Neutral Citation Number: [2021] EWHC 3399 (QB)

Case No: QB-2020-001937

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2021

Before :

MR JUSTICE FOXTON

- -

Between :

BILAL KHALIFEH	**Claimant**
- and -	
BLOM BANK SAL	**Defendant**

- -
- -

Raymond Cox QC and **Zahler Bryan** (instructed by **Rosenblatt (a trading name of RBG Legal Services Limited)**) for the Claimant
Ian Wilson QC and Ryan Ferro (instructed by **Dechert LLP**) for the Defendant

Hearing Dates: 3, 4, 5, 8, 9, 10 and 11 November 2021
Further Submissions: 12, 18, 19 and 25 November 2021
Draft Judgment sent to Parties: 7 December 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE FOXTON

"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 17 December 2021 at 10:00"

Mr Justice Foxton :

INTRODUCTION

1. This action arises out of a USD bank account ("the Personal USD Account") which the Claimant ("Mr Khalifeh") opened with the Defendant ("the Bank") in 2016. Mr Khalifeh alleges that the Bank has wrongfully refused to re-pay him the balance on the Personal USD Account in the manner to which he is entitled to such payment, and he seeks to recover the balance and consequential loss which he says he has suffered by reason of its non-payment. The Bank initially contended that no valid demand for repayment has been made, although this issue fell away after the Personal USD Account was closed. The Bank contends that it discharged the debt by tendering payment in a form in which Mr Khalifeh was obliged to accept, and then paying a notary public in Lebanon when Mr Khalifeh refused to accept payment in that form.

2. The reason for what might, at first sight, seem a rather esoteric dispute is the very difficult financial conditions faced by Lebanese banks and their customers at the current time, and the practical impossibility of transferring foreign currency out of Lebanon, a state of affairs which has had a very prejudicial effect on and been the source of acute anguish for those with foreign currency accounts in Lebanese banks, who have understandably explored every avenue open to them in an effort to access their hard-won savings.

3. To resolve this dispute, the parties agree that (at least some of) the following questions must be answered:

Governing Law

i) What is the applicable law?

a) Did the parties make an implied choice of Lebanese law under Rome I, Article 3?

b) If not, does Lebanese law apply by virtue of Rome I, Article 6?

i) What is the date (or are the dates) for assessing habitual residence under Article 6(1)?

ii) Was Mr Khalifeh habitually resident in England and Wales on that date (or dates)?

iii) If so, was the Bank pursuing and/or directing its commercial or professional activities in England at the relevant time(s) and/or did the contract(s) fall within the scope of such activities (Article 6(1)(a)-(b))?

(a) What does Mr Khalifeh need to show in order to establish that the Bank pursued and/or directed such activities in England?

(b) Did the Bank do so on the facts?

(c) Must there be a causal nexus between the pursuing and/or directing of such activities and the conclusion of the contract?

(d) If so, was there such a causal nexus on the facts?

iv) If so, was the contract for the supply of services exclusively in a country other than England (Article 6(4)(a))?

Lebanese Law

ii) Is the money of payment of the debt Lebanese Pounds ("LBP") as a matter of Lebanese law and, if so, is Mr Khalifeh entitled to judgment (subject to defences) in USD?

iii) Does the Bank have a defence because the alleged debt was discharged under Article 822 *et seq.* of the Lebanese Code of Civil Procedure?

a) Did the Bank's *"tender and consignment"* lapse because the Bank filed a Lebanese Validation Action before the Bank was notified of the Claimant's rejection of it?

b) Did the *"tender and consignment"* discharge the alleged debt?

iv) If the debt is due and owing, is the Bank liable for damages for any consequential losses arising from non-payment?

a) Would Mr Khalifeh have converted a USD payment into GBP on receipt and, if so, what foreign exchange losses were suffered?

b) Were such losses a direct and natural result of the breach and/or foreseeable?

c) Do such damages fall to be reduced on the grounds of the Mr Khalifeh's fault?

v) What is the date from which the Mr Khalifeh's damages claim and interest fall to be assessed?

English Law

vi) Is Mr Khalifeh entitled to judgment (subject to defences) in USD?

vii) Is the money of payment LBP? As an aspect of this, was it an implied term of the *"contract(s)"* that the money of payment was USD?

viii) Does the Bank have a defence on the basis that the Court should have regard to Lebanese law under Rome I, Article 12(2)?

a) What is the meaning and effect of Article 12(2)?

b) Issues iii) and iv) above are repeated *mutatis mutandis.*

c) How should the Court have regard to Lebanese law?

ix) If the debt is due and owing, is the Bank liable for damages for any consequential losses arising from non-payment?

x) Would Mr Khalifeh have converted a USD payment into GBP on receipt and, if so, what foreign exchange losses were suffered?

xi) Were such losses too remote? Do such damages fall to be reduced on the grounds of failure to mitigate?

xii) What is the date from which Mr Khalifeh's damages claim and interest fall to be assessed?

4. Before considering those questions, I will set out the key underlying facts.

THE UNDERLYING FACTS

5. In this section of the judgment, I set out a number of the key facts. They are supplemented by further factual findings in the Confidential Annex to this judgment.

6. Mr Khalifeh is a Lebanese citizen, whose mother worked for the Bank's principal branch in Beirut ("the Main Branch") until 2007, and thereafter for Blom France Dubai until 2015.

7. The Bank is a Lebanese bank, whose headquarters are located in Beirut.

8. On 11 June 2012, Mr Khalifeh established a digital media agency which was operated by a Dubai company he established known as InsideJob Management DMCC ("InsideJob Dubai").

9. In July 2015, Mr Khalifeh incorporated an English company called InsideJob Management UK Ltd ("InsideJob UK")

10. On 13 and 14 October 2016, Mr Khalifeh visited Beirut, and on 14 October he opened two US dollar accounts with the Bank, including the Personal USD Account. Mr Khalifeh signed various documents on this occasion, including:

i) A document in Arabic entitled "General Agreement for Opening and Operating Creditor Accounts" ("the General Agreement"). This gave a Dubai address and phone number for Mr Khalifeh.

ii) A document entitled "Information about the client (for individual clients)". I shall refer to any document of this type as a "Client Information Document" and this particular version as "the 2016 Client Information Document". This gave an address in Dubai as Mr Khalifeh's domicile.

iii) A "Feature of Term Deposits and Savings Account" document (a "Key Features Document", and this particular version "the 2016 Key Features Document") recording the commercial terms relating to the accounts.

iv) A document authorising the giving of instructions relating to the USD accounts by phone or fax (an "Instructions by Phone or Fax Document" and this version "the 2016 Instructions by Phone or Fax Document").

I address the terms governing the Personal USD Account ("the Personal USD Account Agreement") below, when resolving the issue as to the applicable law of the account.

11. Mr Khalifeh transferred his USD savings into the Personal USD Account from his bank in Dubai by seven payments.

12. In July 2017, Mr Khalifeh visited the Bank's Main Branch in Beirut and on 6 July 2017 he opened an account with the Bank in the name of InsideJob Dubai. At this point, Mr Khalifeh signed:

i) A document entitled "Individual Self-Certification" (an "Individual Self-Certification Document" and this document "the 2017 Individual Self-Certification Document") which was specifically concerned with issues of international tax compliance. This gave a Dubai address.

ii) Another Instructions by Phone or Fax Document ("the 2017 Instructions by Phone or Fax Document").

iii) Another Key Features Document ("the 2017 Key Features Document").

iv) Another Client Information Document ("the 2017 Client Information Document") which recorded a Dubai address as Mr Khalifeh's domicile.

13. Mr Khalifeh raised the possibility that he may have signed the 2017 Individual Self-Certification Document as a blank document, which the Bank later filled in. I accept that on occasions Mr Khalifeh signed blank documents provided by the Bank because signed blank copies have been produced as part of the Bank's disclosure. However, on this occasion in 2017, I am satisfied that Mr Khalifeh either gave the Dubai address himself or confirmed that his personal details on file with the Bank (which included the Dubai address) should be used in relation to the account opened for InsideJob Dubai. It is probable that Mr Khalifeh used a Dubai address for the purposes of a bank account opened for a Dubai company and he was still tax-resident in Dubai at this point.

14. Two other documents were signed by Mr Khalifeh at around this time:

i) A proxy form for Mr Khalifeh's mother.

ii) An English-language Key Features Document.

15. In October 2017, Mr Khalifeh opened personal and business bank accounts with Lloyd's Bank in the United Kingdom, and I accept that from this point, the business of InsideJob Dubai was swiftly and progressively transferred to InsideJob UK. For the financial year 2017/2018, the turnover of InsideJob UK was £804,000, InsideJob Dubai had ceased employing anyone by January 2018, and by Spring 2018, the winding-down of the business of InsideJob Dubai was substantially complete.

16. On 27 February 2018, Mr Khalifeh visited the Bank's Main Branch in Beirut to open a bank account for a Lebanese company he had incorporated called Hadaf 360. On that

visit, he signed some documents (although the account was not opened until 21 June 2018):

i) A KYC document. In its completed state, this gave a residential and business address for Mr Khalifeh in Dubai. I address the issue of how the form came to be in these terms below.

ii) Another Individual Self-Certification Document.

iii) A 2018 Key Features Document recording "Features of Term Deposits and Savings Accounts and Demand/Sight Savings Accounts". As explained below, Mr Khalifeh contends that this form gave rise to an agreement amending the terms of the Personal USD Account Agreement, and he argues that this is significant when determining the date at which his habitual residence is to be ascertained for the purpose of identifying the applicable law of the Personal USD Account Agreement.

17. Mr Khalifeh contends that, at this meeting, he also signed another KYC form, which he completed and which he says set out details of his United Kingdom residence. He says that Ms Orfali of the Bank warned him that the Bank would have to declare his income to the United Kingdom authorities if he gave a United Kingdom domicile, and sought to dissuade him from completing or submitting the form. He also gave evidence about the aftermath of this meeting which I address in the Confidential Annex. Ms Orfali denies that any such form was completed, or that any such conversation took place. The Bank says that it has no KYC form in these terms in its records. There are other factual events relevant to this issue which I set out below, before setting out my conclusions.

18. Mr Khalifeh also says that he signed a blank "information about the client" form which the Bank later completed in terms which referred to InsideJob Dubai, even though that company was in the process of being wound-up.

19. On 12 April 2018, Mr Khalifeh sent Ms Orfali a WhatsApp message referring to making a transfer "from my personal account here in the UK". There was also a reference by Mr Khalifeh to bringing cash from London in a message of 25 April 2018.

20. On 21 May 2018 Mr Khalifeh sent Ms Orfali a message saying that he wanted to transfer "almost 99% of the amounts of InsideJob that are in BLOM Beirut" to his savings account. It is clear that Ms Orfali understood this to be a reference to transferring funds from an account held by a company to a personal account because she replied on 22 May, with what appears to be the benefit of input from the Bank's legal department, stating that Mr Khalifeh would need to check the regulations applicable to the company and have a good reason for the payment. Mr Khalifeh replied on 23 May asking if it was necessary to have a reason for the payment if he was the sole shareholder of the company, and Ms Orfali said he should still check the applicable regulations and prepare an official minute.

21. On 24 May 2018, Mr Khalifeh sent a message to Ms Orfali saying:

> "If I want to take a loan out against the savings I have. Let's say $300,000. What is the interest rate on this amount? And for how many years".

This was followed immediately by a further message stating:

> "Reason, Is it necessary to give a reason or not?
>
> If I have to mention a reason, it's that I'm renovating the flat in London, and I need this amount.
>
> That would be the reason, the actual reason.
>
> Please advise".

22. The message appears to reflect an assumption that Ms Orfali knew that Mr Khalifeh had a flat in London ("the flat in London").

23. This message was clearly understood by Ms Orfali as being linked to the earlier email about taking money out of the InsideJob company for Mr Khalifeh's personal use, by taking out a loan against the security of the InsideJob account which could then be made available for Mr Khalifeh's personal use as an alternative to a direct payment. In fact, this understanding appears to have been mistaken, as a later message from Mr Khalifeh made clear. Ms Orfali continued:

> "There are two things. If you want to mention London, you also have to notify us that you hold a residency permit in London. Either ways you're stuck.
>
> Also I mean. As per the regulations you can't use it for very personal stuff.
>
> I know the company is yours, but I prefer if you prepare a minutes of meeting, and mention that the company is giving you back the capital, or the money injected by yourself before."

24. She then added in a further message:

> "Honestly, the best thing to do [is] check with your company's lawyer. Please ask him. Ask him if you can withdraw money from the company's money and use them for personal interest. He'll help you find the part in the regulations that covers this issue".

25. The first of these messages also appears to reflect knowledge on Ms Orfali's part of Mr Khalifeh living in London (hence the reference to a residency permit, when Mr Khalifeh's message had said nothing about residing in London), and a concern that this might raise compliance or approval issues for the Bank.

26. On 30 May 2018, Mr Khalifeh told Ms Orfali that "I want to renovate a flat I live in, in London". In a further message on 31 May 2018, Ms Orfali stated:

> "My concern is: the issue is that if you want to mention London, we have to check if you have if you have [sic] a problem notifying us that you are already a resident in London for good, or you prefer not to. So think about it and let me know".

27. She also said, "we can do it through BLOM London if you want, or if you're coming to Beirut now or during the holidays". Mr Khalifeh responded:

> "Second thing, yes I was speaking to an accountant here and yes it's better to declare because she told me that it's better to declare, so I will speak to her again and tell her that I have this much deposit in Lebanon and how much interest will I have, and see what she will advise me, if she tells me yes declare or not, if not then not, this way I can take, I will see how I can take a cash collateral from my account, I will see how, I will explore a way that keeps this within the law, of course".

28. There was no reference by Mr Khalifeh, in this message or otherwise, to any incident in which Mr Khalifeh had completed a KYC form which reflected a UK residency, which Ms Orfali had advised him not to leave with the Bank.

29. On 6 June 2018, Mr Khalifeh told Ms Orfali that he was visiting Beirut, and asked if she needed anything from London, including tea. Ms Orfali replied referring to London green tea.

30. On 13 June 2018 Mr Khalifeh was in contact with Carole North of Harrison North, his accountants. Mr Khalifeh was asked when he became a United Kingdom resident, and Mr Khalifeh said this happened on 29 September 2017.

31. On 21 June 2018, Mr Khalifeh visited the Bank's Main Branch again, and completed the documents necessary to open an account for Hadaf 360. That included a signed document entitled "Instructions by Phone or Fax" and another Key Features Document. Mr Khalifeh contends that on this visit, the KYC form which had previously been completed with UK residence details was discussed again, with Ms Orfali asking him to remove the document from the Bank. There is also further evidence on this issue which I address in the Confidential Annex.

32. On 11 February 2019, Mr Khalifeh sent Ms Orfali an email about opening an account for InsideJob UK in connection with a tender bond to be supplied for the purposes of its business. There was a follow-up message from Mr Khalifeh on 10 June 2019, and on 11 June 2019 Mr Khalifeh met Ms Orfali at the Main Branch to open a corporate deposit account for InsideJob UK which would hold collateral for the bond. At that meeting Mr Khalifeh signed a number of documents. These included (i) another Phone or Fax Instruction document; (ii) another Key Features Document (which Mr Khalifeh maintains involved a variation of the 2016 contract relating to the Personal USD Account); and Client Information Document. This did give United Kingdom residence information for Mr Khalifeh.

33. It is convenient at this point to address the issue as to whether, at meetings in February and June 2018, Mr Khalifeh completed a Client Information Document with United Kingdom residence details, which the Bank refused to process:

    i) I am satisfied that by May 2018, when the messages referring to the London and the flat in London set out at [19]-[26] above were sent, Mr Khalifeh had told Ms Orfali that he was living in London in a flat there.

    ii) I am also satisfied that that information, when communicated to Ms Orfali, is likely to have flagged some form of discussion that this might give rise to a compliance or regulatory issue (that being Ms Orfali's immediate response when the subject surfaced again in the May messages).

iii) However, I do not accept that the outcome of that discussion involved any form of disagreement between Ms Orfali and Mr Khalifeh, which would have been a source of concern for Mr Khalifeh. It is more likely that the discussion took the form of a statement by Ms Orfali that recording a London residence on the Bank's internal documents could raise issues that Mr Khalifeh might want to think about, and Mr Khalifeh saying he would do so.

iv) Had there been a disagreement at the February 2018 meeting of the kind said to have been witnessed by Mr Khalifeh, it is highly likely that there would have been some reference to this in the May messages. It is also likely to have been referred to, at least obliquely, in the WhatsApp messages exchanged between Ms Orfali and Mr Khalifeh (which were frequent and remained friendly in tone). However, Mr Khalifeh's only response was that he would discuss the issue with his accountant.

v) Nor am I persuaded that there was any similar disagreement about recording United Kingdom client information details at the June 2018 meeting. Once again there is not a hint of it in the WhatsApp conversations between Ms Orfali and Mr Khalifeh. Further, there is nothing to suggest that there was any resistance by the Bank at the July 2019 meeting to having United Kingdom residence details on file, and no explanation as to why the Bank's position would have changed in the meantime. By contrast, in the second half of 2018, Mr Khalifeh was clearly engaged in regularising his personal tax position in the United Kingdom, and this process appears to have been completed by July 2019.

vi) It follows that I am unable, in differing degrees, to accept the contrary evidence from Mr Khalifeh or (in witness statement form) from Ms Orfali on this narrow issue. I have concluded that Mr Khalifeh's accurate recollection of the Bank raising some question mark about whether Mr Khalifeh wished to enter a London residence on the Bank's records has unconsciously hardened into a recollection of something more disturbing and confrontational with the passage of time and in the atmosphere of hard-fought litigation. I am satisfied that Ms Orfali had simply not recollected that she was told that Mr Khalifeh was now living in London in the first half of 2018 (as Ms Orfali was willing to accept in cross-examination).

vii) I have addressed the additional evidence on this issue in the Confidential Annex.

34. By October 2019, Lebanon was undergoing a severe financial crisis, which led the Lebanese Government to default on its borrowings in March 2020. That crisis led the Lebanese central bank, the Banque du Liban ("BdL"), to put pressure on banks intended to restrict payments of foreign currency out of Lebanon. In response to that pressure, in December 2019 the Bank opened an LBP account in Mr Khalifeh's name, into which interest payments on the Personal USD Account were made. That happened without reference to or the approval of Mr Khalifeh.

35. On 29 January 2020, Mr Khalifeh asked the Bank to transfer USD 75,000 from the Personal USD Account to his account in the United Kingdom. On 6 February 2020, he completed a transfer form instructing the Bank to transfer almost the entirety of the USD balance on InsideJob UK's account with the Bank to the United Kingdom, and on 17 February 2020 this was superseded by a request to transfer the full balance. These

and subsequent communications to similar effect were ignored by the Bank, until on 23 April 2020 the Bank responded to InsideJob UK's requests stating:

> "We regretfully inform you that we are unable to provide the requested transfer service for the time being, noting that our Bank is prepared to remit to you a banker's cheque drawn on the [BdL] for the amount of your choice out of the net balance available in your account with us at maturity, subject to request being compliant with all applicable laws and regulations".

36. On 28 April 2020, the Bank wrote and stated once again that it was unable to provide the requested transfer service for the time being, but was prepared to provide Mr Khalifeh with a banker's cheque drawn on the BdL. On 1 May 2020, Mr Khalifeh's solicitors, Rosenblatt, sent the Bank a letter before action complaining that the offer of a cheque drawn on the BdL "is effectively worthless to our client" because "there are no exchanges willing to exchange Lebanese pounds". The letter complained that the Bank had not maintained sufficient foreign currency reserves and/or had handed those reserves it had to the BdL. The letter demanded a transfer of USD balances in the Personal USD Account and InsideJob UK's USD account to accounts in London. The Bank temporised in its response, leading Mr Khalifeh's solicitors to repeat their demands.

37. On 2 June 2020, by which date almost all of the amounts had been transferred back into the Personal USD Account following a request made by Mr Khalifeh on 26 May 2020, Mr Khalifeh sent the Bank a transfer instruction requiring the Bank to transfer the full balance in USD to his personal account in the United Kingdom. These proceedings were commenced three days later.

38. Mr Khalifeh sought summary judgment, and the Bank sought to challenge the jurisdiction of the English court. Both applications were rejected by Master Davison, and the action proceeded to trial.

39. On 13 January 2021, the Bank addressed a letter to Mr Khalifeh in England in which it said that it was exercising the right of termination provided for in Article 6 of the General Agreement and stating that the Bank had drawn up two cheques drawn on the BdL, one in USD for the balance of the Personal USD Account and the other in LBP for the balance of the account unilaterally opened by the Bank (together "the BdL Cheques"). The letter asked Mr Khalifeh to make arrangements to collect the cheques from the Main Branch failing which they would be deposited with a notary public in compliance with Article 822 of the Lebanese Code of Civil Procedure.

40. On 25 January 2021, the Bank deposited the BdL cheques with a notary public in Lebanon, so as to initiate a formal process by which its offer could be served on Mr Khalifeh by the notary public, and those cheques have since cleared in the notary public's account. The Bank asked the notary public to serve Mr Khalifeh at his father's residence in Beirut, and a note prepared by the notary said that an attempt was made to effect service at that address (albeit the note referred to the wrong street), but the process server was informed that Mr Khalifeh was abroad.

41. On 8 February 2021, the Bank commenced proceedings before the Court of First Instance of Beirut seeking to validate the offer made by its letter of 25 January 2021 ("the Validation Proceedings"). It is common ground that the Validation Proceedings

were commenced before the offer had been served on Mr Khalifeh. That did not take place until 30 March 2021, when Mr Khalifeh was served with the Bank's offer of 13 January 2021 in London.

42. The commencement of the Validation Proceedings led Mr Khalifeh to issue an application for anti-suit relief, with both a prohibitory element (preventing the further pursuit of the Validation Proceedings) and a mandatory element (requiring the proceedings to be withdrawn). That part of the application concerned with prohibitory relief was resolved by undertakings offered by the Bank on 22 March 2021 at a hearing before Freeman J, who adjourned that part of the application for mandatory relief to trial.

43. It is now common ground that the Bank effectively closed the Personal USD Account on 13 January 2021, and, that by no later than the date (Mr Khalifeh says earlier) the debt represented by the positive balance on the Personal USD Account became due from the Bank to Mr Khalifeh, whichever system of law applies.

WHAT IS THE APPLICABLE LAW OF THE PERSONAL USD ACCOUNT AGREEMENT?

44. Mr Cox QC realistically accepts that, unless Mr Khalifeh is able to bring himself within the provisions relating to consumer contracts in the Rome regulation on the law applicable to contractual obligations ((EC) No 593/2008) ("Rome I"), the answer to this question is Lebanese law.

45. Article 6 of Rome I provides:

> "Consumer contracts
>
> 1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
>
>   (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
>
>   (b) by any means, directs such activities to that country or to several countries including that country,
>
>   and the contract falls within the scope of such activities.
>
> 2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

> 3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.
>
> 4. Paragraphs 1 and 2 shall not apply to:
>
> (a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence …".

46. Mr Wilson QC, for the Bank, contends that there are four reasons why Mr Khalifeh cannot avail himself of Article 6 of Rome I:

i) Mr Khalifeh and the Bank impliedly chose Lebanese law as the applicable law, with the result that Article 6(2) applies.

ii) The Bank was not at any material time pursuing or directing its commercial activities in England and Wales, and the Personal USD Account Agreement did not fall within the scope of any such activities as were so directed.

iii) The Personal USD Account Contract was for the supply of services exclusively in a country other than England and Wales, with the result that Article 6(4)(a) applies.

iv) Mr Khalifeh was not habitually resident in England and Wales on 14 October 2016, being the only relevant date for the purposes of determining if Article 6 of Rome I applies.

(i) Was there an implied choice of Lebanese law?

The relevant principles

47. The relevant legal principles are summarised by Picken J in Avonwick Holdings Ltd v Azitio Holdings Ltd [2020] EWHC 1844 (Comm), [489]-[497], and I gratefully adopt his summary, which it is not necessary to set out. The essential question is that identified by Lord Toulson in Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd [2013] 2 Lloyd's Rep 98, [33]:

> "On an objective view, the parties must have taken it without saying that their contract should be governed by that law or …. that the contract taken as a whole points ineluctably to the conclusion that the parties intended it to be governed by that law".

48. I accept that it is for the Bank to establish such an implied choice (Lawlor, [29]).

49. It is clear that an implied choice can be manifest by the express choice of law in a closely related contract (Lawlor, [35]), even one concluded on a subsequent occasion (Avonwick, [497]).

50. By virtue of s.3(3)((a) of Contracts (Applicable Law) Act 1990, *the Report on the Convention on the law applicable to contractual obligations* OJ C 282, 31 October 1980, prepared by Professors Giuliano and Lagarde ("the Giuliano-Lagarde Report") is

admissible when interpreting the provisions of the Rome Convention and both parties relied upon it as regards the interpretation of the provisions of Rome I. The Giuliano-Lagarde Report, p.17, states that a contractual choice of forum "may show in no uncertain terms that the parties intend the contract to be governed by the law of the forum". *Dicey, Morris and Collins on the Conflict of Laws* (15th) ("*Dicey, Morris & Collins"*), [32-021], [32-061] to [32-062] and [33-304], contains statements to similar effect, citing Marubeni Hong Kong and South China Ltd v Mongolian Government [2002] 2 All ER (Comm) 873. The Giuliano-Lagarde Report also notes that references in a contract to specific provisions of a particular legal system may establish an implied choice of that legal system as the applicable law.

The position here

51. The Personal USD Account Agreement was entered into in Lebanon, between a Lebanese bank and a Lebanese national, to open a personal bank account at the Beirut branch of that bank. The Bank's obligations were principally to be performed in Lebanon (there was no obligation to send statements or notices outside Lebanon; it is common ground that the account balance was payable in Lebanon, and it was also common ground that there was no obligation to transfer funds by bank transfer out of Lebanon). The fact that the Bank operated accounts for other customers in other countries where it has branches does not change the nature of its obligations under the Personal USD Account Agreement. However, while these matters would provide a strong case for Lebanese law as the law with which the Personal USD Account had its closest connection, they are not, on their own, capable of establishing an implied *choice* of applicable law.

52. The General Agreement, which was in Arabic, contained the following provisions which were relied upon by the Bank:

    i) "We declare that pursuant to Decrees No 9976 dated 01/04/1975 and No 29 dated 05/02/11977 – which we took acknowledgement of - we hereby inform you that we accept and acknowledge to implement the provisions of Article (3) of Decree No 9976 dated 01/04/1975; for this purpose, each of the President and the two members of the Banking Control Commission established by virtue of your Bank may examine the registers related to the accounts of the free banking zone only to make sure that our account bearing the abovementioned number, in case it is listed in such registers, meets the conditions set forth in the abovementioned decree".

    Decree No 9976 appears to be a decree exempting deposits and other banking commitments in foreign currencies from specific taxes and fees in certain circumstances and Decree No 29 appears to be a rule exempting deposits and banking commitments in foreign currencies made by non-residents from certain taxes. The contractual provision, properly interpreted, appears to comprise both an agreement by Mr Khalifeh to comply with those provisions and to permit an inspection of the account to monitor such compliance. I do not accept, therefore, Mr Cox QC's submission that the clause is only about inspection. Moreover, the specific reference to an agreement to comply with these laws is a far cry from – say – the incorporation of a statute containing rules which enjoy general application in contracts of a particular kind, such as the United States Carriage of Goods by Sea Act 1936. The references here cannot sensibly be regarded as

no more than "a convenient 'shorthand' alternative to" setting out the terms of those statutes verbatim (cf. *Dicey, Morris & Collins*, [32-056]-[32-057], relied upon by Mr Cox QC).

ii) "Competent Courts. The Courts of Beirut shall have jurisdiction to settle any dispute or conflict arising between your Bank and us for any reason whatsoever. We [Mr Khalifeh] refrain from raising any plea of incompetence based on the fact that our domicile is located at another place, and we also hereby accept the competence of a court chosen by your Bank to settle any dispute or claim resulting from this contract".

I return to this provision below.

iii) "We hereby accept without any reservations to implement by the regulations of the Central Office for the Credit Risk which we reviewed and accepted its content without reservations".

This does not appear to be a legal instrument at all, but a code operating between Lebanese banks and the BdL in relation to cheques. I agree with Mr Cox QC that the presence of a clause of this kind referring to some form of non-legislative industry code is of no assistance in this case on the issue of implied *choice* of law.

iv) Mr Wilson QC also relied on references to Lebanese legal provisions in those sections of the General Agreement which related to types of account which Mr Khalifeh did *not* open. There was some debate as to whether these provisions could be relied upon for the purposes of establishing an implied choice of law. If the General Agreement is viewed as an umbrella agreement, intended to establish the framework within which further accounts would be opened, then I can see force in the view that provisions relating to other types of accounts, when opened, could be relevant to the question of whether there had been an implied choice of applicable law at the outset. However, as I read the General Agreement, this is not its status: it is simply a standard document which the Bank can use for clients opening different types of account, indicating the applicable provision through the tick-box section on the front page. In these circumstances, it can forcefully be said that the consumer's agreement to jurisdiction should be found in provisions applicable to the particular types of goods or services being provided to them, and for that reason I have placed no reliance on those provisions.

53. At the start of the trial, both parties appeared to be proceeding on the basis that the jurisdiction clause in the General Agreement was a non-exclusive jurisdiction clause. That appeared to me to be incorrect so far as Mr Khalifeh was concerned, whatever additional rights the Bank enjoyed:

i) There can have been no doubt that the courts of Beirut would have jurisdiction for a claim brought by Mr Khalifeh against the Bank, without the need for a clause conferring non-exclusive jurisdiction on them, a factor which provides some support for the view that the purpose of this provision is not simply to make Beirut *a* permissible forum.

ii) The clause uses the word "shall" which is an indication that it is exclusive.

iii) The next part of the jurisdiction clause allows the Bank, but not Mr Khalifeh, to bring suit in an alternative jurisdiction, which strongly supports the conclusion that the clause confers exclusive jurisdiction, so far as Mr Khalifeh is concerned, on the courts of Beirut.

54. That conclusion was supported as a matter of English law by the decision in Continental Bank NA v Aeakos Companiea Naviera SA [1994] 1 WLR 588 and by the English Court applying UAE law in Middle Eastern Oil LLC v National Bank of Abu Dhabi [2008] EWHC 2895 (Comm). Mr Wilson QC adopted this argument, and I therefore gave Mr Cox QC the opportunity to put in responsive submissions. In those submissions, Mr Cox QC appears to accept that the clause is exclusive so far as Mr Khalifeh is concerned but advanced a number of arguments as to why that does not assist the Bank.

55. First, he points to the fact that Recital (12) refers to the fact that "an agreement between the parties to confer jurisdiction on one or more courts *of a Member State* exclusive jurisdiction … should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated", and points to the fact that, as Michael McParland QC points out in *The Rome I Regulation on the Law Applicable to Contractual Obligations* ("*McParland"*), paras. [9.78] to [9.102], a proposal by the Finnish Presidency that Recital (12) should refer to the courts *of a country* instead of the courts of *a Member State* was rejected. *McParland* expresses the view that "the better argument is that the mandatory direction in Recital (12) to refer to such an agreement does not apply to exclusive jurisdiction agreements in favour of non-Member States, but that does not stop such agreements being a factor that a court may consider as part of the circumstances of the case" ([9-102]).

56. Bearing in mind that the issue presently under consideration is whether the court is satisfied that "the contract taken as a whole points ineluctably to the conclusion that the parties intended it to be governed by [a particular] law", it is not clear why a choice of Danish jurisdiction should be relevant to the determination of whether the parties have manifested such an intention as a matter of fact, but a choice of Lebanese (or perhaps now English) jurisdiction should not. As Sir Richard Plender QC and Michael Wilderspin note in *The European Private International Law of Obligations* (5th) ("*Plender and Wilderspin"*), [6-039]:

> "It is, however, by no means obvious why the Commission chose to restrict the scope of its proposed rule to situations where the jurisdiction agreement conferred jurisdiction on the courts of a Member State. If a jurisdiction agreement is to be interpreted as an indication that the parties intended the contract to be governed by the law of the chosen forum, i.e. a pointer towards the parties' subjective intention, this principle should apply irrespective of the chosen forum, even where the agreement is invalid. Since the question is not alluded to in any way in the Explanatory Memorandum, it is not clear whether this restriction represented a clear policy objective of the Commission or whether it was merely the result of sloppy drafting."

57. It would seem to follow from Mr Cox QC's argument that it would not be permissible to rely on the choice of a particular arbitral seat when determining whether there has

been an implied choice of law for the purposes of Rome I, even though this has been found to be permissible when applying its predecessor, the Rome Convention (see for example Egon Oldendorff v Liberia Corp [1996] 1 Lloyd's Rep 380).

58. I prefer the view expressed in *Dicey, Morris & Collins*, [32-063], which is also approved in *Plender and Wilderspin*, [6-039], that any such limitation "would be unprincipled and can safely be ignored". In any event, I note that *McParland* recognises that exclusive jurisdiction clauses in favour of non-member states remain a factor the court *can* consider, even if it is not obliged to do so.

59. Mr Cox QC's second argument was that the exclusive jurisdiction clause in favour of the place of establishment of the professional would not be enforced against Mr Khalifeh as a consumer (C/240/98, 241/98, 243/98 and 244/98 Océano Grupo Editorial SA v Murciano Quintero [2002] 1 CMLR, [24]), and for that reason it should not be taken into account for Rome I purposes.

60. I cannot accept the argument that a jurisdiction clause which would not be given effect as such cannot, for that reason, be relied upon as an indication of choice of law. Article 6 of Rome I allows the parties to a consumer contract to choose the applicable law. That choice might be express, or it might (if the requisite threshold of clarity is met) be implied. In consumer contracts, an express choice of applicable law will in a great many cases arise from the professional's standard terms and conditions. It has been recognised both in the Giuliano-Lagarde Report, p.17, and in Recital (12), that a choice of exclusive jurisdiction is a relevant factor when determining whether an implied choice has been made out, without any suggestion that the jurisdiction clause in question must be one which would be enforced as such against the consumer. As *Plender and Wilderspin* note at [6-040], these are two different questions. They refer to a judgment of the Bundesarbeitsgericht of 10 April 2014 in Case 2 AZR 741/13, in which an exclusive jurisdiction clause in an employment contract in favour of the courts of Algeria, which was held not to be enforceable as such, was nonetheless relied upon as supporting a finding that Algerian law had been chosen by the parties as the governing law. As they observe, "whether the jurisdiction agreement was valid or not was irrelevant" (and, to similar effect, at [6-039]).

61. The third argument raised by Mr Cox QC was that the exclusive jurisdiction clause was unfair under the Consumer Rights Act 2015 ("the CRA") "if it is accepted as pointing to a choice of law under Article 3 … because as an exclusive jurisdiction clause it would cause or contribute to a choice which would prevent Article 6 from determining applicable law and therefore hinder Mr Khalifeh from exercising his rights under English law". However, Mr Khalifeh did not submit that an implied choice of Lebanese law established by matters other than the exclusive jurisdiction clause was unfair.

62. I found this argument difficult to follow, in circumstances in which:

    i) the role of the exclusive jurisdiction clause and the other factors relied upon was a (non-determinative) part of the process of ascertaining if the parties had implicitly chosen Lebanese law as the applicable law of the contract;

    ii) the sole respect in which it is said that the exclusive jurisdiction is unfair is in causing or contributing to a decision that the appliable law was other than English law;

iii) all of the contractual terms relied upon by the Bank in support of the argument that Lebanese law applied (and which have also "caused or contributed" to my determination that the applicable law is Lebanese law) were terms in the Bank's standard-form documentation; and

iv) if a choice (express or implied) of Lebanese law for other reasons would not itself trigger the application of the CRA 2015 even though it had the effect of preventing English law applying, I find it difficult to see how a contractual term, viewed solely for the purpose of determining whether there had been such a choice, could be said to be unfair because it would have that same effect.

63. For all of these reasons, I am satisfied that:

i) The General Agreement contained an exclusive jurisdiction clause in favour of the courts of Beirut.

ii) I am entitled to take the existence of that clause into account, together with other relevant matters, when deciding whether the parties made an implied choice of Lebanese law for the purposes of Article 6 of Rome I.

64. Finally, Mr Wilson QC relied on the terms of a Securities Account Opening Form executed by Mr Khalifeh at the same time as the Personal USD Account was opened:

i) The Account Opening Form provided that "the Account" (a reference to the Securities Account plus any other accounts falling within the definition in ii) was expressly subject to the General Agreement and was a chapter (in effect a sub-account) of "one single indivisible current account which shows one single credit or debit balance upon its closing".

ii) The Account was defined as including "a credit current account opened by the Client with the Bank" which was the Personal USD Account.

iii) The treatment of the Securities Account and the Personal USD Account as sub-accounts of the same overall account was also reflected in the General Agreement, clause 2A of which provided:

> "We hereby … confirm that all of the banking transactions we carry out with your Bank, no matter what their nature and currency is, whether Lebanese or foreign, do not represent – although posted [in] different accounts – more than chapters of one single and indivisible account showing one single balance upon the closing of the account in accordance with the principle of account unity".

iv) "The Account" was stated to be subject "in general to the laws and regulations in force" and to "the terms and conditions specified hereinafter". Its signatory page provided that non-beneficial signatories (which did not apply to Mr Khalifeh) "remain bound vis-à-vis the Bank according to the provisions of Article 799 of the Lebanese Code Des Obligations et Des Contrats".

v) Clause 2 of the specific terms expressly referred to the Lebanese Laws of 19 December 1961 and 27 December 1999 and Article 11 and following of the

Lebanese Code of Obligations and Contracts, albeit only in the context of joint accounts.

vi) Clause 18 provided that the agreement was "governed by Lebanese laws, in particular Law No 234 of June 10, 2000".

65. The effect of these provisions was that (a) the Securities Account was subject to an agreement governed by Lebanese law and also subject to the General Agreement; (b) that agreement regulated the position of the Personal USD Account in certain respects; and (c) all of these accounts were, contractually, simply sub-accounts of a single account.

66. I have concluded that the combined effect of:

i) the jurisdiction clause;

ii) the express reference to an agreement to comply with and facilitate the enforcement of identified provisions of Lebanese law; and

iii) the express choice of Lebanese law in a closely related and interwoven contract;

against the surrounding circumstances, clearly manifests an implied choice by the parties that the Personal USD Account Agreement would be governed by Lebanese law. The fact that, in common with a great many banking contracts, the Bank (alone) is given a choice to sue the client elsewhere does not undermine the strong support which the choice of Lebanese jurisdiction as the principal (and for Mr Khalifeh the only) contractual jurisdiction provides. If clause 10 of the General Agreement is treated as a non-exclusive jurisdiction clause, even as regards Mr Khalifeh, I accept that would reduce the weight to be accorded to that clause in determining whether there had been an implied choice of Lebanese law, but it would not eliminate it (Marubeni Hong Kong and South China Limited v The Mongolian Government [2002] 2 All ER 873, [43]). Together with the other matters I have identified, I would nonetheless have been satisfied that an implied choice of Lebanese law is clearly demonstrated here. Indeed, I would be so satisfied even if the jurisdiction clause was ignored altogether.

67. It follows that Mr Khalifeh's argument that the Personal USD Account Agreement falls within Article 6 of Rome I fails at the first hurdle.

(ii) Was the Bank at any material time pursuing or directing its commercial activities to the United Kingdom and did the Personal USD Account Agreement fall within the scope of any such activities as were so directed?

What is the relevant time?

68. It was not in dispute that the time when the conditions for the application of Article 6 of Rome I must be satisfied is the time when the natural person concludes the contract in question. Article 19(3) provides:

> "For the purposes of determining the habitual residence, the relevant point in time shall be time of the conclusion of the contract".

69. Mr Cox QC contends that if a contract is concluded on one date, but subsequently amended, Article 6 of Rome I will apply to the entire contract (as varied) if the relevant conditions are satisfied on the date of the latest amendment, even if they were not satisfied before. He contends that in this case, the Personal USD Account Agreement was varied on:

    i) 27 February 2018, by virtue of the signature by Mr Khalifeh of the 2018 Key Features Document; and again on

    ii) 11 June 2019, by virtue of the signature on that date of the 2019 Key Features Document.

70. The 2016 Key Features Document sets out various features of current and term deposit accounts. I asked Mr Cox QC, for Mr Khalifeh, to identify which features of the Personal USD Account were amended by the 2018 and 2019 Key Features Documents. The changes identified were the following:

    i) A revised level of Lebanon Government stamp duty rates in the 2018 Key Features Documents. However, I do not accept that a reference to the revised rate, resulting from a change in stamp duty rates, involves a change in the contractual terms applicable to the account, as opposed to the tax liabilities engaged by operating the account.

    ii) A revised level of tax on interest with effect from 26 October 2017. For the same reasons, I do not accept that a reference in the 2018 and 2019 Key Features Documents to the-then prevailing tax rates involves a new contractual term.

    iii) A fee in the 2019 Key Features Document for dormant accounts. This appears to be a new term.

    iv) An account closure fee in the 2019 Key Features Document of LBP 10,000, or USD 7, which appears to be a new term.

    v) A statement in the 2019 Key Features Documents next to the heading "value date" that interest and commissions in relation to an overdrawn account are applied based on the "Value date" and not the "Transaction date". I shall assume that this also involves a new term.

    vi) A statement at the end of the 2019 Key Features Document that "BLOM Bank SAL reserves all rights to review or amend any or all of the above conditions as its sole discretion. BLOM Bank will use reasonable efforts to notify the client for any amendments made to this KFS, whether occurred before or after the implementation of such amendments. The client undertakes to periodically visit the Bank's website to check any amendment applied therewith". I accept that this is a new term.

71. I therefore turn to consider the circumstances in which the 2019 Key Features Document was signed. It is clear that Mr Khalifeh attended at the Main Branch of the Bank in June 2019 in order to open a new corporate account in the name of InsideJob UK, to enable InsideJob UK to obtain a tender bond through the Bank. Mr Khalifeh had emailed the Bank documents relating to such an account on 11 February 2019. Mr

Khalifeh followed up on this request in a further email of 10 June 2019. Mr Khalifeh then attended at the Main Branch on 10 and 11 June 2019, and signed an account opening form in the name of InsideJob UK, a Client Information Document which identified InsideJob UK as the account holder and the 2019 Key Features Document.

72. It was the evidence of Ms Orfali that whenever a customer visited the Bank – and in this regard, she appeared to include visits by the beneficial owner of a corporate customer who was also an individual customer – the customer would be asked to sign the latest Key Features Document to confirm their awareness of the current level of Bank fees. She also mentioned that on some occasions, customers were asked to sign more than one version of such documents, to be placed on the relevant file. This appears to have happened on 19 July 2017, and again on 11 June 2019 when Mr Khalifeh was asked to sign two (slightly different) versions of the 2019 Key Features Document: one (v5.1-06/18) which did not include the account closure fee, and another (v5.2-10/18), presumably prepared four months later, which he did. In these circumstances, I am persuaded that the 2019 Key Features Document involved an amendment which effected relatively minor variations to the contractual terms relating to account charges, but variations nonetheless.

73. In these circumstances, it is necessary to address Mr Cox QC's legal argument that any contractual variation (including those of the kind in issue here) requires the application of Article 6 of Rome I for all purposes at the date of the last variation. I am unable to accept this submission:

    i) The argument finds no support in the terms of Rome I, Article 19(3) referring simply to "the date of the conclusion of the contract".

    ii) The argument would seem to involve the applicable law of the contract varying at different points in time, which would be a recipe for chaos and potentially involve a retrospective impact on accrued rights and obligations. Further, it would seem to follow from Mr Cox QC's argument that a contract which was not concluded with a consumer might subsequently fall within Article 6 (and the special jurisdiction regime for consumers) if amended at a point in time at which the relevant contracting party had become a consumer: for example, someone who purchased a computer for work purposes, but later extended the contractual warranty at a point in time when they were using the computer for domestic purposes. There would also be contracts in which a later amendment could "cost" the consumer their Article 6 protection (for example a case in which, by the time of an amendment, the "consumer" had moved to a country towards which the professional party was not directing its activities). It would also, on Mr Cox QC's argument, attribute very significant differences to the issue of whether a new arrangement between contracting parties as to some aspect of their dealings amounted to a variation of an existing contract or a new, separate contract. It is difficult to conceive of an interpretation less conducive to the aim of Rome I, as recorded in Recital (6), "to improve the predictability of the outcome of litigation [and] certainty as to the law applicable".

    iii) While it would be possible to treat the subject-matter of any variation as, in effect, a stand-alone contract to which Article 6 would fall to be applied prospectively, that would involve different parts of the same contract being subject to different applicable laws. While dépeçage is conceptually possible

and is contemplated by Article 3(1) of Rome I, *Dicey, Morris & Collins*, [32-026], notes that it is "in practice inconvenient, and infrequent". The Giuliano-Lagarde Report, p.17, notes that dépeçage must be limited to cases where "elements in the contract … can be governed by different laws without giving rise to contradictions". There will be many contractual variations which cannot be treated separately from the pre-variation terms of the contract (for example a change to the level of fees charged for contractual services which are a standard feature of continuing contracts such as those governing banks accounts, or later terms releasing or modifying an existing obligation). The matters relied upon by Mr Cox QC here are, at best, of this kind.

iv) In any event, the right which Mr Khalifeh asserts – repayment of the account balance – is not one which either arose or was modified by the 2019 Key Features Document.

v) These difficulties are not (or at least not obviously) confined to consumer contracts, because there are other provisions of Rome I which involve determining the applicable law by reference to the habitual residence of one party at the date of contracting: e.g. under Articles 4(1)(a), (b), (d), (e), (f) and (2) (Applicable law in the absence of choice), 5(1)-(2) (contracts of carriage) and 7(1)(3) (insurance contracts).

vi) In my view, there is very real force in Mr Wilson QC and Mr Ferro's submission that Mr Khalifeh's case involves a category error in the application of Rome I. Once it is established that there is a "contract", and its applicable law determined by reference to the provisions of Rome I, the issue of the status and effect of any subsequent variation to that contract is determined by applying the applicable law so determined, rather than raising a new issue for determination under Rome I as to what the applicable law of the contract (as varied) now is.

vii) There can be contractual variations which amount to a complete restatement of the parties' relationship, sometimes with retrospective effect (cf. the discussion of a similar issue in a very different context in MacDonald Eggers, Picken and ors, *Good Faith and Insurance Contracts* (4th), [10.25]) or which involve something akin to a novation in practical, albeit not legal, terms (such as the example given in *McParland*, [5.70]). The application of Article 6 in such a situation is best considered in a case in which it arises. However, the minimal and highly ancillary nature of the new terms which were agreed in this case does not come close to raising this type of argument.

The legal test

74. The concept of a commercial party directing its activities to a particular jurisdiction features in at least two contexts: in the special jurisdiction regime for consumers provided for by Section 4 of Chapter II of the Brussels I Regulation 1215/2012 and retained by s.15B of the Civil Jurisdiction and Judgments Act 1982, and in Article 6 of Rome I. The authorities cited to me were principally drawn from the former context, in which determinations are made on a "good arguable case" rather than a final basis.

75. The leading authority in the jurisdictional context is Pammer v Reederei Karl Schluter & Co KG, Hotel Alpenhof GesmbH v Heller (Cases C-585/08 and C-144/09) [2012]

Bus LR 972. At [69], the Court held that "it does not follow … that the words 'directs such activities to' must be interpreted as relating to a website's merely being accessible in member states other than that in which the trader concerned is established". At [75], the Court held that what was required was that "the trader must have manifested its intention to establish commercial relations with consumers from one or more other member states, including that of the consumer's domicile" and (at [76]) that:

> "It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other member states, including the member state of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers."

76. The Court noted at [81] that clear expressions of such an intention on the part of the trader included (i) mentioning that it is offering its services or its goods in one or more member states designated by name and (ii) disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader's site by consumers domiciled in various member states. However, at [82] the Court noted that a finding of directed activity was not dependent on such "patent" activity. At [83], the Court noted that other evidence capable of establishing such an intention – "possibly in combination with one another" - included (i) the international nature of the activity at issue; (ii) mention of telephone numbers with the international code; (iii) use of a top-level domain name other than that of the member state in which the trader is established; and (iv) mention of an international clientele composed of customers domiciled in various member states. In some (but not all) cases, the use of particular languages or currency could also constitute a relevant factor ([84]).

77. In the jurisdictional context, it has also been noted that the mere fact that the primary focus of the professional's business lies outside the state of the consumer's habitual residence does not preclude a finding that its activities are directed there: Oak Leaf Conservatories Ltd v Weir [2013] EWHC 3197 (TCC), [17].

78. Recitals (24) and (25) of Rome I provide as follows:

> "With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities'. The declaration also states that 'the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract

> has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.'
>
> Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, **provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country**. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, **and the contract is concluded as a result of such activities**."

79. The highlighted language in Recital (25) might suggest that it is necessary to establish a causal connection between the commercial activity directed to the Member State in question and the contract which has been concluded.

80. It is clear that there is no such requirement when applying the special jurisdiction regime for consumers in the Brussel I Regulation (Emrek v Sabranovic [2014] Bus LR 104), with which (Recital (24) tells us), Rome I is to be interpreted harmoniously. It is possible to rationalise this conclusion as reflecting the particular nature of jurisdiction hearings. As Professor Briggs QC notes at [2.106] of *Civil Jurisdiction and Judgments* (6th edition):

> "Whatever the merits of the point might otherwise have been, the need to demonstrate causation at the jurisdictional stage of the proceedings which in most cases will be in actions for very modest sums, would have put the weaker party at a severe disadvantage".

81. However, notwithstanding the wordings of Recital (25), there is no reference to the requirement of a causal connection in Article 6, and the language of that Article in the relevant respects tracks the language of the jurisdiction regime very closely. Further some of the policy considerations which have been recognised as under-pinning the approach at the jurisdiction stage – in particular the difficulties of showing the causal effect of advertising or promotion on a particular purchase and the adverse impact of imposing such a requirement on consumers seeking to bring claims in their national courts (see Emrek, [25]) are equally applicable to the operation of Article 6 of Rome. While an attempt might be made to square the circle by requiring the professional to disprove the existence of a causal connection for Rome I purposes, this approach finds no support in the text, and would be alien to an international instrument which generally leaves all issues of evidence and procedure to national law.

82. There are cases in other jurisdictions in which courts were resistant to the suggestion that a consumer who transacts with a professional in the professional's country, having been in no way influenced by any directed activity to the country of its habitual residence, can nonetheless take the benefit of the special consumer regimes. *McParland*, [12.176], cites a decision of the German Bundesgerichtshof (BGH, III ZR/08), decided in the jurisdictional context, in which a consumer concluded a contract while in Greece without being aware of or motivated by the terms of the Greek professional's website. *McParland* summarises the decision as follows:

> "The fact that the Greek professional has presented his services in a way which was directed towards German consumers in a broad sense did not result in consumer protection being granted when the actual contract was made in Greece, with no reference to, or knowledge of, this directed activity by the professional".

83. However, in the jurisdictional context, that decision has now been superseded by Emrek (itself a reference from a German court which had held the special jurisdictional regime to be inapplicable because the consumer was unaware of the company's website and had learned of its activities through friends). Professor Dickinson, who edits the relevant chapter of *Dicey, Morris & Collins* had previously expressed the view that "there must be a direct and substantial link between the activity in that country" and the contract. In the post-Emrek supplement, Professor Dickinson notes at [33-132]:

> "The view expressed in the text, that there must be a direct and substantial causal link between the activities carried out in that country and the conclusion of the contract, has been rejected by the European Court in its case law on the corresponding provision of the Brussels I Regulation (see Case C-218/12 Emrek v Sabranovic [2014] I.L.Pr. 571). On the court's approach, it would be necessary only that the contract falls in a more general sense within the scope of relevant activities of the professional of which those undertaken in the consumer's home country form part. But compare Rec. (25) of the Rome I Regulation: contract must be concluded "as a result of the professional's activities in the consumer's home state".

84. *McParland*, [12-169] to [12-172], expresses the view that no such link is required in Rome I, as do *Plender and Wilderspin*, [9-062] to [9-063]. Given the position now reached in relation to the special jurisdictional regime, I have concluded that they are right, and that, so far as this issue is concerned, the reference to such a requirement in Recital (25) represents a path not taken. I agree with *Plender and Wilderspin*, however, that "in order to avoid the undue application of art. 6 to situations in which a professional had no real intention of contracting with a consumer of a particular country, it is important for courts not to conclude on the basis of one or two weak indicators, such as an international dialling code, that a directed activity exists" ([9-063]).

85. There is also a requirement that the contract concluded "falls within the scope of such activities" (viz the activities directed to the relevant country). Quite how close the subject-matter of the contract in issue must be to the scope of the directed activity has been a matter of debate. *Plender and Wilderspin*, [9-060], give the example of a German company which sells both cars and bicycles and argue that a contract for one of these products would not fall within the scope of directed activity in relation to the other. By contrast, they suggest that the test would be met by the purchase of a second-hand car of any type from a company undertaking directed activity in relation to new cars of a particular type only. This is necessarily a fact-dependent issue. A useful guide is suggested in *McParland*,[12.170]: whether such a contract "in general terms, was a likely product of that activity".

The material relied upon

86. Mr Khalifeh's case in this regard was advanced by reference to:

i) Statements in the Bank's Annual Accounts.

ii) Statements in a prospectus issued by the Bank.

iii) The Bank's media platforms.

iv) The evidence of and statements by Mr Azhari, the chairman of the Bank's board and its general manager.

v) The terms of the website maintained by the corporate group of which the Bank formed part ("the Group").

vi) Mr Khalifeh's evidence as to how he came to open the Personal USD Account.

I shall consider these in turn.

The Annual Accounts

87. Mr Khalifeh relied on the terms of the annual reports of the Group for the 2016 accounting year. These record the importance of deposit inflows from Lebanese expatriates to the Lebanese economy, and how those inflows had started to slow in 2015 due to reduced direct foreign investment in Lebanon and reduced inflows from the GCC countries. Mr Khalifeh submitted that the Bank had a particular incentive, against the background of steps taken by the BdL, to increase the volume of foreign deposits. I accept that the reports refer to an increase in Group assets during 2016 which was said to reflect "the perceived confidence of expatriates in BLOM Bank Group". However, the report says nothing about steps to target expatriates, still less to target those habitually resident in the United Kingdom.

88. Mr Khalifeh also relied upon information in the Group's 2019 accounts demonstrating that individuals were an important source of deposits, and statements which reflected the benefits to customers of being able to access services "from anywhere in the world". For essentially the same reason, this does not advance Mr Khalifeh's case that the Bank directed relevant activity to the United Kingdom.

The prospectus

89. On 2 May 2018, the Bank issued a prospectus in relation to an issue of Deposit Certificates, which included language specifically addressed to United Kingdom-based readers and refers to the Bank conducting operations in the United Kingdom. The prospectus stated:

> "Regional and International Operations and Expansions
>
> The Bank operates through its branches and subsidiaries in 12 countries. As a result, the Bank is subject to political and economic risks in such countries. The Bank's largest markets in terms of assets and earnings are Lebanon, Egypt, Jordan and the UAE".

The prospectus stated that the Bank's European presence was "primarily" comprised of offering corporate and private banking services to the Arab diaspora, through seven

branches including one in London. The prospectus described the Bank's European operations as follows:

> "Europe
>
> The Bank has operations in Europe in France, Switzerland, the United Kingdom, Cyprus and Romania".

90. However, the issue of deposit certificates post-dated the opening of the Personal USD Account by 18 months. In any event, the statements relied upon by Mr Khalifeh (which included others beyond those quoted above), were clearly statements identifying those countries in which the Bank had opened branches, or where its subsidiaries had branches, with the references to the United Kingdom being to the London branch of Blom France. There was nothing to suggest that the Bank was targeting customers in (say) the United Kingdom for the purposes of opening accounts in Lebanon.

The Bank's media platforms

91. Mr Khalifeh relied on a tweet from the Bank's Twitter account from November 2014 which stated "#BLOMBANK provides you with #PeaceOfMind in Lebanon, Cyprus, Jordan, France, UAE, UK, Romania, Switzerland, Syria, Egypt, KSA, Qatar, Iraq". However, these were clearly references to those countries where the Bank or its subsidiaries had branches, with the reference to the United Kingdom being, once again, to Blom Bank France's branch here.

92. He also relied on an interview given by Mr Azhari in September 2016, which can be found on YouTube. The interview was given in Arabic. In the interview, Mr Azhari emphasised the importance of the Lebanese diaspora to the Bank. However, in the interview, Mr Azhari clearly draws a distinction between countries where the Bank goes "to serve our customer base" (i.e., to serve existing customers) and those where it goes because "it can be a strong local bank" (i.e., obtain local customers). The reference relied upon by Mr Khalifeh – that "in Europe, we are present really to service the Lebanese and Arabs who go to Europe – Paris, London and Geneva" – was to countries where the Bank had gone "to serve our customer base", and the locations in question were those where Blom Bank France, or its subsidiaries, had branches. There was nothing to suggest it was part of the Bank's purpose to persuade those resident in these countries to open accounts with the Bank in Lebanon. The places where the Bank could be "a strong local bank" were identified as Egypt, Jordan, Syria and the Gulf.

93. In his closing submissions, Mr Khalifeh also referred to a document which was not explored in cross-examination, which discussed the Bank's digital media strategy in 2016 and its plans for 2017. The date of this document is not clear, but in relation to both Twitter and Facebook, it noted that these communications were overwhelmingly in English and stated that "it is very important to note that almost our whole audience … is located in Beirut which guarantees the right exposure to the right people". One goal for 2017 was stated to be "to increase the usage of Arabic in our posts to be closer to our audience (Lebanese dialect is preferable)". There was a reference to an intention *in 2017* to pay for search engine optimisation for the new website which had gone online in 2016. However, there was no attempt to explore whether this was done. The report does suggest, however, that there was no such marketing activity in 2016.

The evidence of Mr Azhari

94. Mr Khalifeh understandably relied on Mr Azhari's acknowledgement that the market of Lebanese expatriate was of particular interest to the Bank. However, it is necessary to consider Mr Azhari's evidence as to how the Bank engaged with that community. In many cases, they held Bank accounts with branches opened by the Bank in Arab countries with a significant Lebanese community, and in other cases with branches opened by subsidiaries of the Bank.

95. So far as accounts held with the Bank in Lebanon are concerned, it was Mr Azhari's evidence that UK-domiciled individuals formed a very small part of the Bank's clientele, and that no efforts were made to market to them. He said that according to the Bank's records, in 2016 only 43 such customers opened accounts (as against 49,143 new accounts in Lebanon). There was a total of 910 such accounts held by UK residents in 2016, out of 40,924 held by individuals outside Lebanon. Mr Khalifeh suggested in closing that the figures for 2017 evidenced a successful marketing effort by the Bank, on the basis that 190 new accounts were opened by UK residents. However, that contention cannot stand against the figures for 2018 (20 new accounts) and 2019 (30). Significantly, accounts held by persons living in England as a proportion of those held by persons outside Lebanon remained roughly constant (2% in 2016, 2.6% in 2017, 2.5% in 2018 and 2.3% in 2019). These figures do not preclude the possibility of activities directed to those habitually resident in the United Kingdom, but they cannot be said to evidence it, or make it a commercial activity which the Bank was inherently likely to undertake.

96. Mr Azhari's evidence was that the principal source of those customers was existing customers of the Bank who had moved to Europe to study or for business – either from Lebanon, a country from which a great many individuals have moved abroad for various reasons, or from the countries of the GCC - but maintained their Lebanese accounts as well, in some cases, as opening accounts with the London subsidiary of Blom France. I accept that evidence, which is consistent with Mr Azhari's statement in the interview available on YouTube that in Paris, London and Geneva the Bank is "present really to service the Lebanese and Arabs who go to Europe", and also consistent with the recent history of Lebanon. That does not mean that there are no individuals who opened accounts with the Bank for the first time from a United Kingdom habitual residence, but the number is likely to have been very small indeed, and scarcely worth the effort of directed commercial activity. While I accept for the purposes of the argument on this issue that it is the Bank's apparent, rather than actual, intent which matters (c.f. Merck KGaA v Merck Sharp & Dohme Corp & Or's [2017] EWCA Civ 1834, [165]), to the extent that Mr Cox QC sought to bolster Mr Khalifeh's case by relying on what was said to be the Bank's actual intention, I am unable to accept that argument.

The Bank's website

97. Some historical pages from the Bank's website have been recovered using the Wayback Machine, which captures and maintains website pages for posterity, and has long been a friend to the legal profession. This does not provide anything like a comprehensive record of the website over time. The pages which are available include a series of links (or at some point "drop down" menu choices) to countries, including the United Kingdom. The country-specific pages for the relevant time are not available. Later versions of the website describe the terms of the United Kingdom offering by reference

to the services offered by the London branch of the Bank's French subsidiary, Banque Banorient France, and I am satisfied that this is the best evidence as to what appeared on the hyperlinks or drop-down menu for the United Kingdom in earlier iterations.

98. Pages on the website for the Group as at October 2016 stated that the Group was an international bank with a presence in 12 or in some versions 13 countries including the United Kingdom, and referred to the Group conducting "worldwide operations through a network of 258 banking and financial units, either directly or through its subsidiaries" which included "Blom Bank France", continuing:

> "In this respect, the Bank serves the niche market of Lebanese and Arab expatriates and businesspeople in Europe, and acts as one of the trusted local universal, full-service banks in the Middle Eastern countries in which it is present".

Mr Cox QC argued that this was a statement that the Bank served the niche market of Lebanese and Arab expatriates and businesspeople in Europe through its Lebanese branches as well as its overseas branches and subsidiaries. However, I do not accept that this is the appropriate interpretation. Rather the words "in this respect" are directed to the overseas branches and subsidiaries. I am also satisfied that the reference to the Bank conducting overseas operation "directly" is to those branches outside Lebanon operated by the Bank itself, rather than through subsidiaries. I do not accept that a reasonable reader of this material would regard it as an attempt by the Bank to persuade Lebanese expatriates in the United Kingdom to open bank accounts in Lebanon.

99. The Bank's website lists the accounts it offers and their features. A page addressing the Bank's retail services for current accounts includes a statement that it is possible to transfer cash using the Bank's "eBLOM" service "from anywhere in the world to anyone in Lebanon" but does not mention the United Kingdom. It refers to facilitating cash transfers in USD and LBP but makes no reference to sterling. This section of the website concludes:

> "Apply today to any BLOM Bank's current account by visiting you nearest branch. For more infor please contact our 24/7 call center in 01-753000".

100. The equivalent page for the Bank's saving accounts stated:

> "For more information, head towards the nearest BLOM Bank branch, or contract our 24/7 Call Center on +961 1-753000 anytime, any day".

+961 is the international dialling code for Lebanon.

101. The November 2016 website contains a list of correspondent banks including three in the United Kingdom. However, I do not accept that this, of itself, involves directing activity to the United Kingdom (not least because correspondent banks would assist the Bank in providing international banking services to Lebanese residents).

How Mr Khalifeh came to open the Personal USD Account

102. Finally, there is an issue as to whether Mr Khalifeh can further support his case, evidentially, on the basis that the Bank's efforts did cause or influence his decision to open the Personal USD Account. Emrek establishes that the fact of a causal connection

may be evidence which supports the existence of directed activity (at [26]). I do not accept, however, the contrary proposition advanced by Mr Wilson QC (namely that if the contract in issue is not entered into as a result of activity directed by the professional to the consumer's habitual place of residence, that is evidence that there is no such directed activity).

103. Mr Khalifeh gave evidence that before opening the Personal USD Account, he did online research from which he became aware that the Bank offered good rates of interest, and which confirmed his existing knowledge that the Bank's French subsidiary had a London branch. He also said that he "looked at the Bank's website and any other materials available online … in September 2016." There was other evidence which I address in the Confidential Annex, but which does not identify any particular website Mr Khalifeh is said to have visited.

104. I am not persuaded that statements on the Bank's website caused or contributed to Mr Khalifeh's decision to open the Personal USD Account. Mr Khalifeh's mother had for many years been a senior employee in the Bank, before becoming a senior employee in Blom France Dubai, where Mr Khalifeh's company InsideJob Dubai opened an account in 2012. Mr Khalifeh accepted he opened this Dubai account as a result of his mother's introduction, and there was no suggestion that this was the result of any internet research on his part. It was also on the basis of his mother's introduction that Mr Khalifeh attended at the Bank's Main Branch to open the Personal USD Account. On that occasion, he accepted that he did not mention the website to Ms Orfali. His evidence that he recalled accessing the Bank's website before opening the Personal USD Account hardened from reconstruction to recollection between his witness statement filed for the jurisdiction application and that prepared for trial. Mr Khalifeh's evidence that Blom France's London branch was a relevant factor because of its convenience is difficult to reconcile with the lack of any attempt to ascertain what the London branch's facilities were and whether he could avail himself of them before he opened the Personal USD Account, and his minimal interaction with the branch afterwards (effectively confined, on his own evidence, to an enquiry as to opening an account *in 2017* and attendance at the branch to sign documents relating to internet banking with the bank). In any event, Mr Khalifeh accepted he had independent knowledge of the existence of the London branch and had not derived this information from the website. If it matters, I would not in any event have been satisfied on the balance of probabilities that Mr Khalifeh accessed the websites *from London*, given the very limited amount of time he spent in England in 2016 (see [113] below).

Conclusions

105. Against this background, I have reached the following conclusions.

106. The only evidence of any directed activity before the court is the Bank's website. That website is accessible from the United Kingdom and has a top-level domain name. While there are cases in other national courts which have held that such a website will be treated as directed to a particular country unless those resident in a particular country are implicitly or explicitly carved out (e.g. the decision of the Oberlandesgericht Dresden of 15 December 2004 referred to in *Plender and Wilderspin*, [9-049]), the Court of Justice in Pammer made it clear that the ability to access a website from a particular country is unlikely of itself sufficient to establish the direction of activity to that country. In my view, it is insufficient to do so here.

107. I accept that the Bank or the Group did direct activity to the United Kingdom through those parts of the website which specifically referred to the United Kingdom and contained a link to a page dealing with that subject. However, that form of directed activity was limited to the promotion of services provided through the London branch of the Bank's French subsidiary, rather than through banking services supplied in the form of accounts in Lebanon. The Personal USD Account which Mr Khalifeh opened at the Bank's Main Branch in Beirut does not fall within the scope of that directed activity. While it might be said that both involve the promotion of banking activity, there is a very significant difference between directing activities with a view to encouraging customers habitually resident in the United Kingdom to open accounts at or use the services of a London branch of a French subsidiary (in effect inviting residents of the United Kingdom to deal with a branch within their own jurisdiction), and activity designed to encourage UK residents to open accounts at the Bank's Main Branch in Lebanon.

108. That leaves the issue of whether the Bank, through its website, was directing activity to consumers resident outside Lebanon (and hence in the United Kingdom) for the purposes of encouraging them to open accounts with the Bank in Lebanon. In this regard, in addition to the use of a website with a top-level domain name, those webpages identifying the terms of the Bank's savings accounts included an international dial code.

109. I have found this a finely balanced issue, on which both sides have forceful points to make. While all bank accounts can be used for the purpose of effecting international transfers, the opening of a savings account (in contrast, for example, to a holiday cruise) is not an inherently international activity. While the pages dealing with savings accounts included an international dial code (as did other pages), the pages giving details of current accounts did not. Once again, there are cases in national courts in which the presence of an international telephone number on a website has been held to be sufficient to establish directed activity to any country from which the website can be accessed. However, *Plender and Wilderspin*, [9-057], rightly describe this as a "weak indicator" (particularly given the ubiquity with which international dial codes are given). Against the background of the other evidence I have set out, I have concluded this is simply too slender a basis for a conclusion that the Bank directed relevant commercial activities to the United Kingdom in or before 2016.

110. Finally, I should mention the decision of Michael Kent QC in Bitar v Banque Libano-Francaise SAL [2021] EWHC 2787 (QB) to which both parties referred me. That was a jurisdiction decision, in which the judge was persuaded that there was a good arguable case that the Lebanese bank in that case had directed relevant activities to the United Kingdom. That decision necessarily reflects the evidence of the activities of the bank in that case (and I note that the website pages relied upon included materials addressing Lebanese expatriates for the purpose of "encouraging more investments in your homeland" with a direct link under the expatriates page to information on how to open an account with the bank in Lebanon: [31]), and the nature of the hearing in which the issue arose. I have reached my conclusion in this case on the basis of the materials placed before me, obtained through disclosure and tested in cross-examination and I have reached a final determination on the balance of probabilities.

(iii) Was Mr Khalifeh habitually resident in the United Kingdom on 14 October 2016?

The test

111. There was no real dispute as to the applicable principles:

i) A person is habitually resident in the country in which they have their permanent or habitual centre of interests: *Dicey, Morris & Collins*, [6R-145].

ii) A person can only have one habitual residence at any particular point in time: *Dicey, Morris & Collins***,** [6-151].

iii) In determining whether a habitual residence has been acquired, the European Court of Justice in Swaddling v Adjudication Officer [1999] ECR I-1075, [29]-[30], identified the following matters as relevant:

> "The … person's family situation; the reasons which have led him to move; the length and continuity of his residence, the fact (where it is the case) that he is in stable employment and stability of any employment; and his intentions it appears from all the circumstances."

iv) Habitual residence is not simply a matter of intention, and someone does not acquire a habitual residence merely by intending to do (Re LC (Children) [2014] UKSC 1, [59], cited by Slade J in Winrow v Hemphill [2014] EWHC 3164 (QB), [40]).

112. For reasons I have already given, I am satisfied that, in this case, that test falls to be applied on 14 October 2016. I should record that there is no dispute that if the test fell to be applied at the date of the June 2019 amendment, Mr Khalifeh was habitually resident in the United Kingdom by that date.

The position on the facts

113. For the reasons summarised very briefly below, which are further developed and elaborated on in the Confidential Annex, I have concluded that Mr Khalifeh was not habitually resident in the United Kingdom on 14 October 2016:

i) Mr Khalifeh's visa status until April 2017 at the earliest did not permit him to live in the United Kingdom, and I am satisfied that he abided with the letter and spirit of that restriction.

ii) An agreed schedule showed that in 2014, 2015 and 2016, Mr Khalifeh spent a total of 17, 87 and 52 days respectively in the United Kingdom, as against 172, 182 and 188 in the UAE (and 31, 49 and 56 in Qatar). It was only in 2017 when the figure for the UK (134) came close to that for the UAE (147), and only in 2018 (235 as against 13) that it surpassed it.

iii) The 52 days spent in the United Kingdom in 2016 comprised numerous short periods rather than lengthy stays. Looking at the position from 1 January to 13 October 2016: there was a period of 3 days; one of 4 days; one of 2 days; two 1-day periods; a period of 5 days, one of 7 days, one of 4 days and one of 10 days, For the remainder of the year, there were two periods in the UK of 8 and 7 days respectively.

iv) The terms in which Mr Khalifeh applied for, and obtained, a changed visa status in April 2017 strongly support the conclusion that, up to that point, he was living in the UAE and not the United Kingdom.

v) Mr Khalifeh's business activities, and in particular the operations of InsideJob UK and InsideJob Dubai, show that it was only after 2016, and substantially only in 2018, that he transferred the business from Dubai to the United Kingdom.

vi) Numerous statements made by Mr Khalifeh when dealing with his accountants, in particular in relation to the issue of United Kingdom income tax, confirm that it was only in 2017 that he moved to the United Kingdom.

114. While I accept that, by October 2016, Mr Khalifeh had a fixed and settled intention to transfer his habitual residence to the United Kingdom in the future, and that he had begun taking the steps necessary to allow that to happen, those steps had not reached a stage by 14 October 2016 that it could be said that Mr Khalifeh had acquired a habitual residence in the United Kingdom.

(iv) Did the Personal USD Account Agreement fall within Article 6(4) as a contract for the supply of services to be supplied to Mr Khalifeh exclusively in a country other than that in which he has his habitual residence?

115. In view of the conclusions I have already reached on other issues, I will deal with this issue very shortly. It is common ground that the relevant principles are set out in C-272/18 Verein fűr Konsumenteninformation v TVP Treuhand und Verwaltungsgesellschaft fűr Publikumsfonds mbH & Co KG [2019] I L Pr 44:

i) The question of where the services are to be supplied must be determined before the applicable law is identified ([49]) and therefore the expression must be construed autonomously.

ii) The rationale for Article 6(4) is that, in a situation where the supply of services is to be outside of the consumer's country of habitual residence, the consumer cannot reasonably expect that the laws of his home state be applied by way of derogation from the general rules of Articles 3 and 4: [50].

iii) It is necessary to ascertain whether it follows from the very nature of the contractual services that they can be supplied as a whole only outside the state in which the consumer has his habitual residence: [54].

iv) The consumer must have "no possibility of receiving" the services in his state of residence and "must travel abroad in order to do so": [55].

116. The examples of such contracts given in the Giuliano-Lagarde Report, p.24, involve services supplied *directly* to the consumer outside of their country of habitual residence – "accommodation in a hotel, or a language course" - and the decision in Verein also refers to the consumer having to travel abroad to receive services. It is possible to conjure up examples which test the limits of that latter restriction – for example the consumer habitually resident in the United Kingdom who agrees with a Spanish contractor that the contractor will paint their Spanish holiday home but never visits the property. But even in that example, it might be said that the supply is exclusively

outside their habitual residence, whatever non-contractual benefits (in the form of "consumer surplus" satisfaction) the consumer may derive in the place of their habitual residence from the knowledge that the job has been done.

117. In this case, I am not persuaded that the services provided by the Bank were to be received exclusively outside the United Kingdom. The reality is that it was possible for Mr Khalifeh to make withdrawals from the balance of the Personal USD Account using a debit card, write cheques for those who would accept them drawing on that balance, and give remote instructions to transfer funds from the account to other places, including to accounts in the United Kingdom, all without leaving his place of habitual residence. He could also move funds between accounts through remote instructions, and otherwise "manage" the accounts from the United Kingdom. If it is assumed that the conditions of Article 6 are otherwise satisfied, and a foreign bank directs commercial activities in relation to retail banking to the United Kingdom, from where a consumer opens an account with the main branch of the bank which it can operate and manage from the United Kingdom, I do not think it could be said that the circumstances of the transaction were such that the consumer could not reasonably expect the laws of their home state to be applied.

THE POSITION UNDER LEBANESE LAW

118. In the light of my conclusions that the applicable law of the Personal USD Account Agreement is Lebanese law, it is not necessary to consider whether the position under Lebanese law would nonetheless have been relevant (by virtue of Article 12(2) of Rome I) even if the applicable law had been English law. However, I should record my gratitude for Mr Ferro's comprehensive and clear oral closing submissions on this issue.

119. I heard evidence as to the contents of Lebanese law from two experts:

    i) Professor Dr Nayla Comair-Obeid for Mr Khalifeh ("Professor Obeid");

    ii) Dr Fadi Moghaizel for the Bank.

120. I accept both experts were fully qualified to assist the court and did their best to do so. As will become apparent, the Lebanese courts are still working their way through the difficulties created by the Lebanese financial crisis for those holding foreign currency deposits at Lebanese banks, and the conflicting views of the experts reflects an underlying conflict within Lebanese law as to how these issues should be resolved.

121. I have relied on the Lebanese legal sources provided to me, informed by the context and explanation for those sources provided by the experts. For understandable reasons, in a case in which the legal costs incurred are already prohibitive, in most cases only extracts of court decisions were translated, with the result that my interpretation of these materials on occasions brought echoes of youthful attempts to answer gobbet questions with the most tenuous of grasps of the surrounding text. Given the ongoing and unresolved dispute among Lebanese courts as to how some of the issues raised by this case should be resolved, I have considered the extent to which decisions are compatible with the primary sources of Lebanese law (the general and specialist codes).

122. I found Dr Moghaizel the more persuasive expert when arguing at a level of principle rather than simply by reference to what cases have decided. In addition, on a number

of occasions, Professor Obeid was reluctant to answer questions put at a level of principle on the basis that they were too general or that she had not been asked to consider such matters for the purposes of preparing her report. I should also record my conclusion that Professor Obeid changed her evidence on the issue of whether an unaccepted proffer of payment of debt was, without more, a defence to a subsequent claim on the debt between the report which was submitted to Freeman J at the hearing of the anti-suit injunction application, and the report submitted for this hearing, although Professor Obeid did not accept that there had been such a change. However, I am also satisfied that the position adopted by Professor Obeid at trial that there was no such defence is correct, and had this remained a live issue, I would not have accepted Dr Moghaizel's evidence to the contrary. In the event, the Bank did not pursue this argument in closing submissions.

123. In determining the issues of foreign law, I have followed the guidance given by Simon J in Yukos v Rosneft [2014] EWHC 2188, [24]-[30].

Lebanese law: an introduction

124. Lebanon has a civilian legal system. The main instrument of Lebanese private law is the Code of Obligations and Contracts ("the COC"), derived from the French Code Civil and adopted in 1932. Like the Code Civil, the COC is supplemented by a number of specialist laws including, for present purposes:

i) The Lebanese Code of Commerce ("LCC").

ii) The Lebanese Code of Money and Credit ("CMC").

The procedural rules which apply in civil actions are set out in the Lebanese Code of Civil Procedure ("LCCP"). As will become clear, the divide between substance and procedure as it is agreed it should be drawn in this case does not stop at the front cover of the LCCP.

125. Lebanon has no doctrine of precedent as such, but the jurisprudence of the Lebanese courts is capable of establishing (as well as evidencing) legal principles, particularly when a particular principle is endorsed by a number of cases, so as to give rise to a *jurisprudence constante*. The civil courts operate in a triarchy of courts of first instance, the Court of Appeal and the Cassation Court. In addition to what might be termed the ordinary courts, Lebanon also has courts of summary jurisdiction in which a single judge (sometimes referred to as the "Urgent Matters Judge" but who I shall refer to as "the Summary Procedure Judge") presides. The jurisdiction of these courts is concerned with granting urgent relief in cases in which this can be done without determining the merits of the rights and obligations of the parties (Articles 579 to 588 of the LCCP). When an issue that is seriously disputed is submitted to the Summary Procedure Judge, the Judge is required to rule that they have no jurisdiction.

126. Thus Article 579 of the LCCP provides:

> "The Sole Judge may look, in his capacity as an urgent matters judge, into applications to take urgent measures in civil and commercial matters without addressing the basis of the right, and without prejudice to the special jurisdiction of the President of the Enforcement Court. He may, in the same capacity, take

> measures aiming at removing manifest assaults on rights or on lawful situations. In situations where the debt's existence cannot be the subject of a serious dispute, the Urgent Matters Judge may grant the creditor a provisional advance on account of his right."

127. Article 583 of the LCCP provides:

> "The Urgent Matters Judge gives his decision in the lawsuit submitted to him without delay".

128. Article 584 of the LCCP provides:

> "The decision of the Urgent Matters Judge does not have the force of res judicata in relation to the basis of the right. However, he may not amend or cancel it except if new circumstances arise that justify it".

129. Decisions of Summary Procedure Judges can be appealed. I accept Dr Moghaizel's evidence that when such appeals are brought, it is very rare for a stay of the decision of the Summary Procedure Judge to be ordered (not least because that would be inconsistent with the urgent and essentially interim nature of the jurisdiction). A stay is only to be granted when it appears clear to the relevant court (the Court of Appeal, or if that court has refused a stay and a further appeal is brought, the Cassation Court) that the consequences resulting from enforcement would be unreasonable or if there is a likelihood that the appealed decision will be overturned.

130. It is necessary to explain the nature of the summary procedure jurisdiction because:

i) A number of customers with foreign deposits at Lebanese banks have invoked the summary procedure jurisdiction to obtain orders that their bank is obliged to pay them in foreign currency or effect a foreign currency transfer to a bank outside Lebanon in accordance with their instructions.

ii) Banks have almost always contested the jurisdiction of the Judge of Summary Procedure by arguing that the matter cannot be decided without the Judge getting into the merits. However, the banks' arguments have generally been rejected by the Judges of Summary Procedure.

iii) In the vast majority of cases, the banks have then appealed the decisions, and sought stays of execution.

iv) I accept the evidence of Dr Moghaizel that in almost all of these cases, the Courts of Appeal, or the Cassation Court, have granted stays of enforcement, and done so on the "likely to be overturned" ground.

v) The final position under Lebanese law can only be resolved by a decision of the Cassation Court. However, no such decision is expected for a year or two, and neither party has suggested it would be appropriate, in the context of this expedited trial, to wait for a decision of the Cassation Court before ruling on the position under Lebanese law myself. I cannot pretend to be altogether grateful for the confidence thereby reposed in me.

131. Finally, it is important to note that, at least on the evidence before me, the restrictions imposed on banks in relation to payments out of foreign currency accounts have not taken the form of legislative provisions which directly affected the contractual relationships between banks and their customers. Rather, banks have been subject to informal regulatory pressure in the form of circulars addressed to them by the BdL or the Association of Banks. The position is, in my view, well-summarised by a decision of the Judge of Summary Procedure sitting in Zahle (Decision no 5 dated 13 January 2020, Mohammad Ismail Abdelrahman v Banque Credit Libanais SAL) where the judge noted:

> "The aforementioned circulars do not have any binding capacity towards the clients and it is not possible in any way to limit their right to carry out any banking operation that meets the accepted banking conditions within the laws and regulations ... Any Capital Control by the Association of Banks needs legislation and this is not the case in Lebanon to date, noting that no circular was issued by the Central Bank of Lebanon represented by its Governor aiming to impose such restrictions … Such measures require exceptional powers to be granted to the [BdL] pursuant to a specific regulation".

132. The result is that, whatever regulatory pressure it may be under, the Bank has sought to defend this claim before me in reliance on the pre-crisis provisions of Lebanese law, rather than by reference to any emergency legislation.

The nature of a bank's obligation to a foreign currency deposit holder and how it can be discharged

133. One issue which arises in this case is the nature of the obligation owed by a bank to the holder of a foreign currency deposit account with the bank, and how that obligation can be discharged.

The nature of a bank's obligation under a foreign currency deposit account

134. So far as the first sub-issue is concerned, it was Professor Obeid's evidence that a deposit bank account was to be treated as a contract of deposit within Part I Book VI of the COC (dealing with "the obligations of the dépositaire under a contract for ordinary deposit"). On this basis, Professor Obeid submits that the bank is subject to the obligation created by Article 711 of the COC:

> "The depository is required to return the deposit itself together with its accessories exactly in the state received, without prejudice to the provisions of Article 714".

135. Professor Obeid reasoned from the application of Article 711 to the conclusion that if a customer pays USD into a foreign currency bank account, the bank is obliged to return USD to the customer when they make withdrawals from or close the account. Professor Obeid derived support for her analysis from one of the summary procedure cases I have referred to below, a decision of the Court of Appeal of Mount of Lebanon in Blom Bank SAL v Khalil Michelle Nakad and others of 26 April 2021, which applied Article 711 to a foreign currency deposit account and relied upon that provision as a basis for concluding that the bank was under an obligation to effect an international foreign currency transfer at the customer's request. In particular, the Court of Appeal stated:

> "Whereas with reference to the general rules as required by Article 711 of the Code of Obligations and Contracts, [the bank] undertakes to return the deposit itself together with its accessories in the state received, i.e. in the same currency in which it was deposited …
>
> We conclude that the opening of an account with a bank allows the holder to have all the methods to payment including the financial transfer, considering that the money transfer constitutes a basic banking service and an essential element of financial transactions."

136. That decision is under appeal to the Cassation Court, and enforcement has been stayed. I should record at this point that Mr Khalifeh does not contend that a bank which holds a foreign currency deposit account is obliged to effect an international foreign currency transfer at the customer's request, and, to that extent, does not seek to support the reasoning in the summary procedure cases which have made that finding (which, in addition to the Nakad case, include the Judge of Summary Procedure in Metn, Decision no 27/2020 dated 10 January 2020, Salah Abdel Al Jamil v Banque Libano-Suisse SAL and the Judge of Summary Procedure in Zahle, Decision no 5 dated 13 January 2020, Mohamad Ismail Abdul Rahman v Credit Libanais SAL).

137. Dr Moghaizel disputed that Article 711 applies, saying that it created an obligation to return *in specie* which was fundamentally inconsistent with the debtor-creditor relationship which payment into a bank account creates under Lebanese law.

138. I am unable to accept Professor Obeid's analysis which seems to me to be fundamentally inconsistent with the nature of the payment into a deposit account, with the general principles of Lebanese law and with decisions of the ordinary (rather than summary procedure) courts. It is clear that under Lebanese law as much as under English law, the funds deposited by an account-holder become the property of the bank, being replaced by a debt owed to the customer (generally payable on demand). If Article 711 of the COC applied to a deposit account, it would seem to follow that any interest earned by the bank on the deposit would have to be repaid to the customer as well, which is clearly not the law.

139. Both experts agreed that a deposit account is subject to Article 123 of the CMC, which provides "deposits shall be regulated by article 307 of the Lebanese Code of Commerce". Article 307 of the LCC in turns provides:

> "The bank which receives a sum of money as deposit acquires ownership thereof. It must refund it in one or several instalments of equivalent value on the depositor's first request or within the terms of time-limit or prior notice laid down in the contract".

140. A payment into a deposit account is, therefore, properly classified as an act which gives rise to a debt rather than a deposit properly so-called or a loan for use. In this regard, it is significant, as Dr Moghaizel pointed out, that Article 691 of the COC provides:

> "If the trust deposit has, for its object, a sum of money or other fungible things, and if the depository has been authorised to use it, the contract is considered as a loan for consumption".

Loans for Consumption are addressed by Book VII Title II of the COC (Articles 754 to 765), Article 754 providing:

> "The loan for consumption is a contract by which one of the parties remits to another person money or other fungible things, on condition that the borrower makes restitution to him of as much of the same kind and quality at the expiry of the time-limit agreed".

141. There may well be an issue in Lebanese law as to whether a bank deposit is properly classified as a loan for consumption for the purposes of Articles 754 to 768 of the COC or as a *sui generis* debt obligation. I was referred to a Lebanese textbook, Professor Fady Nammour's *Droit Bancaire* (2003 edition, p.556), which suggested that this is a live controversy in Lebanese law which the Cassation Court has stayed clear of, simply characterising the resulting relationship as that of debtor and creditor. A more recent edition of the same text (2012, pp.278-283) records that certain of the rules relating to deposits do not apply to deposit accounts, and that "the depository banker is in reality only the debtor of the sum so deposited". I am satisfied that the relationship is one of debtor and creditor, and that Article 711 (which is concerned with the deposit of non-fungibles which must be returned *in specie*) has no application. There is a separate issue as to what effect Article 307 of the LCC has on the way in which the debt arising from a deposit account can be discharged to which I return below.

142. The conclusion I have reached by interpreting the provisions of the various codes is supported by a number of court decisions. A Beirut Court of Appeal decision (Decision no 296 of 6 March 1971) held:

> "Lebanese law considers the deposit of funds at the banks as a loan for consumption by the provisions of Article 307 et seq of the Code of Commerce and also the provisions of Articles 754 to 765 of the COC [concerned with loans] which renders the bank receiving the funds as the owner (of such funds) as of the date of the occurrence of the deposit and it must return similar (funds)".

143. To similar effect, the Lebanese Cassation Court sitting in criminal matters (Sixth Chamber) in its Decision no 294/2012 dated 9 October 2012 held that because funds deposited by a customer become the funds of the bank under Article 307 of the LCC, they were "not considered as deposits with the banks in the meaning of Article 690 et seq of the COC [Book VI dealing with deposit and sequestration which is the section of which Article 711 forms part] rather they are loans against interest at a specified rate and the funds become part of the estate of the borrowing bank that can use them in all domains of banking activities provided it returns them to the clients either upon demand or at the determined agreed term".

144. For these reasons, I am satisfied that the obligation owed by a bank to the holder of a foreign currency deposit account is that of debtor to creditor, and that Article 711 of the COC does not apply to the Bank's obligation to Mr Khalifeh.

Money of account and money of payment

145. Most legal systems recognise a distinction when it comes to monetary obligations between the money of obligation and the money of payment. That distinction is explained in the following terms in *Dicey, Morris & Collins*, [37-004]:

> "An equally important distinction must be drawn between the 'money of account', and the 'money of payment'. Money serves the twofold function of a means of measurement and of a medium of payment. Hence a distinction must be drawn between the currency in which a debt is expressed or a liability to pay damages is calculated and the currency in which such debt or liability is to be discharged. The first is called the 'money of account,' or 'money of contract' or 'money of measurement.' It measures the quantum of the obligation and thus concerns its substance. It indicates that which is owed, 'in obligatione.' The second is called the 'money of payment.' It indicates the quomodo of the performance and thus concerns its manner, that which is 'in solutione.'"

146. It is clear (and was not disputed before me) that Lebanese law recognises a similar distinction between *la monnaie de compte* and *la monnaie de paiement*. There was also no dispute that the money of account of the Personal USD Account is USD. However, there is a dispute, which I have been asked to determine, as to whether the money of payment is USD or LBP.

What was the money of payment of the Personal USD Account?

147. The issue of the money of payment of foreign currency monetary obligations under Lebanese law is a topic which has moved from the periphery to the legal mainstream since the advent of the Lebanese financial crisis. For the purposes of resolving this argument, I was referred to various provisions addressing what constitutes performance for the purpose of the law of contracts generally, or deposit agreements, as well as provisions specifically addressing the money of payment.

148. I have already referred to Article 307 of the LCC, with its reference to the bank's obligation to return the sum deposited "in one or several instalments of equivalent value" on request. In addition, Professor Obeid relied on Article 249 of the COC which provides:

> "As much as possible, the obligations must be performed in-kind as the creditor has an acquired right in collecting the object of the obligation itself";

and Article 299 of the COC, which provides:

> "Payment must involve the thing due itself, and the creditor should not be compelled to accept another, even if it was of a greater value".

149. The Bank relied on the following provisions of Lebanese law:

i) Article 301 of the COC:

> "When the debt is a sum of money, it should be paid in the currency of the country. In normal times, and when inconvertibility has not been established for fiduciary money, the contracting parties remain free to agree that repayment would be made in a specific metallic currency or a foreign currency".

ii) Article 192 of the CMC:

> "Refusal to accept the Lebanese currency within the framework of conditions set out in articles 7 and 8 is subject to penalties stipulated in article 319 of the Penal Code".

At one stage, Professor Obeid suggested that Article 192 of the CMC did not apply to individuals or between banks and their customers but only between banks *inter se*. However, she later accepted that this was not correct (as is clear from the fact that imprisonment is one of the forms of penalty which can be imposed for this offence).

iii) Article 7 of the CMC:

> "Banknotes of a value of 500 pounds and over shall be unlimited legal tender throughout the Lebanese territory".

150. The Lebanese legal materials placed before me included an article by Bechara Karam, an Assistant Professor at the Faculty of Law and Political Science at the Holy Spirit University of Kaslik, entitled "Payment of monetary debts in foreign currencies in Lebanese law: an interpretation of the 2nd paragraph of article 301 COC" (2020) No 20 Revue Juridique de L'USEK 7. Professor Karam's impressive article traces the origins of Article 301, which was adopted from the French Code Civil, which had in turn taken this provision from the argument of avocat-général Matter in a 1927 decision of the French Cour de Cassation (Cass, civ 17 May 1927). As Professor Karam notes, the provision has not worn well. The situation of "abnormality" during which the parties are not free to agree that payment shall be made in a foreign currency (when currency is not convertible into gold) has long been "the new norm". Nonetheless, it remains Lebanese law.

151. As Professor Karam explains, the effect of Article 301 of the COC is that, at least in respect of a debt payable in Lebanon (as it is common ground this debt is), even when the money of account of a debt is a foreign currency, the debtor can insist on discharging the debt in LBP, although if both debtor and creditor agree to make and accept payment in that form, the debt can also be discharged in the relevant foreign currency (p.27):

> "To pay a monetary debt denominated in foreign currency, Lebanese courts give to the debtor two options: A payment in the national currency that cannot be refused by the creditor, or a voluntary payment in foreign currency to which the debtor cannot be forced".

152. That summary is supported by a significant body of Lebanese case law, including the Cassation Court decision of 23 March 2003 (Cass. Lib. Civ. 2, no 21) which referred to the fact that "the Lebanese pound is the national currency, and the debtor can discharge himself in that currency if he wishes". To similar effect, a decision of the Beirut Court of Appeal (Decision no 33 of 20 March 1997) provides that Article 301:

> "does not prevent contracting in foreign currency but it provides to the debtor the possibility to discharge himself from the debt by paying the equivalent of the value of the foreign currency in Lebanese currency, this means that this currency has a full discharging effect".

153. Professor Obeid's opinion is that Article 301 of the COC does not apply to a bank's obligation to the holder of a deposit account, being a *lex generalis* which is superseded in this context by the *lex specialis* of Article 307 of the LCC with its reference to the obligation to refund "in one of several instalments of equivalent value". She relies, in this context, on a number of decisions of Judges of Summary Procedure which have made foreign currency awards in favour of bank customers including:

i) The decision of the Judge of Summary Procedure in Nabatiye (Decision no 199 of 25 November 2019, Commerce International SAL v Byblos Bank SAL) which held:

> "Whereas the performance of the obligation is in-kind as per Article 249 of the Code of Obligations and Contracts as the creditor has the right in collecting the object of the obligation itself. In addition Article 293 of the LCOC stipulates that the performance should be to the creditor himself …. The Defendant Byblos Bank SAL should perform his obligation which he committed himself to, and pay the balance of the account of the claim which amounts to 129,033,39 Euros immediately without delay …. in cash or according to means acceptable by the creditor claimant".

ii) The decision of the Judge of Summary Procedure in Zahle (Decision no 5 of 13 January 2020, Mohamad Ismail Abdul Rahman v Credit Libanais SAL) in which the Judge stated:

> "The present court considers that the most worthy of protection in the present case is the right of the claimant the customer, to dispose of his money deposited with the bank and unfrozen, and in the manner that he deems appropriate, especially by making a transfer abroad in foreign currency so long as his transfer satisfied the generally accepted conditions for making international bank transfers …";

and after referring to Article 249 of the COC, continued:

> "Whereas in the current case it is evident that the bank's payment to the client of the entire account balance does not discharge it of its liability towards him and does not constitute a performance in kind of the obligation, particularly since it is established from the current case that the purpose of the claimant in carrying out the transfer abroad, namely to the People's Republic of China, is to settle the price of the goods purchased and imported from the said country".

iii) Professor Obeid also relied upon a decision of the Cassation Court, Decision no 47 of 21 March 2005, which addressed a settlement agreement denominated in Central African CFA Francs and appears to hold that the payment had to be made in CFA Francs. Only one line of that decision was translated, and it is impossible to tell from the translated text whether the obligation in question was payable in Lebanon or not. However, Professor Karam analyses this decision as a case addressing an international payment which falls outside of Article 301 of the COC for that reason, describing the decision as involving a contract executed in Abidjan in the Ivory Coast between two Lebanese parties. That is consistent with the single line translated which refers to the payment being made "in such

currency and value, in accordance with Articles 299, 301 and 302 of the COC". Article 302 is a provision concerned with the place of payment, which was to be at the debtor's domicile. For this reason, I do not believe this decision assists Professor Obeid.

154. I found Dr Moghaizel's opinion that the debt obligation recognised in Article 307 of the LCC is also subject to Article 301 of the COC more persuasive:

i) Article 301 is a provision reflecting Lebanese public policy (the monetary system being, in Professor Karam's words, a sovereign power), and clear words would be necessary to displace its operation.

ii) The language of Article 307 of the LCC is not in any way inconsistent with the operation of Article 301 of the COC, in which monetary obligations with a foreign currency money of account are discharged by a payment in LBP deemed to be of equivalent value.

iii) It is noteworthy that there are provisions of the LCC which expressly derogate from the rule embodied in Article 301 of the COC, in clear terms: Article 356(3) (dealing with bills of exchange) provides that the drawer of a bill can stipulate for payment only in foreign currency; Article 405 makes a similar provision for promissory notes and Article 432(3) for cheques. The absence of any similar provision in Article 307 is significant, and I note that Professor Karam does not refer to Article 307 when identifying those provisions of the LCC which do disapply Article 301 of the COC.

iv) Based on the extracts available to me, the vast majority of the decisions of Judges of Summary of Procedure (including those discussed at [153(i)] and [153(ii)] above) do not address Article 301 of the COC. As Professor Karam notes of two such decisions (decisions of the Judges of Summary Procedure of Nabatiyeh of 25 November 2019 and of Tyr of 8 April 2020), those decisions simply ignore Article 301 of the COC. Further, many of these decisions are founded upon an alleged obligation on the bank's part to make an international payment of foreign currency (whereas it is accepted in this case that the Bank owes no such obligation and that the debt arising from the Personal USD Account is payable in Lebanon). As I have stated, Article 301 of the COC does not apply to international payments.

v) While the decision of the President of the Keserwan Executive Bureau in a decision dated 2 July 1920 does support the view that in Lebanon's changed circumstances, the option to pay in LBP should no longer apply (holding that "although the general principle enshrined in the jurisprudence and doctrine permits the repayment in national currency debts issued in foreign currencies … it is unreasonable to adhere to such principle in the present case … given the expressed will of the [party] to pay in the USD and in the absence of any expressed provision in the Code of Money and Credit that restricts the dealing with and paying in a foreign currency"), the extract of that decision which is available does not explain what legal basis there could be for departing from the provisions of Article 301 of the COC, nor the substantial body of jurisprudence which has given effect to it.

vi) In any event, there are recent decisions to the contrary effect. In Decision no 160 of 14 October 2020, and Decision no 167 of 28 October 2020, the Beirut Enforcement Court held that the effect of Article 301 was that "one may not impose payment in a foreign currency, quite the contrary one may not refuse payment in the national currency and therefore the objecting party's statement that payment must be made in American dollars must be dismissed because the national currency has full legal tender". Professor Karam noted that this last decision coincided exactly with the view expressed in his article.

155. To the extent it is suggested that there was any particular oral agreement between Mr Khalifeh and the Bank in relation to the opening of the Personal USD Account which changes the position:

i) I am not persuaded that there was any such agreement. The terms of the Personal USD Account were set out (and only set out) in the written documents signed by Mr Khalifeh, which provided the framework agreement in which the terms applying to a Lebanese bank account are generally set out (see e.g., Professor Fady Nammour, *Droit Bancaire* (2012) p.106).

ii) Even if there had been such an agreement, Article 301 of the COC is a mandatory provision of Lebanese law, as Professor Karam's detailed analysis makes clear at pp.25-26. That is also an answer to Professor Obeid's suggestion that there was an established custom requiring banks to repay foreign currency deposits in foreign currency (although no such custom was established, because Lebanese law undoubtedly *permits* a bank to repay such a deposit in foreign currency – the question is whether it is *obliged* to).

The applicable exchange rate

156. That leaves a further question as to what exchange rate should be applied for the purposes of discharging a foreign currency money of account debt in LBP. It was the evidence of Dr Moghaizel that there are four exchange rates in use in Lebanon:

i) There is the official BdL rate of LBP 1,507.5: USD.

ii) There is the so-called preferential rate of LBP 3,900: USD.

iii) There is a rate available on a platform created by the BdL for bureaux de change called Sayrafa of LBP 12,000: USD.

iv) Finally, there is the rate available in the market of LBP20,000-22,000: USD.

157. Professor Karam expresses the view that the rate applied for the purposes of Article 301 of the COC is the official rate, citing a number of Lebanese court decisions going back to 1954. He does not specifically discuss Article 307 of the LCC in this context or identify it as an exception to the general rule. The official rate was also adopted in two court decisions to which I was referred, both concerned with debts denominated in foreign currencies payable by customers *to* their banks, although those cases do not appear to discuss what the appropriate exchange rate is:

i) A decision of the 6th Chamber of the Beirut First Instance Court no 289/2020 (of 1 December 2020) in which a bank advanced a counterclaim in USD, in which the Court held:

> "Whereas it is clear from the aforementioned statutory provisions governing payment that the debtor's right to pay in the national currency is consecrated by Lebanese law and it is of no use to the defendant to say that such provisions did not address the question of indebtedness in foreign currency, since it is clear that they did not differentiate between debts expressed in the national currency or foreign currency so that is why the statements of the defendant to the contrary on that point must be dismissed on the grounds of unlawfulness".

ii) A decision of the 4th Chambers of the Beirut First Instance Court no 64/402/20202 (of 6 July 2021) which in similar circumstances held:

> "Whereas in Article 301 of the COC states that when the debt is a sum of money it must be paid in the currency of the country and in normal times when transactions in banknotes is not mandatory the contracting parties remain free to provide for payment in foreign metallic coins or banknotes …
>
> Whereas the aforementioned provisions pertain to public policy and in particular the economic and financial public policy aiming at protecting the national currency, one may not agree to the contrary otherwise the agreement would be null, and thus one may not impose payment in foreign currency and foremost one may not refuse settlement in the national currency and refusal conflicts with such mandatory provisions".

158. I asked Dr Moghaizel which rate of exchange rate was to be applied when working out the amount of LBP which a bank holding a foreign-currency denominated deposit account was required to pay when closing the account. His evidence was that a bank was obliged to use the market exchange rate if closing a customer's USD account in LBP, even though a customer who had run up an overdraft on a foreign currency bank account could repay that debt in LBP calculated at the official rate. Dr Moghaizel was clear in his evidence, which was based on his view as to how Lebanese courts would interpret the words "in one or several instalments of equivalent value" in Article 307 of the LCC. While Professor Obeid's report assumed that any conversion for Article 307 purposes would be at the official exchange rate, that was one of the reasons why she had reached the conclusion that Article 307 required payment in the foreign currency concerned, and not LBP.

159. In these circumstances, and in the absence of contrary evidence from Professor Obeid on this issue or underlying Lebanese material directly addressing this question, I accept Dr Moghaizel's evidence.

Conclusions

160. On the evidence before me, I have reached the following conclusions:

i) The relationship of customer and bank in relation to a deposit account is that of creditor and debtor, and Article 711 of the COC has no application.

ii) The money of account of the debt represented by a positive balance in a USD account is USD.

iii) Where the debt is payable within Lebanon, the bank can offer to discharge the debt by payment in the relevant foreign currency, which will discharge the debt if the customer accepts it.

iv) However, the bank is also entitled to discharge the debt in LBP in the equivalent amount, which the customer is not entitled to refuse on that basis.

v) By virtue of Article 307 of the LCC, the rate of exchange to be applied when the bank seeks to discharge the debt in LBP is the market rate.

Article 822 of the LCPC

161. It is next necessary to consider the Bank's defence that the debt, which it is common ground arose no later than 13 January 2021, when the Bank closed the Personal USD Account, was discharged by the operation of the procedure established by Articles 822 *et seq* of the LCPC. By way of summary:

i) On 13 January 2021 the Bank closed the Personal USD Account and issued the BdL Cheques for the balance of the account.

ii) On 25 January 2021, the Bank deposited the BdL Cheques with the notary public, relying on the provisions set out at Articles 822-826 of the LCCP.

iii) The BdL Cheques have now cleared in the notary public's account.

iv) On 8 February 2021, the Bank commenced the Validation Proceedings in Lebanon under Articles 822-826 of the LCCP asking the court to find that the debt had been discharged.

v) On 22 March 2021, the Bank offered an undertaking not to prosecute the Validation Proceedings.

The Article 822 regime

162. Article 822 provides:

> "The debtor who wishes to discharge his/her liability towards his/her creditor has to offer to the latter through the notary public the item or amount that he/she considers to be owed, and to deposit the same with the notary himself, or, if it is a sum of money, to deposit it through and in the name of the latter in an acceptable bank or in the Treasury fund …"

163. This article is supplemented by Article 823 to 826 which provide:

> "Article 823

> The creditor has to take a position whether to accept or reject the offer, either through writing a statement on his notification document or through a declaration that is submitted to the notary public within forty-eight hours at most from the date of his/her notification. Acceptance may not be suspended on a condition or reservation. If the offer is refused, the notary must inform the debtor. If the creditor declares accepting the offer, the notary may deliver the item or the sum deposited with him/her or in his/her name or in the place specified in the offer. If he/she does not claim his/her receipt, he/she bears the risk of his/her perishing and the debtor is discharged. If the creditor rejected the offer and the item offered was not in the possession of the notary public and it was possible to transfer it, the debtor may inform the judge of summary proceedings, within two days from the date of his notification of the creditor's refusal, to authorize it to be deposited in the place designated by the judge. However, if the item is intended to remain where it is, the debtor may ask the aforementioned judge to place it under guard.
>
> Article 824
>
> Within ten days from the date of his notification of the creditor's rejection, the debtor must file an action to prove the validity of the offer and deposit, failing which the effect of the offer and deposit will fall. The creditor shall file a claim to prove that the tender and deposit are invalid within ten days of the date of its refusal. The lawsuit that is filed to prove the validity of the tender and deposit or to nullify it shall be filed in accordance with the rules for initiating legal proceedings. This lawsuit may be filed as an urgent request within the course of the proceedings on the merits based on the rules related to urgent requests.
>
> Article 825
>
> The judgement confirming the validity of the tender and deposit discharges the debtor as of the date of the tender and deposit. The interest shall cease to apply to the amount of the debt as of the date of the deposit, and the debtor is released from the liability of delay in payment, and the costs and risks are transferred to the creditor
>
> Article 826
>
> The debtor may present the offer during the hearing before the court without further procedures, if the person to whom the tender is directed is present. In the event that the offer is rejected, the court decides to deposit the offered amount in the Treasury fund against a receipt in its name. The clerk shall draw up a report confirming the deposit and what was mentioned in the minutes of the meetings regarding the offer and its rejection. And if what is offered during the hearing was other than cash, the tenderer must request the court to appoint a guard over it. The judgement appointing the guard cannot be subject to appeal."

164. Although Article 822 appears in the LCCP, there was no suggestion that it did not form part of the applicable law (cf. Article 1(3) of Rome I). The parties were agreed that the terms on which the anti-suit injunction application had been disposed of had the result that this court was to act, in effect, as the court determining the validity of the tender and deposit under Article 822, and that if a valid tender and deposit was established, that provided a defence to Mr Khalifeh's claim if Lebanese law applied.

Did the Article 822 process lapse?

165. In addition to the substantive issue as to whether the Bank made a valid tender or deposit, a procedural issue arises as to whether the requirements of Article 824 were satisfied. It will be recalled that this requires the debtor to file the validation action "within ten days from the date of his notification of the creditor's rejection". In this case:

    i) The Validation Proceedings were filed in Lebanon on 8 February 2021.

    ii) Mr Khalifeh rejected the Bank's tender on 31 March 2021.

    iii) The terms on which the anti-suit application was disposed of involved the Bank giving an undertaking not to prosecute or take further steps in the Validation Proceedings.

    iv) As a result of that undertaking (first offered by the Bank in March 2021), there have been no further steps by the Bank in the Validation Proceedings.

166. Against that background, Mr Khalifeh argues that the Bank has not complied with Article 824 because it has not *commenced* proceedings within 10 days of his refusal of the tender. That construction of Article 824 is supported by Professor Obeid but challenged by Dr Moghaizel.

167. On this issue, I prefer the evidence of Dr Moghaizel. Article 824 is clearly intended to ensure that the validation proceedings are not commenced more than 10 days *after* the rejection, but I do not accept that Article 824 requires fresh proceedings to be commenced if the validation proceedings had already been issued before the rejection but remains live. Those proceedings have a continuing vitality at the date of rejection. This conclusion is not only supported by a purposive reading of Article 824, but also by a decision of the Mount Lebanon Court of Appeal (Decision no 101/2001 of 5 July 2001) which holds that Article 824:

> "does not prevent the filing of this lawsuit before the start of the above deadline and before the debtor's notification of the creditor's refusal because what is important in this context is that the lawsuit must not be filed after the expiry of the deadline since it is a lapsing deadline and it is up to the debtor to preserve his right to file this lawsuit even before the start of the deadline".

168. It also derives support from the terms of Article 826, which suggests that tender can be made (and refused) for the first time in court in the context of proceedings commenced at an earlier point in time.

169. An issue was also raised to whether it was open to Mr Khalifeh to advance this argument in circumstances in which the point of controversy between the parties in the anti-suit application was whether the Bank should be required to withdraw the Validation Proceedings, in addition to undertaking not to pursue them. Freeman J (at [2021] EWHC 1502 (QB), [65]) refused to make a mandatory injunction, because:

> "If the Defendant's alleged legal position is correct ... then it is possible that the Defendant would suffer irreversible harm if it had to withdraw the Lebanese

> proceedings. Although that is only a possibility … it outweighs any prejudice caused to the Claimant by adjourning he application for a mandatory injunction to a speedy trial".

170. It was only after the disposal of the anti-suit injunction that Mr Khalifeh first took the point that the mere commencement of the Validation Proceedings could not assist the Bank in any event (because, as I accept, that possible argument was not identified until that point). Against that background, Mr Wilson QC submitted that it was not open to Mr Khalifeh to resile from the common assumption on the basis of which the anti-suit application had been conducted and resolved, namely that the Validation Proceedings already commenced by the Bank were sufficient to preserve any Article 822 defence for argument in this court without the need for the Bank to take any further steps in Lebanon. Given my conclusion on the Article 824 issue, it is not necessary to resolve this issue.

Was the Bank obliged to discharge the debt arising on the closure of the USD Account by any particular method?

171. Under English law, absent contractual terms to the contrary, it has been held that the customer of a bank is entitled to demand repayment by methods which include an internal transfer between accounts within the bank, transfer to an account at another bank, by banker's draft or payment to another bank and by paying cash (Libyan Arab Foreign Bank v Banker's Trust Co [1989] 1 QB 728, 761-63).

172. I was not taken to any clear statement of Lebanese law as to the manner of payment by which a bank was obliged (or permitted) to discharge an obligation to its customer to repay the balance of a foreign currency deposit account. Professor Obeid appeared to accept that it was open to the bank to pay by one of a number of means, provided that any instrument used was readily convertible to cash and subject to no restrictions in this regard, a requirement which she said arose as a matter of general principle but was "not written". Dr Moghaizel's evidence was that the bank could pay by cash, cheque or bank transfer, stating:

> "Lebanese law does not specify in what form payment of the bank debt must take place, whether in cash, by cheque, transfer or otherwise",

with payment to be in the form agreed by the parties or alternatively by any legal means of payment.

173. It was common ground in this case that the Bank was not obliged to effect such a payment by international transfer. It is also clear on the facts that this was the only means of repayment demanded by Mr Khalifeh (assuming that the customer is entitled to choose which of the permissible methods of payment should be adopted). Finally, neither party contended that there was a contractual agreement as to the method of payment.

174. I accept on the evidence before me that it was permissible for the Bank as a matter of Lebanese law to discharge the debt by providing a cheque (whether a USD cheque or one in the equivalent amount of LBP). However, under Lebanese law as under English law, an ordinary cheque constitutes only a conditional, rather than an actual, payment,

and the underlying debt remains in being and payable if the cheque does not clear. This is expressly provided for by Article 444 of the LCC:

> "Payment by delivering a cheque accepted by a creditor does not imply the renewal of the debt contract but the original claim persists with all the guarantees attached thereto, until payment of the said cheque."

175. That principle is also confirmed in court decisions (for example Cassation Court Decision no 45 of 13 June 1957) and by doctrine. The conditional nature of payment effected by a cheque reflects the risk that the drawer of the cheque may have insufficient credit in its account to meet the cheque when presented for payment: as Professor Obeid put it, "it is always possible that the cheque may not be paid". However, where a cheque is drawn not on the account of a bank customer, but on the bank itself, or (as appears to be the case for most banker's cheques) on the BdL as Lebanon's central bank, the method of payment is not seen as being subject to that risk.

176. I accept Dr Moghaizel's evidence that Lebanese court decisions and doctrine have long recognised that so-called banker's cheques differ from ordinary cheques, and constitute actual rather than merely conditional payment. Judge Mohammad Mari Saab, in *The Real Offer and Deposit – A Comparative study* (2010), p.62, explains the position as follows:

> "The truth is that even though it is not for the debtor to choose the method of payment and thus to limit it to a cheque, however this does change the legal nature of the cheque and the rules of payment through it, which is not considered as having taken place, unless the cheque is presented and the price collected, which raises the question about the legal solution for the debtor who can only pay by cheque and is worried, at the same time, that the offer by cheque may not be considered valid. In fact, the solution to this issue is for the debtor to submit the offer by what is called a banker's cheque, which is the cheque which amount is blocked once it is issued under the bank's name. In such a case, the concerns about the debtor's payment default disappear, through withdrawing the funds in full after the cheque is issued and sent as an offer accepted by the creditor, and in such case the payment is considered made".

177. That conclusion is supported by a decision of the Beirut Enforcement Court of 15 January 2020 (Decision no 2019/2018) which held:

> "Whereas a banker's cheque is a cheque drawn to the order of a designated person by a specific bank on one of its branches, or on its main branch, or on the Central Bank, and in such a case the bank that has drawn the banker's cheque upon the request of its client records the amount of the cheque in advance on this latter's account, and as a result said amount is earmarked in favour of the bearer of the cheque in a way that makes payment of the amount of the cheque certain once the cheque is presented for payment to the bank on which it was drawn … and
>
> Whereas, as a result, drawing a banker's cheque, which is a common banking practice, carries in itself the guarantees, the lack of which used to form the basis of old court decisions to justify not considering payment by cheque as complete payment …

> Therefore, it is decided to accept payment in the form described in the body of this decision, and to hold the enforcement procedure no. … terminated by payment…".

178. It is important to note that a banker's cheque drawn on the BdL has never itself been directly convertible to cash (for example at the BdL's counters). Instead, it is a financial instrument which can be used to achieve a credit in the amount of the cheque in the payee's bank account from which, in normal times, cash withdrawals and foreign transfers can generally be made.

179. There is also a (non-binding and unpublished) decision of a Judge of Summary Procedure to similar effect (Decision no 122/2020 of 14 September 2020). This holds:

> "Whereas in all cases, the defendant expressed its readiness to deliver to the plaintiff the claimed amount by virtue of a banker's cheque, and bankers' cheques are deemed as a mode of payment that discharges the debtor; and one cannot respond to this by saying that the payment by this means does not have a discharging effect in the current situation because it does not ensure to the creditor the required liquidity and does not lead to the payment of his debt abroad, since this (objection) would deprive the cheque from its value as a means of payment as provided by law."

180. Professor Obeid appeared to accept that, before the 2019 financial crisis, payment by bankers' cheques was itself sufficient to discharge a debt, and I am satisfied that this was the position. However, Professor Obeid said that this rule no longer prevailed in the current financial circumstances in Lebanon (an issue I address below).

181. The final method of payment which I need to consider is a bank transfer to another account held by the customer. I accept that under Lebanese law, this constitutes a permissible means of discharging a debt, and that the discharge takes place when the credit is entered in the beneficiary's bank account. Professor Fady Nammour, in *Instruments de Paiement et de Crédit* (2008), [137], states that:

> "the payment is made on the date and at the place of such entry – the debt of the ordering party, materialized by the transfer, becomes extinguished – the rule of the inopposability of exceptions becomes applicable; the exceptions which exist between the banker of the ordering party and the ordering party cannot be set up against the beneficiary of the transfer. That rule is justified because the beneficiary receives, through the crediting of if its account which funds over which it acquires the legal right and the status of which cannot be different to those resulting from a deposit of funds himself".

182. To similar effect, an entry in a digest of Lebanese laws and legal decisions relating to banks maintained by Sader Legal records at page 586, [41]:

> "Deeming the banking transfer a formal material transaction, equivalent to a cash delivery. The recent trend applied by courts and doctrine deems that the banking transfer is a new transaction subject to the requirements of banking activities, and is used to transfer cash amounts from one account to another by banking entries through the bank. Whereas the substance of this transaction lies in a single transfer from one account to another, therefore, the rules of keeping these accounts govern

> the relationship of the parties concerned. Accordingly, this transaction is deemed as a formal material transaction equivalent to a cash delivery, and is therefore called scriptural money, i.e. it is a way to transfer funds by book entry or in writing."

183. Under normal conditions, therefore, I am satisfied that, at least absent a demand by the customer for any particular form of payment which Mr Khalifeh was entitled to require, it was open to the Bank to discharge the payment in Lebanon by:

    i) Paying USD in cash, assuming that Mr Khalifeh was content to accept such a payment by way of discharge: see [160].

    ii) Paying the equivalent of the USD balance in LBP in cash (on Dr Moghaizel's evidence, converted at the market rate), whether Mr Khalifeh was willing to consent to payment in LBP or not: see [160].

    iii) Payment by a cheque which clears so as to credit Mr Khalifeh's account: [174]-[175].

    iv) Payment by a banker's cheque: [176]-[180].

    v) Payment by bank transfer to an account maintained by the beneficiary in Lebanon: [181]-[182].

Was Mr Khalifeh obliged to accept the bank cheque tendered by the Bank?

The practical position of a USD balance in a Lebanese bank account

184. It is clear that USD balances in Lebanese bank accounts are currently subject to a number of restrictions. USD credit balances of this kind are referred to as "lollars" – USD stuck in Lebanon – because they cannot be removed from the Lebanese banking system, and have reduced purchasing power within Lebanon as a result.

185. On the evidence before me, it is possible to use cheques drawn on a lollar bank account balance, and to make a bank transfer from such a balance to another Lebanese bank account in USD to pay for goods or services. It may also be possible to use those balances by way of a credit card. However, in many cases the price for goods and services paid for using such balances will be higher to reflect the restrictions which the recipients will themselves face in using the credit. According to Dr Moghaizel, there are certain transactions where USD balances can be used to make payments without any restrictions – payment of salaries, rent and electricity. In addition, such balances can be used to discharge debts due to banks.

186. Any cash withdrawals or payments by debit cards from such accounts are subject to monthly limits (currently not exceeding USD4,000 per month or less, depending on the USD balance) and are made in LBP converted at the preferred rather than the market rate for such payments (see [156] above). Banks will not transfer such funds abroad.

187. I also accept Professor Obeid's evidence that it is currently very difficult to open a USD account with a Lebanese bank, and that such accounts are likely to be impose a time-limit of a number of months before the customer can withdraw any money. However, the evidence did not establish that it is not in fact possible to open such an account.

The Lebanese court decisions

188. There have been a number of Judges of Summary Procedure who have either rejected, or at least called into serious question, the suggestion that provision of a banker's cheques drawn on the BdL discharges a bank's debt to its customer in respect of an account denominated in a foreign currency. Professor Obeid understandably relied upon these decisions. There were also some (but many fewer) decisions to contrary effect, which Dr Moghaizel relied upon. I consider these in chronological order below.

189. The first is a decision of the Judge of Summary Procedure in Beirut, Decision 1/2020 of 3 January 2020 (Ayman Tarawy v Bank Med SAL). The case arose from the refusal of the bank to carry out its customer's instruction to transfer USD25,000 to his son in France. The Judge held that the bank was obliged to effect the transfer, but also rejected the bank's argument that it had discharged its obligations by offering a USD banker's cheque (it is not clear from the translated extracts how this issue arose, and whether it was as a result of the bank's attempt to close the account). The Judge stated:

> "Even if a cheque is a means of payment upon perusal and often replaces money the crossed bank cheque that the Defendant proposes to fulfil shall not be considered as such. This is because the current conditions of its fulfilment as known by all through attachment by another bank does not make it unlimited means of payment like money".

190. The Judge appears to have found that a banker's cheque would not constitute payment for two reasons. The first was that the banker's cheque could only be paid into a bank account, and a citizen was entitled not to have a bank account if they did not want one. I would note that this argument would have applied equally before the financial crisis, and is inconsistent with the decisions and textbooks which state that a banker's cheque constitutes payment. The second objection was as follows:

> "In addition, reopening a new bank account under the said cheque became almost impossible as most banks have recently been refusing to accept new accounts especially those denominated in USD … Although this transaction is still accepted by some banks, it will be implemented under very limited conditions and restrictions such as the condition to freeze deposits for at least 3 months which will lead the Claimant to an endless vicious cycle of restrictions to its right to freely move and dispose of its money".

The decision was appealed by the bank, but the appeal withdrawn.

191. The Judge of Summary Proceedings in Nabatiye addressed the status of a banker's cheque in Decision no 4/2020 (Majed Abo Zeid v Byblos Bank of 7 January 2020). In this case, the customer wanted to transfer funds abroad to discharge a foreign currency debt. The bank appears to have tendered a foreign currency banker's cheque. The Judge held:

> "Whereas this offer [of a banker's cheque] in addition to not providing any benefit to the plaintiff in terms of avoiding incurring any damages and aiding him in fulfilling his obligations towards third parties outside Lebanon, this method does not constitute a complete discharge of liability towards the beneficiary. This is because and according to the doctrinal definition of banker's cheques whereby it

> is a type of cheque issued by the bank upon the request of the customer to be offered to a third party, by that it would be issuing an order to itself to settle a certain amount to the beneficiary of the cheque and such a document is not a cheque in the legal sense but is nothing more than an ordinary deed of debt – nominal or bearer – as it does not include an order to pay, but it involves the bank's commitment to make the payment".

192. The decision appears to rest on two factors. First, the banker's cheque could not discharge the foreign currency debt which the customer wished to discharge (it being implicit in the ruling that the customer had a contractual right to make an international transfer from its account for that purpose). Second, a banker's cheque was not capable of constituting payment as a matter of contract. This last finding is not consistent with what I accept is an established line of Lebanese court decisions, as reflected in the textbooks I have referred to. This decision has been appealed to the Nabatiye Court of Appeal who have ordered a stay of the decision.

193. The Judge of Summary Proceedings in Zahle addressed this issue in Decision no 5/2020 (Mohamad Ismail Abdul Rahman v Credit Libanais SAL of 13 January 2020). The bank had tendered a banker's cheque drawn on the BdL to settle the customer's demand under its foreign currency account. The Judge rejected that argument on the basis that the customer required the funds to discharge a liability to the customer's Chinese supplier. The Judge held:

> "Whereas in the current case, it is evident that the bank's payment to the client of the entire account balance does not discharge [the bank] of its liability towards [the client] and does not constitute a performance in kind of the obligation, particularly since it is established from the current case that the purpose of the Claimant in carrying out the transfer abroad, namely the People's Republic of China, is to settle the price of the goods purchased and imported from the said country".

194. It will be apparent that the Judge in this case reasoned from the premise that the customer had a legal entitlement to instruct the bank to transfer foreign currency funds to its Chinese supplier to the conclusion that a banker's cheque which could not accomplish that purpose did not discharge the bank's obligation. The Court of Appeal refused to stay the decision, but the bank appealed to the Cassation Court who granted a stay on 17 February 2020 on the basis that:

> "the bank has raised in its appeal … essential and serious factual and legal grounds related to the nature of the relationship between the two parties and the contractual obligation arising therefrom and concerning the extent".

Professor Obeid observed that it was unusual for the Cassation Court to give reasoning of this kind when staying a judgment.

195. The next decision in point of time was the decision of the Judge of Summary Procedure of Baabda, Decision no 122/2020 (Ayoub v Byblos Bank of 14 September 2020). This is an unpublished decision. This was another case in which a customer wished to transfer funds abroad from a foreign currency account in Lebanon (in this case to meet the client's daughter's university fees) and in which the bank offered a banker's cheque drawn on the BdL. However, the Judge in this case reached a very different conclusion.

The Judge held that the bank was not obliged to make an international payment (as is conceded to be the position here) and said:

> "Whereas in all cases the Defendant expressed its readiness to hand the Claimant the requested amount by virtue of a banker's cheque and that the banker's cheque is considered a means which discharges the debt from its financial liability. This cannot be rebutted by stating that this means does not discharge a party from financial liability in the current circumstances since it does not provide the debtor with the necessary liquidity and does not allow the Claimant to settle his debts abroad. This is because this would deprive the cheque from its value as a means of payment established by the law".

The Judge's final conclusion was that the issues in the case were sufficiently disputable to fall outside the limited jurisdiction of the Courts of Summary Procedure.

196. The next decision was by the Judge of Summary Proceedings in Beirut (Decision no 1022/2020 of 23 December 2020). This was a case in which the bank had purported to close the customer's account, and tendered a banker's cheque drawn on the BdL, in anticipation of the customer bringing court proceedings in relation to the bank's failure to act on the customer's instructions to make a foreign currency payment to the customer's sons abroad. The Judge appears to have held that the closure of the account was wrongful, describing it:

> "as a preventative measure in anticipation of the latter resorting to the judiciary to demand the required transfer and despite that [the Bank] is the most aware that it will be difficult for the Plaintiff if not impossible to use the bank cheque offered and deposited before the notary public in the amount of the balance of her account, whether to cash it or to open another bank account. It has become known to all that the bank cheque provided by banks to their customers cannot be cashed and none of the banks operating in Lebanon and since the revolution of 17 October [2019] have been approving to open new bank accounts to new depositors in foreign currency".

197. The case was appealed to the Beirut Court of Appeal (Byblos Bank SAL v Ms Rizik, decision of 11 February 2021), albeit still within the summary procedure jurisdiction. The Court of Appeal held:

> "Whereas if the use of a cheque is deemed as an acceptable means to settle cash debts, provided that the settlement is conditional upon effective receipt of the value of the cheque, the bank's insistence on using the said method, and none other, to deal with the Appellee's requests constitutes an unjustified obstruction of the right of the latter to benefit from the bank transfer service that became, by virtue of the development in banking activity and the expansion of its fields, a principal method of moving and transferring money in light of the free economic system in Lebanon, which is founded upon the freedom of trading and exchange;"

On the evidence before me, that decision is also under appeal to the Cassation Court.

198. The issue came to an appellate court again on an appeal to the Court of Appeal in Mount of Lebanon (Blom Bank SAL v Khalil Michelle Nakad & Ors, of 26 April 2021), by way of an appeal from the Judge of Summary Procedure in Metn. This decision is

translated in full, and as a result it is possible to get a fuller picture of the argument in this case (and, I suspect, other cases). The customer's complaint was that the bank had acted abusively in purporting to close the customer's account and depositing a banker's cheque drawn on the BdL for the balance with a public notary, for the purposes of preventing the customer from giving the bank instructions to effect a foreign currency account abroad in order to discharge a liability due to a counterparty in the UAE. The case was brought against the background of an ongoing case in the ordinary courts, in which the bank had brought a validation action in respect of its closure of the account and the deposit of a banker's cheque with a notary public, which the Judge of Summary Procedure did not purport (or have jurisdiction) to determine.

199. The Judge of Summary Procedure appears to have held that the closure of the account could not be relied upon because it had been done in order to deprive the customer of their contractual right to require the bank to transfer foreign currency abroad. The Judge of Summary Procedure had also held at first instance that:

> "by virtue of Article 307 of the Code of Commerce which obliges the bank to return the deposit, by an equivalent amount at the first request of the depositor, the Defendant Bank's offer to pay by virtue of a crossed check to be withdrawn from the Banque du Liban, does not remedy the manifest infringement it has committed. This check does not include an immediate payment order in favour of the Plaintiff, but it implies a restricted payment. That is, it does not enable the Plaintiff to obtain his funds in cash to transfer them abroad".

200. The Court of Appeal upheld the Judge of Summary Procedure's conclusion that the bank was obliged to give effect to the customer's transfer instructions. As I have noted, the Court of Appeal expressed the view that the bank owed the holder of a deposit account the obligation under Article 711 of the COC to return the deposit and its accessories in the same state as received (see [135]-[144] above). The Court of Appeal also addressed the means by which the bank might return the deposit, holding:

> "It is established by jurisprudence that the bank's obligation to return the deposited money can be discharged by giving the money to the client by a check to the client order or in cash or by the transfer on the account to be appointed by the client (Author Dr. Fadi Nammour). However, it is undisputed that this option must necessarily apply to the method which achieves the actual performance and does not cause the depositor to suffer any damage."

201. The Court of Appeal noted that the bank could also seek to close the customer's account, but that this had to be done in good faith, and not in a way which harmed the customer. The Court stated that:

> "the bank does not have the right to invoke its discharge during the repayment of its debt in a prejudicial manner".

202. The Court held that the bank was not entitled to refuse the customer's request to transfer foreign currency funds abroad and that "what the Appellant bank has done in circumventing the legitimate claim of the respondent by closing his [i.e. depositor's] bank account and depositing banker's cheque - drawn on the Lebanese Central Bank - amounting to the balance of the account through an actual tender and deposit via the notary public is not rightful, neither de facto nor de jure" because it deprived the

customer of its right to require the bank to effect the international transfer requested. In this context – the effect of the depositing of the banker's cheque on the customer's right (as found by the court) to require the bank to effect an international transfer of foreign currency – the Court stated:

> "In this respect, it is not allowed to confuse the provision of the law which considers the check as a legal method of payment which replaces the cash for which the Lebanese legislator guaranteed this function, and a certain fact known to all, represented by the current banking transactions and banking performance, that led to depriving the check in the case of its capacity as an instrument of certain payment which discharges of the obligation. This can be proved by the fact such check is not acceptable by any of the Lebanese banks which refuse to deposit its value in an account opened with them. Therefore, it is impossible to make any financial transfer necessary to cover the financial obligations of the Plaintiff abroad, depriving the latter as part of the free economic system of Lebanon, to benefit from the bank transfer service."

203. The Court of Appeal stated that the issue raised before the Judge of Summary Procedure was a different one to that which was pending in the bank's validation action in the ordinary courts (holding that "the Appealed Judgment regarding the subject matter of the substantive claim pending before the Court of First Instance is different from the subject matter of the present claim"). On 16 June 2021, the Cassation Court stayed the decision pending the hearing of an appeal on the basis that the arguments raised by the bank raised serious and factual legal grounds which were capable of giving rise to a serious dispute.

204. Finally, there are two decisions, one relied upon by each party, which were not decisions of Courts of Summary Procedure but of the Beirut Enforcement Court. Professor Obeid relied on Decision no 49/2021, a decision of the head of the Enforcement Court of Beirut of 5 November 2021. That was a case in which a ship had been arrested in Lebanon in relation to a dispute between two foreign parties about the owner's failure to pay for bunkers supplied outside Lebanon. The bunkers had been invoiced in USD. The owner sought the release of the vessel on the basis that it had provided security in the amount of the claim in the form of a USD banker's cheque drawn on a Lebanese bank in the amount of the claim. The issue for the Judge was whether this amounted to sufficient security for the value of the claim. The bunker supplier said that it did not, on the basis that the bank on whom the cheque was drawn would not pay in USD but in LBP at an amount calculated by reference to the preferential exchange rate. The owner relied on its legal right to discharge the debt in LBP.

205. The Judge agreed with the bunker supplier and refused to lift the judicial attachment. The immediate relevance of this decision to the issue before me is limited because:

i) The context was a procedural one: whether the court should lift a provisional seizure made under Article 857 of the LCCP.

ii) The debt in question was one not governed by Lebanese law or payable in Lebanon (and therefore not subject to Article 301 of the COC: see [154(iii)] above), a point made by the Judge.

iii) The issue in the case was not one of discharge of a debt but the giving of security for a debt. As the Judge of the Enforcement Court noted, the banker's cheque in question was not payable to the creditor, but to the Enforcement Court.

206. I accept, however, that the reasoning in the case provides some support to Professor Obeid. The Judge noted that it was no longer possible to liquidate a foreign currency banker's cheque for its face value, and that such a cheque could only be realised in the market for less than its face value. As a result, the Judge concluded that a banker's cheque in foreign currency could not be regarded as a means of payment that replaced money, but only as a means of credit. However, the state of flux of the Lebanese courts on this issue can be seen from the fact that, on 4 December 2020, the same judge, also sitting in the Beirut Enforcement Court, lifted the provisional seizure of property after the respondents had lodged a banker's cheque for USD 1,138,500 with the Enforcement Court by way of security.

Analysis and conclusions

207. This is clearly a difficult issue of Lebanese law on which no definitive ruling has as yet emerged from the Lebanese courts. While the various Summary Procedure decisions provide some support for Professor Obeid, the weight to be accorded to them is limited by (i) the particular nature of the summary jurisdiction, as set out at [125]-[130] above; (ii) the fact that they all proceed from the conclusion that the customer had a contractual right to transfer funds abroad, which it is accepted does not arise in this case; (iii) the fact that many of them involved challenges to the validity of the closure of an account, on the basis that allowing the closure to take effect would deprive the customer of its rights, whereas there is (now) no challenge to the closure of the account here; and (iv) most importantly, the Cassation Court has taken what I accept is the very rare course of staying a number of the decisions on the basis that it is seriously arguable that they are wrong. Further, while the clear majority of these decisions are consistent with Mr Khalifeh's case, the decisions are not all to one effect.

208. I start from the common ground, which is supported by the Lebanese legal materials available to me, that before the financial crisis, a bank could discharge a foreign currency debt to a customer which was payable in Lebanon by a foreign currency banker's cheque drawn on the BdL. It was also common ground that such a cheque could never be cashed at the counters of the BdL but had to be paid into a bank account. Professor Obeid's view, therefore, is that at some point during the financial crisis, the legal status of such a cheque changed.

209. In addition, I am satisfied that legal limitations which apply to the proceeds of payment in the customer's hands cannot of themselves prevent a debt being discharged. If, for example, a bank paid a customer dollar bills to discharge a USD debt payable in Lebanon, the fact that it was not permissible to remove that cash from Lebanon or that it could only be spent there at an exchange rate which was adverse to the market rate (such as the "official" exchange rates applied in some countries to foreign tourists) would not, in my view, prevent the payment from discharging the debt.

210. I have concluded that that is equally true of those cases where the means of payment adopted is a transfer to another bank account of the customer. The effect of the Lebanese law materials before me was that the crediting of the recipient account is sufficient to discharge the debt. It is this act which constitutes the clearing of a cheque, and it is

because banker's cheques do clear, whereas ordinary cheques may not, that the former were treated before the financial crisis as absolute payments, the latter only as conditional payments. The evidence in this case is that the deposit of the BdL Cheques has led to a credit (and therefore "cleared") in the notary public's bank account. Restrictions on the customer's ability to access funds credited to its account which are imposed by the host bank, or by some external source, do not, in my view, prevent the crediting of the account from constituting payment by the transferring bank (any more than they would in the case of cash). Those restrictions apply as much to foreign currency amounts credited to the account before the Lebanese financial crisis, as to those credited while the crisis continues, and as much to credits to a foreign currency bank account arising from payments to the bank in dollar bills, by ordinary foreign currency cheques which clear or by a transfer from a USD account outside Lebanon as to one arising from the deposit of a banker's cheque.

211. In this case, of course, Mr Khalifeh did not have a Lebanese bank account at the date of payment. While I accept that on the evidence it would be difficult to open a foreign currency account in Lebanon, I am not persuaded that this could not be done, although I accept that such an account would be subject to restrictions on accessing these funds. In any event, I am not attracted by the suggestion that the status of a banker's cheque under Lebanese law varies depending on whether the beneficiary has or does not have another bank account in Lebanon at the relevant time.

212. I am also unable to accept Professor Obeid's evidence that unless the recipient of a banker's cheque could convert it into cash without restrictions, it would not constitute payment. I suspect many banks impose some daily or even monthly limits on the amount of cash which can be withdrawn from a bank account into which a transfer has been made or a cheque (whether banker's or ordinary) has been deposited.

213. Finally, in this case, it is common ground that the debt due from the Bank was payable in Lebanon and that Mr Khalifeh had no contractual right to require the Bank to transfer funds abroad. To the extent, therefore, that payment by the BdL Cheques has the effect of "locking" Mr Khalifeh into the Lebanese banking and financial system, this reflects the situs and place of payment of the debt. While Mr Khalifeh has alleged that the provision of the BdL Cheques did not constitute payment, he has not identified the means by which it is said that the Bank could and should have discharged the debt, consistent with the place of payment being Lebanon and the fact that the Bank was not obliged to transfer the funds abroad.

214. For these reasons, I have concluded that Dr Moghaizel's evidence is correct, and that a Lebanese court would hold that the tender of the BdL Cheques by the Bank was a valid tender which, coupled with the subsequent crediting of those cheques to the account of the notary public, discharged the debt under Lebanese law.

MR KHALIFEH'S CLAIM FOR DEBT AND DAMAGES

215. In view of the conclusions I have reached, the following issues do not arise for determination. However, as I have heard argument on them, I shall state my conclusions shortly.

216. First, there is a very minor dispute as to the amount of the debt: Mr Khalifeh says that the balance is USD 1,439,891.20 whereas the Bank says the correct amount is USD

1,439,787.78. The reason for the difference – of USD 103.42 – remains unclear and (quite properly, in view of the obvious considerations of proportionality) no attempt was made at trial to explore the underlying dispute. On the evidence before me, I am satisfied that the amount of the debt did not exceed the amount of USD and LBP banker's cheques tendered by the Bank and paid to the notary ([161])]. For the reasons given at [160] above, it was open to the Bank to discharge its indebtedness in LBP, and there was no suggestion that the combined value of the two cheques was insufficient to do so, if the means of payment was valid.

217. Second, there was also a claim for damages based on the Bank's wrongful failure to pay the balance on the Personal USD Account when due. The applicable legal principles under Lebanese law were not in dispute and are familiar in their content to English lawyers. In addition to establishing breach of contract, Mr Khalifeh must also establish that:

    i) he suffered the loss for which damages are claimed;

    ii) the breach caused that loss; and

    iii) the loss in question could have been foreseen at the time the contract was concluded.

    Any damages awarded will be reduced if the Bank (bearing the burden in this respect) establishes that Mr Khalifeh is at fault in a respect which caused or contributed to the damage.

218. In this case, Mr Khalifeh contends that he has suffered a foreign exchange loss from the Bank's failure to pay the debt when due, because he would have converted the debt into GBP on receipt. That case assumes a contractual entitlement on Mr Khalifeh's part to payment by a method which would have left him in a position whereby he could have converted the amount to GBP on receipt, and I should make it clear that the paragraphs which follow assume such an entitlement on Mr Khalifeh's part, although none was established at trial.

219. If there had been such a breach of the Personal USD Dollar Agreement by the Bank, the first issue to be determined would have been the date of breach, and whether it was only on the failure to make a valid tender following the closure of the Personal USD Account on 13 January 2021, or whether the debt became payable as a result of the demand made by Mr Khalifeh of 3 June 2020, or some other date.

220. Taking the alleged demand of 2 June 2020, two issues arise:

    i) This was an instruction for a transfer from a Personal USD Account to a sterling account in the United Kingdom in the sum of USD 1,439,000. It did not purport to close the account (it would have left a small amount in it). It is common ground that the Bank was under no obligation to effect an international transfer from the Personal USD Account. I do not believe that the document can reasonably be interpreted as a demand for repayment coupled with a request for international transfer. A bank could not reasonably assume that a customer asking the bank to make an international transfer which the bank was not obliged to make was instructing the bank to tender a similar amount in Lebanon if it was

unwilling to effect the transfer. In these circumstances, the 2 June 2020 document was not a valid demand capable of rendering the sum of USD 1,439,000 immediately payable.

ii) The Bank's alternative argument relies on the wording of the transfer instruction which provides "I/we discharge your Bank from any Responsibility if this transfer/check was rejected, delayed or retained by your bank or your correspondent and I/we authorize you to debit my/our account with any related supplementary charges or fees". However, leaving aside the fact that the Bank offered no explanation as to how such a statement in a document which was not acted upon by the Bank could have contractual force, I am satisfied that the words "rejected, delayed or rejected" would not relieve the Bank from liability for refusal to action a lawful request at all, as opposed to cases in which delays or rejection arose from administrative issues in the course of processing the application.

221. The Bank submits that a breach case based on the June 2020 demand is the only breach pleaded, and that it is not open to Mr Khalifeh to advance an alternative case for consequential damage based on the Bank's failure to make a valid tender of the debt at any other point, including following the closure of the account on 13 January 2021. I do not accept that this point is not open to Mr Khalifeh on the pleadings. The case advanced is that the funds would have been exchanged into sterling on receipt, and while the pleaded calculation is formulated by reference to the June 2020 demand, the determination of the exchange rate at any alternative date is a straightforward exercise.

222. In this case, I am satisfied that a valid demand was made by the service of the claim form.

223. The next issue is causation: has Mr Khalifeh established that he would have converted USD into GBP on receipt (assuming, in his favour, an ability to do so)? Mr Khalifeh's witness statement addressed this issue by reference to the June 2020 demand, saying that he would have converted USD to GBP at that stage because he was considering buying a property in the United Kingdom. I was not persuaded by Mr Khalifeh's evidence that there was a specific purpose which would have caused him to convert USD into GBP. On 29 January 2020, Mr Khalifeh had sought a transfer of USD 75,000 to meet a £60,000 liability on work done on his flat in England. However, after that, the balance of the Personal USD Account was transferred to the account of InsideJob UK, and the transfer which Mr Khalifeh sought to make from that account was to a USD account of InsideJob in the UK.

224. However, I accept that, as a matter of fact, if Mr Khalifeh had been in a position to transfer funds out of Lebanon, on balance it is likely that the funds would have been transferred to his personal GBP account (which appears to be the only personal bank account he had in the United Kingdom, and was the account to which he had asked the Bank to transfer funds on 2 June 2020). That is sufficient to establish this aspect of causation.

225. That brings the issue of remoteness. I am satisfied that it was foreseeable when the Personal USD Account was opened by Mr Khalifeh, who was known by the Bank to be an expatriate account holder with a bank account in the UAE, that he might suffer an exchange rate loss if the Bank failed to pay amounts from the Personal USD Account

when they were due. I do not accept that under Lebanese law (any more than under English law), it was necessary for it to be foreseeable that the loss would arise from an inability to convert funds to GBP, or that the extent of any such loss should be foreseeable. The provisions in the LCOC addressing remoteness of loss and the rule in Hadley v Baxendale (1854) 9 Ex 341; 156 ER 145 share a common ancestry in Articles 1150 and 1151 of the Code Napoleon, and it is scarcely surprising that they lead to the same outcome.

226. Finally, there is the Bank's suggestion that Mr Khalifeh was at fault in respect of the loss he suffered because, it is said, it took him six months to formulate his claim. I am satisfied that there is nothing in this point. The thrust of Mr Khalifeh's position – that he was entitled to repayment in USD of the amount standing to the credit of the Personal USD Account – has been clear throughout, and the Bank's resistance to that claim was adopted and maintained on a point of principle.

227. Had I concluded that the Bank's tender of a banker's cheque and its invocation of the procedure established by Article 822 of the LCCP had not discharged the debt, and found that performance of the Bank's obligation would have left Mr Khalifeh in a position whereby he could convert the USD received to GBP, I would have upheld Mr Khalifeh's claim to damages, to be calculated in accordance with the findings I have made in this part of the judgment.

THE CURRENCY OF JUDGMENT

228. By the end of the closing submissions, it was common ground that, if the debt had been outstanding, any judgment should be entered in USD as the money of account: *Dicey, Morris &Collins*, [37-004], [37R-017] and [37R-081] and Miliangos v George Frank [1976] AC 443. The parties had also agreed that any issues as to the applicable exchange rate between the money of account and the money of payment, and any issues which might arise if the applicable rate differed from the rate which would have applied if proceedings had been brought in Lebanon, were not matters to be determined at this time.