CFI 027/2016 (1) Nest Investment Holding Lebanon S.A.L. (2) Jordanian Expatriates Investment Holding Company (3) Qatar General Insurance and ReInsurance Company P.J.S.C. (4) Ghazi Kamel Abdul Rahman Abu Nahl (5) Jamal Kamel Abdul Rahman Abu Nahl(6) Trust International Insurance Company (Cyprus) Limited(7) His Excellency Sheikh Nasser Bin Ali Bin Saud Al Thani (8) Fadi Ghazi Abu Nahl (9) Hamad Ghazi Abu Nahl (10) Kamel Ghazi Abu Nahl v (1) Deloitte & Touche (M.E.) (2) Joseph El Fadl

Claim No: CFI-027-2016

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

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

IN THE COURT OF FIRST INSTANCE
BEFORE JUSTICE ROGER GILES

BETWEEN

(1) NEST INVESTMENTS HOLDING LEBANON S.A.L.
(2) JORDANIAN EXPATRIATES INVESTMENT HOLDING COMPANY
(3) QATAR GENERAL INSURANCE AND REINSURANCE COMPANY P.J.S.C.
(4) GHAZI KAMEL ABDUL RAHMAN ABU NAHL
(5) JAMAL KAMEL ABDUL RAHMAN ABU NAHL
(6) TRUST COMPASS INSURANCE S.A.L.
(7) TRUST INTERNATIONAL INSURANCE COMPANY (CYPRUS) LIMITED
(8) HIS EXCELLENCY SHEIKH NASSER BIN ALI BIN SAUD AL THANI
(9) FADI GHAZI ABU NAHL
(10) HAMAD GHAZI ABU NAHL
(11) KAMEL GHAZI ABU NAHL

Claimants

and

(1) DELOITTE & TOUCHE (M.E.)
(2) JOSEPH EL FADL

Defendants

Hearing: **31 October 2017**
Counsel: Jonathan Fisher QC, Faisal Osman and Caley Wright (Onoma FZE) for the Claimants
Anneliese Day QC, Shane Jury and James Abbott (Clifford Chance LLP) for the Defendants
Judgment: **12 February 2018**

JUDGMENT

Summary of Judgment

The Claimants collectively hold approximately 24 percent of the shares in Lebanese Canadian Bank SAL ("LCB"), a company based in Beirut formerly conducting a banking business. LCB is now in liquidation. The claims in the proceedings are for breaches of duties as auditor of LCB's financial statements. The Claimants allege breaches of duties essentially of two kinds, being failure to address, adequately or at all, compliance with requirements of Lebanese reporting laws, and failure to address losses caused to LCB by related party transactions. The Claimants allege that, had the Defendants properly fulfilled their duties, LCB would not have gone into liquidation. They allege that the breaches of duties caused them collective loss in the order of USD 128 million.

The audits were performed by a Lebanese auditor, of which the former Second Defendant was Managing Partner.

The First Defendant applied for an order striking out the claim form and particulars of claim as against it in whole or in part, or alternatively that immediate judgment be granted in its favour in respect of the claims or some of them and that they be dismissed ("the immediate judgment application"). It contended that Lebanese law applied, and that under Lebanese law (a) the claims against it were statute-barred, (b) they had been released and discharged from any liability, and (c) the Claimants could not sue for their individual (reflective) losses as shareholders. It contended also that there was no factual or legal basis for it being liable on the basis, as alleged by the Claimants, that the Lebanese auditor was its agent.

Justice Giles held that there should not be striking-out or immediate judgment. He assumed that Lebanese law applied, while observing that it was not reasonably arguable that (as the Claimants contended) DIFC law governed. Having considered evidence of Lebanese law, he considered that the matters above were open to factual and legal investigation at trial and were not so clear that the Claimants had no real prospect of success. He also considered that there was more than a fanciful case of agency, and that further materials were likely to become available to show the relationship between the Claimants and the Lebanese auditor, and again that the Claimant's case in that respect should go to trial.

At an earlier time, it had been held that the Court had no jurisdiction to hear and determine the claims against the former Second Defendant. The Claimants applied for an order that the former Second Defendant be added as a new party pursuant to RDC 20.7(2).

Justice Giles held that RDC 20.7 (2) does not enable the joinder of a new party where the issue involving that party and an existing party is a claim which the Court does not have jurisdiction to hear and determine.

Both applications were dismissed. The costs of the applications were reserved.

ORDER

UPON hearing Counsel for the Claimants and Counsel for the Defendants at a hearing on 31 October 2017

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1.The First Defendant's application filed on 22 January 2017 is dismissed.

2. The Claimants' application filed on 24 September 2017 is dismissed.

3. The costs of both applications are reserved.

Issued by:

Natasha Bakirci

Senior Assistant Registrar

Date of Issue: 12 February 2018

At: 4pm

JUDGMENT

Introduction

1.The Claimants commenced these proceeding on 19 July 2016, and filed their particulars of claim on the same date. A defence has not yet been filed.

2. On 1 August 2017 I heard a jurisdiction application by the Second Defendant. In a judgment issued on 24 August 2017 I declared that the Court has no jurisdiction to hear and determine the claims against him, and made consequential orders having the effect that he ceased to be a party ("the jurisdiction decision"). No application for permission to appeal from the jurisdiction decision has been made.

3. On 31 October 2017 I heard two further applications. The first was an application by the First Defendant for an order striking out the claim form and particulars of claim as against it in whole or in part, alternatively that immediate judgment be granted in its favour in respect of the claims or some of them and they be dismissed ("the immediate judgment application"). The second was an application by the Claimants for an order that the former Second Defendant be added as a new party ("the joinder application").

4. If the immediate judgment application wholly succeeds, subject to any appeal that will be an end to the

proceedings and the joinder application will be redundant. In my opinion, however, the immediate judgment application should be dismissed. It is therefore necessary to decide the joinder application. In my opinion, the joinder application should also be dismissed.

Background

5. The Claimants collectively hold approximately 24 percent of the shares in Lebanese Canadian Bank SAL ("LCB"), a company based in Beirut formerly conducting a banking business. They acquired their shares in 2006/7. LCB is now in liquidation.

6. The First Defendant, Deloitte & Touche (ME) ("DTME"), is a general partnership registered in accordance with the laws of Cyprus. It is an accounting firm, operating through branches in a number of countries in the Middle East including in Dubai, and is a Registered Auditor in the DIFC.

7. The former Second Defendant, Joseph El Fadl ("Mr Fadl") is a partner in DTME. He is also the Managing Partner of Deloitte & Touche ("DTL"), a civil company registered in Lebanon carrying on an accounting business in that country.

8. The claims in the proceedings are for breaches of duties as auditor. They are made in relation to audits of the financial statements of LCB and its wholly owned subsidiary, LCB Investments (Holding) SAL ("LCBIH"), for the financial years ending 31 December 2006, 2007, 2008 and 2009 in the case of LCB and for the financial years ending 31 December 2008 and 2009 in the case of LCBIH. For the purposes of the applications it is not necessary to refer separately to LCBIH, and I will refer only to LCB.

9. The particulars of claim appeared also to raise claims in relation to audits of the financial statements of a sub-subsidiary of LCB, Tabadul Company for Shares and Bonds LLC ("Tabadul"). However, it was explained in submissions that the claimed losses flowed from failure to recognise in LCB's audits matters which should have been ascertained in Tabadul's audits, not from breaches of duties in relation to Tabadul's audits themselves. Breaches of duties as auditor in relation to Tabadul's audits do not arise.

10. The audits of LCB were performed by DTL under letters of engagement with LCB. Mr Fadl was the responsible Managing Partner. The audits were carried out solely by DTL, that is, with no part of their performance by DTME. The Claimants allege, however, that DTME was responsible for DTL's performance of the audits; this is pleaded rather obscurely but in the applications came to be rested on DTL carrying out the audits as the agent of DTME.

11. The Claimants allege breaches of duties essentially of two kinds, being failure to address, adequately or at all, compliance with requirements of Lebanese reporting laws, and failure to address losses caused to LCB by related party transactions. It is alleged that this lead to failure to report the true financial position of the companies or to disclose various illicit activities, including but not limited to money laundering and terrorist financing.

12. Prominent in the failures alleged is ignoring proceedings commenced in the United States in July 2008 in which it was claimed that LCB had intentionally or negligently aided and abetted terrorist activity by maintaining bank accounts for Hezbollah entities. In February 2011 a notice issued by the United States Financial Crimes Enforcement Network opined that LCB was being used to promote or facilitate money laundering. The Claimants allege that this effectively put LCB out of business. Untainted assets were sold and LCB went into liquidation

13. The Claimants allege that, had the Defendants properly fulfilled their duties, the illicit activities and other deficiencies would have been corrected and LCB would not have gone into liquidation. They allege that the breaches of duties caused them collective loss in the order of USD 128 million.

14. The causes of action in the particulars of claim are in deceit, for negligence and for compensation under the Regulatory Law, DIFC Law No 1 of 2004; more specifically –

(a) contravention of Article 31 of the Law of Obligations, DIFC Law No 5 of 2005, in deliberately ignoring

reasonable suspicion of money laundering and terrorist financing or recklessness in the audit opinions in that respect;

(b) owing a duty of care to the shareholders and contravention of Article 18 of the Law of Obligations, in falling below the standards of a competent auditor and failing "to apply professional scepticism and objectivity"; and

(c) liability to compensate for breach or dishonest conduct in connection with duties imposed under regulatory Rules, pursuant to Article 94 (2) of the Regulatory Law.

The Grounds of the Immediate Judgment Application

15. The immediate judgment application challenged DTME's responsibility for DTL's performance of the audits, but went further. The grounds of the application were –

(1) The parties' rights and liabilities in relation to the audits are to be determined in accordance with the laws of Lebanon, and under the laws of Lebanon –

(a) the claims against the auditor of LCB are statute barred;

(b) the auditor has been released and discharged from any claims; and

(c) the Claimants are not entitled to bring the claims in their personal capacities as distinct from through LCB.

(2) In any event there is no factual or legal basis for DTME being responsible for any default of DTL in the performance of the audits.

Striking Out and Immediate Judgment

16. Rule 4.16 of the Rules of the DIFC Courts (RDC) relevantly provides that the Court may strike out a statement of case (which includes a claim form and particulars of claim) –

"…if it appears to the Court:

(1) that the statement of case discloses no reasonable grounds for bringing or defending the claim…".

17. By RDC 4.17, when the Court strikes out a statement of case it may make any consequential order it considers appropriate.

18. RDC 24.1 relevantly provides –

"The Court may give immediate judgment against a claimant … on the whole of a claim, part of a claim or on a particular issue if:

(1) it considers that;

(a) that claimant has no real prospect of succeeding on the claim or issue; or

(b) …

(2) there is no other compelling reason why the case or issue should be disposed of at a trial".

19. By RDC 24.11, the orders the Court may make include the striking out or dismissal of the claim.

20. There is a degree of overlap between these two provisions. RDC 4.16 is apt for an application on the basis that, even if the pleaded grounds are accepted, the claim must fail. That can also be the basis for an application under RDC 24.1, but that rule is apt for an application on the basis of evidence showing that the claim must fail, or of absence of evidence to support it. The overlap suggests, however, a common approach under either rule, subject to questions of fact in an evidence-based application and to RDC 24.1 (2).

21. In the present case RDC 24.1 is the more appropriate avenue of approach. It was common ground between the parties that whether the Claimants have "no real prospect of succeeding" under that rule requires consideration of whether they have a realistic, as distinct from a fanciful, prospect of success (*Swain v Hillman* [2001] 2 All ER 91), or a case which is better than merely arguable and carries some degree of conviction (*ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [8]).

22. In Easy Air Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15], approved in *AC Ward and Son Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24], Lewison J summarised the approach –

> "(i)The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> (ii) A "realistic" claim is one that carries some degree of conviction.This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> (iii) In reaching its conclusion the court must not conduct a "minitrial": *Swain v Hillman*;
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550;
>
> (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co Ltd* [2007] FSR 63;
>
> (vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

23. The test for the RDC 4.16 avenue has been regarded as materially the same, see *Kryvenko The Reno Sport Racing Team Ltd* [2016] EWHC 2289 (Comm) at [54]. In that case gaps in the document record and unexplained gaps in the chronology were regarded as precluding summary judgment.

The Applicable Law

24. I have concluded that there should not be striking-out or immediate judgment on any of the three bases under Lebanese law. I do not think I should unnecessarily rule, on an interlocutory application when the criterion is reasonable grounds or real prospect of succeeding, in favour of the laws of Lebanon as the applicable law; nor has that been posed itself as an "issue" for immediate judgment under RDC 24.1. I therefore proceed on the assumption that the parties' rights and liabilities in relation to the audits are to be determined in accordance with the laws of Lebanon.

25. I nonetheless make the following observations, in the hope that they will assist in resolving an issue for the trial.

26. Article 8 of the Law on the Application of Civil and Commercial Laws in the DIFC, DIFC Law No 3 of 2004, provides –

> "8. Application
>
> (1) Since by virtue of Article 3 of Federal Law No.8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).
>
> (2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:
>
> (a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,
>
> (b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,
>
> (c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,
>
> (d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,."

27. DTME contended that Lebanese law applied by force of para (d) of Article 8 (2). The Claimants contended that DIFC law applied by force of para (a), but that if that were not so then the jurisdiction ascertained under para (d) was the DIFC.

28. It is convenient first to address the Claimants' arguments for the application of DIFC law by force of para (a).

29. Article 8 (1) and the introductory words of Article 8 (2) call for selection of the laws of a jurisdiction. While paras (b) to (e) of Article 8(2) offer jurisdictions for their laws in their entirety, para (a) does not. It confines the selection to laws in force in the DIFC "so far as there is a regulatory content". The evident purpose is that any DIFC law or other law in force in the DIFC with regulatory content, if material, will apply in determining the rights and liabilities of the parties, but otherwise those rights and liabilities are to be determined according to the laws of a jurisdiction ascertained under one of the succeeding paragraphs. Paragraph (a) does not import DIFC law in its entirety, or a DIFC law or other law in force in the DIFC other than for its regulatory content.

30. The Claimants' primary argument assumed that DTME is to be regarded as having performed the audits. They referred to the allegations that DTME was bound to apply certain "Professional Standards" in performing the audits, namely the International Ethics Standards Board Code of Ethics, the International Standards on Auditing, the International Accounting Standards, and self-imposed standards referred to as the Deloitte Standards. They said that their claims were in part founded on failure to comply with the Professional Standards, and that –

> "…there can be no clearer example of 'regulatory content' than a tortious claim against a member of a regulated profession… who fail to adhere to the Standards."

31. This misapprehends Article 8 (2) (a). The submission was terms of regulatory content of a claim; if in the claims under the Law of Obligations or the Regulatory Law, the Professional Standards arose, those laws were applicable. The Claimants said that did not matter that the regulatory content had not been "issued" by the DIFC or the DFSA: DIFC law nonetheless applied. In my view, the argument is unsound. One does not look to regulatory content of a claim, but to regulatory content of a law material to the claim.

32. The Claimants said that in *Forsyth Partners Global Distributors Ltd* (Michael Hwang CJ, 30 January 2007) it was held that a case involving preferential debts qualified as having 'regulatory content', and that in *Lutfi v*

DIFCA [2013] DIFC CA003 it was held that an employment claim had regulatory content and DIFC law applied even though no relevant DIFC regulations had been issued. In the first of these cases it was held that the Insolvency Law, DIFC Law No 7 of 2004, applied even though there was as yet no promulgation of preferential debts. I am unable to see the proposition asserted in the second of the cases. Neither assists the Claimants' argument.

33. None of the Professional Standards is a DIFC law or a law in force in the DIFC. The suggested path to the Law of Obligations and the Regulatory Law is not opened. Even if it were, the Claimants also alleged failure to comply with reporting obligations under Lebanese law, plainly not regulatory content of a DIFC law or law in force in the DIFC.

34. As a variant of the argument, the Claimants submitted that para (a) was attracted because Article 21 (3) of the Law of Obligations described reasonable care as "the standard of care of an ordinary skilled person exercising and professing to have the special skill in question", therefore consideration of the Professional Standards was required. It would appear that this could apply only to the claim in negligence. That the Professional Standards may come up for consideration does not mean that there is regulatory content in the Law of Obligations whereby that law's prescription of liability applies in determining the rights and liabilities of the Claimants and DTME. In my view, the argument is without substance.

35. The Claimants' secondary argument was directed to the claim under the Regulatory Law. The Claimants alleged in the particulars of claim that, as a Registered Auditor, DTME "remains under the supervisory control of the DIFC at all times", and was bound by requirements in Rule 8.9 of the DFSA Rule Book GEN Module, relevantly compliance with the Professional Standards. Thus, it was submitted, the claim alleging failure to comply with those Standards was "made pursuant to the Regulatory Law" and was a claim with regulatory content.

36. The argument suffers from the same reliance on regulatory conduct of a claim rather than regulatory content of a material law. The Module governs obtaining and maintaining the status of a Registered Auditor. It does not govern the conduct of the audits in Lebanon of a Lebanese entity.

37. In my view, therefore, para (a) of Article (8) (2) does not prescribe the law applicable in determining the Claimants' claim.

38. Turning to para (d) of Article 8(2), the Claimants submitted that the law of the DIFC was the applicable law under that paragraph because it was "[t]he law that governs DTME as the entity responsible for oversight" (meaning oversight of DTL's performance of the audits), and that this was supported by what was said in various ways to be the international character of the case distancing it from Lebanon. The submission does not address the terms of para (d). The question is whether Lebanon, rather than some other jurisdiction (here, the DIFC), appears to be the jurisdiction most closely related to the facts of and the persons concerned in the matter.

39. In my view, the answer is plain. The audits of Lebanese companies were performed in Lebanon by a Lebanese auditor. A significant element of the Claimants' case is to do with Lebanese reporting laws. The alleged losses and their causation are Lebanese events. The facts and persons concerned are overwhelmingly connected with Lebanon, and that is so even though on the Claimants' case DTL was so connected with DTME that it was acting as DTME's agent whereby DTME is responsible for its defaults as auditor. As will appear in the "could DTME be liable" section of these reasons, the asserted connection is itself significantly founded on events in or to do with Lebanon, and scarcely to do with the DIFC.

40. It is not reasonably arguable that the law applicable in determining the rights and liabilities of the Claimants and DTME is DIFC law rather than Lebanese law. However, I repeat that I express this view, and the reasons for it, as observations for the assistance of the parties.

Statute barred under Lebanese law?

41. As in the jurisdiction application, I had the benefit of experts' reports concerning Lebanese law of Mr Chakib Cortbaoui (also instructed on behalf of DTME) and Dr Phillipe Boustany (instructed on behalf of the Claimants). The experts did not give oral evidence.

42. Mr Cortbaoui said that the liability of auditors is subject to a five year limitation period pursuant to Article 178 of the Lebanese Commercial Code ("the CC"). By that Article "commissioners", which on the evidence refers to or includes auditors –

> "…commit their responsibility, either individually or jointly, even towards third parties, whenever they commit a supervision offence, subject to the five-year time-limit".

43. Mr Cortbaoui said that the limitation period "starts as of the date of the general assembly of shareholders of the company to which the auditors submitted the disputed report". He described it as a limitation period ("délai de prescription") rather than an extinction period ("délai de forclusion"), the difference being that a limitation period could be "interrupted" while an extinction period "runs for 5 straight calendar years without any possibility of suspension". Interruption could be in circumstances stated in Articles 357 and 358 of the Lebanese Code of Obligations and Contracts ("the COC").

44. DTL's audit reports were submitted to general assemblies of LCB at various times after the close of the relevant financial years, that for the 2009 financial year on 26 May 2010: that is the latest start date. The proceedings were commenced on 19 July 2016. Accordingly, DTME submitted that any claim against it was statute barred.

45. Dr Boustany agreed that Article 178 of the CC regulated proceedings brought against auditors. He said that the time limit "in commercial situations" was ten years unless a shorter time was provided for, but agreed that in regard to auditors Article 178 provides a time limit of five years "in case of supervision/ controls". He agreed also that, where the auditors' report was submitted to the general assembly, time began to run when it was submitted. But he departed from Mr Cortbaoui –

> (1) in saying that a different period of ten years would apply "in the case of violation of extra-contractual violations", and suggesting that the obligations arising out of the Lebanese reporting laws were extra-contractual;
>
> (2) in suggesting that in the case of concealment of the "harmful act", time began to run when "the concealed facts / acts" were discovered, even though a report had been submitted to the general assembly; and
>
> (3) by stating that there could also be interruption (in his word, suspension) of the time limitation under Article 356 of the COC where "the creditor… faced an impossibility to interrupt the time limitation for reasons not depending on its will", including by the creditor's ignorance of the existence of its right.

46. The suggestion in (a) above is not in point: the Claimants do not sue for breach of obligations under the reporting laws, but for breach of obligations owed to them by the auditor including an obligation owed to them to comply with the laws. Mr Cortbaoui's response to (b) was that concealment required intentional concealment by the auditors of an irregularity of which they were aware. He did not respond to (c).

47. I do not think that it can properly be concluded for this application that the Claimants' claims are statute barred under Lebanese law. Divergence between the experts is not of itself an impediment to finding that the claims have no real prospect of success, although assessment of their opinions on a final basis would preferably not be upon their bare reports. But the Claimants allege deceit and dishonesty, which even if Mr Cortbaoui's opinions be otherwise

> accepted could amount to concealment, and Dr Boustany's impossibility through ignorance of rights remains in play. The matter is open to factual and legal investigation at trial, and I am not satisfied that it is so clear that the Claimants have no real prospect of success.

48. I note that the Claimants submitted that a limitation defence was procedural and was governed by DIFC

law as the law of the forum. DTME took an opposing position; it acknowledged that in earlier times a limitation defence had been regarded as procedural, but cited decisions in other jurisdictions (not England) which it said showed movement to it being substantive: *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503 at [98] – [100]; *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; (2005) 223 CLR 331 at [187] (Australia); *Tolofson v Jensen* [1994] 3 SCR 1022 (Canada). It is not clear that the Claimants would be better off if their submission were accepted, but that was not explored. It is not necessary to deal with the submission: on the basis propounded by it, DTME is not successful.

Release and discharge of the auditor?

49**.** As earlier noted, the audit reports were presented to general assemblies of LCB. At each general assembly a resolution was passed releasing and discharging the directors of LCB: an example (in translation) from the meeting on 19 January 2008 is –

> **"Second Decision"**
>
> After discussing and debating Item No. / 3 / of the General Assembly's Agenda,
>
> The Annual Ordinary General Assembly decided to discharge the Chairman and Members of the Board of Directors in connection with all of the activities that they undertook during the fiscal year ended 31/12/2006."

50. Article 169 of the CC provides –

> "Final discharge, if it is to be used as defence, must always be preceded by a statement of the company's account and the commissioners' report; it only covers facts of management with which the general meeting may have been acquainted."

51. Mr Cortbaoui said that, although the release and discharge is granted to the directors, "most scholars agree" that the release and discharge covers also the auditors of the company, and that "it is construed as being equivalent to a waiver by the Company of the right to bring a claim against the auditors for a supervision offence". He explained that, although the release and discharge in the resolutions above mentioned did not expressly extend to the auditor, scholars considered that it will discharge the auditors on the same conditions as the managers, that is, "from liability to the company (and hence the shareholders suing on behalf of the company)".

52. Mr Cortbaoui said that, by force of Article 192 of the CC, the release and discharge "will be binding on the shareholders of the company, even those who voted against the grant of the relevant release and discharge": that Article provides to the effect that resolutions of the general assembly are binding on all shareholders "even absentees and dissidents". He concluded by stating that the release and discharge –

> "… would discharge [the auditors] from liability, towards the company (and hence the shareholders acting on behalf of the company), under Article 167 C. Com and 178 C. Com in the event that the accounts have been submitted to the general assembly noting that such discharge does not have effect with respect to facts which were not known by the assembly."

53. Dr Boustany disagreed that the release to which Article 169 referred extended to auditors, observing that the text on which Mr Cortbaoui relied was old (1971) and the law had evolved. He referred to an extract from a 2016 text, but it is in French without translation. He also pointed out that, because the release and discharge only covers facts of management with which the general meeting may have been acquainted, it was not effective inter alia in case of fraud.

54. Mr Cortbaoui responded to Dr Boustany on the extent of the release, but I do not think it profitable to take the debate further. As the matter was left, with the uncertainty of "most scholars" and a contrary view, there is a live issue which should go to trial on whether the release and discharge extends to an auditor. As well, the allegations of deceit and dishonesty, if made out, may exclude the necessary extent of any release and

discharge. There are matters for factual and legal investigation at trial.

55. Further, on Mr Cortbaoui's explanation of the discharge, it is regarded as equivalent to a waiver by the company, that is LCB. That the shareholders are bound by a resolution giving rise to such a waiver does not mean, or at least does not mean with the force required for this application, that the discharge extends to and is the equivalent of a waiver by the shareholders as claimants in their own right; indeed, from Mr Cortbaoui's reference to discharge of the shareholders "acting on behalf of the company", it appears that it would not. Mr Cortbaoui's response is unclear on this, and I am not satisfied that it can be decided in this application to the level of negation of a real prospect of success for the Claimants.

56. For all these reasons, immediate judgement is not appropriate.

Entitlement to bring the claims?

57. That the Claimants do not sue on behalf of LCB, but sue in their own right, was the foundation of DTME's contention that they are not entitled to bring the claims.

58. In the particulars of claim, the Claimants claim for loss allegedly suffered as shareholders, being the difference between the value of their shareholdings in LCB and the dividends they would have received had it not gone into liquidation, on the one hand, and the money they in fact received in the winding up of LCB, on the other. This is reflective loss, incurred by reason of the harm done to and the loss suffered by LCB. DTME submitted that, under Lebanese law, the Claimants cannot bring claims in their individual capacities, as opposed to through LCB, unless they can demonstrate that they have suffered individual prejudice distinct from that suffered by LCB: they cannot sue for reflective loss. This has some resonance with the position under English law as explained in *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) (1982) Ch 204 and more recently *Johnson v Gore Wood & Co* (2002) 2 AC 1 and *Day v Cook* [2001] EWCA Civ 592.

59. Mr Cortbaoui opined that a shareholder can only sue the auditor "in his individual capacity… with respect to an individual prejudice he suffered, distinct from the prejudice suffered by the company". He said that –

> "An individual prejudice is a prejudice suffered individually by a shareholder and which is distinct from the social interest of the company. It is a prejudice which is not a consequence of a prejudice suffered by the company. By analogy with the liability of managers, it is worth noting that the individual prejudice is in practice rare since it is not common that a shareholder suffers, from the acts of auditors and managers, a prejudice independent and distinct from the prejudice suffered by the company."

60. Mr Cortbaoui referred to "scholarly opinion" that a shareholder could sue the auditor in the name of the company if the company failed to take action against the auditor ("ut singuli", described also as a "social" claim, as distinct from an "individual" claim), although there was no express legislation or court ruling in this respect.

61. Dr Boustany, on the other hand, said that Lebanese law "does not differentiate between individual actions and social actions ut singuli regarding auditors, and applies the general principle of liability in actions brought against them". He said also that the Claimants "are able to sue in relation to the audits of LCB/LCBIH in their individual capacities". However, his report is not clear on the loss which may be claimed in the respective actions, and he does not clearly opine that a shareholder in an individual action may claim reflective loss. He does not seem fully to appreciate Mr Cortbaoui's opinion, and to be making the point that the shareholder can sue for loss it has suffered without addressing whether that includes reflective loss.

62. In a responsive report Mr Cortbaoui repeated and elaborated upon his opinion, including stating that the Claimants' loss in the value of their shares is not an individual prejudice for the purpose of Lebanese law.

63. So far as the evidence permits, in my view Mr Cortbaoui has the best of the debate over a shareholder's ability to sue for reflective loss, and I doubt that Dr Boustany should be understood as supporting a shareholder's claim to reflective loss under Lebanese law. I hesitate, however, to find that in that respect the Claimants have no reasonable prospect of success in their claims. To an extent that is because the obscurity

in Dr Boustany's report could be clarified at the trial, but more importantly it is because none of the reports made more than passing reference to exceptions, as they might arise in this case, to a general principle against recovery of reflective loss.

64. In that regard, I invited supplementary submissions on the principle in common law jurisdictions. It is unnecessary, and inappropriate for the purposes of this application, to go into the detail of the submissions. It is sufficient that, with due gratitude, I explain why with their assistance, and recognition that I am concerned with Lebanese law, I consider that the issue should go to trial.

65. The principle is not universal in common law jurisdictions: in contrast with the English cases abovementioned, in New Zealand the loss in the value of shares may be recoverable by the shareholder (*Christensen v Scott* (1995) 1 NZLR 273). And there are limits to the principle. Its policy basis is that there should not be double recovery at the expense of the defendant or recovery at the expense of the company, its creditors and other shareholders. Accordingly, it does not apply where the company has no claim or (of more present significance) where by reason of the wrong done to it the company is unable to pursue its claim against the wrongdoer: *Webster v Saundersons* [2009] EWCA Civ 830. So in *Giles v Rhind* [2003] Ch 618 a director's wrongdoing caused the company to go into liquidation and the proceedings brought by the company against him were discontinued, and it was held that the principle did not operate to preclude the shareholder recovering.

66. It is not evident that these limits are also found in Lebanese law, but nor does the evidence exclude them: the matter is simply not dealt with. I do not feel able to accept DTME's submission to the effect that, because it is not dealt with, Lebanese law is stricter than the common law and always does not allow the recovery of reflective loss. The common law alleviates the shareholder's difficulty by permitting a derivative action in the name of the company under the so-called fraud exception where the wrongdoer controls the company and will not permit it to bring an action; it is clear enough that Lebanese law offers a broad equivalent in the form of a social claim, although the nature of and requirements for such a claim are without detail. Given the policy considerations apt to mould Lebanese law alike with the law in other jurisdictions, I do not think that the evidence of Lebanese law excludes, to the standard required for striking out or immediate judgment, recovery by the Claimants of their reflective loss.

67. This is so particularly having in mind (a) that from Mr Cortbaoui's evidence concerning release and discharge, it may well be that LCB has no claim; (b) on the evidence, LCB is controlled by persons who brought about the alleged illicit activities and will not cause it to bring an action against DTL or DTME; and (c) the allegations of deceit and dishonesty include that the auditor was willfully blind to those activities, and so by the alleged wrongdoing complicit in causing LCB to go into liquidation. The part played by the auditor in the liquidation and a more fully explained operation of Lebanese law should be left for trial. I am not satisfied that in relation to reflective loss there are no reasonable grounds for or no real prospect of success in the claims, and in any event consider that the incomplete state of the evidence of Lebanese law provides a compelling reason for that course.

68.I recognise DTME's submissions that in English law *Giles v Rhind* has been confined as a limited exception, that the reflective loss principle has been applied where there will not be double recovery because the company has chosen not to claim, and that the principle can be applied on a summary application. The position in common law jurisdictions, however, invites asking whether the position under Lebanese law has been shown in this application to warrant striking out or immediate judgment. In my view, it has not.

In any event, could DTME be liable?

69. DTL had legal personality under Lebanese law. It became common ground that DTL and DTME were separate legal entities. The audit engagements by LCB were specifically of DTL. The engagement letter for the 2007 audit contained a note that the member firms of the Deloitte network were separate legal entities and

none had any liability for another's acts or omissions. DTME had no involvement in the performance of the audits. How, then, was DTME said to be responsible for DTL's performance of the audits, and liable for any default?

70. In the particulars of claim it was alleged –

> "34. The Claimants aver that:
>
> 34.1 Deloitte and Touche in Lebanon is **D1**'s [DTME's] Lebanese Practice Office;
>
> 34.2 By its own admission, in fact and in reality, **D1** and Deloitte and Touche in Lebanon are part of a single economic unit (namely Deloitte and Touche (M.E.) – the 'Member Firm' of the DTTL network;
>
> 34.3 Every step taken by Deloitte and Touche in Lebanon in the performance of its auditing functions is overseen by and through **D1**'s supervisory function and binding policy;
>
> 34.4 **D1** is liable, alternatively vicariously liable, for the breaches, acts and omissions set out in **Part 3** and **Part 6** hereunder
>
> .....
>
> 36. Within his role at **D1**, **D2** [Mr Fadl] was responsible for the audits conducted by **D1** on LCB and LCBIH. At all material times **D2** acted as **D1's** agent. **D1** is vicariously for the acts and omissions of **D2**."

71. In written submissions, the Claimants sometimes attributed DTME's liability to DTL and DTME being a single economic entity. They eventually abandoned the adventurism of a single economic entity (see the adverse discussion in *Manuchar Steele Hong Kong Ltd v Star Line Pte Ltd* [2014] SGHC 101 to which DTME referred). In oral submissions DTME's liability came to be rested solely on agency: that DTL was DTME's agent, whereby DTME was vicariously liable for its defaults. I understand para 36 of the particulars of claim to have been abandoned as a basis of liability separate from the assertion of the relationship of DTME as principal and DTL as agent.

72. The Claimants submitted that the agency was to be found or inferred on the facts, and that the evidence in the application was sufficient for reasonable grounds or a real prospect of success.

73. Although the audits were in the period 2006 – 2010, the case for agency can usefully be seen against the background of DTME and DTL in the Deloitte network at the present time. A Swiss Verein, Deloitte Touche Tohmatsu ("the Verein") owns the Deloitte name. It enters into license agreements with Member Firms, under which they may use the name in particular territories and may enter into sublicense agreements; the sub-licensees are described as affiliates. The Member Firms and affiliates are separate legal entities and are autonomous, save that they must comply with quality standards, best practices and procedures required by the Verein. DTME is currently a Member Firm and DTL is currently its sub-licensee.

74. The evidence of the relationship between DTME and DTL at earlier times was incomplete. So far as it went, the history was as follows.

75. The predecessor of DTL was Saba & Co, a general partnership registered in Cyprus in 1978 with auditing practices in a number of countries in the Middle East including Lebanon. In 1990 it became a Member Firm under a licence agreement with Deloitte Ross International, the predecessor of the Verein.

76. The business of Saba & Co was then split up by the creation of entities bearing the Deloitte name in the territories in which it was licensed to use that name. This included the creation of DTME and DTL, in the case of the latter with its registration as a civil company in 1993. Practitioners and clients were transferred to the new entities. Despite this, it appears from the license agreement mentioned below that Saba & Co continued in existence.

77. On 1 September 1995 a Professional Technical Agreement ("the PTA") was entered into between DTME and DTL, from which it is evident that DTME purported to be a Member Firm but DTL was neither a Member Firm nor an affiliate. I say more of the PTA later in these reasons.

78. As described in the evidence, the basis on which the new entities were using the Deloitte name "appears

largely to have been undocumented". In 1999 the Verein sought to regularise it. On 1 January 2000 there were executed –

(a) a license agreement between the Verein and Saba & Co as Member Firm; and

(b) an agreement between the Verein and DTME under which, at the request of Saba & Co, the Verein licensed DTME as an affiliate of Saba & Co.

79. A certificate from the Verein shows that by 2007 DTME had become a Member Firm. There was no evidence of a license or sublicense to DTL as an affiliate of Saba & Co in 2000. Nor was there direct evidence of a sublicense to DTL as an affiliate of DTME when it became a member Firm, but from other certificates from the Verein in 2006 and 2011 DTL was an affiliate although the Member Firm was not stated; having regard to the Introduction in the PTA later cited, it may safely be taken to have been DTME.

80. On 31 July 2010 the Verein entered into a license agreement with DTME as a Member Firm, stated to supersede any prior agreements. On 28 May 2013 DTME entered into a sublicense agreement with DTL as affiliate. Both agreements post-date the audits the subject of the Claimants' claim, but the parties gave them considerable attention. They appear to be in standard forms. The license agreement makes a point of the separate legal identities of the parties, and is at pains to exclude any partnership, agency or other such legal relationship and liability for the acts of any Member Firm. The sublicense does not contain an equivalent provision (although the 1 January 2000 license agreement to DTME as affiliate has a far less extensive provision excluding merger of firms or practices and agency).

81. Going then to the Claimants' case for agency, their construct (accompanied by the submission that, the evidence being incomplete, more could be available at trial) went as follows:

(a) under Lebanese law, an entity providing audit services in Lebanon must be registered, and a partnership such as DTME cannot be registered (there does not appear to be evidence of this, but I did not understand DTME to contest it);

(b) by Article 8 of its Articles of Association, a partner of DTL "may not perform any duty other than connection with Deloitte & Touche Group or otherwise under a decision issued by the Partner's Board";

(c) the DTME Partnership Agreement includes that branch offices may be opened in the name of the firm or in the name of an agent or representative;

(d) it should be inferred that on the split-up of Saba & Co, with its parts coming within the Deloitte network, because DTME could not itself participate in Lebanon it did so through its agent DTL by opening a branch office in that name, with the agent being confined to Deloitte work and thus dependent on being an affiliate of DTME;

(e) this is supported by the PTA, which in the absence of a contemporary licence or sublicense agreement is the best guide to the relationship between DTME and DTL at times material to the audits the subject of the Claimants' claim; I refer to parts of the PTA below; and

(f) it is also supported by the fact that DTL Transparency Reports for 2012 and other years, apparently required within the Deloitte network, are signed in the name of DTME and include –

(i) that DTME "conducts its business in the Middle East through a network of 26 offices in 15 Countries", including Lebanon;

(ii) that DTME "includes the operations of" DTL;

(iii) a description of the governance structure of DTME which amongst other things addresses "the activity in each of the 26 offices of the [DTME] network, including the operations in [DTL]."

82. The Claimants drew attention to a number of parts of the PTA.

83. The Introduction reads –

"1. **INTRODUCTION**

Deloitte & Touche ME (DTME), a Member Firm of Deloitte Touche Tohmatsu (DTT), is one of the

leading regional professional firms in auditing and management consulting and is committed to serving DTT Global Clients, by admitting Deloitte & Touche, Lebanon as an integrated firm of DTME and member firm of DTT.

Deloitte & Touche, Lebanon is a licensed Public Accountant in Lebanon and has been established with consent of the First Party as a civil professional partnership and operating under the name Deloitte & Touche to practice in Lebanon. It is considering the admission to become an integrated firm of a regional leading professional firm and a member firm, a Member Firm of an international group representing one of "the big 5" operating in this line of activity and to be part of a global network.

And since both parties find it beneficial to cooperate professionally for their mutual interest.

It has been agreed by both parties to establish a Professional Agreement between them as follows:

2. The above introduction is a part of this Agreement.

3. The relationship between DTME and Second Party shall be described as an integrated firm of DTME and the Second Party shall present this arrangement on his stationery as follows:

Deloitte & Touche

A Member Firm of Deloitte Touche Tohmatsu

The First Party shall list the Second Party in its international directories in the same style above."

(emphasis added)

84. Clause 3 of the PTA provides that the relationship between DTME and DTL "shall be described as an integrated firm of DTME", and that DTL should "present itself in its stationary as a Member Firm of Deloitte Touche Tohmatsu". Clause 4 provides that DTME shall provide services to DTL, being technical assistance, audit training, assistance as required in performing audit assignments which need expertise to ensure an appropriate standard, publicity and methodology, and that "[t]he Cost and fees relating to the above services should be born by [DTL]". Clause 5 provides for obligations on DTL, including compliance with Deloitte professional standards and payment of a "royalty and subscription fee" of a percentage of turnover.

85. By clause 10, DTL may render services out of Lebanon only at the request of or in consultation with DTME or any other Deloitte office in the relevant country. Clause 12 provides for termination by DTME for breach or failure to adhere to standards, or by either party on written notice. By clause 14, upon termination any clients that were referred to DTL by DTME or other Member Firms will be transferred to a firm designated by DTME. Clause 17 provides that "any admission of national partners by [DTL] requires the prior approval of DTME".

86. I do not set out DTME's submissions in detail. It emphasied that DTME and DTL were separate legal entities, and that DTME had not had anything to do with the relevant audits. It submitted that DTME did no more than ensure proper use of the Deloitte name and compliance with standards laid down by the Verein, and as to the PTA that, whilst it provided that the relationship would be described externally as an integrated firm, internally it was no more than a mechanism for ensuring the above compliance. I do not set out the submissions in greater detail because this application is not the occasion for resolving agency or no agency, in the conduct of a mini-trial. The question is whether the Claimants' case is realistic as opposed to fanciful, not whether there are facts or arguments which can be deployed against it.

87. A matter not addressed was whether the application of Lebanese law extended to whether the relationship between DTME and DTL was such that the former was responsible for the latter's performance of the audits as its agent. On one view, it was for DTME to underpin this ground for its application with evidence of Lebanese law.

88. Putting that aside, in my view the prospects of the Claimants' case for agency are more than fanciful. There is a basis for finding agency in the matters outlined above, perhaps a slim basis but one which can be said to have real prospects. As well, the evidence so far as it goes has obscurities and, although there was

evidence suggesting a dearth of available contemporary records, a more full factual investigation than made for this application can be made for at trial and would be likely to enlarge the presently incomplete evidence of the relationship between DTME and DTL at the time of the audits. In my opinion, a case for immediate judgement has not been made out.

A further submission

89. DTME made a late submission that DTL was providing information and not advice and that, in accordance with the recent decision of the Supreme Court in *BPE Solicitors v Hughes-Holland* [2017] UKSC 21; (2017) 2 WLR 209 no duty of care was owed to the Claimants. The submission, which was not developed, was at odds with DTME's position that Lebanese law applied, and was without support from evidence of Lebanese law. It is not immediately attractive, and certainly not at the level necessary to conclude that the Claimants have no real prospect of success.

The joinder application

90. Mr Fadl was named as the Second Defendant in the claim form and particulars of claim. The orders in the jurisdiction decision set aside those documents as regards him. By the joinder application, the Claimants sought to restore him as a defendant notwithstanding the decision that the Court has no jurisdiction to hear and determine the claims against him.

91. The application was made pursuant to RDC 20.7, which provides –

> "The court may order a person to be added as a new party if:
>
> (1) it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings; or
>
> (2) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the Court can resolve that issue."

92. RDC 20.7 (1) is not attracted: adding Mr Fadl as a party would do nothing for resolving the matters in dispute between the Claimants and DTME. The application was founded on RDC 20.7 (2). In short, the Claimants said that there was an issue involving the new party, Mr Fadl, and an existing party, the Claimants, being the claims against Mr Fadl, which was connected to the matters in dispute in the proceedings, being the claims against DTME; and that the desirability lay in having all claims determined together, and in avoiding what they alleged were, for them, impediments to a just resolution in the Lebanese courts.

93. Mr Fadl submitted that, if the Rule was available to the Claimants, its requirements were not satisfied. But he submitted that he could not be joined pursuant to the Rule when, as had been decided, the Court did not have jurisdiction to hear and determine the claim against him. In my view, that is correct.

94. RDC 20.7 (2) reproduces the English CPR 19.2 (2). However, in England there is no overriding jurisdictional fetter; jurisdiction over a party can be founded simply on service within the (physical) jurisdiction or service out of the jurisdiction with the permission of the court under CPR 6.36. By contrast, this Court is a court of limited jurisdiction, its jurisdiction being relevantly prescribed in Article 5 (A) (1) of the Law in respect of the Judicial Authority at Dubai International Financial Centre, Dubai Law No 12 of 2004 ("the JAL"). While the origin of RDC 20.7 (2) may lie in CPR 19.2 (2), its scope must take account of the overriding jurisdictional prescription.

95. Article 5 (A) (1) of the JAL provides –

> "(1) The Court of First Instance shall have exclusive jurisdiction to hear and determine:
>
> (a) Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;
>
> (b) Civil or commercial claims and actions arising out of or relating to a contract or promised

contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract;

(c) Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities;

(d) Appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals;

(e) Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations."

96. Jurisdiction is prescribed in terms of claims and actions (and an equivalent in Article 5 (A) (1) (d)) having particular characteristics. It is jurisdiction by kinds of claims and actions, not by persons or territories. The various paragraphs are often described as gateways, and a claim or action of a requisite kind opens the gate. As a result of the jurisdiction decision the claims against Mr Fadl are not claims within the gateways. How, then, can RDC 20.7 (2) be used to add him as a new party, if the issue involving him and the Claimants is the claims against him but there is no jurisdiction to hear and determine the claims?

97. The Claimants' answer was twofold; it is not entirely clear whether each limb was said to be sufficient in itself.

98. First, the Claimants submitted that nothing in the wording of RDC 20.7 (2) suggested that it was subject to any limitation; that the only criterion was that joinder should be "desirable", and that if the intent had been that it was also necessary to go through one of the gateways, the Rule could easily have said so.

99. As a freestanding submission, this cannot be accepted. Their definition in Article 2 of the JAL states that the Rules are "rules regulating litigation procedure before the Courts", and as provided in Article (4) (II) (b) of the JAL the Chief Justice may approve and issue rules "falling within the Courts' jurisdiction". The Rules operate within the jurisdictional limits in the JAL, and RDC 20.7 (2) cannot of its own force enlarge the Court's jurisdiction beyond that in Article 5 (A) (1).

100. Secondly, and perhaps intended to be taken with preceding submissions, the Claimants submitted that RDC 20.7 (2) brought jurisdiction through the gateway in para (e) of Article 5 (A) (1). To repeat, that gateway is "[a]ny claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations". It was submitted that the Rules were DIFC Regulations, and the argument, although not fully enunciated, was then that in providing for joinder RDC 20.7 gave jurisdiction over a claim or action against the new party.

101. The definition of DIFC Regulations in Article 2 of the JAL is "any rules, regulations, bylaws or orders relating to DIFC issued by the President or by DIFC Bodies". The Claimants submitted that the Rules relate to DIFC and were issued by the President. Accepting for the purposes of the argument that they relate to the DIFC, the second element in the definition may be doubted.

102. Article 31 (c) of the DIFC Courts Law, Law No 10 of 2004, provides that the Chief Justice –

"…shall recommend for enactment by the President rules of procedure to be known as the Rules of Court in relation to any proceedings before the DIFC Courts or a tribunal of the DIFC Courts".

103. Conformably with this, the Rules state (RDC 1.2) that they are made by the President of the DIFC (although by RDC 1.4 any amendments subsequent to the enactment of Law No 7 of 2011 "are made by the Chief Justice of the DIFC Courts"). However as earlier noted Article 4 (2) (II) (b) of the JAL provides for the Chief Justice to "approve and issue the Rules of the Courts… falling within the Courts' jurisdiction". As a matter of language, the Rules are not within the definition of DIFC Regulations because, while made by the President (at least prior to Law No 7 of 2011), they are issued by the Chief Justice.

104. This may be an over-fine distinction. There is a more substantial difficulty with the Claimants' argument.

105. When para (e) of Article 5 (A) (1) refers to jurisdiction "in accordance with DIFC Laws and DIFC Regulations", there must be found a sufficiently clear conferral of jurisdiction by the Law or Regulation. A Law or Regulation may implement government policy expressly by conferring jurisdiction over a claim or action; Article 94 (2) of the Regulatory Law is an example. But that is not the purpose of the Rules: as earlier described, they operate within the jurisdictional limits in the JAL. Nor is it how they are framed; specifically, RDC 20.7 does not purport to confer jurisdiction over a claim or action embodying the issue involving the new party and an existing party. It gives the power to add a new party, but the power must be exercised within the Court's jurisdictional limits. The words "in accordance with" require more than is to be found in the Rule.
106. In my view, therefore, RDC 20.7 (2) does not enable the joinder of a new party where the issue involving that party and an existing party is a claim which the Court does not have jurisdiction to hear and determine.
107. Although nothing was made of it in submissions, a similar question may arise in relation to an additional claim against a person not already a party under Part 21 of the Rules. This might be thought unsatisfactory. However, the jurisdictional prescription in Article 5 (A) (1) of the JAL cannot be gainsaid; the adoption of rules from the CPR may not have sufficiently taken into account the jurisdictional limits and their terms.
108. The parties could find no decision of the DIFC Courts directly in point. They referred to regimes in some other jurisdictions, but it is necessary to address this Courts' jurisdictional regime and Rules; I do not think the regimes elsewhere are comparable. At the conclusion of the hearing I was referred to *Barclays Bank PLC v Afras Ltd* (Sir John Chadwick DCJ, 11 July 2013). Barclays Bank brought an additional claim against Afras and Kumar. They brought a challenge to jurisdiction. It was held that there was jurisdiction to entertain the additional claim because Barclays Bank was a DIFC Establishment (Article 5 (A) (1) (a) of the JAL). Mr Fadl cited the case for the fact that the Court enquired into jurisdiction under a gateway. It is consistent with my view, but can-not be regarded as a decision on the point.
109. Mr Fadl submitted also that RDC 20.7 was unavailable because the limitation period for any claim against him had expired; because there was no issue involving him and the Claimants connected to the matters in dispute in the proceedings; and because it was in any event not desirable that he be added so that the Court could resolve an issue. There were extensive submissions by the Claimants on desirability, to which Mr Fadl responded. It would unduly lengthen this judgment to deal with these matters, and it is not necessary to do so.

Costs

110. The costs of the jurisdiction application were reserved, to be dealt with holistically with the costs of the then anticipated immediate judgment and joinder applications. I will reserve the costs of the present applications. Given the mixed success in the applications, I expect the parties to confer in an endeavour to reach agreement upon costs. If they are unable to do so, they should submit agreed directions for the exchange of submissions on costs. The cut-off date for agreement or directions is 9 March 2018.

Orders

111. I make the following orders –

1. Dismiss the First Defendant's application filed on 22 January 2017.
2. Dismiss the Claimants' application filed on 24 September 2017.
3. Reserve the costs of both applications.

Issued by:
Natasha Bakirci
Senior Assistant Registrar
Date of Issue: 12 February 2018
At: 4pm