Neutral Citation Number: [2021] EWHC 2907 (Comm)

Case No: **LM-2019-00021**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 November 2021

Before :
MR ANDREW HOCHHAUSER QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

SETHIA LONDON LIMITED

Claimant

- and -
(1) AJAY SETHI
(2) DEEPNA SETHI

Defendants

- -

WILLIAM EDWARDS (instructed by **CND Parker**) for the **Claimant**
DUNCAN MACPHERSON (instructed by **Zaiwalla & Co**) for the **Defendants**

- -

APPROVED JUDGMENT
ON THE OUTSTANDING ISSUES
STATED IN PARAGRAPH 1 OF THE ORDER DATED 22 FEBRUARY 2021

I direct that pursuant to CPR PD 29A para 6.1 no official shorthand note shall be taken of this Judgement and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 4 November 2021 at 10.30am.

MR ANDREW HOCHHAUSER QC

Introduction

1. I handed down my judgment in this matter (the "**Judgment**") on 22 February 2021 at a hearing (the "**22 February Hearing**") at which the form of order was finalised (the "**Order**") and consequential matters were considered. Save as otherwise indicated, I will use the same abbreviations as those contained in the Judgment. Undertakings were given by SLL and Mr Sethia, in a personal capacity, as the controller of SLL, to guard against double recovery of the sums due under the Loan Agreement, given the Dubai Judgment obtained on a cheque (the "**Cheque**") provided by Mr Sethi to NSIL, another company controlled by SLL. At paragraph 94(3) of the Judgment, I found that NSIL was to be regarded as receiving the Cheque as agent for SLL. By the 21 August 2020 Letter, SLL's solicitors accepted that credit should be given for any sums recovered pursuant to the Orders of the Courts of Dubai and/or the United Arab Emirates (the "**UAE**") in relation to the Cheque. I approved the Order on 26 February 2021, and it was sealed on 1 March 2021.

2. There was one issue that was not resolved, on which the parties asked to submit further written submissions. This is recorded at paragraph 1 of the Order as follows:

> *"The issues (a) whether the Claimant is entitled to be indemnified by the Defendants against the costs incurred in the UAE proceedings and if so in what amount and/or whether it is entitled to appropriate payments made by, or attributable to, the Defendants against the costs incurred in the UAE proceedings and (b) for what final sum (including, for the avoidance of doubt, any further contractual interest due) the Claimant is entitled to judgment be decided pursuant to the directions given in paragraph 2 below. Interest on the final sum for which judgment is entered shall be payable at the rate provided by clause 7 of the Loan Agreement dated 31 August 2017."*

3. It was agreed that I should deal with this matter on the basis of written submissions. Paragraph 2 of the Order provided for the service of short written submissions by the Claimant in relation to the issues in paragraph 1 of the Order: on behalf of SLL by 6pm on Wednesday, 24 February 2021 and on behalf of the Defendants by 9am on Friday 26 February 2021. These were duly served, and shortly thereafter on the same day, Mr Edwards, on behalf of SLL, sought permission to serve a short witness statement to deal with "*a number of factual points*" made by the Defendants in their submissions. I granted permission to serve such a statement, provided it was limited to addressing factual assertions in the Defendants' submissions, which had not already been addressed

in SLL's evidence already served. The third witness statement of Abhijit Khandeparkar ("**AK3**") was duly served later that day. I further permitted the Defendants to serve responsive evidence in response, if so advised, by 10am on Monday 1 March 2021. In the event, the Defendants indicated that they did not wish to serve any evidence, but by an email timed at 15:25 on 26 February 2021, Mr Macpherson, on behalf of the Defendants, objected to AK3 on the grounds that it was not responsive, but sought to fill in evidential gaps. He indicated that the Defendants did not wish to serve any evidence in reply. He concluded: "*This issue is not suitable for determination by the Court at this stage. The court should refuse to allow SLL to deduct the Dubai Costs from the 30.08.20 Payment for the purpose of calculating the English Judgment sum*."

4. I intend to have regard to AK3 *de bene esse* and will deal with the Defendants' objection to it in due course. At paragraph 9 of the Defendants' submissions, Mr Mcpherson stated that the Defendants had not had time to obtain evidence on Dubai law. I asked whether the Defendants were seeking more time in order to file such evidence, otherwise I would proceed on the basis that Dubai law was the same as English law. After requesting time to consider the matter, they indicated that they wished to adduce such evidence. There then followed an exchange of emails between me and Counsel in relation to the manner in which the questions identified in paragraph 1(2) of the Order should be determined. On 26 March 2021, I gave directions in the following terms:

> "*1. I grant permission to the Defendants by 5pm on 30 March 2021 to file with the Court and to serve on the Claimant expert evidence on the issue of whether Dubai law permits a claimant to deduct the legal costs of pursuing, obtaining and enforcing judgment on a security cheque from a payment toward that judgment before applying the remainder to the judgment debt.*
>
> *2. The Claimants have permission to file and serve evidence in response, and to respond to the points made in paragraphs 7-9 of the Defendants' skeleton dated 25 February 2021, if so advised, by 5pm on 6 April 2021.*
>
> *3. I refuse the application by the Defendants further to extend the time for permission to appeal the Order, relating to the judgment handed down on 22 February, already extended until 30 March 2021.*
>
> *4. I will determine the matter on the basis of the parties' written submissions and the evidence submitted.*
>
> *5. Costs reserved."*

5. Pursuant to those directions, the Defendants served the first witness statement of Rohit Ralleigh ("**RR1**"), a solicitor at Zaiwalla & Co, the Defendants' solicitors, dated

30 March 2021 exhibited to which was a letter of the same date from Zayed Al Shamsi ("**Mr Al Shamsi**"), a lawyer in Zayed Al Shamsi Advocates and Legal Consultants, the Dubai firm representing Mr Sethi in the Dubai proceedings, together with a number of attachments, addressing the issue set out in paragraph 1 of my Order. I shall turn to his evidence in due course.

6. In essence, Mr Al Shamsi stated:

> *"The recovery of legal costs is governed by Articles (55) to (57) of the Executive Regulations of the UAE Federal Civil Procedure Law No. (l l) of I 992 as amended by the Cabinet Resolution (No. 57) of 2018… These regulations broadly provide for costs in legal proceedings in the UAE to be determined finally at the stage of judgment, and for limited expenses to be charged to the losing party, subject always to the court's discretion to make a different order.*
>
> *ln practice, when the court decides the legal fees paid by losing party, it does not assess such costs based on what the client actually incurred, because this is subject to the agreement between the lawyer and his/her client and may reach unreasonable levels. Rather, the court tends to rule for a very small amount ranging between 500 dirhams and 2000 dirhams. This is the convention in most countries in the UAE, including Dubai.*
>
> *The successful litigant cannot collect these sums before the judgment is executed and the adjudicated debt is obtained, whereupon the costs ordered are added to the judgment debt, including the attorney's fees.*
>
> *There is no equivalent principle of UAE law of the type referred to in the Claimant's written submissions at paragraphs 3-8, nor any equivalent concept of what under English law is called an "equitable charge". Furthermore. NS Investments Limited/Sethia London Limited may not, as suggested in paragraph 2 of the Claimant's written submissions. appropriated the UAE costs to the debt, because this would be in contravention of Article 55 and the order made by the UAE Execution Court which has assessed the recoverable costs of the proceedings in Dubai between NS Investments Limited and Mr Jay Sethi."*

7. On 7 April 2021 SLL indicated that it did not wish to serve any responsive expert evidence on the grounds that it was irrelevant, but instead served further written submissions.

8. I will first deal with the background and then turn to the parties' respective submissions on the issues, taking first the issue of whether SLL is entitled to deduct the costs of the Dubai proceedings (the "**UAE Costs**"). Then, if necessary, I will consider the issue of quantification.

The Background

9. Clause 10.2 of the Loan Agreement states that: "*The Borrower shall pay to the Lender the amount of all reasonable costs and expenses (including legal, printing and out-of-pocket expenses) incurred by the Lender in connection with enforcing, preserving any rights under, or monitoring the provisions of the Finance Documents* (which definition included the Loan Agreement and the Guarantee of Mrs Sethi)."

10. At the 22 February Hearing, when assessing the interim payment on account of costs at paragraph 4 of the Order, I found that clause 10.2 amounted to a contractual indemnity and came within the provisions of CPR 44.5(1), which provides:

> *"Subject to paragraphs (2) and (3), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –*
>
> *(a) have been reasonably incurred;*
>
> *(b) are reasonable in amount and the court will assess them accordingly."*

11. I found that on a proper construction of the wording of clause 10.2, the presumptions in CPR 44.5(1), although rebuttable by reason of sub-paragraph (2), had not been rebutted and sub-paragraph (3) was inapplicable. This is reflected in paragraph 4 of the Order.

12. On 30 August 2020, Mr Sethi paid US$215,000 in reduction of the sums outstanding on the Loan (the "**Payment**"). SLL, however, contend that they are only obliged to give credit for the sum of US$106,000, on the grounds that it is entitled to apply part of that sum against the legal costs, incurred in the Dubai proceedings, which are not recoverable in that jurisdiction, namely the equivalent of US$109,000.

13. The matter was addressed in the Order in that the sum in paragraph 1(1) thereof is the minimum to which the Claimant is entitled and leaves to the costs claimed by it in the Dubai proceedings, to which it claims it is entitled, which turns on the determination of the issues identified in paragraph 2 of the Order.

SLL's submissions on its entitlement to deduct the legal costs incurred in the UAE proceedings from the Payment

14. SLL relies upon two grounds for making the deduction in relation to the costs incurred. First, it maintains that this is the application of the general law where security is given for the debt. Secondly, in the alternative, Mr Edwards, on behalf of SLL, relies upon the contractual indemnity for costs contained in clause 10.2, coupled with an asserted entitlement to appropriate payments in that regard.

15. Taking the first ground, SLL submits that given my finding that NSIL was to be regarded as receiving the Cheque as agent for SLL, it has an entitlement to be indemnified against its expenses incurred in the execution of the agency: see *Bowstead & Reynolds on Agency* (22nd ed), para 7-057.

16. The Cheque stood as security for the debt owed under the Loan Agreement. As a matter of analysis, that was an equitable charge: See *Fisher & Lightwood's Law of Mortgage* (19 ed), para 6.4.

17. As a principle of the general law, a chargee is entitled to reimbursement out of the charged property for his costs. This principle is most commonly seen in play in the context of mortgaged real property. It was conveniently summarised by Nourse LJ in *Parker-Tweedale v Dunbar Bank plc* (No 2) [1990] 2 All ER 588, at 591:

> "*A mortgagee is allowed to reimburse himself out of the mortgaged property for all costs, charges and expenses reasonably and properly incurred in enforcing or preserving his security. Often the process of enforcement or preservation makes it necessary for him to take or defend proceedings. In regard to such proceedings three propositions may be stated. (1) The mortgagee's costs reasonably and properly incurred, of proceedings between himself and the mortgagor or his surety are allowable. The classical examples are proceedings for payment, sale, foreclosure or redemption, but nowadays the most common are those for possession of the mortgaged property preliminary to an exercise of the mortgagee's statutory power of sale out of court…*"'

The consequence of the mortgagee so reimbursing himself is that it is only the sum in his hands less the relevant costs, etc, that falls to be applied against the secured debt.

18. The rule applies not merely to mortgages, but to equitable mortgages and charges:

> *"The principle that a mortgagee can recover from the mortgaged property his costs, charges and expenses properly incurred applies equally in relation to equitable mortgages, including mortgages by deposit (whether with or without a memorandum of deposit) and charges."* [See *Fisher & Lightwood's Law of Mortgage* (15th ed), para 555.7].

19. In the present case, the Payment represented the partial fruits of the security, and in accordance with this well-settled general principle, SLL was entitled to reimburse itself in respect of its costs, before crediting the balance against the loan debt.

20. The second ground relies upon SLL's contractual indemnity for its costs under clause 10.2. That indemnity extended to the costs of the UAE proceedings, incurred by its agent, NSIL. The general principle is that where there are several separate debts and the debtor does not when making payment appropriate the payment, the creditor may do so: see *Chitty on Contracts* (33rd ed), paras 21-061 to 21-069. Here, Mr Sethi made no appropriation. SLL was therefore free to appropriate the Payment first against the liability under the costs indemnity and secondly against the loan debt.

21. The expert evidence of Mr Al Shamsi (which was unchallenged) is irrelevant because SLL is owed a debt which is governed by English law and has the benefit of an indemnity governed by English law. In such circumstances, questions of foreign law are irrelevant to the performance and discharge of such obligations. It is to be noted that previously the Defendants argued the case entirely by reference to cheques under English law. They are now taking a different stance.

22. Mr Edwards expanded this point in his further written submissions, which I shall briefly summarise. In relation to his first point he submits, the Loan Agreement, giving rise to the debt, was governed by English law. The Cheque was only ever given as security for that debt. It is therefore necessary to distinguish between (a) the agreement to create that security and (b) the Cheque itself.

23. The question what law governs (a) is to be answered by applying the Rome Regulation regime. Under that regime, it is clear that a previous course of dealing between the parties may lead to the conclusion that the parties impliedly chose the same law as they had previously (see *Dicey, Morris & Collins on the Conflict of Laws*, para 32-059 to 32-061).

24. In the present case:

    (1) The Loan Agreement provides for English law to govern in wide terms (clause 24).

    (2) There is nothing to show that the parties intended the agreement to give security to be governed by a law other than English law – and for it to be governed by a different law would lead to obviously inconvenient results.

    (3) Thus, the parties impliedly chose English law. Even if they did not, the "closely connected" test in Art 4(3) and (4) of the Rome Regulation leads to the application of English law.

25. The Cheque itself is different: cheques are excluded from the Rome Regulation (Art 2(d)) and the rules remain those in the Bills of Exchange Act 1882. It is common ground that the Cheque itself is not governed by English law. The fact that a foreign law governs the Cheque (or that a foreign court has given judgment on it), however, does not alter the fact that it only ever stood as security for the debt, as does the judgment on the Cheque – and that the creation of the security is governed by English law.

26. This distinction – between an agreement to create security and the security itself – is well established and rests on the *in personam* jurisdiction in respect of property abroad. He referred to a number of authorities in support for the proposition that English law will be applied in order to enforce and give effect to foreign security: *Lord Cranstown v Johnston* (1796) 3 Ves Jun 170, (1796) 30 ER 952, at 958-959 per Sir Richard Arden MR; *Re Courtney, ex p Pollard* (1840) Mont & Ch 239, [1835-'42] All ER Rep 415 and *British South Africa Co v de Beers Consolidated Mines Ltd* [1910] Ch 502, per Sir Herbert Cozens-Hardy MR at 514, Farwell LJ at 517-518 and Kennedy LJ at 524 (although the House of Lords reached a different decision on the case, he submits it did not affect that aspect of the judgment).

27. Accordingly, the relationship is that of equitable charge, and the view a foreign law may take of the matter is irrelevant. It follows that SLL is both subject to the obligations, and entitled to the benefits, resulting from that position and is therefore entitled to "*recover from the mortgaged property [its] costs, charges and expenses properly incurred*".

28. In relation to the second point, both relevant obligations – the loan principal plus interest and the contractual indemnity – are governed solely by English law. Questions of performance and discharge are obviously for the governing law (Rome Regulation,

Art 12(1)). For example, in *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm) (which involved an Indonesian moratorium on payments), Teare J said at [12]:

> "*The comment in* Dicey *at para.31-093 states that there is no doubt that discharge under a foreign bankruptcy law, like the discharge of contracts generally, is governed by the law applicable to the contract. There is indeed no doubt that the authorities state this*."

29. Thus, the only law relevant to the questions of performance, discharge and appropriation of payments in respect of both relevant aspects (loan debt and interest and contractual indemnity) is English law – UAE law has no bearing at all. Therefore, it is simply irrelevant to enquire into the approach UAE law might take to any of these points. SLL is therefore entitled to appropriate the Payment first against the liability under the costs indemnity and second against the loan debt. The fact that a foreign law might not permit that is irrelevant.

The Defendants' submissions in opposition to SLL's entitlement to deduct the legal costs incurred in the UAE proceedings from the Payment

30. The Defendants argue that prior to the deduction being made, SLL gave no indication that it intended to deduct the costs of the UAE proceedings from payments made by the Defendants for the purpose of calculating the sums due under this judgment. SLL has ambushed the Defendants with this issue.

31. The Court should dismiss SLL's claim to deduct the costs of the UAE proceedings from the Payment for the purpose of calculating the sum due under this judgment. SLL has not produced evidence to support a claim for an indemnity. Dubai law applies and does not permit the deduction of costs from a guarantee charge. The contractual indemnity does not apply. Even if it does, SLL has not made a demand. SLL cannot appropriate the Payment to the Dubai Costs. SLL is trying to go behind its undertaking given to the Court, contained in part II of the Appendix to the Order.

32. Mr Sethi has made four payments in respect of the Dubai Judgment to the Dubai Execution Court, pursuant to the payment plan directed by that court, to which plan I referred in paragraph 31 of the Judgment. NSIL has obtained payment from the Dubai Execution Court. SLL seeks to appropriate part of the first of these payments (for 790,000 AED, or 10% of the Cheque) for payment of NSIL's costs of the Dubai proceedings. To do so would run contrary to the public policy of Dubai, which according

to the expert evidence of Mr Al Shamsi permits the recovery of those costs only to a very limited amount indeed and requires the payments to the Execution Court to be appropriated to the Dubai Judgment debt.

The position of NSIL as agent for SLL

33. The Court found that NSIL acted as agent for SLL in respect of the Cheque. Mr Macpherson, on behalf of the Defendants, agrees under English law, NSIL is entitled to an indemnity from SLL for costs NSIL incurred in obtaining judgment on the Cheque.

34. In order, however, for the Court to determine whether SLL can rely on this indemnity, SLL must show that: (a) NSIL has incurred costs in obtaining judgment on the Cheque; and (b) NSIL has asked SLL for an indemnity for those costs.

35. This is not just a technical point. Mr Sethi may have paid the UAE Costs personally or arranged for another company to do so. If NSIL has paid the UAE Costs, Mr Sethi may have decided that SLL need not indemnify NSIL. If so, the UAE Costs cannot be deducted from the Judgment debt.

AK3

36. At this point it is appropriate to consider AK3. Having read it, I see nothing in the objection made on behalf of the Defendants. It is limited to addressing factual assertions in the Defendants' submissions. The fact that it may provide evidence in answer to them does not detract from that point. The Defendants had the opportunity to serve reply evidence, if they wished to challenge or supplement what Mr Khandeparkar said in AK3, but they have chosen not to do so. In my judgment it is appropriate to take AK3 into account when determining this application and I do so. In it Mr Khandeparkar, a director and solicitor of CND Parker, SLL's solicitors, makes two points:

    (1) On instructions, he states that NSIL did ask the Claimant to indemnify it in respect of the costs in what he refers to as "*the UAE proceedings*", which I have referred to earlier as the Dubai proceedings, and the Claimant agreed to do so. It is to be noted that he supplies no documentary evidence of this, nor does he state the basis of his instructions as who, how and when those instructions were given. At paragraph 3 of AK3, "*If there is an issue in that regard, I respectfully suggest that it can be most conveniently dealt with by the costs judge as part of the assessment.*"

(2) Again, on instructions, he states that "*substantial costs were in fact incurred in the UAE proceedings*", and in relation to that exhibits a number of copies of a number of invoices or payment advices in respect of the UAE proceedings. Once again, he invites that quantification to be referred to a cost judge for resolution.

The position of an equitable charge

37. Mr Macpherson accepts (a) the Cheque was a security cheque; (b) this amounted to an equitable charge in English law and (c) under English law that an equitable charge can recover from charged property his costs. He submits, however, that English law does not apply. The agreement to provide the Cheque as a guarantee cheque was subject to Dubai law: Mr Sethi and Mr Sethia were in Dubai; NSIL is a UAE company; the Cheque was in AED drawn on a Dubai bank; the Cheque was security for the transfer of Dubai property as well as for the SLL debt; clause 9 of the draft Side Agreement stated that Dubai law applied (see paragraph 17 of the Judgment).

38. He relies on the expert evidence of Mr Al Shamsi, referred to at paragraph 6 above, as to the small amount of costs recoverable in the UAE in such actions and that is the extent of any entitlement on the part of NSIL, which should have been sought when obtaining judgment.

Discharge of a contractual debt and apportionment

39. SLL has a contractual indemnity against Mr Sethi under clause 10.2 of the Loan Agreement for its costs of "*enforcing ... the Finance Documents*." The Finance Documents are the Loan Agreement, "*the Security Document, and any other document designated as such by the borrower and the lender*". The Security Document is defined in the Loan Agreement as Mrs Sethi's personal guarantee.

40. Mr Macpherson argues that the Cheque was not a Finance Document, nor had it been designated as such by either the borrower or the lender. The Third Amendment was never signed. The claim on the Cheque in Dubai did not constitute enforcement of the Loan Agreement or any other Finance Document. The contractual indemnity does not apply.

41. Mr Macpherson submits that Clause 10.2 provides that the indemnity is payable on demand. SLL has never made a demand on the Defendants to indemnify it for the UAE

Costs. The full amount of US$215,000 is to be deducted from sum due to SLL to calculate the English Judgment debt.

42. The Defendants contend SLL was not entitled to appropriate any of the Payment to any debt under the indemnity. Mr Sethi paid the money to the Dubai Execution Court for the purpose of settling the Dubai Judgment on the Cheque. He had appropriated the Payment for this purpose.

The undertaking given to the Court

43. The Judgment records SLL's undertaking (the "**Undertaking**") at [43]. It provides that SLL will credit all Recoveries against the English Judgment. "Recoveries" are defined to mean "*any recoveries (less the costs and expenses of any enforcement action) made pursuant to orders of the Dubai Court and/or the United Arab Emirates in respect of the Cheque*".

44. Mr Macpherson submits the UAE Costs are costs of the actions in Dubai and the UAE, not the costs of enforcement. The Judgment was based on the Undertaking. SLL should not be permitted to go behind the Undertaking by seeking to deduct the UAE Costs, and credit should be given for the full amount of the Payment.

The issues are too complicated to determine now

45. The secondary argument raised on behalf of the Defendants is that the Court should refuse to decide whether SLL is entitled to be indemnified on the grounds that there is not enough evidence, there are too many issues, and there is insufficient time for the Court to determine them.

Discussion and conclusion

46. I do not accept that the issues are too complicated to determine now. I have reached the firm conclusion that the full amount of US$215,000 is to be deducted from sum due to SLL when calculating the outstanding English Judgment debt.

47. I do so for the following reasons:

    (1) Whilst I accept SLL's submissions that, in the light of the authorities Mr Edwards relies upon, English law, and not UAE law, is the applicable law when having regard to consequences of the provision of the Cheque as security for the debt. Thus: (a) the Cheque was a security cheque; (b) this amounted to an equitable

charge in English law and (c) under English law SLL can recover from charged property its costs reasonably and properly incurred. In principle, therefore, SLL is therefore entitled to recover from the Defendants such of NSIL's costs that it has agreed to pay in the Dubai proceedings, and which have been reasonably and properly incurred. That, however, is not the end of the matter;

(2) I accept Mr Macpherson's submission that the Defendants were ambushed with this issue. Prior to the deduction being made, SLL gave no indication that it intended to deduct the costs of the UAE proceedings from payments made by the Defendants for the purpose of calculating the sums due under this judgment. Having made four payments pursuant to the terms of the payment plan directed by the Dubai Execution Court, in my view, all those payments are properly to be regarded as having been appropriated by Mr Sethi towards discharge of the English Judgment. That was the purpose for which they were made, particularly since under the law of the UAE, the payment plan could only relate to the judgment debt and any limited costs properly recovered in that jurisdiction, which are added to the Dubai Judgment Debt: see the evidence of Mr AL-Shamsi, referred to at paragraph 6 above, which I accept. In those circumstances, it is not open to SLL to apply those sums for a different purpose. I do not accept, however, that SLL doing so amounted to a breach of the Undertakings given to the Court by SLL to credit any or all Recoveries against the English Judgment. This is because the definition of Recoveries expressly provided that they were "*less the reasonable costs and expenses incurred by NSIL of any enforcement action*". It was simply not entitled to do so in the circumstances described above;

(3) Further, I am not satisfied on the evidence served by SLL that NSIL did in fact ask the Claimant to indemnify it in respect of the costs in the Dubai proceedings, and the Claimant agreed to do so. As stated at paragraph 36(1) above, it is to be noted that Mr Khandeparkar supplies no documentary evidence of this, nor does he state the basis of his instructions as who, how and when those instructions were given. This is particularly significant, given the facts recorded at paragraphs 26 and 29 of my Judgment in relation to the stance taken by NSIL, both at first instance in the Dubai proceedings and thereafter before the Court of Cassation;

(4) Nor do I see evidence that a proper demand has been made on the Defendants for the costs incurred in the Dubai proceedings;

(5) Therefore, in such circumstances, I do not consider SLL are entitled to apportion any part of the payments made by Mr Sethi pursuant to the Dubai Execution Court payment plan towards the costs incurred by NSIL in the Dubai proceedings on the first ground relied upon;

(6) In relation to the second ground, namely whether SLL can rely upon the contractual indemnity as to costs contained in clause 10.2 of the Loan Agreement. That clause entitled SLL to its costs of "*enforcing… the Finance Documents*". As stated at paragraph 39 above, the Finance Documents are the Loan Agreement, "*the Security Document, and any other document designated as such by the borrower and the lender*". The Security Document is defined in the Loan Agreement as Mrs Sethi's personal guarantee. I accept Mr Macpherson's submissions that the Cheque was not a specified Finance Document, nor had it been "*designated as such by the borrower and the lender*." When bringing the Dubai proceedings, NSIL never presented the claim on this basis and Mr Sethi strenuously maintained that it related to the Third Amendment which was never signed. There is no evidence of such designation by the parties. The claim on the Cheque in Dubai did not constitute enforcement of the Finance Documents, as defined. In my judgment, the contractual indemnity does not apply;

(7) Even if I am wrong and the contractual indemnity does apply, there are still the difficulties identified in sub-paragraphs (3) and (4) above. Therefore I do not consider SLL are entitled to apportion any part of the four payments made by Mr Sethi pursuant to the Dubai Execution Court payment plan towards the costs incurred by NSIL in the Dubai proceedings on the basis of the second ground relied upon.

48. It follows from my reasons given above, that going forward, subject to (a) proving that the Claimant agreed to indemnify NSIL in respect of the latter's costs in the Dubai proceedings, and (b) a proper demand being made by SLL on the Defendants in that regard, SLL are entitled to recover such of NSIL's costs that it has agreed to pay in the Dubai proceedings, which have been reasonably and properly incurred.

49. Should that happen, it is common ground between the parties that the issue of quantification should be referred to a costs judge for determination pursuant to section 51 of the Senior Courts Act: see *Gomba Holdings (UK) Ltd v Minories Finance Ltd* [1993]

Ch 171 and *Banco San Juan Internacional Inc v Petroleos de Venezuela SA* [2020] EWHC 2937 (Comm) at [155]-[157]. It would be convenient and cost-effective for that exercise to be performed at the same time as the assessment of the costs of this claim.

50. I would ask Counsel to agree a draft Order reflecting the conclusions set out above in relation to the questions posed in paragraph 2 above by 4pm on Wednesday 3 November 2021. The final sum should take account of all four payments already made by Mr Sethi, which I believe has already been done in paragraph 1 of the Order, but there may need to be some interest adjustments. If there are any disagreements between the parties in relation to the terms of the draft Order, please could their respective positions be set out in track-changes. I would ask that any consequential applications with skeleton arguments be submitted at the same time.

51. I conclude by thanking Counsel, as ever, for their assistance and apologise for the delay in handing down this judgment.