THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) FIVE HOLDING LIMITED
(2) FIVE HOTEL JUMEIRAH VILLAGE LLC

Claimants in Claim No CFI 027/2021

and

ORIENT UNB TAKAFUL PJSC

Defendant in Claim No CFI 027/2021

and

(1) FIVE HOLDING LIMITED
(2) FIVE HOTEL FZE

Claimants in Claim No CFI 028/2021

and

QATAR INSURANCE COMPANY

Defendant in Claim No CFI 028/2021

ORDER WITH REASONS OF JUSTICE WAYNE MARTIN

UPON the Order of H.E Justice Omar Al Muhairi, in CFI-027-2021, dated 14 April 2021 staying proceedings due to referral of the case to the Joint Judicial Committee

AND UPON the Order of H.E Justice Omar Al Muhairi, in CFI-028-2021, dated 14 April 2021 staying proceedings due to referral of the case to the Joint Judicial Committee

AND UPON reviewing the Claimants' Application No. CFI-027-2021/3 dated 18 May 2021 to set aside the Order of H.E Justice Omar Al Muhairi dated 14 April 2021 and for the stay of proceedings to be lifted in CFI-027-2021 (the **"First Application"**)

AND UPON reviewing the Defendant's evidence in answer to the First Application dated 1 June 2021

AND UPON reviewing the Claimants' evidence in reply dated 8 June 2021

AND UPON reviewing the Claimants' Application No. CFI-028-2021/3 dated 18 May 2021 to set aside the Order of H.E Justice Omar Al Muhairi dated 14 April 2021 and for the stay of proceedings to be lifted in CFI-028-2021 (the **"Second Application"**)

AND UPON the Defendant's evidence in answer to the Second Application dated 1 June 2021

AND UPON the Claimants' evidence in reply dated 8 June 2021

AND UPON reviewing all documents recorded on the court file

AND UPON hearing Counsel for the Claimants and Counsel for the Defendants at a hearing for CFI-027-2021 and CFI-028-2021 on 1 July 2021

IT IS HEREBY ORDERED THAT:

1. The First Application is dismissed.

2. The Second Application is dismissed.

3. The Claimants in CFI-027-2021 shall pay the Defendant's costs of the First Application to be assessed by a Registrar if not agreed within 14 days of publication of these reasons.

4. The Claimants in CFI-028-2021 shall pay the Defendant's costs of the Second Application to be assessed by a Registrar if not agreed within 14 days of publication of these reasons.

Issued by:
Nour Hineidi
Registrar
Date of issue: 4 August 2021
At: 11am

SCHEDULE OF REASONS

Summary

1. The Defendant in each of the actions the subject of this decision made applications to the Joint Judicial Tribunal (the "JJT") established pursuant to Dubai Decree No 19 of 2016 (the "Decree") on the basis of an asserted conflict between the proceedings brought in this Court and proceedings brought in the onshore Courts of Dubai. Following the practice prevalent in this Court prior to the recent decision of the Court of Appeal in Lakhan v Lamia,[1] ("Lakhan") without reference to the parties a Judge of this Court ordered that each action be stayed on the ground that an application was pending before the JJT.

2. Following the publication of the decision in Lakhan, the Claimants in each action have applied to set aside the stays on the ground that the conditions necessary to justify the grant of a stay identified by the Court in Lakhan are not satisfied in each case.

3. For the reasons which follow, each application must be dismissed, and the stay of each action maintained until the JJT has determined the references pending before it.

The two actions in this court

4. Although the actions in this Court are brought against different defendants under different insurance policies, and the Second Claimant in each action is a different subsidiary company of the First Claimant (which is identical in both actions), it is common ground that the issues which arise in each of the two actions are identical. It is also common ground that the circumstances relevant to the applications to set aside the stay of proceedings in each action are identical, with one exception. That exception is that in the Dubai proceedings brought against Qatar Insurance Company[2] the Dubai Court of Appeal has dismissed an application brought by the Claimant in those proceedings to abandon them, whereas a similar application brought by the Claimant in the proceedings brought in the Dubai Courts against Orient UNB Takaful PJSC[3] does not appear to have been determined by the Dubai Courts. No party contended that this distinction had any material bearing upon the outcome of the applications to set aside the stay of each action, and for reasons which will be developed, I agree with that implicit proposition.

5. The Claimants are represented by the same legal representatives in both proceedings in this Court, as are the Defendants. The written and oral arguments presented in relation to the applications in each action have been presented jointly, without differentiation between the actions or the parties, with the one exception to which I have referred. It is convenient to adopt a similar approach in these reasons, and although I will shortly identify the different parties in the different proceedings in each Court, it will not generally be necessary to differentiate between those parties thereafter, or to identify differences in the steps taken in each set of proceedings, apart from the minor differences in relation to the steps taken in the proceedings before the Dubai Courts.

The parties and the context of their dispute

6. Five Holding Ltd is the First Claimant in each of the actions commenced in the DIFC Courts. As a company incorporated under the laws of the DIFC, it is a "DIFC Establishment" for the purposes of Article 5A(i)(a) of the Judicial Authority Law.[4] That Article relevantly provides that this Court has exclusive jurisdiction to hear and determine civil actions to which a DIFC Establishment is a party.

7. Five Hotel Jumeirah Village LLC is the Second Claimant in action CFI-027-2021, and Five Holding FZE is the Second Claimant in action CFI-028-2021. The First Claimant in each of those actions is the parent or holding company of each second claimant and each second claimant is incorporated under the laws of Dubai[5] and each conducts a separate hotel operation within Dubai. The First Claimant does not conduct hotel operations in its own right.[6]

8. Each Defendant is an insurer. The Defendant in each action in the DIFC Courts provided insurance coverage in respect of the hotel operations conducted by the Second Claimant in that action, albeit over different periods. The First Claimant is not named as an insured in those policies, but nevertheless asserts, in the DIFC proceedings, that it is entitled to the benefit of coverage as an insured under those policies.

9. Each policy provides indemnity in respect of losses suffered by reason of business interruption up to a limit of indemnity of AED25 million. In October 2020, the First and Second Claimants applied to the insurance authority for indemnity from each Defendant up to the limit of indemnity (that is, AED25 million) in respect of business interruption losses alleged to have been suffered due to government mandated actions in response to the pandemic.[7] The insurance authority referred the claims to the Insurance Disputes Committee. On 20 January 2021 that Committee decided that the Claimants were not entitled to indemnity under the policies.

The commencement of the Dubai proceedings

10. On 18 February 2021, each of Five Hotel Jumeirah Village LLC and Five Hotel FZE commenced an action in the Dubai Courts against their respective insurer. In each action the claimant challenged the resolution of the Insurance Disputes Committee to reject the claim for indemnity for losses suffered by reason of pandemic related business interruptions. Each claim was for a total of AED25 million (being the limit of indemnity under each policy).

The commencement of proceedings in the DIFC Courts

11. On 21 February 2021, three days after the commencement of the proceedings in the Dubai Courts, proceedings were commenced in the

DIFC Courts against each insurer. Five Holding Ltd is the First Claimant in each action, and the second claimant in each action is the claimant in the Dubai proceedings against the relevant insurer.

12. The brief details of claim indorsed on each Claim Form assert that "the Claimants" were given insurance coverage by the Defendant. Details of the terms of cover and of the events giving rise to the claimed business interruption are provided in each Claim Form. Reference is also made to the refusal of each claim by the Insurance Disputes Committee.

13. On each Claim Form, the remedy sought by the Claimants includes:

> To order the Respondent (sic defendant) to pay an amount of AED25 million (or such other sum as the Court finds due) in favour of the Claimants as the stipulated insurance coverage under the Policy and/or as damages for breach of the terms of that policy.

14. For reasons which I will develop, it is significant to the arguments advanced by the Claimants in support of their application to set aside the stays that the proceedings in this court were each brought by the Claimants jointly, that no attempt is made in either Claim Form to differentiate any separate or individual claim specific to either Claimant, and that the monetary relief sought is by way of an order for payment to the Claimants jointly.

The default judgments

15. On 11 March 2021, each of the Claimants in the DIFC proceedings applied for default judgment on the ground that each Defendant had failed to file an Acknowledgement of Service within the relevant time. On 14 March 2021 a Judge of this Court ordered the entry of default judgment in each action. It was a term of each judgment that:

> The defendant shall pay the claimants the amount of AED25 million.

The Defendant's objection to the jurisdiction of the DIFC Courts

16. On 16 March 2021, two days after default judgment had been entered, each Defendant in the DIFC proceedings filed an Acknowledgement of Service indicating that it intended to contest the jurisdiction of the DIFC Courts.

17. On 28 March 2021, each Defendant filed an application for orders that the DIFC Court does not have jurisdiction to try the Claimants' claim together with ancillary relief, on a variety of grounds.

The application to set aside the default judgment

18. In the meantime, on 18 March 2021, each Defendant applied to set aside the default judgment entered in the DIFC proceedings on a variety of grounds, including the assertion that the judgment had been entered prematurely and an assertion that the Defendant has a real prospect of successfully defending the claim and/or disputing the jurisdiction of the DIFC Court to hear the claim.

The applications to the JJT

19. On 17 March 2021, each insurer made an application to the JJT. As the precise terms of those applications (which are relevantly identical) are significant to an argument advanced in support of the application to set aside the stays of proceedings, it is desirable to refer to the applications in some detail.

20. The relevant named insured - Five Holding Jumeirah Village LLC in one case and Five Hotel FZE in the other is the respondent to the application brought by that company's insurer. Each application requests the JJT to "identify the court which has jurisdiction to consider the case filed by the respondent against the appellant regarding the appeal of the decision issued by" . the Insurance Disputes Committee. Each application refers to the proceedings commenced in the Dubai Courts and the DIFC Courts by the relevant respondent to the JJT application and asserts that:

> It is evident that it is a dispute over jurisdiction due to the existence of two cases related to the same subject matter .

21. Each application asserts that the Dubai Courts (without DIFC Courts) has jurisdiction to consider the case.

22. Each application refers to the action commenced by the relevant respondent in the Dubai Courts, and the relevant case "filed by the Respondent before DIFC courts" and asserts that "a dispute arose over the authority which has jurisdiction to consider the same subject matter .".

23. Each application asserts various reasons why the Dubai Courts have jurisdiction to entertain the relevant claim, rather than the DIFC Courts.

24. Five Holding Limited is not named as a party to the applications to the JJT. The only reference to Five Holding Limited in those application is in the following passage:

> The company which the present Respondent joined as a First Plaintiff in the Case filed before DIFC courts (is Five Holding Limited) claiming that it is one of the establishments of DIFC, although it has no relation to the Insurance Policy in question, as it is neither an Insured nor a beneficiary, and it was neither mentioned in any of the Insurance Policy Terms, or in the definitions of the "Insured" under the Insurance Policy Schedule; accordingly, this company has no capacity in the insurance dispute which was raised over the Insurance Policy. As such, DIFC Courts may not have jurisdiction just because the Respondent involved one of the DIFC Establishments in the case, despite that it has no capacity or relation to the Insurance Policy.

25. Each application seeks a summary order for suspension of the relevant proceedings in the Dubai Courts and the DIFC Courts until the JJT issues its Decision. The application for suspension of the DIFC proceedings is made by reference to the claim number of those proceedings, without differentiating between the claims of the two Claimants to those proceedings.

26. Each application also seeks a substantive order that the Dubai Courts are competent to consider the appeal from the decision issued by the Insurance Disputes Committee and confirming that the DIFC Courts lack jurisdiction.

The attempts to abandon the Dubai proceedings

27. On 23 March 2021, shortly after the applications were lodged with the JJT, each of Five Hotel Jumeirah Village LLC and Five Hotel FZE applied to abandon the proceedings which they had initiated in the Dubai Courts "while retaining the right to pursue the case before the courts of" the DIFC.

28. The Defendant in each of the Dubai Courts proceedings objected to the abandonment of those proceedings. Further, each Defendant filed a defence in those proceedings.

The stays of the Dubai proceedings

29. On 4 April 2021, the Dubai Courts ordered the suspension of the proceedings brought by Five Hotel FZE pending the decision of the JJT. On 7 April 2021, a similar order was made in relation to the proceedings commenced in the Dubai Courts by Five Hotel Jumeirah Village LLC.

30. An appeal by Five Hotel FZE against the stay of the Dubai proceedings was dismissed by the Dubai Court of Appeal on 10 June 2021. As I have noted, the Court of Appeal also rejected the application for abandonment of those proceedings.

31. An appeal brought by Five Hotel Jumeirah Village LLC against the stay of those proceedings has also been dismissed. The application by the Claimant in those proceedings to abandon them does not appear to have been determined.

The stay orders

32. On 13 April 2021, the Defendants in each of the DIFC proceedings sent copies of their applications to the JJT to the Registry of the DIFC Courts. The following day a Judge of the Court made orders staying each of the DIFC proceedings without requiring an application from either party, and without hearing any of the parties. The course taken by the Judge accorded with the then prevailing practice in the Court, which was based upon a view as to the obligations imposed upon the Court by the Decree.

The applications to set aside the stays

33. On 18 May 2021 separate applications were filed by each of the Claimants in each of the DIFC proceedings to set aside the stays of those proceedings granted on 14 April 2021. These are the applications the subject of this decision. The fact that separate applications were brought by each of the two Claimants in each action reflects the importance which was placed upon the differing position of those Claimants in argument in support of the applications, and to which I will refer.

The nature of the applications

34. All parties have approached the applications before the Court on the basis that the question to be resolved is whether the stays should be maintained in light of the principles enunciated by the Court in Lakhan. No party has contended that there is any onus upon the Claimants to demonstrate error on the part of the Judge who granted the stays, or that there is any constraint upon the power of the Court to set aside those stays. The decision in Lakhan has established that the previous practice of granting a stay upon the Court's own motion as a quasi-administrative process without providing the parties the opportunity to be heard is not appropriate. In these circumstances the parties have, in effect, invited the Court to consider afresh whether the proceedings should be stayed on the basis of the principles enunciated in Lakhan and after hearing *inter-partes* argument.

The decision in Lakhan

35. The decision in Lakhan speaks for itself. It is sufficient for present purposes to identify the features of that decision which are most pertinent to the argument presented in this case.

36. The facts in Lakhan were quite different to the circumstances of these cases. Lakhan involved the fairly common circumstance in which a Defendant to proceedings in one Court commenced proceedings in another Court, applied to the JJT for a determination as to which of the proceedings should be permitted to continue and then relied upon the application to the JJT as a basis for seeking a stay of both proceedings. The critical feature of the factual circumstances in Lakhan was the fact that in this Court the only step which had been taken after commencement of the proceedings was the lodgment of an objection to the jurisdiction of the Court by the Defendant to those proceedings, which [objection] was unresolved.

37. By contrast, the circumstances of the present cases are very different. The differences include:

(a) the same parties have instituted proceedings in both Courts;

(b) another party has been joined as a Claimant in the proceedings initiated in one of the Courts;

(c) the parties initiating proceedings in both Courts have unsuccessfully attempted to abandon the proceedings in one of the Courts; and

(d) although there are unresolved objections to the jurisdiction of this Court, judgment has been entered in the proceedings in this Court, with the result that there can be no doubt that this Court has exercised jurisdiction.[8]

38. The essence of the reasoning in Lakhan is that a mere application to the JJT is not sufficient, of itself, to require the grant of a stay of proceedings in both Courts. Rather, the trigger for a stay is the existence of a conflict of jurisdiction in one of the forms described in the chapeau to Article 4 of the Decree.[9] The mere existence of proceedings involving the same claim in both Courts is not enough to give rise to a relevant conflict

of jurisdiction.[10] Further, no conflict of jurisdiction arises when the only steps taken by one of the Courts were to receive the initiating process and then embark upon an inquiry as to its jurisdiction to entertain the claim. It followed that because, in Lakhan, this Court had done nothing other than receive the initiating process and an objection to jurisdiction, until that objection to jurisdiction was determined, no conflict in jurisdiction within the meaning of the Decree had occurred, and both the application to the JJT and the grant of a stay were premature. If the objection to jurisdiction was upheld, no conflict in jurisdiction would arise.

Because of the factual circumstances in Lakhan, it was sufficient for the Court to determine that no conflict in jurisdiction had arisen, and it was unnecessary for the Court to determine precisely what circumstances would give rise to a conflict in jurisdiction. In that context the Court expressly left open the question of whether a conflict would only arise when each of the Courts had turned its mind to and decided that it did, or did not, have jurisdiction or whether a conflict would arise if each Court exercised jurisdiction towards determining the claim, and if so, what actions would constitute a relevant exercise of jurisdiction.[11] In this case neither party submitted that a conflict of jurisdiction can only arise when both Courts have expressly ruled upon the extent of their jurisdiction. It would therefore be undesirable to address the question left open in Lakhan in the absence of contradictory argument upon it. In any case it is unnecessary to answer that question in this case either, because, for the reasons which follow, in the unusual circumstances of this case there is no doubt that a conflict of jurisdiction has arisen.

When will a conflict of jurisdiction arise?

39. In order to assess whether a conflict of jurisdiction has arisen, it is necessary to revisit the terms of the Decree and in particular Articles 4 and 5 of the Decree, which, as the Court observed in Lakhan, must be read together. As the Court also observed in Lakhan, one of the difficulties for an English language Court undertaking this process is that the Arabic text is authoritative, and there is no official translation of the Decree into English.

40. There were three translations before the Court in Lakhan, and a fourth translation has been presented to this Court. The various translations of Articles 4 and 5 are as follows:

Wilberforce Chambers translation

Article 4

In the event that there is a dispute as to jurisdiction between the Dubai Courts and the DIFC Courts either where both Courts had claimed or disclaimed jurisdiction or where the two Courts have issued inconsistent decisions on jurisdiction, the following procedure shall be follows:

An application for the determination of the competent Court or the judgment to be enforced shall be submitted to the Judicial Committee by any of the parties or by the Attorney General..

Article 5

The reference of any dispute to the Judicial Committee shall have the following consequential effects:

(i) The claims or applications in respect of which there is a dispute as to jurisdiction shall be stayed pending a decision of the Judicial Committee in determining the competent court.

(ii) There shall be a stay of execution in respect of any conflicting judgments pending a decision of the Judicial Committee as to which judgment is to be enforced in accordance with its decision in the matter.

Supreme Legislative Committee translation

Article 4

Where a conflict of jurisdiction arises between the Dubai Courts and the DIFC Courts by reason that both of them assert or decline jurisdiction over a claim, or that they deliver conflicting judgments on a claim, the following procedures must be applied:

(i) An application to determine the competent Court or the enforceable judgment will be referred to the Judicial Committee by means of a petition .

Article 5

The referral of a dispute to the Judicial Committee pursuant to Article 4 of this Decree will result in:

(i) The stay of proceedings for hearing the claims or applications in respect of which the conflict of jurisdiction arises until the issuance of the Judicial Committee's decision determining the competent Court having jurisdiction over those claims or applications; and

(ii) A stay of execution of conflicting judgments until the enforceable judgment is determined pursuant to a relevant resolution issued by the Judicial Committee.

Westlaw translation

Article 4

In case of a conflict of jurisdiction between Dubai Courts and the DIFC Courts, so that no Court decides to waive hearing of the action or both Courts waive the hearing thereof or enter contradicting judgments thereon, the following procedures shall be followed:

(i) A motion for designation of the competent Court or the executable judgment shall be submitted to the Judicial Body .

Article 5

In accordance with the provisions of Article 4 hereof, referral of disputes to the Judicial Body shall result in the following:

(i) Actions or Motions subject of the conflict of jurisdiction shall not proceed further until the Judicial Body issues a decision determining the court having jurisdiction to hear the same.

(ii) Stay of execution of the contradicting judgments until the executable judgment is determined under a decision to be issued by the Judicial Body in this regard.

LexisNexis translation

Article 4

In the event of a conflict of jurisdiction between the Dubai Courts and the Centre's Courts, as none of the Courts has gave up hearing the case or all of the Courts have given up same or have issued conflicting provisions, the following shall be applied:

(i) The claim of specifying the competent Court or the applicable judgment shall be submitted to the Judicial Tribunal by virtue of a petition filed by any of the litigants or the Public Prosecutor .

Article 5

The Referral of the Dispute to the Judicial Tribunal as per the provisions of Article 4 of the present Decree shall result in the following:

(i) Discontinuation of the proceedings in the cases or claims on which a conflict of jurisdiction has arisen, pending a decision of the Judicial Tribunal that specifies the Court having competence to hear such cases or claims.

(ii) Stay of execution of the conflicting judgments pending the determination of the applicable judgment, under a decision issued by the Judicial Tribunal in this regard.

41. The differences in the English words used in the translations set out above impede a search for meaning by reference to the natural and ordinary meaning of the precise language of the legislative instrument. For example, the different translations are capable of suggesting different answers to the question of whether an express decision on jurisdiction is necessary before a conflict can arise. The reference to "waiver" of jurisdiction in the Westlaw translation suggests an express decision on the subject of jurisdiction is required, whereas the Wilberforce Chambers translation includes both inconsistent decisions on jurisdiction and both courts "claiming or disclaiming jurisdiction" suggesting that the exercise of jurisdiction is itself sufficient to create a conflict without necessarily requiring an express decision to exercise jurisdiction. As that question did not arise in this case, as I have noted, it is inappropriate to endeavour to resolve it. It is sufficient to step back from the precise words used in the translations, and to instead focus upon common themes or concepts which run through the various translations.

42. As the Court pointed out in Lakhan, the chapeau to Article 4 identifies the conflict of jurisdiction which:

(a) confers jurisdiction upon the JJT under Article 4; and

(b) has the effect of staying both proceedings until the JJT has exercised that jurisdiction, if and when the conflict in jurisdiction is referred to the JJT.

43. All translations identify with relative clarity the circumstances which will give rise to a dispute or conflict as to jurisdiction - namely, either:

(a) both Courts exercising jurisdiction (or perhaps expressly deciding to exercise jurisdiction) in respect of the same dispute; or

(b) both Courts declining to exercise jurisdiction in respect of a dispute; or

(c) both Courts issuing inconsistent or contradictory judgments.

44. The policies or objectives which underpin Article 4 are clear. Inconsistent or contradictory judgments by the same or different Courts in a single jurisdiction create uncertainty and bring the system of justice in that jurisdiction into disrepute. The existence of inconsistent or contradictory judgments is one of the triggers of a conflict of jurisdiction. However, the exercise of jurisdiction over the same dispute by different Courts can also result in oppression to the parties as a result of multiplicity of proceedings with all their burdens of time and cost. On any translation of the Decree it is clear that the JJT is given jurisdiction to intervene prior to the point of inconsistent or contradictory judgments having been reached.

45. The other policy evident in Article 4 addresses the risk that litigants might be left without a Court in which to seek a remedy, should both Courts decline jurisdiction in favour of the other. This is another of the triggers for the jurisdiction of the JJT.

46. It is appropriate to bear these considerations in mind when assessing whether, in any particular case, a conflict of jurisdiction has arisen. That is the question which must now be addressed having regard to the circumstances of this case.

Have the DIFC Courts exercised jurisdiction?

47. There can be no doubt that the DIFC Courts have exercised jurisdiction in relation to the claims made jointly by the Claimants in those proceedings. Judgment has been entered in favour of both Claimants in both actions and Senior Counsel for the Claimants properly accepted that there has been an exercise of jurisdiction by the DIFC Courts for the purpose of the Decree.[12]

Has there been an exercise of jurisdiction by the Dubai Courts?

48. The Claimants did not contend that a conflict of jurisdiction (for the purposes of the Decree) can only arise when each of the Courts has positively and consciously addressed the question of jurisdiction.[13] However, the Claimants submit that in cases in which the Courts have not made definitive rulings with respect to their respective jurisdictions, a conflict will only arise when each Court has taken "a positive step to assert jurisdiction" or "something which shows that it has accepted jurisdiction".

49. I do not understand this submission to go so far as to contend that a Court only exercises jurisdiction (for the purposes of the Decree) when it makes orders which affects rights and obligations or which can be coercively enforced. In any event, that proposition should not be accepted. The mischiefs which are addressed by the Decree are the potential for conflicting decisions and the burdens imposed upon the parties by a multiplicity of proceedings in relation to the same dispute. Those mischiefs arise whenever both Courts exercise jurisdiction over the same dispute concurrently, irrespective of the orders made in the exercise of that jurisdiction. Although the Decree also deals with conflicting judgments, there can be no doubt that the JJT is empowered to act before that circumstance arises, in order to prevent that circumstance arising.

50. The mere receipt of initiating process or the consideration and determination of an objection to jurisdiction, do not, of themselves, constitute the exercise of jurisdiction.[14] However, in this case the steps taken in the Dubai proceedings and their current status cannot be characterized in this way.

51. The Claimants initiated proceedings in the Dubai Courts before they initiated proceedings in these Courts. No party has objected to the jurisdiction of the Dubai Courts, and all parties to those proceedings have submitted to the jurisdiction of those Courts. The Claimants' attempt to abandon those proceedings have not been successful in either case - having been dismissed in one case and not determined in the other, and in that other case the application will not be determined until the JJT has made its decision because of the stay of those proceedings. It follows that there will be no occasion for those Courts to question their jurisdiction to entertain and resolve the claims before them. But for the operation of the Decree, those Courts will be obliged to hear and determine those claims in the ordinary way. So, at least in cases such as this, where both parties have submitted to the jurisdiction of a relevant court, if the other court is also unequivocally exercising jurisdiction by, as in this case, entering judgment, a conflict of jurisdiction has clearly arisen.

52. Put another way, in a case where all parties have submitted to the jurisdiction of one of the Courts, so that no occasion will ever arise for that Court to rule on its jurisdiction, it would defeat the evident purposes of the Decree to construe at as only applying if and when that Court expressly rules on its (uncontested) jurisdiction. No party advanced that contention to the Court.

53. Further, in this case substantive defences have been filed to each of the claims in the Dubai Courts and hearings have been held in each matter. The Claimants' submission that the only substantive step which has been taken by the Courts in those proceedings is to order stays of the proceedings does not accord with the facts which I have related above, and ignores the vital fact that all parties to the Dubai Court proceedings have submitted to the jurisdiction of those Courts.

Exercise of jurisdiction - conclusion

54. In this case it is unnecessary to lay down general rules as to what will, and what will not constitute an exercise of jurisdiction such as to give rise to a conflict of jurisdiction. The answer to that question will generally depend upon the particular circumstances of the case. In this case, where judgment has been entered in one Court and all parties have submitted to the jurisdiction of the other Court, there is a conflict in the exercise of jurisdiction by this Court and the Dubai Courts in respect of the claims brought before them. It follows that the jurisdiction of the JJT under Article 4 of the Decree is engaged and the question of which of the Courts should proceed to exercise jurisdiction was properly referred to the JJT. It further follows that, on the face of it, Article 5 of the Decree is also engaged and the proceedings in both Courts must be stayed until the JJT has made its determination.

The Claimants' contentions

55. In an attempt to resist this conclusion, the Claimants advance three contentions, namely:

(a) there is no "conflict" in both Courts proceeding to exercise jurisdiction simultaneously because both Courts have jurisdiction and the point of conflicting judgments has not been reached;

(b) the Dubai proceedings should be withdrawn on the Claimants' application, and the only reason the conflict continues is because the Defendants have opposed their withdrawal; and

(c) as Five Holding Limited is not a party to the proceedings in the Dubai Courts, no conflict arises in respect of its claims in the DIFC Courts, which should be permitted to proceed even if the claims of the other Claimants are stayed.

56. I will deal with each of these contentions in turn.

Is there a conflict in the simultaneous exercise of jurisdiction?

57. The submission that there is no conflict in the simultaneous exercise of jurisdiction by both Courts flies squarely in the face of the express terms of the Decree, in whichever translation is adopted. The simultaneous exercise of jurisdiction by both Courts is precisely one of the circumstances which creates a conflict and which engages the operation of Articles 4 and 5 of the Decree. It is a circumstance which creates a significant risk of inconsistent judgments and which burdens the parties with a multiplicity of proceedings in respect of the same dispute. As I have noted, the Decree does not require that there must be inconsistent decisions or judgments before its operation is engaged - the potential for such decisions arising from the concurrent exercise of jurisdiction is sufficient.

58. In summary, the simultaneous exercise of concurrent jurisdiction by both Courts provides no reason why the Decree should not operate with the result that all proceedings are stayed until the JJT has made its determination. To the contrary, it is one of the circumstances to which the Decree expressly applies.

Should the conflict be resolved by permitting the Claimants to abandon the Dubai proceedings?

59. The Claimants submit that the only reason there is a conflict of jurisdiction is because the Defendants have opposed the applications to abandon the proceedings in the Dubai Courts by the Claimants in those proceedings. The Claimants submit that the Defendants should not be permitted to take advantage of the position they have adopted in this respect by obtaining a stay of all proceedings pending the decision of the JJT.

60. There are a number of answers to this submission. Perhaps the most obvious is that the source of the conflict in the exercise of jurisdiction by both Courts is the fact that the Claimants initiated proceedings in both Courts at almost the same time. Senior Counsel for the Claimants was unable to proffer any explanation for this forensic strategy, which is anomalous, to say the least. However, it doesn't really matter what strategy underpinned the course which the Claimants took - the significant fact is that it is the actions taken by the Claimants which have given rise to the conflict in jurisdiction, not the positions adopted by the Defendants.

61. It is also significant that as the Claimants have invoked the jurisdiction of both the Dubai and DIFC Courts, the Defendants are perfectly entitled to assert to the JJT, as they do, that it is the Dubai Courts which should determine these disputes. There is no basis for any proposition implicit in the Claimants' submission to the effect that the Defendants are acting improperly or unreasonably by objecting to the withdrawal of the proceedings in the Dubai Courts. As I have noted, all parties to the proceedings in those Courts have submitted to the jurisdiction, and it will be for the JJT to determine whether those proceedings continue, not the Claimants

62. For these reasons it makes no difference that in one of the cases pending before the Dubai Courts the Court of Appeal has dismissed Claimant's application to abandon the proceedings, whereas the equivalent application in the other proceedings pending before the Dubai Courts does not appear to have been resolved. What is significant is that the capacity of the Claimants to abandon those proceedings is subject to the control of the Dubai Courts, and those Courts have not permitted their abandonment pending the determination by the JJT.

Is there a conflict of jurisdiction in relation to the claim by Five Holding Limited?

63. The Claimants submit that even if there is a conflict in the jurisdictions invoked by the Second Claimants in each of the DIFC proceedings, there is no conflict in jurisdiction in relation to claims made by Five Holding Limited in those proceedings, because Five Holding Limited is not a party to the proceedings in the Dubai Courts. This proposition was the focus of much of the oral argument advanced on behalf of the Claimants.

64. A number of discrete propositions were advanced in support of this argument. It is submitted that Five Holding Limited has a separate and discrete claim against each Defendant, and that the Defendants might raise defences to those claims which differ from defences to the claims brought by each second claimant in the DIFC proceedings. It is further submitted that the stay imposed pursuant to Article 5 of the Decree is a stay imposed upon claims, not upon proceedings or actions, with the consequence that the stay does not apply to the claims of Five Holding Limited.

65. There are a number of reasons why this submission must be rejected. First, while it can be accepted that the Defendants might raise separate defences to the claims brought by Five Holding Limited to those advanced in respect of the claims brought by the second claimants in each of the DIFC proceedings, that does not have the consequence that the claims brought by Five Holding Limited are properly characterized as separate and divisible from the claims brought by the second claimants. Irrespective of whether the matter is viewed through the perspective of the form of the proceedings brought in the DIFC Courts, or the underlying substance of the claims, there is an inextricable overlap and commonality in the claims brought by Five Holding Limited and the claims of each second claimant.

66. In each Claim Form, the claim is brought jointly in the name of Five Holding Limited and each respective second claimant. No attempt is made in the Claim Form to differentiate between any separate and divisible interests of the two Claimants. To the contrary, a single claim for the full limit of indemnity available under the relevant policy is brought jointly on behalf of both Claimants.

67. It is of profound significance that judgment has been entered in favour of both Claimants jointly in each of the DIFC proceedings, in an amount which exhausts the limit of indemnity available under the policy. Although the Defendants have applied to set those judgments aside, those applications are yet to be heard, and the applications to set aside the stay of each proceeding must be determined on the basis that those judgments stand. As long as those judgment stand, at least arguably they exhaust the liability of each Defendant. But in any event, a judgment in the Dubai Courts in favour of the individual Claimant in each of the proceedings before those Courts would be inconsistent with the judgments in the DIFC Courts in favour of the Claimants jointly.

68. But even if the claims brought jointly in the names of both Claimants and the judgments entered in favour of those Claimants jointly could somehow be regarded as separate and severable claims brought on behalf of each separate Claimant, and as separate judgments entered in favour of each separate Claimant, it would not follow that the stay imposed by Article 5 of the Decree would only apply to the claims brought by each second claimant in the DIFC proceedings.

69. As I have noted, the English words used to describe that which is to be stayed pursuant to Article 5 differ in the various translations from the authoritative Arabic. In two of the translations[15] the phrase "claims or applications" is used, in another, the expression "proceedings in the cases or claims" is used,[16] and in the other the phrase "actions or motions" is used.[17] However, significantly, each of those phrases is a qualified by the requirement that the relevant claim, application, action, motion or proceeding must be that which is the subject of the conflict or dispute in jurisdiction referred to the JJT pursuant to Article 4. That is why the Court in Lakhan emphasized the need to read Article 5 with Article 4.

70. Put another way, the ambit of the stay properly granted in accordance with Article 5 is to be ascertained by reference to the ambit of the conflict or dispute as to jurisdiction within the meaning of Article 4. For the reasons I have developed, that ambit is to be ascertained by reference to the evident objectives of the Decree, which include preventing the risk of inconsistent judgments and avoiding the burden of multiple proceedings in respect of the same dispute. The ambit of any stay appropriately granted pursuant to Article 5 should be determined by reference to the manifest objectives of the Decree, rather than by reference to the particular form of the proceedings in question, or a strict legal analysis of the divisibility or severability of the relative rights and obligations of different parties to the actions in the different Courts.

71. Put yet another way, the operation of the Decree should be determined on the basis of substance rather than form and by reference to the substantive risks of inconsistency and duplication.

72. Viewed as a matter of substance, there is one insurance policy which is the subject of the corresponding claims in each of the Courts. In each of the Courts the insured events said to give rise to the claims are identical. There is one limit of indemnity applicable to all claims brought in respect of those insured events and in each Court that limit of indemnity is claimed in full. Obviously each Defendant is only obliged to pay an amount equal to the limit of indemnity once, and any payment made to any insured will reduce the amount available to any other insured.

73. In these circumstances the claims made by Five Holding Limited are inextricably bound up with the corresponding claim made by its wholly owned subsidiary in each proceeding. The prosecution of claims in the DIFC Courts by Five Holding Limited simultaneously with the prosecution of a claim by its subsidiary against the same Defendant, under the same policy, arising from the same insured events in the Dubai Courts would create a serious risk of inconsistent judgments and would inevitably engage all parties in a multiplicity of proceedings in respect of what is, in substance, the same dispute.

74. As the continued prosecution of the claims brought by Five Holding Limited in the DIFC Courts would defeat the evident objectives of the Decree, it is appropriate that those claims should be stayed along with the claims of the relevant subsidiary.

75. It is further submitted that each defendant has elected to refer only the claims of Five Hotel Jumeirah Village LLC and Five Hotel FZE to the JJT, and that it would be wrong to "reward" those Defendants for their forensic choice to refer only part of the proceedings to the JJT. There are a number of reasons why this submission must be rejected. The submission ignores the factual circumstances which gave rise to the reference to the JJT. It was the Claimants who decided to commence proceedings in both Courts, and to only join Five Holding Limited in the proceedings in the DIFC Courts. It is the Claimants who are using the distinction in the separate composition of the proceedings which they have commenced in an attempt to use the distinction in their composition as a basis for an assertion that one set of proceedings is immune to a determination by the JJT and to a stay of proceedings pending that determination.

76. Further, the submission misconceives the nature of a reference to the JJT under the Decree. The jurisdiction of the JJT is engaged by a conflict or dispute of jurisdiction as between the two Courts. The application to the JJT is for a determination as to which of the Courts will proceed to exercise jurisdiction. The application does not involve the referral of either or both sets of proceedings to the JJT. Rather, what is referred to the JJT is the need to make a determination as to which of the two Courts should exercise jurisdiction so as to avoid the conflict or dispute with respect to jurisdiction.

77. It follows that a semantic examination of the particular words used in the reference to the JJT, of the kind undertaken by the Claimants, is of no particular assistance. What was referred to the JJT by each Defendant was the dispute or conflict as to jurisdiction. For the reasons I have already given, the ambit of that dispute or conflict is to be determined by reference to substance rather than form, taking into account the evident objectives of the Decree.

78. The Claimants further submit that it would be unjust to Five Holding Limited if its claims were stayed when the Defendants references to the JJT have, in effect, denied Five Holding Limited standing to present submissions and argument to the JJT. Given the view which I have expressed with respect to the nature of a reference to the JJT, it is not immediately clear to me that a party whose interests could be affected by a determination on that reference would be denied the opportunity to present submissions to the Tribunal. However, assuming that is not so, and that there is a basis for this submission, its acceptance would represent the triumph of form over substance. Five Holding Limited is jointly represented with each of its relevant wholly owned subsidiaries in the DIFC Courts proceedings. Those subsidiaries have been named as parties to the reference to the JJT. It is quite artificial and unreal to suggest that those wholly owned subsidiaries would not be able to present all relevant facts and submissions to the JJT, including submissions which draw attention to the position of Five Holding Limited.

79. For these reasons the fact that Five Holding Limited is a party to the proceedings before the DIFC Courts but is not a party to the proceedings before the Dubai Courts provides no justification for refusing a stay of that company's claims prior to the determination of the JJT.

Conclusion

80. Although the stays of each of the proceedings the subject of these applications was granted merely because there had been a reference to the JJT, and without consideration of the issues which have now been canvassed by the parties, when those issues are considered, the stay of each action should be maintained for the reasons given. Each application to set aside the stay previously granted should be dismissed. The Claimants in each action will be ordered to pay the Defendant's costs of the application to be assessed by a Registrar of the Court unless agreed within fourteen (14) days of publication of these reasons.