

**Claim No: CA-002-2020**

**THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS**

**IN THE COURT OF APPEAL**

**AND**

**PURSUANT TO ARTICLE 5(B)(1)(b) OF THE JUDICIAL AUTHORITY LAW  
BEING DUBAI LAW 12 OF 2004 (AS AMENDED)**

**BY**

**THE DUBAI INTERNATIONAL FINANCIAL CENTRE AUTHORITY**

Applicant

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**SUBMISSIONS IN RESPONSE**

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## **Introduction**

1. These Submissions in Response are provided in accordance with paragraph 8 of the Order of the Court issued on 12 February 2020.
2. Submissions have been provided to the Court by each of three Interested Parties:
  - Society of Trust and Estate Practitioners NPIO (“STEP Arabia”);
  - Family Business Council – Gulf NPIO (“FBCG”); and
  - Al Tamimi & Co (“ATCO”).
3. These Submissions in Response respond to each of those Submissions.
4. In summary, each of the Interested Parties’ Submissions supports the Applicant’s proposed answers to Questions 1, 3, 4, 5, 6(a), 10, 11 and 13. STEP Arabia and FBCG support the Applicant’s proposed answers to the remaining questions. ATCO have proposed alternative (or qualified) answers to Questions 2, 7, 8, 9 and 12 and submitted that the Court should not answer Questions 6(b) and 6(c).

## **Nature of these Proceedings**

5. At paragraphs 3.12 to 3.14, the Applicant’s submissions addressed the question of the utility of the Court entertaining the Application and the interest of the Centre, its licensed establishments and the wider regional community in achieving greater certainty in the application of the Centre’s Laws in relation to wealth management and family business succession within the region.
6. The submissions of each of the Interested Parties, and in the case of the FBCG the work of Mr Hammadeh which has been provided to the Court, provide cogent evidence in support of the Applicant’s submission<sup>1</sup> that the

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<sup>1</sup> Witness Statement 1 of Jacques Visser paragraphs 8 to 20

issues raised in the Questions are matters of significant concern within the DIFC Community and that an authoritative statement from the Court on them would greatly assist the development of this aspect of the Centre's activities.

7. The fact that from the perspective of experienced legal practitioners practising in the area (and no doubt of the Court) the answers to some of the Questions seem obvious does not detract from the utility identified by the Interested Parties and the Applicant in having the Questions definitively answered by the Court. The absence of definitive precedent in the context of common law islands in a civil law ocean<sup>2</sup> was no doubt one of the reasons why each of the AIFC, ADGM and DIFC<sup>3</sup> made provision for their respective Courts to be asked to provide it, notwithstanding the absence of an actual dispute between parties.
8. That is, indeed, the experience of the DIFC in this area of the law: there is only one reported case in the DIFC Courts in which the *Trust Law* is referred to, and even that did not require its interpretation.
9. It is not surprising that in matters of family wealth structuring participants are particularly concerned to seek the high level of legal certainty referred to in the ATCO<sup>4</sup>, FBCG<sup>5</sup> and STEP<sup>6</sup> Submissions. The FBCG Submission<sup>7</sup> and Mr Hammadeh's work *Family Business Continuity on the Middle East & Muslim World*<sup>8</sup> set out in come detail why this is important in the wider regional context.
10. These considerations point strongly in favour of the Court answering all the Questions in the Request for Interpretation, with any qualifications

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<sup>2</sup> Deputy Chief Justice Michael Hwang: *The Courts of the Dubai International Financial Centre – a Common Law Island in a Civil Law Ocean* (2008) Lawasia Conference, Kuala Lumpur

<sup>3</sup> Applicant's Submissions, paragraphs 3.3 to 3.5

<sup>4</sup> paragraph 5

<sup>5</sup> paragraph 8

<sup>6</sup> paragraph 9

<sup>7</sup> paragraph 4

<sup>8</sup> see, e.g., pages 15 and 22

necessary to make it clear that the Court is providing interpretations of DIFC Laws, not the laws of other jurisdictions.

11. The Applicant notes (and agrees with) the suggestions in paragraph 12 of the ATCO Submission, which is broadly reflective of the recommendations of the Wealth Management Review Working Group<sup>9</sup>.

## Question 2

12. The Applicant submits that the Court should give the proposed answer.
13. As a matter of legislative history, as originally enacted Article 10 of the *Foundations Law* did not include Article 10(2) which was inserted later in the same year<sup>10</sup> and the remaining provisions of Article 10 renumbered.
14. The purpose of Article 10(3) in its original numbering was to make it clear that a foundation was not a trust<sup>11</sup>. The need for such provision arose from the disputes which have arisen in other jurisdictions, specifically in relation to the tax treatment of foundations<sup>12</sup> which has caused difficulty in a number of jurisdictions<sup>13</sup> as recognised by the ATCO submission<sup>14</sup>.
15. The addition of Article 10(2) served to make it clear that although the property of the Foundation was not held in trust for anyone, it had the powers of a natural person (which, as the ATCO Submission accepts, include the power to be a trustee, at least of a purpose trust).
16. It is not correct to classify Article 10(3) as a prohibition – rather, as its place in an Article entitled “Nature of a Foundation” suggests, it serves to

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<sup>9</sup> Recommendations 51 and 53, page 75 of the Report, Ex. JJV1 page 78

<sup>10</sup> *DIFC Laws Amendment Law No.8 of 2018* Article 14

<sup>11</sup> Panico, page 2

<sup>12</sup> Stibbard et al, pages 808 to 809 – a work familiar to the Wealth Management Review Working Group (see footnote 51 on page 62 of the Report, Ex. JJV1 page 64)

<sup>13</sup> see, e.g. *Her Majesty the Queen v. Sommerer* 2012 FCA 207, reversing in this respect the first instance decision of Miller J at (2010) Tax Court of Canada

<sup>14</sup> at paragraph 31

explain what a Foundation is in the context of common law jurisdictions to which foundations were, until the 2003 St Kitts legislation, unknown<sup>15</sup>. Even if it were, it would not change the fact that if a Foundation were to undertake to hold property on trust for a third party, received that property on that basis, and then sought to retain it notwithstanding a request for its return from the third party, a Court of Equity would not recognise a defence to the claim based on Article 10(3), as the ATCO submission recognises<sup>16</sup>. Even on the alternative view, that the trust failed by reason of Article 10(3), the consequence would be a resulting trust for the intending settlor.

17. In a similar vein, Article 10(3) would not be a defence to a claim seeking as a remedy a declaration that the Foundation held identified property as constructive trustee. Constructive trusts are imposed by Courts as a remedy, frequently against the wishes of the person upon whom they are imposed.
18. Moreover, the terms of Article 10(3) do not reflect the language of prohibitions where they are to be found in the *Foundations Law* such as Articles 12(5), 16, 19(11), 23(11), 26(1) and 35(5) - cf Article 27(4).
19. Nothing in the *Foundations Law*, which was enacted at the same time as the 2018 *Trust Law*, and amended by the same legislation<sup>17</sup> later that year, suggests that it was intended to be in conflict with the provisions of the *Trust Law*. The latter Law is quite clear as to how a trust is created, and a trust created under that Law will be enforceable, even if the trustee (or one of the trustees) of the trust is a Foundation.
20. The ATCO Submission correctly notes<sup>18</sup> that a Foundation (or for that matter any other person) cannot receive and hold gifts as trustee of trust(ee) property for its own benefit. In such a case the legal and

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<sup>15</sup> Panico, page 2

<sup>16</sup> at paragraph 30

<sup>17</sup> *DIFC Laws Amendment Law* No.8 of 2018 Articles 14 and 16

<sup>18</sup> at paragraph 25

beneficial interests merge as noted subsequently in the ATCO Submission<sup>19</sup>.

21. There is no issue between the Applicant and ATCO as to the desirable outcome on this issue, merely as to the means whereby it is to be achieved<sup>20</sup>. Given that a submitter of ATCO's standing has expressed in these proceedings a different view to that of the Applicant, a legislative response may well be helpful so that others reading the Law without the benefit of the Court's conclusion on the matter will not also have concerns as to the effect of the provision. But that should not result in the Court not providing the proposed answer if satisfied it is correct. That is precisely the function of the Court in proceedings of this nature.

**Question 6(b) and (c)**

22. The Applicant agrees with the observations in the ATCO Submission<sup>21</sup> that in order to be recognised as a Foreign Foundation or to obtain a Certificate of Continuance as a DIFC Foundation, the waqf (or indeed any other entity) in question would require careful review by both the entity's legal advisers and the DIFC authorities, and that applications would need to be carefully considered on a case by case basis.
23. The Applicant submits that it does not follow that the Court should decline to answer the Questions. The position, it is submitted, is identical with the proposed response to Question 7: there is no reason in principle why an incorporated orphan entity<sup>22</sup> could not be recognised as a Recognised Foreign Foundation or be redomiciliated into the DIFC, but whether or not that can occur in a particular case will be dependent upon the circumstances of that case following the careful review referred to in the preceding paragraph.

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<sup>19</sup> at paragraph 26

<sup>20</sup> at paragraph 33

<sup>21</sup> at paragraph 56

<sup>22</sup> as the ATCO Submission at paragraph 52 correctly characterizes awqaf in the overwhelming majority of cases

24. From a practical perspective, if an application were to be made to the Registrar under either of these provisions after the Court having heard the Application declined to answer the Questions, the Registrar would be placed in the position of not knowing whether such an application should be rejected as legally impossible, or continuing to process it (and, if the requirements of the *Foundations Law* were otherwise satisfied, approve it) with a potentially unlawful result. Such an outcome is not in the interest of certainty or the due administration of the *Foundations Law*.
25. Although the Applicant for these reasons views the inclusion in the answers to each of these Questions of a proviso similar to that suggested by ATCO in respect of the answer to Question 7 as unnecessary, it has no objection to it being included should the Court think it desirable.
26. There are three further reasons why the Court should answer these questions as proposed by the Applicant:
- (a) Whatever the position may be in some jurisdictions, the Court has before it the applicable legislation in relation to the awqaf regimes in the United Arab Emirates. It is clear from those provisions that recognition of such awqaf as Recognised Foreign Foundations presents no difficulty – see Schedule 3 of the Applicant’s Submissions for a comparison of the salient features of those Laws;
  - (b) That applies with particular force in respect of awqaf established under the Dubai law, which in Article 52 expressly recognises the “endowment provisions” of the DIFC. As a matter of comity the same recognition should be extended by the DIFC to awqaf established under the Dubai Law; and
  - (c) More generally, the Court’s answer would address the concern expressed that the DIFC’s wealth management structures are somehow inconsistent with the Islamic values of the region<sup>23</sup> and confirm that they reflect values which date back to the words and precepts of early

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<sup>23</sup> see, e.g., Hammadeh, *op. cit.* at page 116

Islamic scholars and, indeed, the Prophet (PbuH) himself as detailed in Part 4 of the Applicant's Submissions.

#### **Question 7**

27. The Applicant agrees that the suggested proviso in the ATCO response to this question necessarily applies, as it would in relation to an outbound redomiciliation of a Foundation to another jurisdiction which recognised Foundations as such.
28. For that reason the Applicant views the suggested proviso as unnecessary but has no objection to it being included should the Court think it desirable to do so.

#### **Question 8**

29. There is no issue as to the underlying position under the *Trust Law* between the Applicant and ATCO. The Applicant endorses the answer proposed by ATCO as a correct description of the nature of a DIFC Trust. The only issue is how this should be expressed in the Court's answer to the Question.
30. As a matter of principle, having regard to the nature of these proceedings which have been publicly notified in accordance with the Court's Order<sup>24</sup>, it might be an undesirable precedent for the Court to proceed on the basis that it can answer a question different to the question whose terms have been so notified. There might be reasons for doing so in particular cases, which are not explored here. In the instant case, however, any concerns as to the form of the question can be allayed by answering it in such a way as to make the conclusion of the Court clear.
31. The ATCO Submission expresses a concern that the question posed asks the Court to express a view on the operation of foreign laws. The



Applicant agrees that it is no part of the function of this Court to do that in these proceedings.

32. As a matter of language, the Question posed seeks the opinion of the Court solely on the operation of the *Trust Law*. The Court's opinion might become relevant in foreign proceedings because under the Hague Convention a trust is to be interpreted by reference to its governing law<sup>25</sup> but that is not because the Court is expressing an opinion on foreign law but because its opinion authoritatively states the DIFC Law. Foreign Courts will determine the way in which the Hague Convention or their own private international law applies to a DIFC Trust.
33. Although, for those reasons, the Applicant is of the view that the proposed answer is correct, it has no objection to the proposed ATCO answer being included in the answer should the Court think it desirable, possibly by using that formulation followed by the words "For that reason, the answer to this Question is "No" ". Alternatively, the ATCO suggested answer could be included as the first paragraph of any reasons given by the Court.

### **Question 9**

34. The Applicant notes and agrees with the careful ATCO analysis of the practical issues raised by the interplay of the DIFC Laws the subject of this question and the question is what further elucidation the Court should provide.
35. The Applicant submits that the issues raised in the ATCO Submission are best resolved by adding to its Proposed Answer the following:

In particular:

- a. Shari'a inheritance rules do not form part of the public policy of the DIFC within the meaning of the *Trust Law* or the *Foundations Law*;

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<sup>25</sup>

See Article 8

- b. Article 361 of the UAE *Law of Personal Status* does not form part of DIFC law;
- c. In the case of a DIFC trust, the terms of the trust may or may not conflict with Shari'a inheritance rules. Whether it does so will depend on the terms of the trust, and the *Trusts Law* has no impact on the question;
- d. A settlor wishing to establish a trust that will respect Shari'a inheritance rules in its operation will be able to do so;
- e. No issue arises as regards the validity of prior dispositions to a trustee to be held by the trustee on trust during the lifetime of the deceased (apart from any period of death illness); and
- f. A testamentary disposition to trustees of a trust or a Foundation contrary to Shari'a inheritance rules raises no issue under the *Trust Law* or the *Foundations Law*. It may however raise an issue of foreign law (including the law of other parts of the United Arab Emirates) where that law is the applicable law governing the validity of the disposition and includes Shari'a inheritance rules because Article 13(2)(c) of each of the *Trust Law* and the *Foundations Law* provides that DIFC law shall not validate any testamentary trust or disposition which is invalid according to the laws of the testator's last domicile.

### Question 11

- 36. The Applicant notes that the ATCO position does not depart from the proposed answer.
- 37. As noted in the ATCO Submission, any restrictions which may exist in relation to the activities of private trust companies are to be found outside the *Trust Law*, either in the form of the *Prescribed Company Regulations*, or because the company in question is engaged in a regulated activity such as providing trust services by way of business (which would be highly unlikely in the context of a private trust company as opposed to that of a professional corporate trustee).

### Question 12

- 38. The Applicant agrees with the ATCO Submission<sup>26</sup> that it is important that

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<sup>26</sup> at paragraph 80

the Court's answer should not imply that DIFC law acts to correct a conflict with Shari'a law as opposed to giving effect to the settlor's (or, in the context of a Foundation, the founder's) intentions.

39. The Applicant submits this can be achieved by adding, at the end of its Proposed Answer, the words "so as to give effect to the Settlor's true intentions".
40. There is no issue between the Applicant and ATCO that the Court has the necessary power to vary the terms of a trust so it is Shari'a compliant if that was the intent of the settlor. But the Applicant submits the source of that power is more appropriately identified as Article 40(8)(a).
41. ATCO's submissions presumably have in mind the terms of Articles 24(2)(c) and 25(2)(a). Whilst on a literal reading without reference to context those provisions may have that effect, the more likely (and the Applicant suggests correct) interpretation is that they empower a Court to limit the effect of a disposition (as opposed to setting it aside) but do not empower it to give effect to a different disposition which was not in fact made, even if it was intended to be. That would most accurately reflect the policy underlying the decision in *In Re Hastings-Bass*, which these provisions are intended to give effect to.
42. Although not the subject of the Question, the result under the *Foundations Law* is the same by reason of Articles 50(2), 51(2) and 44(4).

**David Russell QC**  
**Outer Temple Chambers**