THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) EMIRATES NBD BANK PJSC
(2) HSBC BANK MIDDLE EAST LIMITED
(3) ICICI BANK LIMITED, BAHRAIN LIMITED
(4) ICICI BANK UK PLC
(5) UNION BANK OF INDIA
(6) BANK OF JORDAN COMPANY
(7) NATIONAL BANK OF BAHRAIN BSC
(8) AHLI UNITED BANK BSC (DIFC BRANCH)
(9) COMMERCIAL BANK OF DUBAI PSC
(10) WARBA BANK KSCP

Claimants

and

(1) KBBO CPG INVESTMENT LLC
(2) MR KHALEEFA BUTTI BIN OMAIR YOUSIF ALMUHARI
(3) HIS EXCELLENCY SAEED MOHAMED BUTTI MOHAMED ALQEBAISI
(4) INFINITE INVESTMENT LLC
(5) GROUP OF FATHIMA CO LLC
(6) FATHIMA SUPERMARKET LLC (SHARJAH)
(7) FATHIMA SUPERMARKET WLL (ABU DHABI)
(8) FATHIMA TRADING & SUPERMARKET COMPANY WLL
(9) FAIRWAY GENERAL TRADING
(10) FAIRWAY CATERING SERVICES LLC (DUBAI)
(11) FAIRWAY CATERING SERVICES LLC (ABU DHABI)
(12) FATIMA GENERAL MARKET LLC
(13) TELE LINK COMMUNICATION LLC
(14) ONE PREPAY COMPANY LLC
(15) TECHLINK SYSTEMS LLC
(16) FRESHLY FROZEN FOODS FACTORY LLC
(17) SENORA FOODS LLC
(18) SPECTRAMI DMCC
(19) ONE PREPAY COMPANY LLC (KSA BRANCH)

Defendants

ORDER WITH REASONS OF JUSTICE SIR JEREMY COOKE

UPON reviewing the First, Second, Fourth, Thirteenth, Fourteenth, Sixteenth and Seventeenth Defendants Application No. CFI-045-2020/9 dated 5 June 2020 for proceedings to be struck out (the **"Application"**)

AND UPON reviewing the Claimant's evidence in answer to the Application dated 14 June 2020

AND UPON all documents recorded in the court file

AND UPON hearing Counsel for the Claimants and Counsels for the Defendants and Counsel for the Eighteenth Defendant at a hearing on 30 June 2020

IT IS HEREBY ORDERED THAT:

1. The Application is dismissed.

2. The First, Second, Fourth, Thirteenth-Fourteenth and Sixteenth-Seventeenth Defendants are to pay the costs of the Second to Tenth Claimants of the Application on the indemnity basis, such costs to be the subject of assessment by the Registrar if not agreed.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 22 August 2021
At: 10am

SCHEDULE OF REASONS

Introduction

1. The First, Second, Fourth, Thirteenth-Fourteenth and Sixteenth-Seventeenth Defendants (the **"Prime Defendants"**) applied on 5 June 2020 for (inter alia) the proceedings to be struck out and for various orders made in it against them to be discharged on the grounds that the First Claimant did not have title to sue or authority to bring claims on behalf of the Second to Tenth Claimants and/or that the Second to Tenth Claimants needed to be, but have not, validly been joined to the proceedings.

2. The First Claimant initially filed this action and issued the Claim Form in its own name alone on 13 May 2020. After issue, but prior to service, the Second-Tenth Claimants were added on 14 May 2020. The RDC does not require an application to be made nor for permission to be obtained to add parties prior to service but the written consent of the party to be joined must be filed - see RDC 20.11 and 20.16. There was no need for the Second to Tenth Claimants to instruct the First Claimant's solicitors to apply on their behalf. All that was required was their written consent.

3. The Prime Defendants maintain that no proper consent was obtained and that Addleshaw Goddard (**"AG"**) had no authority to join these additional Claimants and that the First Claimant had no title to sue on its own because it was a disclosed agent (being the **"Global Facility Agent"**) acting for the Second-Tenth Claimants who were the principal Lenders under syndicated facilities essentially enshrined in the Common Terms Agreement (the **"CTA"**) the Conventional Facilities Agreement and the Master Murabaha Agreement.

4. It is trite law that, in the ordinary way, a disclosed agent cannot sue in its own name and can only sue in the name of its principal or principals. Under the terms of the CTA, clause 17.1 set out the appointment and duties of the Global Facility Agent.

5. Clause 17.1 (a) and (b) constituted an irrevocable appointment and an irrevocable authorisation of the Global Facility Agent to act as agent under and in connection with the Transaction Documents (as defined to include the CTA itself, the Conventional Facilities Agreement and the Master Murabaha Agreement) and to perform the duties, obligations and responsibilities and to exercise the rights, powers and discretions that were specifically given to it under the Transaction Documents, together with any other incidental rights, powers and discretions. Clause 17.2 (f) provided;

> "the Global Facility Agent is not authorised to act on behalf of a Financial Institution [i.e the Second to Tenth Claimants](without first obtaining that Financial Institution's consent) in any legal or arbitration proceedings relating to any Transaction Document. This paragraph (f) shall not apply to any legal or arbitration proceeding relating to the perfection, preservation or protection of rights under the Transaction Security Documents or enforcement of the Transaction Security or Transaction Security Documents."

6. It is thus clear that the Global Facility Agent required the consent of the Second to Tenth Claimants in order to bring proceedings on their behalf, save for proceedings which fell within the second sentence. Clause 32, the jurisdiction clause in the CTA, provided for arbitration or, at the election of the Lenders, proceedings in the DIFC Courts.

7. On 14 May 2020, in support of the amendment to the Claim Form which it sought to make, the First Claimant sent an email to the DIFC Courts' Registry attaching the Claim Form with the requested amendments marked up, asking for an amended claim form to be issued. The email continued: "we also attach copy emails authorising Emirates NBD Bank (PJSC) to add these parties as Claimants to CFI - 045 - 2020". The emails attached used various different forms of words which the Prime Defendants say are not sufficient to satisfy the requirement for written consent on the part of the party to be joined.

8. As I indicated at the outset of the argument, the point is a very short one and I considered the approach of the Prime Defendants to be wholly unrealistic. There is no particular form or formality required for such consent to be given to be joined as a party and in the context of the email sent by an officer of the Court to the Court, the attached emails plainly constituted the consent required. Some of the emails gave explicit consent on their face to being joined whilst others had to be read in the context of the communication from the solicitors to the Court. Unless it is to be said that the solicitors were telling lies to the Court in putting forward these documents as containing the consent of the Second to Tenth Claimants, the documents did constitute written consent within the meaning of the Rules. There is no suggestion that AG were telling lies.

9. Taking the Second to Tenth Claimants' emails in order, the wording used was as follows:

9.1. Second Claimant: "Dear Antonia - we have spoken, yes, I have Nasreen's authorisation, we are signed off. Best regards, Laksh."

9.2. Third Claimant: "Dear Paul, We hereby authorise ENBD (as Global Facility Agent) to add ICICI Bank Limited, Bahrain Branch as a joint claimant in the DIFC Court Proceedings. Regards, Ravi."

9.3. Fourth Claimant: "Hi Robin, We authorise ENBD (as Global Facility Agent) to add ICICI Bank Limited, UK PLC, as a joint claimant in the DIFC Court Proceedings. Thanks & Regards, Ankita Gor."

9.4. Fifth Claimant: "Dear Paul, We authorise Emirates NBD to add Union Bank of India as a joint Claimant in DIFC Proceedings. Regards Jithender Maniram CEO."

9.5. Sixth Claimant: "Dear Paul, We authorise that Emirates NBD to add BOJ claimant in DIFC Proceedings. Kind Regards, Isha".

9.6. Seventh Claimant: "Dear Paul, We authorise ENBD (as Global Facility Agent) to add the National Bank of Bahrain (NBB) as a joint claimant in the DIFC Court Proceedings. Regards, Hussain Abdulkarim Shaker."

9.7. Eighth Claimant: "Hi Robin, okay with us".

9.8. NinthClaimant: "Dear Paul, We hereby authorise ENBD as GFA to add CBD as joint claimant in the DIFC Court Proceedings. Best

Regards Souhayel".

9.9. TenthClaimant: "Dear Paul, Warba Bank approves. Best, Tarek Alazem, Vice President".

10. The Prime Defendants contend that there is nothing to show that the authors of the emails set out in the preceding paragraph of this Ruling had authority to give the instructions in question on behalf of the Second to Tenth Claimants. In some cases, the author's name only appeared at the top of the email as the sender of it, without "signing off" underneath the message (e.g. the Eighth Claimant); in other cases the designation of the author was not given as such (e.g. the Second Claimant); in other cases the designation was not that of a director or obviously senior person with authority; whilst in other cases (e.g. the Fifth Claimant and the Tenth Claimant) the author, in my judgment, was of obvious seniority.

11. I was referred to various authorities in the context of ratification of proceedings which had been begun without authority and in particular to *Danish Mercantile v Beaumont* [1951] 1 CH 680 and the comments of Jenkins L.J at page 687 where he said that it was *"open at any time to the purported plaintiff to rectify the act of the solicitors who started the action to adopt the proceedings, to approve all that had been done in the past and to instruct the solicitor to continue the action"*. It appeared to be the submission of the Prime Defendants that this form of words or something similar to the same effect had to be used by any party when giving consent to an action being brought in its name. It was also contended that, when there was a challenge to the authority of a solicitor to join a party with its consent, the consent had to be shown to emanate from a sufficiently senior person who could be seen to have the authority of the company by virtue of the position held by that person.

12. In my judgment the question of consent of a party to be joined is simply a matter to be established on the evidence and I am entirely satisfied, on the evidence here, that AG obtained the consent of the Second to Tenth Claimants for them to be joined in the proceedings as claimants, thereby giving the First Claimant authority to use their names for that purpose- and that such consent was given in writing by the messages referred to above.

12.1. At paragraph 7.3 of the first Affidavit of David Sanders, the Head of Infrastructure & Real Estate for Middle East, North Africa & Turkey Commercial Banking at HSBC, he expressly confirmed that "the Applicant [namely the First Claimant] has the permission of all members of the syndicate to bring this action".

12.2. In the Fourth statement of Paul Hughes (the "Paul" to whom some of the emails set out above were addressed) at paragraph 6, he states that *"the Second to Tenth Claimants consented to be joined as claimants by the First Claimant to these proceedings and were so joined and as a result the Registry issued an amended Claim Form on 14 May 2020. Written confirmation of their consent was obtained by the First Claimant, provided to the Registry and is exhibited."*

12.3. In the Fifth statement of Paul Hughes at paragraph 6, he again explained, referring to his Fourth statement that *"the Second to Tenth Claimants had consented to being joined by the First Claimant as claimants to these proceedings and still consent to being claimants. Copies of those consents are exhibited.. For completeness, letters confirming that the Second to Tenth claimants consented and do still consent to being joined are exhibited."*

13. Whilst the Prime Defendants objected to the admission of this Fifth witness statement from Mr Hughes, the reality is that the question of authority and consent could only ever turn upon evidence from the Claimants themselves and any lateness in its production caused them no prejudice within the meaning of the Rules. The new exhibits were subjected to similar criticisms to the emails set out above. They all however use the same form of words, under the heading *"CFI - 045 - 2020 - Emirates NBD Bank (PJSC) and others v KBBO CPG Investment LLC and others"*, so that I need not quote each individually. By way of example the letter from the Second Claimant to the DIFC Courts' Registry stated:

"HSBC Bank Middle East Ltd consents and had consented to being joined as Claimant to the above noted DIFC Court proceedings with Claim No CFI - 045 - 2020.

I confirm that my role at HSBC Bank Middle East Ltd is Regional General Counsel. Yours faithfully, Nasreen Bulos."

[c.f.the communication in paragraph 9.1 above with its reference to Nasreen's authorisation].

14. In the case of the Third Claimant the signatory designated himself as *"Country Head - Bahrain"* and as *"Authorised Signatory"*. In the case of the Fourth Claimant, there were 2 signatures from the *"Head of Corporate & Commercial Banking"* and the *"Head Operations, IT & Facilities"*. In the case of the Fifth Claimant the signatory was the same Chief Executive Officer as before. In the case of the Sixth Claimant the signatory was designated as a *"Financial Analyst"* and the bank stamp appeared on the letter. In the case of the Seventh Claimant it was the *"Chief Executive - Financial Restructuring"* who signed. In the case of the Eighth Claimant it was the *"Unit Head of Corporate Banking"*. In the case of the Ninth Claimant it was the *"Chief Legal and Governance Officer"* whilst for the Tenth Claimant it was the same *"Vice President of the Investment Banking Group"* as before.

15. There is simply no basis upon which challenge the authority of any of these individuals to sign on behalf of the Second to Tenth Claimants any more than there is any basis to challenge the authority of any of the other people who sent the emails set out in paragraph 8 above. The evidence is that the consent of the Second to Tenth Claimants was obtained and there is nothing to counteract that.

16. In the DIFC Courts, as in other common law jurisdictions, unlike some other forms of jurisdiction where instruments such as Powers of Attorney are required to show the authority of lawyers to act, the evidence of lawyers of their authority to act is sufficient in the absence of evidence to the contrary. Here there is an abundance of external evidence of consent on the part of the Second to Tenth Claimants to be joined in the proceedings which was all that was required. It is not necessary, in order to show the consent of a Claimant to be joined, that there be a resolution of the Board of Directors, a resolution of the Company in General Meeting, a Power of Attorney, a signature by a Chief Executive Officer, Chief Financial Officer or Director or anyone in a specific Senior Management position, where no viable challenge can be raised to the actual authority of the person who gives the consent. The Prime Defendants had no evidence to suggest that the emails and letters to which I have referred did not constitute consent on the part of each of the Second to Tenth Claimants and did not reveal the basis of their challenge to the validity of joinder until their skeleton argument, other than what appeared in their application notice.

17. Issues of ratification do not therefore arise but, in any event, in Mr Hughes' Fifth witness statement, he not only states that the Second to Tenth Claimants have specifically instructed AG to act for them in the litigation, but *"ratifies on behalf of the Second to Tenth Claimants anything and everything done, or possibly done in the name of the Second to Tenth Claimants"*. Further, Mr Montagu -Smith QC, with the authority to act on behalf of all the Claimants, then used the very words found in the Danish Mercantile case to bind them, for the avoidance of any doubt at all. This somewhat highlighted the absurdity, as I saw it, of the Prime Defendants' argument.

18. In their Skeleton Argument, the Claimants invited the Prime Defendants to withdraw their challenge but the latter not only failed to do so but argued the point for the better part of 2 and a half hours or thereabouts, on my reckoning. Whilst the Prime Defendants are doubtless keen to grasp at any straws, they must pay for their decision to take what, in my judgment, was always an extremely bad point, way beyond the norm of what this court would consider reasonable.