CICA Appeal No 5 of 2019

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION (FSD 68 of 2016)

BETWEEN:

PALLADYNE INTERNATIONAL ASSET MANAGEMENT B.V.

Appellant/Plaintiff

AND

(1) UPPER BROOK (A) LIMITED
(2) UPPER BROOK (F) LIMITED
(3) UPPER BROOK (I) LIMITED
(4) AHMED MOHAMMED JEHANI
(5) ALI JALAL BARUNI

BEFORE:

THE HON SIR RICHARD FIELD JA
THE HON C. DENNIS MORRISON JA
THE RT HON SIR JACK BEATSON JA

Respondents/Defendants

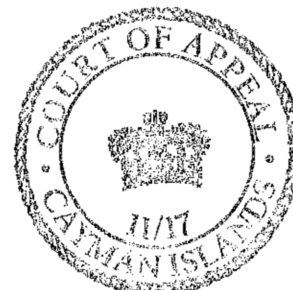
Appearances: Mr Brian Kennelly QC instructed by Kobre & Kim LLP, and Mr Jalil Asif QC and Ms Tonica Williams of Kobre & Kim LLP for the Appellant

Mr Jonathan Moffatt and Mr Peter Hayden of Mourant Ozannes appeared on behalf of the First to Third Respondents

Ms Dinah Rose QC instructed by Appleby (Cayman) Ltd. and Mr Peter McMaster QC and Anya Martin of Appleby (Cayman) Ltd. for the Fourth and Fifth Respondents

Heard: 3 and 4 September 2019

Judgment delivered: 18 November 2019



JUDGMENT

The Rt Hon Sir Jack Beatson JA:

I. OVERVIEW:

1. This is an appeal from the decision of Justice Segal ("the judge") sitting in the Financial Services Division of the Grand Court handed down on 30 January 2019. It concerns the Libya (Restrictive Measures) (Overseas Territories) Order SI 2011 No 1080, hereafter the "Sanctions Order". The Sanctions Order gives effect in the Cayman Islands to resolutions of the United Nations Security Council[1] which required the freezing of Libyan state assets.

2. The Security Council's resolutions were originally adopted in 2011 before the fall of the Libyan government headed by Colonel Gaddafi. Soon after his fall the sanctions were modified and partially lifted by further resolutions of the Security Council and decisions of the UN Sanctions Committee.[2] The Sanctions Order with which we are concerned was originally made on 9 April 2011 but has been amended to reflect those later resolutions and decisions, in particular on 18 November 2011 by the Libya (Restrictive Measures) (Overseas Territories) (Amendment) Order SI 2011 No 2717, hereafter the "Sanctions Amendment Order". The provisions which are relevant to this appeal are either set out or summarised at [18] – [37] below.[3]

3. The issue before the court is whether the adoption of resolutions by companies whose shares and assets are frozen which appoint and dismiss directors and change the names of the companies was prohibited by article 10(1) of the Sanctions Order, which is set out at [32] below. In broad terms, it is whether making the resolutions and appointing and removing directors was either to "deal with" frozen "funds" or "economic resources", that is to "use" or to "deal with" the frozen shares by the exercise of a voting right, or to "allow access to" the frozen assets of the companies or to make a change that "would enable use" of those assets. The judge concluded that they were not.

4. The appellant, Palladyne International Asset Management B.V. ("PIAM"), a Dutch company, was appointed to act as the investment manager and managing director of the first three respondents, three companies which are Cayman Islands investment funds. It established the funds and managed the US$700 million invested in them in December 2006 and May, November and December 2007 pursuant to investment management agreements entered into with the first three respondents at those times. The funds invested were monies paid to these respondents as subscriptions for shares by three Libyan entities, the Libyan Africa Investment Portfolio ("LAP"), the Libyan Foreign

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1. Security Council resolutions 1970 (2011) and 1973 (2011) were respectively adopted on 26 February and 11 March 2011. Their material provisions are set out or summarised at [20] – [25] below.
2. Security Council resolution 2009 (2011) adopted on 16 September 2011 and the decision of the UN Sanctions Committee of 16 December 2011 to remove two Libyan Banks from the scope of the asset freeze in resolution 2009.
3. Square brackets denote other paragraphs of this judgment or of judgments in other cases. References to "para. XX" are to Segal J's judgment.

Bank ("LFB"), and the Libyan Investment Authority ("LIA"), the "Libyan investors".[4] The investments are financial instruments, cash and securities. In August 2012 legal title to most of the investments was transferred by PIAM to a Dutch "stichting" or "foundation" called Palint which gave PIAM a power of attorney enabling PIAM to carry out its investment management functions.[5] The assets were held by third party custodians: 98.5% by Deutsche Bank AG in Germany and 1.5% by the London branch of State Street Bank and Trust, incorporated in Massachusetts.

5. Because the shares in the first three respondents and the investments held by them were owned directly or indirectly by the LIA or the LAP, they were frozen. Because the assets of the first three respondents were held outside Libya by third party custodians, they did not benefit from the partial lifting of the sanctions and asset freezes by Security Council resolution 2009 (2011) on 16 September 2011 after the fall of Colonel Gaddafi. The position of the LFB's shares in the second respondent is that, although LFB remained the registered owner, it was common ground that the shares were beneficially owned by the LIA.[6] Accordingly, these shares remained frozen despite the removal of all asset freezing measures in relation to the LFB on 16 December 2011. PIAM continued to act as the investment manager under a licence granted and policed by the Cayman Islands Monetary Authority. It was able to deal with the custodians, to carry out some activities in relation to the management of the assets but not to settle trades, and it took its fees.

6. The shareholder resolutions to which I have referred are dated 8 and 18 July 2014. They were made by individuals purporting to act on behalf of the LIA, LAP and LFB in their capacity as shareholders of the first three respondents. Under those resolutions, which the appellant maintained were void and of no legal effect, the fourth and fifth respondents, Dr Ahmed Jehani and Mr Ali Jalal Baruni, were appointed directors of the first three respondents and the appellant was removed as a director of those companies. Dr Jehani was head of the LIA's litigation office in London and Mr Baruni was a member of the LIA's Advisory Board between 2008 and 2010, and formerly a consultant to the LIA. The resolutions also purported to change the names of the first three respondents from Palladyne Global Balanced Portfolio Fund Ltd, Palladyne Global Advanced Portfolio Fund Ltd, and Palladyne Global Diversified Portfolio Fund Ltd, respectively to Upper Brook (A) Ltd., Upper Brook (F) Ltd., and Upper Brook (I) Ltd. Resolutions to terminate the investment management agreements with the appellant were made by the shareholders on 9, 10 and 18 July 2014.

7. Segal J accepted the respondents' case that their reasons for deciding to make the resolutions were their concerns about the appellant's management of the funds and its suitability as a director of the first three respondents: see paras. 47, 63, 174, 178, 186-7. The respondents' concerns resulted from their discovery in September 2013 of a criminal investigation into the appellant by the Dutch authorities, what they considered was lack of transparency in the management of the funds, high management fees, and

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[4] $200 million was paid by LAP to the first respondent, and by LFB to the second respondent. $300 million was paid by LIA to the third respondent.

[5] See further, the judgment below at para. 47.

[6] The sanctions meant that a transfer by LFB to the LIA on 27 January 2011 was not perfected. For details see Segal J at paras. 42, 62, 79 and 224(p)(iii) –(vii) and the appellant's skeleton argument, paragraph. 13.

concerns about the circumstances in which the appellant had originally come to be appointed as the Funds' investment manager.[7]

8. Before Segal J, the appellant's first and primary submission was that the exercise of the rights attached to shares in the three respondent companies by adopting and passing the resolutions was a breach of the prohibition in article 10 of the Sanctions Order because it was a "use" of the frozen shares in the three companies and/or the benefits attached to them. It also argued that the effect of removing the appellant and appointing new persons as directors was to "allow access to" and additionally or alternatively to "make any other change that would enable use" of the frozen shares or the investments held by the respondent companies. The judge rejected that submission for reasons I summarise at [42] – [50] below. The appellant appeals against that decision.

9. Before the judge, the appellant also submitted that the resolutions were invalid for two other reasons. The judge also rejected these submissions, but they and the findings of fact upon which his decision to reject these submissions was based are not the subject of appeal. I therefore summarise them briefly.

10. First, the appellant argued that the adoption and passing of the resolutions constituted a breach and contravention of the prohibition in article 13 of the Sanctions Order on knowingly and intentionally participating in activities the object or effect of which was to circumvent a prohibition in article 10(1) or 11(1) of the Sanctions Order or to enable or facilitate the commission of an offence under article 10(2) or 11(2). The judge heard evidence from two witnesses on behalf of the appellant, from the fourth and fifth respondents, and three other witnesses on behalf of the respondents. His reasons for rejecting this submission are given in paras. 178 -188 of his judgment. He accepted the respondents' evidence and found (para. 185) that the appellant had not satisfied the burden of proof that the elements of the article 13 offence were satisfied. He stated (para. 187(b)) that the individuals concerned had no intention of breaching sanctions or of circumventing the need to comply with the sanctions regime and to obtain licences when required and (para. 185) that they always had in mind the need to comply with the UN sanctions regime, to pursue a two staged process that would only involve taking steps in relation to the Funds' assets after obtaining whatever sanctions licence was required.

11. Secondly, the appellant argued that the resolutions were not validly adopted and made *inter alia* because the individuals who signed the powers of attorney which authorised the signing and passing of the resolutions were not validly authorised to do so. The judge's reasons for rejecting this submission are given in paras. 220 -228 of his judgment.

12. The appellant also submitted that the consequence of the breaches and lack of authority was that the resolutions were void *ab initio* and of no legal effect or alternatively unenforceable by the respondents. It argued that it followed that the fourth and fifth respondents were not validly appointed as directors of the three companies, and that it remains a director. The judge stated at para. 188 that in view of his conclusions on the three limbs of the appellant's case summarised above the claim failed in any event and it was not necessary for him to deal with this.

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[7] Mr Ismael Abudher, the appellant's Controller and CEO was the son-in-law of Mr Shukri Ghanem who served as Prime Minister under Colonel Gaddafi from June 2003 until March 2006. The concern was whether their relationship was the reason Mr Abudher was appointed: see Segal J, para. 212 (h)(v).

13. The appellant was represented by Mr Brian Kennelly QC and the fourth and fifth respondents, whose submissions were adopted by the first three respondents,[8] by Ms Dinah Rose QC. I am grateful to counsel for their clear and succinctly presented oral submissions, and to them and their legal teams for their written submissions.

14. I consider the legal framework in section II of this judgment and summarise the judge's decision in section III and the appellant's critique of it in section IV. Section V contains my analysis of the submissions and my conclusions. I have concluded that the exercise of the voting rights in the shareholder resolutions were not in themselves a dealing with the funds and did not in themselves allow access to or make a change that "would enable use" of the assets of the companies and therefore that the making of the resolutions was not prohibited by article 10(1) and that the appeal should be dismissed.

II. THE LEGAL FRAMEWORK

15. The Sanctions Order with which we are concerned is part of an international system of sanctions deriving from United Nations Security Council resolutions. Those resolutions have been implemented by the European Union ("EU") and the United Kingdom. The United Kingdom implemented them for itself in the exercise of powers under section 2(2) of the European Communities Act 1972. It implemented them for United Kingdom Overseas Territories, including the Cayman Islands, in the exercise of powers conferred under a number of statutes including the United Nations Act 1946.

16. The United Kingdom legislator used substantially the same words for the United Kingdom itself[9] and for the overseas territories, and it is common ground between the parties that the intention was that they bear the same meaning. The dispute is as to that meaning. For this reason, because the intention was to implement the EU regime, in particular EU Council Regulation 204/2011 (hereafter "EU Regulation 204/2011"), for the United Kingdom itself, although EU law does not apply in the Cayman Islands, the EU legislation is relevant to the interpretation of the Sanctions Order.

17. In the light of what can loosely be referred to as a hierarchy of legislative instruments, the Security Council resolutions and the EU legislation are important parts of the context against which the Sanctions Order must be interpreted. For this reason, I first set out or summarise their material provisions and relevant parts of the recitals to them.

(i) The Security Council Resolutions

18. Security Council resolutions 1970 (2011) and 1973 (2011) were adopted on 26 February and 27 March 2011, before the fall of Colonel Gaddafi. They called upon all Member States to apply certain measures, one of which was to require Member States to freeze assets held by the individuals and entities identified and listed in them. The LIA, the LAP and the LFB were listed in Annex II to resolution 1973 (2011). The recitals in the preambles to these resolutions show

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[8] Letter dated 31 July 2019 from their solicitors Mourant Ozannes to Kobre & Kim and Appleby (Cayman) Ltd.

[9] At the date of the shareholder resolutions challenged in these proceedings, the relevant UK instrument was the Libya (Asset-Freezing) Regulations SI 2011 No 605 (now replaced by the Libya (European Union Financial Sanctions) Regulations 2016 SI 2016 No 45), both made under s.2(2) of the European Communities Act 1972. Resolution 1970 (2011) was originally given effect to by the Libya (Financial Sanctions) Order SI 2011 No 548, made under s. 1 of the United Nations Act 1946.

the context and the reasons for the measures. Recitals in both resolutions refer to "violence and use of force against civilians" in Libya and to "gross and systematic violation of human rights". They state that "the widespread and systematic attacks … against the civilian population may amount to crimes against humanity and to serious violations of … international humanitarian law". The recitals in the preamble to resolution 1973 (2011) also refer to "the deteriorating situation, the escalation of violence, and the heavy civilian casualties."

19. Security Council resolution 2009 (2011), in the judge's words, responded to the overthrow of Colonel Gaddafi, by unfreezing assets within Libya. It made additional provision to that in the earlier resolutions for Member States to grant access to assets outside Libya if certain conditions are satisfied: see [26] below. But it maintained the freezes over funds, assets and economic resources outside Libya that were frozen as at 16 September 2011 including those of the LIA, LAP and LFB. The recitals in the preamble to it referred to the Security Council's "determination to ensure that assets frozen … shall as soon as possible be made available to and for the benefit of the people of Libya, … and … the importance of making these assets available in a transparent and responsible manner in conformity with the needs and wishes of the Libyan people".

Resolution 1970 (2011)

20. By paragraph 17 of resolution 1970 (2011), the Security Council:

> "***Decides*** *that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in annex II of this resolution or designated by the [UN Libya Sanctions] Committee established pursuant to paragraph 24 …, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the [UN Libya Sanctions] Committee;"*

21. Member States are thus required to ensure that any funds, financial assets or economic resources are prevented from being made available to or for the benefit of those listed in Annex II (Colonel Gaddafi and five members of his family). It should be noted that neither this resolution nor resolution 1973 (2011) contains a definition of "funds, "other financial assets" or "economic resources". Definitions of those terms are contained in EU Regulation 204/2011 and in the Sanctions Order: see [29] and [32] below.
22. By paragraph 18, the Security Council:

> "***Expresses*** *its intention to ensure that assets frozen pursuant to paragraph 17 shall at a later stage be made available to and for the benefit of the people of the Libyan Arabian Jamahiriya;"*

23. Paragraph 19 provides that the measures imposed by paragraph 17 do not apply to funds, other financial assets or economic resources which the Member States have determined fall within sub-paragraphs (a) to (c). Since paragraph 19 has been substantially enacted in the Cayman Islands by the licensing provisions in article 15(2) of the Sanctions Order which I set out at [36] below, it is not necessary to set it out. It suffices to state that the circumstances are limited, including necessity for basic expenses including food, rent and medical expenses, reasonable professional expenses, satisfaction of judicial, administrative or arbitral liens or judgments made prior to the date of the resolution. In all cases, the Member State is required to notify the Sanctions Committee, established pursuant to paragraph 24 of resolution 1970 (2011) of its intention to authorise access. In the case of liens or judgments notification suffices. In most of the other cases, access will be authorised unless the Sanctions Committee makes a negative decision within five working days of the notification. In the case of necessary but extraordinary expenses, the approval of the Sanctions Committee is required.

Resolution 1973 (2011)

24. By paragraphs 19 and 20 of resolution 1973 (2011), the Security Council:

> *"19. **Decides** that the asset freeze imposed by paragraph 17, 19, 20 and 21 of resolution 1970 (2011) shall apply to all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the Libyan authorities, as designated by the Committee, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as designated by the Committee, and decides further that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the Libyan authorities, as designated by the Committee, or individuals or entities acting on their behalf or at their direction, or entities owned or controlled by them, as designated by the Committee, and directs the Committee to designate such Libyan authorities, individuals or entities within 30 days of the date of the adoption of this resolution and as appropriate thereafter;*
>
> *20. **Affirms** its determination to ensure that assets frozen pursuant to paragraph 17 of resolution 1970 (2011) shall, at a later stage, as soon as possible be made available to and for the benefit of the people of the Libyan Arabian Jamahiriya;"*

25. Annex II to the resolution adds seven individuals and five entities including the LIA, the LFB and the LAP to the list of those subject to the asset freeze. The justification for adding the entities is stated to be that they are under the control of Colonel Gaddafi and his family and a potential source of funding for his regime.

Resolution 2009 (2011)

26. In paragraphs 15 and 16 of resolution 2009 (2011), the Security Council modified the measures imposed in *inter alia* resolutions 1970 (2011), paragraph 17 and 1973 (2011), paragraph 19 with respect to the LIA, the LAP, the LFB, and the Central Bank of Libya.[10] Paragraph 15 of resolution 2009 (2011) provides that their assets outside Libya could be used under licence from a Member State (and on five days' notice to the Sanctions Committee) for the purposes specified in paragraph 16(a). These are:

> "*(i) humanitarian needs;*
>
> *(ii) fuel, electricity and water for strictly civilian uses;*
>
> *(iii) resuming Libyan production and sale of hydrocarbons;*
>
> *(iv) establishing, operating, or strengthening institutions of civilian government and civilian public infrastructure; or*
>
> *(v) facilitating the resumption of banking sector operations, including to support or facilitate international trade with Libya;"*

27. Paragraph 19 directed the UN Libya Sanctions Committee in consultation with the Libyan authorities to "review continuously" the remaining measures imposed by resolutions 1970 (2011) and 1973 (2011) with respect to the four entities, i.e. in the context of these proceedings the LIA, the LAP and the LFB, which are referred to in paragraph 18 as "Libyan governmental institutions". Paragraph 19 "decides" that the Committee shall in consultation with the Libyan authorities, lift the designation of these entities as soon as practicable "to ensure the assets are made available to and for the benefit of the people of Libya".

(ii) The EU legislation

28. The judge summarised this succinctly at para. 56. He stated:

> *"Council Decision 2011/137/CFSP and Council Regulation (EU) No. 204/2011 implemented the measures in SC Resolution 1970 and introduced certain EU autonomous measures. A series of subsequent Council Decisions and Regulations implemented SC Resolution 1973 and SC Resolution 2009. On 18 January 2016, the EU adopted Council Regulation (EU) 2016/44 which consolidated the existing restrictive*

[10] In the Resolution, the LFB is referred to by its former name, the Libyan Arab Foreign Bank (LAFB), now called the Libyan Foreign Bank (the LFB). The Libyan Africa Investment Portfolio has been initialised as LAP by the parties and the judge but as LAIP in the Resolution.

measures into a new regulation. This was done for clarity, as the original Regulations had been extensively amended."

29. Article 1(a) of EU Regulation No 204/2011 provides a definition of funds which is in material respects identical to that in article 2(1) of the Sanctions Order, set out at [34] below. For our purposes, it suffices to set out the definition of "freezing of funds" in article 1(b), the syntax of which differs from that of article 10(4). This is because the respondents submitted that what is a minor difference of syntax between the Regulation and the Sanctions Order makes the meaning and intended scope of article 10(4) of the Sanctions Order clear. Article 1(b) of the Regulation provides (emphasis added):

> *"'freezing of funds' means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management;"*

(iii) The Libya (Restrictive Measures) (Overseas Territories) Order SI 2011 No 1080

30. I have stated that since it was originally made on 9 April 2011 the Sanctions Order was amended in the light of later Security Council resolutions and UN Sanctions Committee decisions modifying and partially lifting the sanctions originally imposed.[11] The passages below and quotations in this judgment are from the Order as at July 2014.

31. I first set out the prohibition in article 10 of the Sanctions Order. I then set out or summarise the other provisions which are material to the determination of this appeal, including the definitions in article 2(1).

32. Article 10, with emphasis added, provides:

> *"(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*

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[11] **(1)** On 18 November 2011 SI 2011 No 2717 gave effect to UN Security Council resolution 2009 (2011) adopted on 16 September 2011; **(2)** on 17 February 2012 SI 2012 No 356 gave effect to a decision of the UN Sanctions Committee of 16 December 2011 to remove two Libyan Banks from the scope of the asset freeze in resolution 2009 (2011) and to reflect EU Council Regulation No 1360/2011 of 20 December 2011, and **(3)** on 8 January 2014 SI 2013 No 3160 gave effect to resolution 2095 (2013) and EU Council Regulation No 488/2013 of 27 May 2013.

(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.

(3) In proceedings for an offence under this article, it is a defence for a person to show that they did not know and had no reasonable cause to suspect that they were dealing with funds or economic resources owned or controlled, directly or indirectly, by a designated person or persons acting on their behalf or at their direction or by persons controlled by them.

(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; and

(b) in respect of economic resources, to exchange or use to obtain funds, goods or services in any way, including (but not limited to) by selling, hiring or mortgaging the resources."

33. Article 11(1) prohibits making funds and economic resources available to a designated person.

34. The material definitions in article 2(1) are:

> "*'economic resources' means assets of every kind, whether tangible or intangible, moveable or immovable, which are not funds but can be used to obtain funds, goods or services;*
>
> ...
>
> *'funds' means financial assets and benefits of every kind, including (but not limited to)—*
>
> *(a) cash, cheques, claims on money, drafts, money orders and other payment instruments;*
> *(b) deposits with relevant institutions or other persons, balances on accounts, debts and debt obligations;*
> *(c) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivative contracts;*
> *(d) interest, dividends or other income on or value accruing from or generated by assets;*
> *(e) credit, rights or set-off, guarantees, performance bonds or other financial commitments;*
> *(f) letters of credit, bills of lading, bills of sale;*
> *(g) documents providing evidence of an interest in funds or financial resources;*
> *and*
> *(h) any other instrument of export financing;*
>
> ...
>
> *'person referred to in paragraph 15 of Security Council resolution 2009 (2011)' means the Libyan Investment Authority or the Libyan Africa Investment Portfolio or both;*
>
> ..."

35. Although, as I have stated, there is no appeal from the judge's finding that the respondents did not contravene article 13, which deals with circumventing the prohibitions in articles 10 and 11, I set it out. I do so because Ms Rose relied on it in support of the respondents' case on the interpretation of article 10. Article 13 provides that:

> "*A person shall be guilty of an offence under this Order if they participate, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to—(a) circumvent a prohibition in article 10(1) or 11(1); or (b) enable or facilitate the commission of an offence under article 10(2) or 11(2).*"

36. Article 15(1) provides that the Governor may grant a licence to disapply the prohibitions in articles 10(1) and 11(1). The licence may "relate to" access to funds or

economic resources "for one or more of the purposes" referred to in article 15(2). By article 15(2):

> *"A licence may relate to —*
>
> *(a) Basic expenses of designated persons and their dependent family members ...*
>
> *(b) payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services after notification to the Sanctions Committee and no objection having been made within 5 working days of such notification;*
>
> *(c) payment of fees or service charges for the routine holding or maintenance of frozen funds, other financial assets and economic resources after notification to the Sanctions Committee and no objection having been made within 5 working days of such notification;*
>
> *(d) payment of necessary extraordinary expenses as determined by the Governor and approved by the Sanctions Committee;*
>
> *(e) satisfaction of a judicial, administrative or arbitral lien or judgment in respect of a designated person, provided it was entered into before the date on which the person was designated, it is not for the benefit of a designated person and the Sanctions Committee has been notified of the lien or judgment;*
>
> *(f) 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;*
>
> *(g) access to funds or economic resources of a person referred to in paragraph 15 of Security Council resolution 2009 (2011) provided that*
>
> > *(i) access is for one or more of the purposes referred to in paragraph 16 of Security Council resolution 2009 (2011) as determined by the Governor;*
> >
> > *(ii) the Sanctions Committee has been notified of the intention to authorise the unfreezing of funds or*

> *economic resources and no objection has been made by the Sanctions Committee within 5 working days of such notification;*
>
> *(iii) the funds or economic resources are not made available to, or for the benefit, of any designated person;*
>
> *(iv) the Libyan authorities have been consulted in advance about the use of such funds or economic resources; and*
>
> *(v) the notification submitted to the Sanctions Committee under paragraph (ii) has been shared with the Libyan authorities and they have not objected within 5 working days to the release of such funds or economic resources."*

These purposes are essentially those in paragraph 19 of resolution 1970 (2011) and paragraph 16 of resolution 2009 (2011), part of which is set out at [26] above. The definitions in article 2(1) of the Sanctions Order included a definition of "purposes referred to in paragraph 16 of Security Council resolution 2009 (2011)" which substantially replicated the terms of paragraph 16.

37. Article 24 provides that those convicted of the offences under articles 10 or 13 are liable to imprisonment for up to two years or a fine or both if convicted on indictment and to imprisonment for up to six months or a fine not exceeding £5,000 or its equivalent or to both if convicted summarily.

III. THE JUDGE'S DECISION

38. The ten-day trial ended on 23 March 2018, and the judge handed down his judgment on 30 January 2019. The reason for the delay was an application by the appellant on 27 April 2018, over a month after the end of the trial, for inspection of documents in a list served by the respondents after the end of the trial. Because further evidence was required and there was a risk that the outcome of the application for inspection would make it necessary to reopen the trial, the judge had to deal with this first: see para. 11. Evidence and written submissions were lodged by 19 June 2018 and judgment in the application for inspection was handed down on 25 July 2018.

39. Over half of the judgment handed down on 30 January 2019 deals with the article 13 and authority points referred to at [10] – [11] above. They required the resolution of many factual and legal issues and which have not been appealed. It is therefore not necessary to summarise the judge's reasons for rejecting them.

40. I observe that the judgment covers 222 pages, and has 228 paragraphs, many of which are divided into numerous sub-paragraphs. The judge's summaries of the parties' submissions run to over 90 pages. On any view his judgment is a *tour de force,* but I consider that, even recognising that over half of it deals with the article 13 and authority points which required the resolution of what were complex factual and legal issues, it is much longer than was necessary or desirable.

41. The judge's decision and reasons on the article 10 points which have been appealed are contained in paras. 175 – 177 of his judgment. Sub-paras. (a) to (r) of para. 176 deal with whether the exercise of voting rights constituted the "use" of assets within article 10(4)(a)(i). Sub-paras. (a) to (f) of para. 177 deal with whether the exercise of voting rights "allow[ed] access to" the frozen assets of the first three respondent companies or were "to deal with in any other way that would result in any change" that is referred to in article 10(4)(a)(ii) (see [32] above) or be within article 10(4)(a)(iii) because it would "make any other change that would enable use, including portfolio management". So far as possible I refer to the judge's conclusions by way of summary and cross-reference rather than by quotation.

42. The judge (see para. 176(b)) considered the word "use" in article 10 (4)(a)(i) in the light of the language used in article 10 (4)(a) and in article 10(4) as a whole, and the purpose of the Sanctions Order in the context of the UN and international sanctions regime which he stated was to be read as a single harmonious code.

43. He concluded that the reference in the definition of funds to "financial assets and benefits of any kind" made it clear that the concern was with shares in their character as financial assets. He stated (para. 176(c)) that they "are *financial* assets because they are cash (or cash equivalents) or other assets which are liquid (in the sense of easily being easily turned into cash and having a clear monetary value)". Accordingly (see para. 176(e)), for the purposes of the Sanctions Order "using them" involved activity which touches or concerns or affects those characteristics; i.e. activity likely to involve generation of a financial return or to affect the monetary value of the funds: see para.176 (e), and (f). In these and other sub-paragraphs he said (for example para. 176(r)) that the case involved two types of funds. He made a distinction between the references in article 10(4) to "funds" and to "economic" resources which was criticised by the appellant.

44. The judge stated at para. 176(g) that this construction was supported by the clear statements in the UN resolutions that the purpose of the asset freezes was so that the funds frozen be made available to and for the benefit of the people of Libya. He concluded that this indicated that the assets were to be preserved intact and that the asset freeze is to prevent action which would make the assets less valuable, for example by allowing individuals and entities subject to the freeze to extract value from the funds: judgment, para. 176(g).

45. The judge also stated (at para. 176(j)) that he saw the force of the argument (set out in para. 176(i)) that "use" covers any employment of an asset for a purpose of the owner or holder of the right so that exercising a voting right could be a use of the shares because the asset freeze requires the creation of a complete ring fence around frozen assets so as to prevent a person from getting hold of your asserting rights attached to the asset. But, for the reasons I have summarised, including the context of article 10 and the UN resolutions, he considered that this was not the correct construction of article 10(4)(a).

46. The judge also referred to the appellant not being able to find guidance in authorities which clearly supported its approach: para. 176(l). He stated that he was not assisted by

the guidance of the UN's Al Qaida Sanctions Committee[12] because that Committee was concerned with a position where a listed person owned the asset in common with an unlisted person: para. 176(m). He also stated that if it was the objective of the Sanctions Order that new directors of companies whose shares or assets have been frozen should first be approved by the Sanctions Committee it could have stated this (para.176(n)); and that it was not clear that a licence would have been available under article 15 (para. 176(o)). He considered that the authorities relied on by the appellant, were of little assistance: see para. 176(o)(ii) and (q). This was because *Al-Kishtaini v Shanshal* [2001] EWCA Civ 264 concerned a general and unqualified dispensing power and the analysis in *Libyan Investment Authority v Maud* [2016] EWCA Civ. 788 was brief and dealt only with using an asset as security, a central case of "dealing".

47. The judge concluded that the disputed resolutions left the shares and the underlying investments held by the first three respondents unaffected. He stated (at para. 176(r)) that "the integrity and effectiveness of the asset freeze was unaffected and it was as fully effective after the passing of the resolutions as it was before".

48. The appellant had argued that the exercise of voting rights by the Libyan investors to appoint directors "allow[ed] access to" the funds' assets within article 10(4)(a)(i) because it gave the directors legal and factual control of them from the time of their appointment. It was irrelevant that the investments were held by the custodians because the custodians acted for the funds and were required under the relevant custodian agreements to act as directed by the funds. The judge rejected these submissions based on access as control at para. 177(a) –(e).

49. The position had been tested in argument by considering the position where a bank issues a debit card and PIN for an account containing frozen funds. The appellant submitted that the cardholder has access to the account before withdrawing any funds because the concept of access includes preparatory steps to the actual use of the funds, and the cardholder had a contractual right to make a withdrawal even if he needed a licence to do so. The judge rejected this submission for two reasons. First, "access" in article 10(4)(a)(i) appears with the words "use", "alter", "move" and "transfer", terms which strongly indicate that like them it only covers activity which has an effect on the funds: see para.177(c). Secondly, the prohibition on allowing access is directed to a person and by implication applies to the person who holds the funds, in this case the custodians. Taking control of the account holder or customer cannot be treated as having access to the account. Nor can authorising a third party to draw on the account or to give instructions for the transfer of securities held by the custodian: "[t]he breach would come later when the person given the authority takes action to deal with the funds in one of the prohibited ways": see para. 177(d).

50. For similar reasons, the judge also concluded that the exercise of voting rights by the Libyan Investors was not a change which "would enable use" of" the Funds' assets within article 10(4)(a)(iii). He stated (at para. 177(f)) that "enabling use" requires "a change to the funds whose use will be enabled as a result of the change" and there was no change to the assets of the first, second and third respondents.

[12] Asset Freeze Explanation of Terms, guidance on Security Council resolution 2161 (2014) para1(a), 24 February 2015.

51. As I have stated ([12] above), his conclusions meant that it was not necessary for him to deal with the appellant's submissions about the consequence had there been a breach of the prohibition. Before us, the appellant has maintained its position, arguing that this is a point of law turning on the construction of the Sanctions Order which this court we can determine. The respondents have filed a Respondents' Notice maintaining that, even if the resolutions breached article 10 of the Sanctions Order, they remained valid.

IV. THE APPELLANT'S CRITIQUE OF THE JUDGMENT:

52. The appellant submitted that the judge erred in holding that in making the written resolutions the shareholders of the first three respondents did not breach article 10 of the Sanctions Order and that each of them was lawful and valid.

53. Its argument was essentially the one it had made below which is summarised at [8] and [12] above. Mr Kennelly submitted that the non-exhaustive definition of "funds" in article 2(1) of the Sanctions Order as "financial assets and benefits of every kind" emphasises the breadth of the term. The definition of "funds" includes assets and benefits which cannot easily be traded or turned into cash such as "documents providing evidence of an interest in funds or financial resources" within article 2(1)(g) and some derivative contracts within article 2(1)(c), though he recognised that most derivative contracts are easily traded. The definition of "to deal with" in relation to "funds" uses the terms "use", "allow access to", and "enable use". He argued that these are general terms that capture many activities and they should be given their natural meaning in context particularly in the light of the licensing provision in article 15 enabling the disapplication of the prohibitions. To have to ask, as the judge held was necessary, whether the "use" poses a risk of dissipation of funds or affects the value of the shares or assets dilutes the effectiveness of the prohibition in article 10.

54. Making the resolutions was said to be a "use" of the frozen shares and the benefits attached to them and prohibited by article 10(4)(a)(i) of the Sanctions Order because it was an exercise of rights that enure in the shares. Alternatively, making the resolutions allowed "access to" the assets of the first three respondents, or was a change "that would enable use" of the underlying assets of the first three respondents prohibited by article 10(4)(a)(ii) and (iii) of the Sanctions Order because even where there was no actual access to the frozen funds, preparatory acts fell within article 10(4)(a)(ii) and (iii). Since the resolutions breached these prohibitions, in the absence of a licence under article 15 they were invalid and void *ab initio*, or alternatively unenforceable.

55. Mr Kennelly submitted that the judge's analysis of the purpose of the sanctions regime was incomplete and erroneous. He also submitted that in para. 176 the judge erred in giving "a restrictive or qualified construction" to the terms "deal with", "use", "access to" and "funds" in article 10(4). There were several strands to this second submission apart from that based on the purpose of the sanctions regime.

56. The first of these strands is that the construction adopted by the judge was based on his incorrect view that a licence was not (or might not be) available under article 15 of the Sanctions Order when one would in principle plainly have been available.[13] That, it was said, led him to hold, incorrectly, that *Al-Kishtaini v. Sanshal* [2001] EWCA Civ. 264

[13] For a summary of this submission, see [83] – [84] and [88] below.

and *Bossevain v. Weil* [1950] AC 327 were not analogous. Mr Kennelly submitted that those cases in fact establish that, where a dispensing power is available, the Court should give a statutory prohibition such as that in article 10 its natural meaning. He also stated that the judge's construction was based on an erroneous contrast between "funds" and "economic resources" which the judge relied on to read down the meaning of "funds" and to conclude at para. 176, summarised at [43] above, that the definition of "funds" was limited to "cash" or "cash equivalents".

57. A further strand was that the judge erred in taking into account at para. 176(p) a letter from the Financial Secretary and the absence of complaint by HM Treasury. These were, on the authorities, irrelevant considerations. Mr Kennelly accepted that the judge had placed little weight on the letter[14] but said he should not have relied on it at all. He also criticised the judge for failing to refer to the statements of Mummery and Rix LJJ in *Al- Kishtaini* about the legal irrelevance of the views of the executive to the construction of legislation.

58. The grounds of appeal and the written submissions also maintain that the judge erred in failing to consider the evidence in documents disclosed by the respondents on the last working day before trial. It was stated that these documents (described in the written submissions as "the wrongly suppressed documents") showed that the aim and effect of the resolutions was to allow the LIA and LAP to obtain and exercise control over the frozen assets through the fourth and fifth respondents. Mr Kennelly did not refer to this point when opening the appeal and, in reply, relied on his written submissions.[15]

V. ANALYSIS:

(i) Introduction:

59. The parties differed as to the underlying purposes of the Sanctions Order and the UN Security Council resolutions which it implemented. They both accepted that the ultimate aim was that frozen assets should at a later stage be made available for the people of Libya. But the common ground ended there. The appellant maintained that the purpose of the resolutions and the Order was to ensure that the enjoyment of any benefit, financial or otherwise, accruing from a frozen asset was prevented. Paragraph 19 of resolution 1970 (2011) and the licensing provisions in article 15(2) of the Sanctions Order showed that the purpose was to prevent misuse and that the UN Sanctions Committee approve any use of, allowing access to, or to change that would enable use of frozen "funds" on a case by case basis, including for necessaries such as basic food and medicine. The respondents, however, emphasised that the restrictive measures were protective and precautionary, and not penal. They maintained that the judge was correct to find that the purpose of the sanctions was to freeze the assets to ensure that they were not dissipated or were made less valuable, and not to strip a person of all the rights of ownership of the frozen assets or to remove all means of corporate governance.

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[14] Day 1, p. 68, l 15. Cf para. 176(l) where the judge rejected PIAM's submission that the EU guidance should be given little weight: Day 1 page 55 ll 5-11; Day 2 page 49 ll 11-19, but that guidance does not appear to have been a factor in his analysis and decision.

[15] Appellant's Skeleton Argument, especially paras. 10(5) and 18-22.

60. The parties also differed as to whether the Sanctions Order should be construed broadly or narrowly. For the reasons I have summarised, the appellant submitted that terms in article 10(4), "funds", "to deal with", "to use", to "allow access to" and to make any "change that would enable use" should be given a broad construction and that the judge erred in giving them what he described in para. 176(g) as a restrictive or qualified construction. On the judge's approach and construction, the prohibition in article 10 only applied to the last stage of an act and not to what were described as "preparatory" steps. The respondents emphasised the penal nature of the Sanctions Order. Breach of the prohibition in article 10 was a crime punishable with up to two years imprisonment, and a person should not be penalised except where the relevant legislation did so clearly.

61. Focussing too closely on whether a provision imposing sanctions should be construed broadly or strictly can be distorting in the sense of deflecting attention from the full range of the factors which contribute to the determination of the meaning of a statutory provision. As Sales J (as he then was) observed in *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 at [48], while the principle of strict interpretation of penal legislation, that a person should not be penalised except under clear law is an indicator of great weight, it is one of many indicators of the meaning to be given to a legislative provision and it is capable of being outweighed by other objective indications of legislative intention.

62. In the present context, the judgment of Mummery LJ in *Al-Kishaini* v *Shanshal* [2001] EWCA Civ. 264 is instructive. The case concerned UK subordinate legislation made in 1990 implementing UN sanctions against Iraq and the effect of a dispensing power from the prohibitions. Mummery LJ stated at [35] that, while the court has to bear in mind the penal sanctions for contravening prohibitions in such a provision, it also has to bear in mind that such measures are intended to have far-reaching effects and (at [58]) that their legislative origin in resolutions of the United Nations Security Council in an international emergency embody a very high public interest.

63. In determining the meaning of legislation such as the Sanctions Order, the starting point is therefore the natural and ordinary effect of its language in context including its purpose and in the light of any statutory definitions.[16] Here the purpose of the Order is to implement the relevant United Nations Security Council resolutions and it must be construed so far as is possible compatibly with those resolutions: see Moore-Bick LJ in *Libyan Investment Authority v Maud* [2016] EWCA Civ. 788 at [17]. I also bear in mind the statement, albeit in a different context, in *Bourne (IT) v Norwich Crematorium* [1967] 1WLR 691, at 696 by Stamp J:

> *"English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which one has assigned to them as separate words so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language."*

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[16] See *R v May* [2008] 1 AC 1028 at [48(4)] *per* Lord Bingham.

64. I therefore turn to the words of article 10(4)(a)(i)-(iii) in their context, in particular the Security Council resolutions. The three strands of "deal" relied on by the appellant were dealing by "use", by "allow[ing] access to" and by "mak[ing] any other change that would enable use". The submissions about these three to some extent overlapped, and, although I shall consider each separately, there is also overlap in the analysis of the position. In particular, the discussion of the purpose of the regime, the effect of the licensing power in article 15, and proportionality in the section on dealing by "use" is relevant to the analysis of dealing by "allow[ing] access to" and by "mak[ing] any other change that would enable use".

(ii) Dealing with "funds" by "use":

65. Did the judge err in concluding that voting to pass the resolutions was not dealing with funds, i.e. the shares, by using them? Colloquially it can be said that the owner of shares uses them when exercising the rights vested in it by virtue of the articles of association and the general law even where there is no change in the share itself. Clearly the respondent shareholders were using the rights attached to or derived from their shares but does that amount to "using" the shares within the meaning of the Sanctions Order? Mr Kennelly submitted that it does.

66. He contrasted the unqualified nature of the definition of "use" in article 10(4)(a) with its qualified use in article 10(4)(b) in relation to "economic resources" which provides that the resources be "used to obtain funds, goods or services". He also relied on the absence in article 10(4)(a)(i) of any reference to dealings which cause a "change" to specified characteristics or which has a specified effect whereas articles 10(4)(a)(ii) and (iii) or respectively refer to changes in "volume, amount, location, ownership, possession, character, or [the] destination" and "any other change that would enable use". He submitted that these contrasts showed that where the legislator intended a qualified meaning it did so expressly. He maintained that they are strong reasons for giving the word "use" its ordinary (colloquial) meaning in article 10(4)(a)(i). He also relied on the availability of a dispensing power in the form of a licence under article 15 which would disapply some or all of the prohibitions in article 10 as a reason for giving the word "use" its ordinary meaning.

67. The meaning of "use" for which the appellant argues would include and thus prohibit the exercise of any of the rights attached to a share even where that exercise poses no risk of dissipation of funds. At the hearing the focus was on the appointment and removal of directors, but the resolutions also changed the names of the companies. Mr Kennelly submitted that the identity of the directors could affect the value of shares but his reliance on the broader purpose of preventing "misuse" and the role of the Sanctions Committee showed that his case did not depend on that. He accepted that a change of name would not ordinarily threaten a company or the assets controlled by it but submitted that in this scenario a change of name might well be a threat or something that might ultimately prejudice the funds and which the Sanctions Committee ought to scrutinise. This shows that (leaving out of account at this stage the question of a licence under article 15 disapplying the prohibitions in article 10), as Ms Rose submitted, there would in many cases be complete or virtually complete paralysis of the corporate governance of companies the shares of which are frozen. Article 10 read with article 2

would prohibit the exercise of any of the rights attached to a share even where that exercise poses no risk of dissipation of the funds or a reduction in their value.

68. In the case of activities which have no impact at all on the financial character of funds falling within article 10(4), Ms Rose submitted that the width of the interpretation for which the appellant argued would produce great uncertainty. Courts would have to consider whether moving a document or certificate representing a security from one filing cabinet to another or photocopying a document providing evidence of an interest in funds constitutes "use" for article 10(4)(a)(i). She maintained that on the appellant's argument the answer would appear to be "yes", and, if it was not, Mr Kennelly had identified no limiting principle. Mr Kennelly dismissed the examples relied on by Ms Rose as too insubstantial to qualify but also said that if the move was from a filing cabinet belonging to the Libyan Investment Authority to one belonging to the Gaddafi family it was one apt to be queried or blocked by the Sanctions Committee.

69. Is the interpretation of "use" advanced on behalf of the appellant warranted by the language of article 10(4), the definitions in article 2(1), and the context and purpose of the Sanctions Order and the Security Council resolutions? I address the effect on the construction of the purposes of the Sanctions Order at [79] ff. below and the effect of the prohibitions in article 10 of the provisions of article 15 making provision for a licence disapplying those prohibitions at [83] ff. below.

70. The conclusions I have come to are based on the language, context and object and purpose of article 10 of the Sanctions Order. I have not been assisted by the guidance relied on by the parties. The Al Quaida guidance (see [46] above) addressed a particular and different question. I consider the French and Luxembourg guidance[17] is not legally relevant (or at its highest of doubtful relevance) to the construction of sanctions legislation. I have also not been assisted by the preliminary decision of the Hoge Raad, the Dutch Supreme Court, in *Palladyne International Asset Management BV v Upper Brook (I) Ltd.,* on 18 January 2019. The Hoge Raad did state that it was logical to interpret a provision freezing funds broadly and that it was "plausible" that voting shares and adopting the shareholder resolution was a breach of EU Regulation 204/2011.[18] But these statements were made in what was a preliminary and interlocutory decision, and the court recognised that the validity of the appointment of the fourth and fifth respondents as directors must be determined in proceedings in the Cayman Islands, that is in these proceedings.[19]

71. As to the language of article 10(1) and 10(4) and the definitions in article 2(1), the prohibited activity is to "deal with" and what has to be "used" must qualify as "funds". It is important that sight is not lost of the fact that the prohibited activity is "to deal with" rather than "to control" or "to exercise control". It follows that the "use" must be by dealing rather than by controlling.[20] Moreover, article 2(1) defines "funds" as "financial assets and benefits of every kind" and gives a non-exhaustive list of 8

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[17] Tresor (French Treasury), *Guide de Bonne Conduite Foire aux questions,* 16 June 2016; Ministry of Finance, Luxembourg, *Guidelines relating to implementation of financial restrictive measures (sanctions) against third countries, entities of individuals.*

[18] Paragraphs 3.6.2 – 3.6.3.

[19] Paragraph 3.5.1.

[20] *Re Astec (BSR) plc* [1999] BCC 59, 84-85, relied on by the appellant, states that the right to vote shares is a right of property but is of relevance on "control" by voting and not on whether voting is "dealing".

categories which I have set out at [34] above. The "use" must therefore, in my judgment, also be use as a financial asset or instrument. It follows that not all uses of property or rights qualify.

72. Taking one of the examples canvassed at the hearing, the use of a rolled up $50 banknote as an aid for the inhalation of drugs is a use of the banknote, but not the use of it in a relevant sense for the Sanctions Order. Similarly, while using the shares by the exercise of voting rights to appoint and remove directors is the exercise of control over a company, it is not using the shares as financial assets because the resolutions were not "dealing … in any real sense". That phrase was used in *Libyan Investment Authority v Maud* [2016] EWCA Civ. 788 at [18]. Moore-Bick LJ (with whom Longmore and Macur LJJ agreed) drew a distinction between using a guarantee as a financial asset to raise money, and the exercise of the rights and obligations that arose from the guarantee, in particular the guarantor paying the debt. He stated that "paying the debt is not dealing with the instrument itself in any real sense; it is simply performing the obligation to which it gives rise".

73. What then is "dealing in any real sense"? "Funds" are defined as "financial assets and benefits" and shares are listed as one of the examples of such assets in sub-paragraph (c) of the definition of "funds" as one of the examples of publicly and privately traded securities and debt instruments. In my judgment, the meaning of "use" is also affected by the character of a share as a tradable financial asset and must be construed in the light of that characteristic. Voting to change the name of a company or to appoint or remove directors does not affect that characteristic.

74. Mr Kennelly's submission that the term "funds" includes assets and benefits that cannot readily be traded or turned into cash relies in part on his arguments based on the contrast between article 10(4)(a)(i) and articles 10(4)(a)(ii) and (iii) but faces several difficulties. First, the argument that the judge wrongly excluded financial benefits that are not separate from the underlying asset does not recognise that voting rights and the exercise of such rights are not in themselves a financial benefit or, if they are, why that justifies interpreting "use" to include the use of a right that has no effect on ownership or any other financial aspect of a share. Secondly, as illustrated by his position on derivative contracts, which are within the definition of "funds", in his exchange with Field JA during the hearing, modern financial centres can provide liquidity that renders the items within the definition of "funds" marketable.

75. I also do not consider that the appellant is assisted by the contrast made between article 10(4)(a)(i) and articles 10(4)(a)(ii) and (iii). It is that article 10(4)(a)(i) does not refer to dealings which cause a "change" to specified characteristics or which have a specified effect and articles 10(4)(a)(ii) and (iii) do so refer. Mr Kennelly argued that because there is no reference to "change" or "effect" in article 10(4)(a)(i), "use" is prohibited even where it is not a use in a marketable way or a way which affects value. I stated (at [16] above) that the Sanctions Order and the corresponding United Kingdom statutory instrument have the same wording and that the latter implements EU Regulation 204/2011, and that it is the common ground that for this reason the wording and syntax of article 1(b) of EU Regulation 204/2011 assists in determining the meaning of "use" in article 10(4)(i) of the Cayman Islands Sanctions Order.

76. Article 1(b) of EU Regulation 204/2011 provides that "'freezing of funds' means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the fund to be used…". I accept Ms Rose's submission that the wording and syntax of article 1(b) support the proposition that in article 10(4) of the Sanctions Order all the types of dealing referred to, including "use" in article 10(4)(a)(i) must have some effect of the specified type on the "funds" as financial assets or benefits. The "use" must thus have an effect on the "volume, amount, location, ownership, possession, character, or [the] destination" of the shares. Since the resolutions do not in themselves have such an effect, passing them was not in itself to "use" the shares as a financial instrument within article 10(4)(a)(i). It follows that I reject the submission that the term "funds" includes assets and benefits that cannot readily be traded or turned into cash. If the term "funds" does not include assets and benefits that cannot readily be traded or turned into cash, the criticism of the contrast the judge made between "funds" and "economic resources" falls away.

77. What is the role of the fact that breaches of the prohibitions in article 10 are criminal offences in the determination of the meaning of "dealing" by "use"? The fact that where an asset freeze does prohibit an activity the effect can have devastating consequences is undoubtedly relevant to the determination of whether on its proper construction the legislative language in context and given its purpose it in fact prohibits that activity. This is because of what *Bennion on Statutory Interpretation* states is "the principle … that a person should not be penalised except under clear law": 7th ed., 2017, §27.1. That principle is subject to the qualification in *Bogdanic v Secretary of State for the Home Department* to which I referred at [61] above and must recognise, as Mummery LJ did in *Al-Kishaini* v *Shanshal* [2001] EWCA Civ. 264 that measures imposing sanctions are intended to have far-reaching effects. Where breaching a prohibition is a criminal act, what this means is that, subject to those qualifications, the court should, in *Bennion's* words, "strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful or penalises him or her in a way which was not made clear". In this case, for the reasons I have given, the language used in article 10(4)(a)(i) and article 2(1) itself points against the construction for which the appellant contends and for the construction adopted by the judge and for which the respondents contend. In these circumstances, subject to any guidance from the purpose of the legislation, the principle that a person should not be penalised except under clear law thus supports what the language used indicates.

78. I therefore turn to the purpose of the sanctions regime and the criticism of the judge's analysis of that purpose. I summarised the difference between the parties and the appellant's position that the regime is a wide and proportionate one to protect the funds and prevent misuse at [59] above. The appellant maintained that the purpose of the regime is not only to prevent loss of value to or dissipation of the assets and steps that may lead to dissipation but is also to prevent misuse. Mr Kennelly submitted that the appointment of incompetent directors would obviously threaten the funds and could affect the value of the shares. But he also submitted that, even absent any such threats or effects, because the purpose is not merely to prevent loss of value or dissipation, the Sanctions Committee is entitled to scrutinise who is being put in charge of companies holding substantial Libyan assets. They are entitled to see whether the proposed new

directors are, for example, nominees of one faction or another, who may be themselves opposed to the UN efforts in Libya.

79. I reject this submission and the submission that the judge's analysis of purpose was incomplete and erroneous. In my judgment, it is clear both from the Security Council resolutions and the notices and reports of the UN Sanctions Committee and the Panel of Experts set up by that committee that the asset freeze was designed to ensure that the assets be made available to and for the benefit of the people of Libya and not be made available to or for the benefit of any designated person. In other words, the assets were to be preserved intact and the purpose of the asset freeze is to prevent action which would dissipate them or make them less valuable. It is incidentally the way the appellant had originally presented its case to the judge.

80. The material parts of the resolutions are set out or summarised earlier in this judgment.[21] As to the reports of the Panel of Experts, paragraph 208 of the report dated 17 February 2012 considered that especially because "paragraph 18 of resolution 1970 (2011) makes it clear that frozen assets should at a later stage be made available to, and for the benefit of, the people of Libya", countries "which have frozen assets should ensure the normal level of stewardship in administrating such funds ...". Both the Panel of Experts and the general position of EU law regarding asset freezes is that such measures are not "a means of confiscating the property of individuals in a punitive action"[22] or "intended to penalise any misconduct in which the persons may have engaged, or to deter them by coercion from engaging in such conduct".[23]

81. For these reasons, the purpose of the asset freeze is to preserve the assets intact and to prevent action which would dissipate them or make them less valuable. That purpose is supported by interpreting "use" to include activity which touches or concerns monetary value or generates financial return but to exclude activity which does not. Subject to what impact the licensing provisions in article 15 has on the interpretation of article 10, it is also consistent with the language of article 10(1) and (4), the definitions in article 2(1) and the principle that a person should not be penalised except under clear law.

82. I turn to the licensing provisions in article 15 which, where a licence has been granted, have the effect of disapplying the prohibitions in article 10. The appellant's case for giving the term "use" and the other terms in article 10(4)(a) their ordinary meaning relied heavily on the availability in principle of a licence under article 15(2)(g) and the statements in *Al-Kishtaini v. Sanshal* [2001] EWCA Civ. 264 and *Bossevain v. Weil* [1950] AC 327. In *Bossevain v. Weil* Lord Radcliffe (at 343) stated that

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[21] See [20], [22] and [24] above. The importance of not making assets available to or for the benefit of any designated person is also seen from Sanctions Order, article 15(2)(g)(iii), set out at [36] above.

[22] Report of the Panel of Experts dated 15 February 2014, §§ 243-244.

[23] See the decisions of the EU General Court in *Al Matri v Council*, T-545/13, EU:T:2016:376 (30 June 2016) at [62]. See also [64], [66], [85] and [94] and *Sergiy Klyuyev v Council*, T-731/15, EU:T:2018:90 (21 February 2018) at [107].

> *"when a regulation contains a general dispensing power ... it is very difficult to press to a result any argument for a limited interpretation which is based on the absurdity of its literal construction".*

83. The appellant's case is that the prohibition in the asset freeze and the exceptions to it are to be read together and that the existence of the exception in article 15(2)(g) justifies giving the prohibition its ordinary meaning. It submitted that a licence under article 15(2)(g) is plainly available to permit the first three respondents to appoint and remove directors because those acts fall within two of the purposes referred to in paragraph 16 of Security Council resolution 2009 (2011). Mr Kennelly's primary submission was that, as Libyan government institutions (see para. 18 of resolution 2009 (2011)) the day to day management by the LIA and the LAP of Libyan sovereign funds and assets had the purpose in para. 16 (a)(iv) of "...operating or strengthening institutions of civilian government and civilian public infrastructure." That included changing the directors of a company owned by the LIA or the LAP through which Libyan sovereign wealth is held and managed, as a part of the management of those assets. He also submitted that the LIA and LAP's mandate to purchase foreign securities was generally for the purpose of "facilitating the resumption of banking sector operations, including to support or facilitate international trade with Libya" in para. 16(a)(v).

84. It was also submitted on behalf of the appellant that the judge made two other errors. The first was to state (at para. 176(o)(i)) that article 15 did not in terms cover the management of foreign investments held by the LIA, that its purposes were narrow, and that regarding the resolutions as falling within the purposes in para. 16 was "stretching the language beyond a reasonable understanding of what was intended to be covered". The second was to focus only on the LIA's management of Libyan oil revenues. The appellant's case was that the language of para. 16 captured all legitimate activities of Libyan government institutions such as the LIA and the LAP,

85. It may be putting it too high to say, as the judge did (at para. 176(o)(i)) that the purposes in article 15 were narrow or to place great weight on the fact that the provisions do not expressly cover the management of the corporate vehicles whose shares and assets are frozen. But in my judgment, there are two difficulties with the appellant's submissions.

86. The first difficulty is that the exceptions in article 15(2)(a) – (f) to which a licence "may relate to" expressly concern the release of assets by payment, reimbursement, and satisfaction of judgments, and not with the exercise of other kinds of property rights such as voting the shares. While article 15(2)(g), enabling a licence permitting "access to funds" for the purposes in para. 16 is not expressly limited to the release of funds, it is also not obviously concerned with the exercise of property rights such as voting. Adapting the language of Stamp J in *Bourne (IT) v Norwich Crematorium* set out at [63] above, statutory language derives its colour and meaning from the language that surrounds it. Interpreting article 15(2)(g) in its context, in particular the remainder of article 15(2), I agree with the judge. The construction for which the appellant contends is unwarranted and illegitimate because it stretches the language of article 15(2)(g) in a way that is beyond a reasonable understanding of what was intended to be covered.

87. The second difficulty with the appellant's submissions on article 15 is a more technical one. The terms and definitions of "deals", "to deal with" and "funds" were in the

Sanctions Order as originally enacted in April 2011. But at that time the provision for an exception to the prohibition was the much narrower one in para. 19 of Security Council resolution 1970 (2011) summarised at [23] above. The broader licensing exception in article 15(2)(g) reflecting para. 16 of Security Council resolution 2009 (2011) adopted in September 2011 was introduced in November 2011 by the Sanctions Amendment Order SI 2011 No. 2717. Can that later amendment be taken into account when determining the scope of the prohibitions in articles 10(1) and 10(4)?

88. Mr Kennelly submitted that the principle of reading the prohibitions in the asset freeze and the exceptions to it together when construing the terms of the prohibitions applies in this situation. He relied on the statement in *Bennion on Statutory Interpretation* (7th ed., 2017, §6.7) that:

> *"[w]here an Act makes textual amendments to an earlier Act the intention is usually to produce a revised text that may be construed as a whole".*

Bennion also states that the choice of legislating by making textual amendments:

> *"is a strong indication that the revised text of the amended Act is intended to be construed as a whole for the future".*

Mr Kennelly, however, accepted that, when dealing with the effect of an amendment on words that have not been amended, such as the words in article 10(1) and (4), in §6.7 of *Bennion* it is also stated:

> *"the original wording may ... be used as an aid to interpreting the meaning of words that are unaltered"*

and that

> *"there is a line of authorities to the effect that the amendment of part of an Act does not affect the construction of the remainder, unless the contrary intention appears".*

That then is *Bennion's* view of the default position for the construction of the unaltered words unless there is a positive reason to the contrary.

89. One of the authorities cited in *Bennion* is the decision of the House of Lords in *Boss Holdings Ltd. v Grosvenor West End Properties* [2008] UKHL 5, 1 WLR 289. Amendments to the Leasehold Reform Act 1967 which gave tenants of leasehold houses the right to acquire the freehold extended its scope, removed the original requirement in section 1(1) that the tenant had to occupy the house as his residence, but left the definition of "house" in section 2(1) unchanged. Lord Neuberger considered that in construing the meaning of "house", assistance could be obtained from the residence requirement originally contained in section 1(1). He stated at [23] that:

"The legislature cannot have intended the meaning of a sub-section to change as a result of amendments to other provisions of the same statute, when no amendments were made to that sub-section, unless, of course, the effect of one of the amendments was, for instance, to change the definition of an expression used in the sub-section".

90. Mr Kennelly argued that in this case the contrary intention does appear and the amendment in article 15 affects the construction of the prohibition in article 10. He submitted that this is because it is well established from *Al-Kishtaini v. Sanshal* and *Bossevain v. Weil* (on which see [56] and [82] above) that prohibitions and exceptions are to be read together in construing the legitimacy of a prohibition and in giving it a proportionate construction. I reject the submission that in this case the contrary intention does appear. If accepted, it would reverse the default position as established by the authorities and set out in *Bennion*. It would mean that the effect of the amended provision would affect the meaning of the unaltered provision unless the contrary intention appeared rather than vice versa. In any event, I consider that what I said at [86] above in relation to the first difficulty, the fact that all the other exceptions in article 15(2) concern the release of assets by payment, reimbursement, and satisfaction of judgments and not the exercise of other property rights, is relevant here too. In my judgment that indicates the licensing provisions in article 15 were not intended to affect the meaning of unaltered provisions in article 10 setting out the prohibition and defining the key concepts used.

91. Ms Rose additionally relied on the fact that the prohibitions and definitions in article 10 are also to be found in other sanctions regimes which contain narrower licensing exceptions.[24] She argued that if the appellant's broad interpretation is adopted it would apply to the prohibitions in those regimes but without any possibility of getting a licence to permit any corporate governance. I reject this submission. Since a provision has to be interpreted in its context, it does not follow that the wide interpretation of the prohibition would be given to a sanctions regime with narrower exceptions, although I recognise the complexity that can result if the same terms in different sanctions regimes are interpreted differently.

92. Finally, because where an asset freeze does prohibit an activity the effect can have devastating consequences, the principle of proportionality is also relevant in this context. For a recent example in the context of sanctions against an Iranian bank, see *Bank Mellat v HM Treasury No 2* [2013] UKSC 39, [2014] AC 700. Mr Kennelly submitted that the terms of EU Regulation 204/2011 show where the proportionality balance has been struck, and just how wide a prohibition is permitted in order to ensure that there is no risk to the frozen assets. It includes entities controlled by or associated with designated persons and the need for authorisation for the release of funds for "basic needs" and for "fees or service charges for ... maintenance of frozen funds". Those examples, however, concern the release of the assets themselves rather than the exercise of the rights of the owner of the assets and corporate governance discussed above.

[24] Her example was the Egypt (Restrictive Measures) (Overseas Territories) Order 2011 SI No. 1679.

93. For the reasons given above, I have concluded that the interpretation of "use" and dealing by use advanced on behalf of the appellant is not warranted by the language of article 10(4), the definitions in article 2(1), the licensing provisions in article 15, and the context and purpose of the Sanctions Order and the Security Council resolutions. Similar reasons apply to the assessment of proportionality. I have also concluded that it would not be proportionate to the aims of the Libyan sanctions regime to construe the prohibition as prohibiting the exercise of any rights attaching to share-ownership so as to prevent stewardship of the shares and underlying assets which does not dissipate or affect their value or financial character of the shares and assets and is incapable of doing so.

94. I turn to the appellant's alternative arguments, that the resolutions "allow[ed] access to" and additionally or alternatively "ma[de] [an]other change that would enable use" of the frozen shares or the investments held by the first three respondents.

(iii) Dealing by allowing "access to" funds:

95. The appellant's case on "allowing access to" the assets is that this includes preparatory steps even where actual access has not taken place and there has not yet been any actual effect on the assets themselves or their value. Mr Kennelly argued that the first three respondents were designated persons which moved their representatives, the fourth and fifth respondents, closer to the assets by passing the resolutions. The fact that the assets were held by a third party did not preclude this. It was accepted that the custodians in this case, Deutsche Bank AG and State Street Bank and Trust, were responsible and would not release funds to unlicensed persons. But not all third parties with the power to release funds or not are responsible. Accordingly, the appellant maintained that the change of directors should be scrutinised by the Sanctions Committee even if the designated person could not dissipate the assets immediately. It was also submitted that construing the prohibition to require actual access would make everything depend on what the third party might do in the future and make it difficult to assess in advance if a transaction breached the prohibition.

96. Mr Kennelly also relied on his written submission that the Judge failed to address evidence disclosed very shortly before the trial (as to which see [58] above) which he argued showed that the resolutions had the effect of allowing the LIA and the LAP to obtain and exercise control over the frozen assets via the fourth and fifth respondents. For the reasons in the following paragraphs, I agree with the judge's conclusions and reject the appellant's submissions.

97. First, as the judge stated at para 177(c), "access" in article 10(4)(a)(i) appears with the terms "use", "alter", "move" and "transfer", terms which strongly indicate that like them it only covers activity which has an effect on the funds.

98. Secondly, article 10 does not prohibit or penalise preparatory steps. The Sanctions Order deals with such steps and conspiracy in article 13. That provision prohibits and penalises knowing participation in activities the object of which is to circumvent a prohibition in article 10 or to facilitate the commission of an offence under article 10. I accept Ms Rose's submission that the existence of the offence under article 13 is a strong pointer against giving "access to" in article 10 a broad meaning to include potential access, the risk of access, preparatory acts, or coming closer to the assets. In

substance what the appellant is complaining of in this case is that the resolutions facilitated access, a matter dealt with in article 13. On the facts of this case, the appellant's argument on this point is particularly unattractive. This is because, at trial the appellant alleged breach of article 13, but after considering extensive written and oral evidence and resolving many complex factual issues, the judge rejected that allegation. He held (see [10] above) that the intention of the respondents was to comply at all times with the sanctions regime, and there is no appeal against that finding.

99. Thirdly, the underlying assets were in the hands of custodians who were subject to strict contractual and regulatory obligations requiring them to refuse "access" to or "use" of the frozen assets to those without the appropriate licences and who it had been found would only give access to a person with a licence. There was no evidence before the judge that the custodians would not act in compliance with those obligations.

100. Fourthly, it is this part of the appellant's case that particularly elides the concepts of "allow access to" and "control" to which I have referred. As stated at [70] – [71] above, the Sanctions Order does not prohibit control. The control exercised by the respondents would prevent a third party dissipating or using the frozen assets but does not in itself allow them to do so or give them "access to" those assets. As to the evidence characterised by the appellant as the "wrongly suppressed documents", the judge considered many of the 140 emails and documents at paras. 59 to 126 of his judgment. More fundamentally, all that those documents showed was an intention to put the Libyan investors in control of the first three respondents.

101. Finally, the appellant's submissions on this are inconsistent with my conclusion as to the purposes of the Security Council resolutions and the Sanctions Order. This is because where what has happened does not give actual access to funds or investments there is no risk of dissipating them or making them less valuable.

102. Both parties relied on and sought support from the example of a person being given a debit card for a frozen bank account as they had before the judge: see [49] above. Although it provides an everyday example, I do not consider that it takes the analysis very far because it cannot provide the answer to the question whether preparatory acts constitute "access to". But it does provide an explanation for the answer reached. Merely providing a person with a card and a PIN does not allow access to, or enable use of, the money in the frozen bank account. The bank has to authorise its use, which it would not if the account is frozen and the cardholder does not have the licence required. Possessing a debit card does not allow access if it can only be used where the holder has the licence required. If, when the card is used, money is released to a person who does not have a licence, the bank would have allowed access or enabled access to the frozen funds and thus breached the sanctions. The person who used the card would also have breached the sanctions. It would, however, have done so by "allowing access" to the funds but by obtaining access which is a change that would "enable" "use" of the funds within article 10(4)(a)(iii), to which I now turn.

(iv) Dealing by another change that "would enable use" of "funds":

103. The last limb of the appellant's case was that the resolutions "ma[de] [an]other change that would enable use" of the frozen shares or the investments held by the first three respondents. The arguments it relied on were very similar to those relied on in relation to

"allow access to"; that "enable" should be given its ordinary meaning, includes steps that were prior to actual use, and must be a change not caught by article 10(4)(a)(i) and I reject them for the reasons given at [97] – [101]. The appellant submitted that the judge erred in para. 177(f) in stating that the change "must be a change to the *funds*" rather than to changes that would enable use, but only referred to part of the sentence relied on. With the words that were omitted, what the judge stated was that:

> "... the change referred to must be a change to the *funds* whose use will be enabled as a result of the change".

104. There is no error in that statement. In support of its submission the appellant might have deployed the next and final sentence of the sub-paragraph. That stated that "in the present there has been no change to the assets of the [first three respondents]". But it is clear from the sentence I have set out above that the judge did not fall into error.

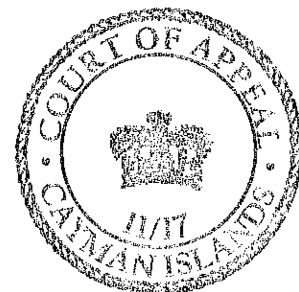
(v) Conclusion:

105. The passing of the resolutions did not dissipate or affect the value or character of the shares as financial assets or the value of the underlying assets of the respondent companies in any way. I have concluded that the exercise of the voting rights in the shareholder resolutions were not in themselves a dealing with the funds and did not in themselves allow access to or make a change that "would enable use" of the assets of the companies and therefore that the making of the resolutions was not prohibited by article 10(1).

106. Accordingly, the question of the consequences of a breach of the prohibitions in the Sanctions Order does not arise for decision. It is therefore not necessary to deal with how the principles governing this question which were radically reformulated by the United Kingdom Supreme Court in *Patel v Mirza* [2017] AC 467 by the introduction of a structured, purposive and policy-based approach would apply to such a breach.

107. For these reasons, the appeal should be dismissed.

The Hon Dennis Morrison JA



108. I agree.

The Hon Sir Richard Field JA

109. I also agree.