer shall be deemed to provide cover . to the extent that the provision of such cover . would expose that (re)insurer to . any economic sanctions . of the United States of America"* meant that if an insurance policy or reinsurance contract provided cover for a particular peril amongst others that would attract US sanctions, the entirety of the cover is rendered void notwithstanding that, on facts, the loss to which the insurance responds would not involve an exposure to sanctions.

46. I cannot accept this argument for four reasons:

(a) The construction gives no effect to the words *"to the extent that"*. Those words indicate that it is only to the extent that the cover would expose the reinsurer to US sanctions that the cover is rendered void;

(b) The construction gives no effect to the obvious intention of the parties which is to ensure that the reinsurance contract is effective. It is a boilerplate clause in many contracts that any illegal provisions will be severed so as to preserve the effectiveness of the other terms;

(c) The Reinsurers argue that the phrase *"to the extent that"* means, in the context of sanctions that prohibit payments to individual persons or entities, that cover which would result in payment to those persons is rendered void. I am willing to accept that direct cover for the benefit of sanctioned persons or entities would be caught by the clause, but the phrase pre-supposes that there may be other cover that will not be caught. The argument does not assist with the interpretation of the Sanctions Clause but merely provides a possible example of its operation;

(d) The Reinsurers accept, on the authority of *Mamancochet Mining Limited v Aegis Managing Agency Ltd & ors* [2018] EWHC 2643 (Comm) - the only case found by the parties on the identical wording - that it is necessary that (in that case) the payment would expose the insurer to sanctions, not that the payment exposed the insurer to a risk of sanctions. The Reinsurers accept that they bear the burden of proving on the balance of probabilities that the cover or the making of a payment under that cover would expose them to sanctions. This demonstrates that the Sanctions Clause is concerned not with the hypothetical possibility that a claim could be made under the reinsurance contract that would lead to sanctions, but rather that an actual claim or payment is prohibited.

47. The foregoing analysis mandates a fact-sensitive enquiry in every case. First, it is necessary to ascertain the cover granted by the reinsurance contract. Secondly, it is necessary to understand the nature of the indemnity claimed and whether the reinsurance contract responds. Finally, if the reinsurance contract responds, it is necessary to determine whether payment of the claim would expose the reinsurer to US sanctions being a prohibited payment under the relevant regulations properly construed.

THE COVER GROUND

48. The Reinsurers say that they advanced two distinct cases, namely (1) that they were not deemed to have provided cover under the Reinsurance Contracts and (2) that they were not liable to pay the claim made by the Insurer, but the Judge only addressed the latter. I accept that the Sanction Clause states that no reinsurer shall be deemed to provide cover and no reinsurer shall be liable to pay any claim to the extent that the provision of such cover or payment of such claim would expose the reinsurer to any sanction.

49. As the Court observed during the course of argument it is a distinction without a difference - at least on the facts of the present case. If there is no cover the Reinsurers will not be liable to make any payment. I accept the possibility that in other circumstances there may be a difference although the draftsperson of the clause may simply have been trying to cover all possibilities without considering whether they overlapped, which does tend to support the intention to carve out only those elements of the reinsurance contract that would expose the reinsurer to sanctions while preserving all other elements.

50. In either case the Court must decide whether the recipient or intended recipient of the payment is a sanctioned person or entity. The Judge directed himself to precisely that question *"the question I have to decide is whether payment by the Claimants to QIC under the various Reinsurance Contracts is prohibited as a matter of US law"* (Judgment paragraph 30). The Judge did in fact direct himself to the Reinsurers' case that they were not deemed to have provided cover under the Reinsurance Contracts. At paragraphs 69 and 70 of the Judgment he held:

> "69. Before looking at the particular Regulations, I should note one point made by counsel for the Claimants. He submitted, under reference to *Mamancochet Mining Limited v Aegis Managing Agency Ltd* (supra) at para.76 that the effect of the Sanctions Clause is not to make all cover void or ineffective because there is involvement by a sanctioned entity. Rather, the exclusion is expressly limited to that part of the cover or payment of a claim which would expose the reinsurers to sanction. He submitted that there was no cover for sanctioned activity and no liability to pay any claim arising from sanctioned activity. But that was as far as it went. What the exclusion does is to carve out from the cover that little bit of activity which is sanctioned, but leaves the rest of the cover intact. In other words, it simply cuts out the particular customer, Alpine, and any loss that might be suffered by that customer, from the scope of overall cover given to Bank.
>
> 70. I have no difficulty with the generality of this submission. It makes the consequence of any potential infringement of the Sanctions Regulations less extreme. But it confirms the position set out above. If on a proper analysis it was the Bank and not Alpine who suffered the loss (see paras.63-64 above), then the present claim is not in any respect a claim in respect of a loss suffered by Alpine, and the Sanctions Regulations do not provide the Claimants with a reason to avoid payment of the Claim."

51. It is clear beyond argument that the Judge focused on the correct question: who will benefit from the cover under the Reinsurance Contracts? The Cover Ground therefore fails.

52. If either the Insurer or the Bank were the only beneficiaries, it cannot be said that the benefits of the Reinsurance Contracts were received by Alpine or the Iranian nationals and therefore it cannot be said that the benefits were received by sanctioned persons or entities.

53. A development of the Reinsurers' case on the Cover Issue that was not immediately apparent from the Grounds of Appeal, but did figure in the

skeleton argument in support, was that the Original Policy and the Reinsurance Contracts provide cover for risks that directly benefit the Bank's customers, for example loss of customer's property held by the Bank for safekeeping. It is said that that is enough to render the totality of the cover afforded by those policies void notwithstanding that no claim is being made for losses consequent on those risks.

54. I have no hesitation in rejecting that argument for two reasons. First, the argument ignores the words *"to the extent that"* in the Sanctions Clause and its obvious intention to sever any offending cover and preserve the rest. Secondly, the words *"would expose"* as explained in *Mamancochet* indicate that the Sanctions Clause is concerned with concrete and not hypothetical situations. In *Mamancochet* Teare J found (correctly, as conceded by the Reinsurers) that the Sanctions Clause provides that the insurer is not liable to pay a claim where payment would be prohibited under one of the named systems of law and thus *"would expose"* the Defendants to a sanction as opposed to the insurer being exposed to the risk of a sanction (see [46]-[50]).

55. Whether or not the Insurer or the Bank were the only beneficiaries and whether or not Alpine or the Iranian nationals were direct or indirect beneficiaries is addressed under the Payment Gound.

FAILURE TO GIVE REASONS GROUND

56. Again, as pointed out during the course of argument, this ground really goes nowhere given that the applicable standard of review is whether or not the Judge's conclusion was wrong. Indeed counsel for the Reinsurers admitted as much. However out of deference to the care with which the Judge addressed his task the suggestion is rejected that he did not explain why: (a) the only person who benefited from the Reinsurance Contracts, both directly and indirectly, was the Insurer and the only person who benefited from the Original Policy, directly and indirectly, was the Bank which was the insured under the Original Policy or (b) he accepted the evidence of Mr Lawler that OFAC would consider the benefit of the reinsurance cover to be received only by the Insurer in the UAE.

57. As to the former, the Judge made his reasons clear at paragraphs 63 and 64 of the Judgment. He found that the relationship between Alpine and the Bank was that of creditor/debtor. Thus when the fraud was perpetrated the Bank was the victim not Alpine. It was the Bank's money that was embezzled not that of Alpine. As he put it:

> "The true state of indebtedness between the Bank and Alpine remained the same, albeit that fact was temporarily disguised by the appearance of Alpine having withdrawn that amount and, no doubt, this purported withdrawal being reflected in Alpine's Bank statement. It was the Bank which suffered the loss, having paid out AED 36 million to the fraudsters in the mistaken belief that it was authorised by Alpine to debit its account with this sum."

58. It followed in the Judge's view that there was no question of any payment made by the Insurer to the Bank in respect of its loss being a payment, directly or indirectly, to Alpine. Nor was there any question of any payment by the Reinsurers under the reinsurance being a payment directly or indirectly to Alpine.

59. As to the latter, the Judge noted that Mr Mortlock accepted that the Bank was liable to recredit Alpine's account after the fraud was discovered regardless of whether or not it had insurance. In the same way the Judge considered that it was the Bank that suffered the loss and the Insurer was liable to pay out to the Bank under the Original Policy irrespective of the existence of the Reinsurance Contracts. Thus the Original Policy was for the sole benefit of the Bank and the Reinsurance Contracts were for the sole benefit of the Insurer. It was on that analysis that Mr Lawler opined that OFAC would not consider the benefit of the payment at issue to be received in Iran, directly or indirectly, because the benefit would be received by the Insurer in Dubai not Iran (see paragraphs 3.5 and 3.6 of Mr Lawler's expert opinion dated 14 August 2023). The Judge was explicit in indicating that Mr Lawler's legal opinion coincided with his own and that is why he accepted Mr Lawler's evidence that OFAC would also reach the same conclusion.

THE PAYMENT GROUND

60. This is the first of the two substantive grounds of appeal. The Reinsurers' argument as developed in oral submissions was that:

> (a) Each of the Reinsurers is a US person within the meaning of the ITSR;
>
> (b) Both Alpine and the Iranian nationals are sanctioned persons and any services to them whether direct or indirect will be received by them in Iran within the meaning of the ITSR. Any transactions with Alpine by a US person, either directly or indirectly, are prohibited;
>
> (c) Alpine had the benefit of the cover and also ultimately it had the benefit of the payment or Alpine's owners ultimately had the benefit of that payment;
>
> (d) In relation to the Sanctions Clause, the first question is the construction of the clause, which is a question of DIFC law, and then to assess whether there is any relevant prohibition or sanction and that is a question of the meaning and effect of a number of US statutory provisions. In answer to the first question, no reinsurer should be deemed to provide cover if such would expose the reinsurer to US sanctions and then, equally, no reinsurer should be liable to pay any claim or provide any benefit if such would expose the reinsurer to US sanctions. The second question turns on whether the sanctioned person or entity benefits directly or indirectly from the cover.

61. The Reinsurers argue that the Judge dealt with the issue of direct cover but not that of indirect cover. Leaving aside their submissions on the cover extending to theoretical losses of the Bank's customer's property, which is addressed above, the Reinsurers submit that by providing indemnity to the Insurer and by the Insurer providing indemnity to the Bank the customer receives a benefit as well as the Bank. The benefit is the repayment obligation of the Bank which is protected by the Original Policy. They suggest that the Bank's customers, including Alpine, also benefit from the cover provided under the Reinsurance Contracts: without the Reinsurance Contracts they would not have any financial security with respect to risks covered by the Original Policy.

62. Mr Craig referred the Court to OFAC's FAQs No. 102: *"How can an insurer participate in worldwide insurance markets through global insurance policies if, by definition, coverage extends to potential risks in sanctioned countries?"* The answer was.

"The best and most reliable approach for insuring global risks without violating U.S. sanctions law is to insert in global insurance policies an explicit exclusion for risks that would violate U.S. sanctions law. For example . '"whenever coverage provided by this policy would be in violation of any U.S. economic or trade sanctions, such coverage shall be null and void." The legal effect of this exclusion is to prevent the extension of a prohibited service (insurance or risk assumption) to sanctioned countries, entities or individuals. It essentially shifts the risk of loss for the underlying transaction back to the insured - the person more likely to have direct control over the economic activity giving rise to the contact with a sanctioned country, entity or individual."

63. He also referred Mr Lawler's evidence in cross-examination about the FAQ (especially the final sentence) on Day 2 of the Trial (8 November 2023) at transcript page 124, lines 10-19:

"Coming back to the point that this

11. makes clear that first of all, you have the insurance?

12. yes? I think you have agreed with me this you have to

13. look at the economic activity of the underlying insured?

14. A. Which is [the Bank].

15. Q. Which is [the Bank]?

16. A. Yes.

17. Q. And it's contact with potentially sanctioned

18. individuals?

19. A. Yeah"

64. Mr Craig referred in oral submissions to two Enforcement Information reports issued by OFAC concerning settlement of the civil penalties process in order to illustrate the principle that the regulations look at the underlying commercial activities as opposed the provisions of the insurance itself. The first was a report of a settlement with a US reinsurer, General Reinsurance Corporation ("Gen Re"). Gen Re made two reinsurance payments to the Steamship Mutual Underwriting Association Limited ("Steamship Mutual") for losses arising from vessel operations of the National Iranian Tanker Company. Gen Re made the excess of loss claim payments pursuant to its facultative reinsurance obligation to Steamship Mutual. Steamship Mutual was not a US person within the meaning of ITSR, but OFAC looked through them to the underlying commercial beneficiary, the National Iranian Tanker Company.

65. The second was a settlement with (what we assume to be) the US parent company of the *First Claimant* ("AIG"). AIG engaged in a total of 555 transactions totalling approximately USD 396,530 in premiums and claims for the insurance of maritime shipments of various goods and materials destined for, or that transited through, Iran, Sudan, or Cuba, and/or that involved a blocked person. While most of the apparent violations occurred under global insurance policies, dozens of apparent violations occurred under single shipment policies. OFAC identified 455 apparent violations in which AIG extended insurance coverage to parties that were engaging in a voyage, shipment, or transshipment to, from, or through Iran, and/or accepted premium payments or paid claims arising from that insurance coverage, in apparent violation of 560.204 of ITSR. Again it was said that this illustrates that an insurer will be liable for dealing with persons who are not US nor Iranian persons but who are supplying services in Iran.

66. In their written submissions the Reinsurers referred to two other reports, the first of which *HCC Insurance Holdings Inc*. is more relevant to the Facilitation Ground, but the second *"Wells Fargo Bank NA (settlement recorded on 30 March 2023)"* does go to the indirect benefit point. Wells Fargo provided software to a European bank. That bank then used the software to process, among other things, trade-finance transactions with US-sanctioned persons and countries. There was no direct relationship between Wells Fargo and the European bank's customers. The Reinsurers note that nevertheless those customers and jurisdictions were, indirectly, the beneficiaries of the services provided by Wells Fargo to the European bank. The benefit was regarded as being received in a sanctioned country and, therefore, there was a breach of the legislation.

67. The Reinsurers also rely on Mr Mortlock's evidence on Day 2 of the Trial (8 November 2023) at transcript page 22, lines 8-16:

"the coverage, the

9 risk assumption was for [the Bank's] economic activity with

10 Alpine. As referred here, the FAQ doesn't suggest that

11 the insurer would pay to the sanctioned contact, it

12 refers to risk assumption for economic activity between

13 he ensured and a sanctioned person. So here it's not

14 that the insurer would pay to Alpine, it's that the

15 insurer and reinsurers were assuming the risk for the

16 Bank's economic activity with Alpine."

68. The Judge described a problem that faced him and also faces this Court, namely the absence of any judicial interpretation of the sanction legislation in the form of court judgments at first instance or at appellate level. The only materials the parties (through their US legal experts) have been able to find are reports of settlements of OFAC enforcement proceedings, regulatory guidance, FAQs, a declaration in proceedings from Alexandre Manfull, the Assistant Director, Sanctions Compliance and Evaluation, Office of Compliance and Enforcement, OFAC (the "Manfull Declaration") and a letter from OFAC to a company in Dubai owned by an Iranian national seeking authorisation to transfer funds to a US company (the "GEM Dubai letter").

69. He explained that the reports of settlements set out the basic facts but often there was little or no analysis of the regulation or of how the facts showed a contravention of the regulation. Settlements do not indicate that the settling party would have been held liable in court and only indicate (briefly) the view of OFAC rather than judicial reasoning. Further, as the Judge noted, OFAC is not a neutral observer, it is the enforcement agency with an agenda to encourage settlements even where there may be live issues as to whether there was a breach of the regulations. Consequently the Judge felt that there was danger in relying too heavily on OFAC's opinions on the terms of the various settlements. While they give an indication of circumstances in which a US company has considered itself to be at risk of being found to have acted contrary to the sanctions regime, and of the circumstances in which OFAC has asserted that to have been the case, they do not answer the question whether the cover or payment under the policy is prohibited as a matter of law, which is the question for the Court.

70. The Judge correctly summarised the Reinsurers' case that they are prohibited from providing cover under the Reinsurance Contracts and from making payments under the same because any such payment:

(a) would be in respect of insurance services provided indirectly to Iran; and/or

(b) would constitute the transfer of funds indirectly to Iran;

contrary to 560.204 of the Regulations as amplified by 560.410 and 560.427. This is the case made before this Court and it is the case it is said the Judge did not address. We have to decide what is meant by the indirect provision of services or indirect payment in the regulations without the assistance of US judicial authority. Nor have we been informed that there are different rules that would govern the US courts' interpretation, nor that any of the words in the regulations has a special meaning, different from its ordinary meaning, in context. In those circumstances we must interpret regulations in accordance with the DIFC rules of statutory interpretation (see paragraph 41 above).

71. ITSR 560.204 prohibits the supply, directly or indirectly, by a US person, wherever located, of any services to Iran, including supply of any services to a person in a third country undertaken with knowledge or reason to know such services are intended specifically for supply directly or indirectly, to Iran. By 560.410 the prohibition on the supply of services contained in 560.204 applies to services performed on behalf of a person in Iran or where the benefit of such services is otherwise received in Iran, if such services are performed outside the USA by a US person, including by an overseas branch of an entity located in the USA. By 560.427 the prohibition on the supply of financial services to Iran contained in 560.204 applies to both the transfer of funds, directly or indirectly, by a US person, wherever located, to Iran and the provision, directly or indirectly, to Iran of insurance services.

72. These provisions are clear in their wording and intent: a US person (wherever located) is prohibited from supplying insurance services in any part of the world indirectly to Iran and from transferring funds indirectly to Iran. In the context of the present case the Court must decide:

(a) Whether the indirect supply of insurance services or payment to Alpine (a Hong Kong company) would be deemed a supply or payment "in Iran" because it is wholly owned by Iranian nationals ordinarily resident in Iran;

(b) If so, was the provision of cover in the Reinsurance Contacts or would any payment thereunder, amount to the indirect supply of insurance services or payment to Alpine; and

(c) If so, whether the cover under the Reinsurance Contracts in respect of the sums paid out by the Insurer to the Bank is avoided.

73. As to the first of those issues, it seems to me that any services rendered, or payments made, by a US person to a company in a third country wholly owned by Iranian nationals ordinarily resident in Iran *could* be regarded as having been made in Iran. To hold otherwise would leave a gaping lacuna in the regulatory regime whereby Iranian entities and persons could establish subsidiaries or use agency/nominee arrangements to avoid sanctions.

74. The Insurer points to the guidance of Russian sanctions to suggest that services supplied to subsidiaries are not caught by the regulations. It refers to OFAC FAQ 1059:

> **"Do the determinations made pursuant to Executive Order (EO) 14071 on May 8, 2022, "Prohibitions Related to Certain Accounting, Trust and Cooperate Formation, and Management Consulting Services", on September 15, 2022, "Prohibitions Related to Certain Quantum Computing Services", and on May 19, 2023 "Prohibitions Related to Architecture and Engineering Services" ("the determinations"), prohibit US persons from providing services outside of the Russian Federation that are owned or controlled by person located in the Russian Federation?**
>
> No, provided that the provision of services is not an indirect export to a person located in the Russian Federation. For the purposes of these determinations, OFAC interprets "indirect" provision of the prohibited services to include where the benefit of the services is ultimately received by a person "located in the Russian Federation".
>
> In contrast, OFAC would not consider to be prohibited the provision of services to a non-Russian company that has a physical presence and operations outside of the Russian Federation, provided that the services will not be further exported or reexported to persons located in the Russian Federation.
>
> For example, the following scenarios describe services that would be prohibited under the determination:

A US corporate service provider administers a trust established under the law of a US state, where the trust exists to hold, sell or purchase assets on behalf of a settlor, trustor or beneficiary ordinarily resident in Russia.

A US corporate service provider registers a limited liability company in a third country on behalf of an individual ordinarily resident in Russia for the purpose of holding real estate assets, and this company has no other physical presence or operations in the third country.

The following scenarios illustrate services to a non-Russian subsidiary of a Russian person that would not be prohibited under the determination:

A US accounting firm provides tax advisory and preparation services to a US subsidiary of a Russian company. This US subsidiary has an office and employees in the United States and conducts business in the United States and the services will not be exported or reexported to the Russian parent company.

A US management consulting firm provides strategic business advice to the subsidiary of a Russian company located in a third country. The subsidiary has an office and employees in the third country and conducts business in this third country, and services will not be reexported to the Russian parent company."

75. I find this FAQ of very limited assistance. First and foremost, the Court has not been provided with the relevant regulations and has no idea whether they are in the same terms as the ITSR. Secondly, even if the regulations were in the same terms as the ITSR, at most the FAQ indicates that it is a fact sensitive enquiry - namely is the benefit of the services ultimately received by a person *"located in the Russian Federation"*? Thirdly, none of the examples given is analogous to the present case. Fourthly, what is not addressed is the situation where a payment is made to the subsidiary of a Russian company and the Russian company benefits, not from the remission of the payment, but from the profitable trading of the subsidiary by, for example, the payment of dividends.

76. Equally unhelpful are the Manfull Declaration and the GEM Dubai letter. The Manfull Declaration is relied upon for an oblique reference in a sentence about entities on a list supplied by a whistleblower in respect of alleged breaches of the Iranian sanctions regime: *"I have reviewed the names of the entities on Mr. Marcellus's list, which includes entities he claims are subjects of alleged leaked SARs, and none of them appear to be Iranian entities or SDNs, Iranian front companies, or otherwise subject to the Iran sanctions."* The submission by the Reinsurers is that *"Iranian front companies"* are caught by the sanctions. There is however no indication what is meant by the expression and therefore the declaration has no value as guidance.

77. The GEM Dubai letter indicates that a Dubai company owned by an Iranian national not ordinarily resident in Iran did not require OFAC's permission to transfer funds to an associated company in California. This provides no guidance as to whether a company incorporated in a third country owned by Iranian nationals ordinarily resident in Iran is or is not a sanctioned entity.

78. I am satisfied that the mere fact that Alpine is established in Hong Kong is not dispositive. Nor is the fact that it is wholly owned by Iranian nationals ordinarily resident in Iran. The Court has been provided with no information about Alpine's business. It is not even known if the company was solvent. If it were not, any payment to it would be for the benefit of the creditors not the shareholders. Even if it were solvent it is possible that any payment to it might be subject to security interests outside Iran.

79. Further, assuming that the existence of cover would be enough to trigger sanctions, it is necessary to establish what is being covered. The same issues arise if the financial losses are not ultimately suffered by the shareholders of the company: it cannot be said that they enjoy the ultimate benefit of the insurance services. There may be circumstances where the shareholder may have liabilities and so would benefit from the cover, for example, under personal guarantees, but that information is not before the Court.

80. Without knowledge of Alpine's business it is not possible to say one way or the other whether any funds ultimately received would be remitted to Iran or whether the insurance cover would benefit the Iranian nationals.

81. Additionally, under ITSR 560.204 the prohibition is to the supply of services to a person in a third country *undertaken with knowledge or reason to know such services are intended specifically for supply directly or indirectly*, to Iran. In the present case in order for the Reinsurers to be held in breach of the prohibition it would have to be proved that they had knowledge or reason to know that the cover under the Reinsurance Contracts was intended specifically for supply directly or indirectly, to Iran. This is a fact peculiarly within the Reinsurer's own knowledge yet (perhaps unsurprisingly given the possible consequences) it is not one that they have pressed upon the Court.

82. In the circumstances, given that the Reinsurers bear the burden of establishing that the cover and any payment under the Reinsurance Contracts would amount to the supply of services to the Insurer undertaken with knowledge or reason to know such services are intended specifically for supply indirectly to Iran so as to expose the Reinsurers to sanctions, the absence of any evidence that the Reinsurers knew or had reason to know that a payment to the Insurer was a payment to Iran via Alpine, or indeed that it was such a payment, must mean that the Reinsurers fail to discharge the burden.

83. Indeed on the Reinsurers' case if the very provision of cover to the Insurer would expose them to sanctions they should already have reported themselves to OFAC as did both Gen Re and AIG itself in the examples cited above at paragraphs 64 and 65. Given that in order to expose the Reinsurers to sanctions for providing indirect cover to Iranian customers of the Bank, the Reinsurers must (at least) have had reason to know their services were intended specifically for supply indirectly to Iran the practical effect of such a requirement would be that each of the Reinsurers would have had to require the Bank to disclose details of every one of its customers to the Insurer and then on to them so that the Reinsurers would have been affixed with constructive knowledge of the customer's (in this case Alpine's) links with Iran. Clearly the Reinsurers' compliance functions did not consider that that was necessary. In my view they were correct for two reasons.

84. First, *"reason to believe"* implies that the person subject to the sanctions is in receipt of information that the services were intended specifically for supply indirectly to Iran. In the absence of authority it seems to me that *"reason to believe"* requires a higher standard of notice than "ought to have known": the former requires specific information leading to belief whereas the latter requires only enough notice to give rise to a sufficiently strong suspicion to impose an obligation to make further enquiry. In the present case there is no evidence of any form of notice to the Reinsurers even to the extent that they were put on enquiry.

85. Secondly, in the absence of specific information, I cannot accept that a reinsurer reinsuring cover incorporating *"Bankers Blanket Bond"* wording is required to obtain from the underlying insured bank via the insurer sufficient details of every customer to satisfy itself that each customer is not a sanctioned person or entity. To hold otherwise would place an intolerable burden on banks, insurers and reinsurers that would render the whole line of business unworkable.

86. Applying DIFC principles of interpretation and without the benefit of US judicial guidance, I consider that ITSR 560.204 requires a *"red flag"* before a reinsurer would be exposed to a sanction or penalty for the indirect provision of insurance services in Iran. I am comforted in this view by the terms of the various settlements with OFAC placed before the Court. In the Gen Re settlement it was noted that the apparent violations resulted from the activities of certain claims personnel. In the HCC settlement it is recorded that HCC had participated in the hull portion of an aircraft hull and liability insurance placement by a foreign insurance broker that insured a foreign-owned commercial airline that leased aircraft to an air charter company that operated in Iran and that HCC knew or had reason to know of the alleged violation because the terms of the insurance policy disclosed that some of the insured aircraft covered by the policy would be operated in Iran. In the AIG settlement it was noted that AIG had for many years issued and maintained polices and processed claims in apparent violation of multiple US sanctions programmes that conferred economic benefit to sanctioned countries or persons. The clear implication was that this pattern of business was sufficient to raise the necessary *"red flags"*. In the Wells Fargo settlement it is recorded that Wells Fargo did not cease the impugned conduct for seven years despite potential concerns raised internally within Wells Fargo on multiple occasions.

87. Without proof that the Reinsurers had knowledge or reason to know that the cover under the Reinsurance Contracts was intended specifically for supply indirectly to Iran in my judgment the Reinsurers' claim fails in *limine* even if the provision of cover to the Insurer was an indirect supply to Alpine's Iranian owners. Even if I am wrong about that and I am wrong that there is no proof that Alpine's owners would in fact benefit from the cover, I do not in fact accept that the provision of cover to the Insurer was in any event an indirect supply to Alpine's Iranian owners.

88. The analysis begins by looking at the insuring clauses in the Original Policy and in the Reinsurance Contracts. Under the material cover in the Original Policy the Insurer insured the Bank against *"direct financial loss sustained by the Insured" "resulting solely and directly from dishonest or fraudulent acts by Employees of the Insured"*. Whether (as found by the Judge and agreed in argument by Reinsurers' Counsel) the loss was the sums embezzled by the fraudsters being the Bank's own funds standing to the credit of Alpine or the amount agreed to be paid by the Bank to Alpine (it is not clear if there was an actual payment or the sum was simply recredited to Alpine) the loss that was covered was that of the Bank not Alpine.

89. Under the Reinsurance Contracts the Reinsurers reinsured the Reinsured's interest in payments made within the terms and conditions of the Original Policy. Thus the beneficiary of the reinsurance cover was the Insurer to the extent of the Insurer's interest in any payment under the Original Policy.

90. It cannot therefore be said any customer of the Bank had a direct interest in either the cover under the Original Policy or the Reinsurance Contracts. It was suggested by the Reinsurers that there was direct cover for customers' property. Leaving aside the point that the Sanctions Clause is not concerned with hypothetical situations, I do not agree that the customer has any direct interest in the property sections of the Original Policy. If there is legal liability on the part of the Bank for the loss of customers' property it is that legal liability to which the Original Policy responds. The Insurer was not providing property insurance to the customer. Insofar as the cover extends to situations where the Bank has no legal liability (for example where customers are robbed on the Bank's premises) this is expressed to be subject to General Condition 1 which means that the customer has no right to make a claim under the policy, the reimbursement of the customer's loss being in the discretion of the Bank.

91. It is clear that neither the Original Policy nor Reinsurance Contracts provided direct cover to the Bank's customers. Did they provide *"indirect cover"*? This is question of interpretation of the meaning to be attributed to that word as used in ITSR 560.204. The Judge found it convenient to use the language of tort liability and held that the benefit of the Reinsurance Contract was *"too remote"* from Alpine's loss. What he was saying was shorthand for a construction of the regulation that places some limit on the meaning of "indirect". On one view *"indirect"* may comprehend the proverbial Amazonian butterfly flapping its wings causing a storm that ravages half of Europe. No reasonable legislator could intend such an all encompassing definition. To adapt the words of Cardozo CJ in *Ultramares v Touche*, again derived from a tort context, it would lead to an indeterminate liability for an indeterminate class of activities.

92. Regrettably none of the examples of the OFAC settlements assists with a principled construction of the regulations. Each is simply either a case where the party involved has thought it in its best interests to self-report or not to contest the imposition of penalties by OFAC. The prohibition in ITSR 560.204 as supplemented by 560.427 includes the exportation, reexportation, sale, or supply of insurance services to a person in a third country undertaken with knowledge or reason to know that such insurance services are intended specifically for supply, transshipment, or reexportation, directly or indirectly to Iran. The meaning of *"indirectly"* is in the context of supply to a person in a third country where the services are intended specifically for supply, transshipment, or reexportation, directly or indirectly to Iran.

93. First, the supply to the person in the third country is of the insurance services. Secondly (ignoring the requirement of knowledge) those services must be intended for supply to Iran. Thirdly, the supply to Iran may be direct or indirect. I consider that last point to mean that it may be through further intermediary arrangements. What however is clear is that it must be the same service as supplied to the person in the third country. The word *"indirect"* qualifies the supply not the services. It seems me that this interpretation is consistent with the examples of the settlements of which the Judge said (and with which I respectfully agree) *"What one can say with some confidence is that in most cases where settlement has been reached on the basis that the insurance cover contravened the sanctions regime the activities complained of have had an obvious and direct link with Iran."* It is also consistent with OFAC FAQ 1059 and the emphasis in that advice that *"the services will not be exported or reexported to the Russian parent company"*.

94. If the US legislators had wished to prohibit the transfer of the benefit of the services as opposed to the services themselves they would have said so. In doing so they would however have encountered what I might call the Cardozo problem. To illustrate the problem in an insurance context - Company A in Dubai is wholly owned by Company B in Iran; Company A is profitable and has substantial assets; Company A is insured with a US insurer and receives a pay out of USD 100,000; Company A then pays a dividend of USD 1 million to Company B; as money is fungible how would it be possible to trace the USD 100,000 into the USD 1 million dividend? The legislators would be setting the regulators an impossible task.

95. It cannot be denied that Reinsurers supplied insurance services to the Insurer by way of indemnity against the Insurer's losses and the Insurer supplied different services to the Bank by way of indemnity against the Bank's losses. The Bank had a separate and independent liability to Alpine that existed whether or not the Bank had the benefit of insurance. The Reinsurers' services were not re-supplied through intermediaries to Alpine. At each stage there was a separate, discrete and free-standing liability between the relevant parties subject to different terms and legal principles.

96. The Reinsurers submit that the regulations look through the contractual arrangements at the flow of economic benefits to see who is the real beneficiary. I am willing to accept that the regulations seek to avoid evasion by the use of deceptive structures but one cannot ignore the contractual arrangements altogether. The contractual arrangements define the relationships between the parties, in particular who is to receive what services or benefit from whom and under what circumstances. In the present case there is no suggestion that any form of structure has been used to circumvent the sanctions regime - the Original Policy and the Reinsurance Contracts must be taken at face value. On any objective construction of those documents, they were intended and drafted exclusively to benefit the Bank and the Insurer respectively.

97. The flow of economic benefit was from the Bank to Alpine. The Bank paid before the receipt of indemnity from the Insurer (see paragraphs 20 to 22 above) and the Reinsurers have still not paid. Alpine did not need any services supplied by either the Insurer or Reinsurer as it had a straightforward banker/customer relationship with the Bank which was, on the evidence, perfectly capable of reimbursing Alpine from its own funds. If the Bank was prudent enough to insure its liabilities and the Insurer to reinsure its liabilities that was no concern of Alpine. It is wholly artificial to say that in some way Alpine was reassured by the existence of the Original Policy and the Reinsurance Contracts. There is not even any evidence that Alpine was aware of their existence. There seems to me to be no reason, on the basis of an analysis of the commercial relationships between the parties, to override the express terms of their agreements.

98. In the circumstances I consider that there was no indirect supply of services from the Reinsurers to Alpine.

99. Finally, even if the indirect supply of services encompasses the supply of the benefits of those services, the Reinsurers' case fails on the evidence. They contend that Alpine would be the indirect beneficiary of any payment under the Reinsurance Contracts, but no payment has been made and the Bank settled with Alpine before it received indemnity under the Original Policy. If the argument is to have any merit it must be that the reinsurance cover facilitated the Bank's payment to Alpine by enabling the Bank to obtain insurance cover and thereby giving it confidence to make the payment to Alpine - which is the Facilitation Ground.

100. For all the foregoing reasons the Payment Ground fails.

THE FACILITATION GROUND

101. The prohibition on facilitation is found in ITSR 560.208: no US person, wherever located, may facilitate any transaction by a foreign person where the transaction by that foreign person would be prohibited if performed by a US person or within the USA. The obvious intent is to prevent US persons from circumventing the prohibition in 560.204 as supplemented by 560.427 on the direct or indirect supply of insurance services to Iran.

102. The Judge analysed the provision at paragraphs 83 to 86 of the Judgment. He held that *"the verb "facilitate" is used in the active tense. It means making something possible or easier. There must be a link - a causal link - between the action which facilitates and the activity which is facilitated. And it seems to carry with it an inference that that was the intention. So, it involves doing something deliberately so as to make something possible or easier."* He found that the examples in 560.417 supported his view that a deliberate act was necessary.

103. It is certainly correct that each of the examples given did involve a deliberate act but he also recognised that they were non-exhaustive.

104. His conclusion was that for a facilitation case under 560.208 to succeed, it must be shown that the US person deliberately took steps to facilitate a transaction by a foreign person where such a transaction would be prohibited if performed by a US person.

105. The Reinsurers criticise this conclusion. They observe that the word "facilitate" does not connote a deliberate act and that deliberate evasion of the regulations is a criminal rather than civil wrong (see 50 USC 1705). They point to the OFAC settlement with Aon International Energy Inc ("Aon"). Aon had facilitated the placement of coverage and the payment of premiums for facultative retrocession reinsurance that reinsured construction risks associated with a petroleum project on Kharg Island in Iran. Aon brokered and placed facultative retrocession reinsurance on behalf of a European reinsurer with two European retrocessionaires. Aon provided specialized insurance services resulting in transactions that were harmful to the sanctions program; OFAC viewed the apparent violations as part of a pattern of reckless, but not egregious, conduct by Aon. The Reinsurers also relied on the HCC Settlement. In both cases they say that the provision of insurance facilitated in the Aon case a construction project in Iran and in the HCC case air charter operations in Iran.

106. In neither case is there sufficient detail in the report of the settlement to indicate whether OFAC regarded the conduct as deliberate. OFAC did say in both cases that it did not regard the conduct as "egregious" which I take to be different. 50 USC 1705 also does not use the word *"deliberate"*, instead it speaks of *"wilful"* violation of regulations or prohibitions. I strongly suspect that there is considerable US jurisprudence on the meaning of *"wilful"* but we were not taken to it.

107. In consequence I do not consider that either 50 USC 1705 or the two settlements provide any assistance on whether facilitation involves a deliberate act. In one sense the act must be deliberate as it is voluntary, but that begs the question. I take *"deliberate"* to imply an intention to circumvent the regulations. If that is what is meant then I respectfully part company with the Judge. Two of the examples under ITSR 560.417 do

appear to involve such an intention (examples (a) and (c) - see paragraph 11(5) above) but one could occur without such an intention. The examples are also just examples, and are non-exhaustive. The principal regulation 560.208 avoids any reference to intention. I am content to approach the issues before this Court on the basis intent is not a necessary ingredient of facilitation.

108. Both counsel accepted the Judge's definition of *"facilitation"*: to enable or make easier. Ms O'Sullivan pointed to the Wells Fargo settlement as an example of what OFAC regarded as facilitation. In that case Wachovia (Wells Fargo's predecessor), at the direction of a mid-level manager, specially designed a customized version of its proprietary software platform for a European bank, Bank A to "host" on Bank A's own systems, in part so that Bank A could use the platform to handle international trade finance instruments involving OFAC-sanctioned jurisdictions and persons. The relationship was direct and unarguably enabled Bank A to carry on activities that were prohibited if carried out by a US entity such as Wells Fargo.

109. Assuming for the purposes of argument that the provision of banking services to Alpine is to be taken as the provision of banking services in Iran, then a US person would be prohibited from providing those services. The first question is therefore, did the grant of cover under Reinsurance Contracts to the Insurer enable or make it easier for the Bank to provide banking services to Alpine? The second question (which assumes the Insurer was indirectly providing insurance services to Alpine or its Iranian owners) is whether the reinsurance cover enabled or made easier the insurance cover which a US person would be prohibited from providing to Alpine or its owners.

110. Whether it be banking or insurance services the chain of reasoning is the same. The reinsurance cover enables the insurance cover which enables the provision of banking services.

111. The Facilitation Ground is based on the factual assertion in the Reinsurers' written submissions that the Bank would not have been able to be insured without the reinsurance. There is no evidence to support this proposition. The Reinsurers rely on the fact their relationship with the Insurer was a so-called *"fronting arrangement"*. Fronting arrangements were explained in evidence by Mr Sathish Krishnan, Senior Operations Manager of the Insurer. He said in his Second Witness Statement that such arrangements are used in the UAE to allow a foreign reinsurer to insure a UAE onshore risk, which is not permitted to occur directly under UAE federal law. It is not suggested that other arrangements do not exist and if it were to be suggested that other arrangements were not available that would necessitate expert evidence from a suitably experienced broker reviewing the entire market for bankers' cover in the Gulf region. None has been adduced.

112. Without establishing that fact the edifice built upon it crumbles. If it cannot be established that the Bank would not have been able to be insured without the reinsurance, it is not possible to argue that there was a causative link between the reinsurance and insurance. Without that link it cannot be said that Reinsurers facilitated the provision of either banking or insurance services to Alpine.

113. In any event there is no evidence that the Bank would have refused to have taken on Alpine as customers had the Insurer not been reinsured or that it depended upon the cover from the Insurer either to be in business or to recredit Alpine (which it did before receiving any indemnity).

114. In all the circumstances the Facilitation Ground also fails.

DISPOSITION

115. The Appeal is dismissed.

116. The Stay of Judgment on the Counterclaim granted by the former Chief Justice Zaki Azmi on 21 June 2024 is discharged.

117. There can be no argument but that the Appellants shall pay the costs of the Respondent of the Appeal on the standard basis. The costs shall be subject to immediate assessment as the appeal lasted less than one day (RDC 44.140(5)). The Respondent shall serve its written statement of costs within 7 days of the date of this Order and Appellants may serve any reply 7 days thereafter.

JUSTICE WAYNE MARTIN:

118. I agree with the orders proposed by Justice Black for the reasons which he gives.

H.E. JUSTICE SHAMLAN AL SAWALEHI:

119. I agree with the reasoning and conclusions of Justice Michael Black and have nothing further to add.