Neutral Citation Number: [2020] EWHC 3594 (Comm)

Case No: **CL-2019-000303 & CL-2020-000304**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **10 December 2020**

Before :

Mrs Justice Cockerill

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Between :

Banco Central De Venezuela	**Claimant**
- and -	
The Governor And Company Of The Bank Of England & Deutsche Bank AG	**Defendant**
- and –	
Central Bank of Venezuela	

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Nicholas Vineall QC and Brian Dye (instructed by **Zaiwalla & Co LLP**) for the **Claimant**
Andrew Fulton and Mark Tushingham (instructed by **Arnold & Porter Kaye Scholar (UK) LLP**) for the **Defendant**

Hearing dates: **10th December 2020**

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APPROVED RULING

Mrs Justice Cockerill **Thursday, 10 December 2020**

Ruling by **MRS JUSTICE COCKERILL**

RULING 1 (11.48 am)

1. I am going to give you an answer now because it seems to me I have to in order that we can continue with the rest of what we need to talk about today. It may be that I will have to flesh it out a bit in due course, if anyone wants to take this decision elsewhere; but the decision to which I come in the light of the full and careful submissions which I have had made to me is that I am going to exercise the discretion to order a case management stay in relation to this case pending the decision of the Supreme Court.
2. Everybody agrees that this is a case management stay issue, and I accept Mr Fulton's submissions that the question of stay of execution is a rather different thing.
3. One then looks at the various factors which go into the balancing exercise which tells us what is the right way to go in this situation and it seems to me that, in the light of the very considerable (and accepted) overlap between the arguments which are being deployed in the Supreme Court and the arguments which would have to be considered in relation to the January hearing, it would be inappropriate to go ahead.
4. In particular, the nature of what is being decided hypothetically in the January hearing is essentially predicated on the correctness of the approach which the Court of Appeal took in relation to the preliminary issues. The essence of that is that they took the view that the answer which they had had from the FCO was not sufficient and that it would be appropriate to look further.
5. The essence of what is now being said in the Supreme Court is that the Court of Appeal was wrong to interpret the express statement as leaving open any possibility of a continuing implied recognition. That being the case, effectively what I would be being asked to do would be to decide an issue which, if the Guaidó Board is correct and is upheld in the Supreme Court, is one which should never arise.

6. There is also an overlap potentially in relation to grounds 2 and 3 -- in relation to ground 3, for example, the question of the STJ judgments is likewise potentially stymied by the answer of the Supreme Court.

7. So everything which is in play stands to be affected by the outcome of the Supreme Court. Then it must be common ground that the area in which we are operating is one which is of considerable sensitivity and has constitutional ramifications. In those circumstances, which indicate very considerable disadvantages if we were to proceed, I conclude that it would be appropriate to look very carefully at whether there are countervailing advantages which would make it appropriate to proceed nonetheless. When I look for the countervailing advantages, I do not see the countervailing advantages which would make that appropriate, so, in effect, the balance does not tip back.

8. One needs to look at (i) what one is achieving at the cost of potentially doing something which this court should not be doing, (ii) in addition, the reason why there was an expedited trial in the first place, why there was an expedited appeal and why we provisionally put in a highly expedited hearing in January. On the first, as I have indicated the balance of advantage/disadvantage is tipped in favour of a stay. As to the second point the reason for all this expedition was that this case was about a route to releasing the assets which both of the parties who are contending before me say can be used for the benefit of the Venezuelan people.

9. But as we sit here now, that possibility has disappeared. Everybody agrees that, even if the January hearing were to go ahead, it would not result in anybody being able to take away and use the money. It's also the case that the Maduro Board could not get to a victory in January because everything that would be decided would be subject to the Supreme Court saying that the Court of Appeal was wrong. It would not realistically produce a result either for the Guaidó Board, and that is taken on the chin by the Guaidó Board.

10. So what one would really be looking at is effectively the contingent possibility, firstly, that in some respect the Supreme Court would find the determination useful, and there is no real reason to suppose, given the grounds which are before the Supreme Court, that they would do so.
11. Further, that is itself contingent on getting an answer in January, getting that answer appealed and through the Court of Appeal process, such that the Supreme Court has got an answer from the Court of Appeal. That may be possible, but it strikes me as presenting a risk that one is in fact congesting and complicating the case management situation.
12. The second remaining reason for going ahead is that, on the hypothesis that the Supreme Court's decision goes a particular way, it could effectively move the agenda of debate on certain issues up by a particular temporal amount. That point is certainly potentially an advantage, but I am not persuaded that it is a major advantage in the context of this case.
13. So even taking those two points, I am not satisfied that it would be appropriate to proceed.
14. That balance comes down yet further in favour of the stay when I consider the other issues which are to an extent related to the points that I've already made, which are the constitutional/political issues. As I have said, the area in which we are operating is one of considerable sensitivity and it does trouble me that one might end up making a decision that there was an implied recognition when the Supreme Court later holds that there is no such thing of any significance. One would then have a situation where you cannot get the concept of a finding back in the box; you can't put it away and pretend it never happened. You would have a finding on something which, on that hypothesis, should never have been found. So that seems to me to push yet further in favour of the stay. As I've said, in any event, I'm persuaded that the stay is the right way to go.
15. So I will order the stay

RULING 2 (12.32 pm)

1. In relation to what we might call the “source of funds” point, I am going to make this ruling subject to whatever rider Mr Fulton makes as to his ability to argue that this is not a matter which is open to

the court to decide. I'm going to reserve that to the extent that it does arise because I am uncomfortable about leaving that firmly parked and off the agenda, in circumstances where it is a point which links to the "who are the parties" point and also links to whatever costs order the Supreme Court may make in due course.

2. So we will leave that where Mr Vineall puts it down and see where it goes in the light of what the parties get to on the "who are the parties" point.

3. In relation to the costs of the unless order application, I certainly agree that the fact that there has been permission to appeal from the Supreme Court cannot undo the fact that there was a breach of the previous costs order, in the sense that it was not paid promptly, and so, to some extent, there must be some marking of that in costs, not the least because it does look rather as if, bearing in mind the responses which were before me last time, that if something had not been done or said about it, that payment which has now been made would not have been made and certainly would not have been made when it was made.

4. Having said that, we have not in the end argued out the question of the unless order. That application for an unless order was an application for a very serious order. While I gave considerable encouragement, shall we say, to the Guaidó Board to do something about paying or coming up with a much better answer, it is by no means certain in the context that I would have made an unless order because of the proportionality reasons which Mr Fulton indicates.

5. It might well be argued, or it might well have been argued if the matter had gone to a conclusion, that making the application for an unless order quite as early as was done, was maybe jumping the gun a little. Of course, when we saw it last time, there had still not been payment for a considerably longer period than nine days and we had probably arrived at a point where making an application for an unless order was not unreasonable by then.

6. So I am not prepared to grant the Maduro Board their costs of the application *simpliciter*, still less on the indemnity basis. However, the order which I propose to make is -- and I hope I'm getting this the right way -- Maduro Board's costs in the [Supreme Court appeal].
7. So if the Maduro Board succeeds in the Supreme Court such that they were right about it, they get their costs. If the Guaidó Board succeeds in the Supreme Court, they do not get their costs of this interim application.
8. In that way, I can mark the court's dissatisfaction with the fact that the order was not complied with in circumstances where, if there was a good reason for it not being paid in the usual way, something ought to have been said at the time the order was made, rather than not paying, and waiting until an unless order application was made.