Claim No. CFI 036/2016

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) BARCLAYS BANK PLC

(2) CREDIT SUISSE LOAN FUNDING L.L.C.

(3) MIDTOWN ACQUISITIONS L.P.

(4) SPECIAL SITUATIONS INVESTING GROUP INC

Claimants

and

ESSAR GLOBAL FUND LIMITED

Defendant

ORDER OF JUSTICE SIR RICHARD FIELD

UPON considering the Claimants' Application Notice CFI-036-2016/1 dated 6 November 2016 for immediate judgment (the "immediate judgment application")

AND UPON considering the Defendant's Application Notice CFI-036-2016/2 dated 14 November 2016 disputing the jurisdiction of the Court to decide the Claimants' claim (the "jurisdiction application")

AND UPON considering the Defendant's Application Notice CFI-036-2016/3 dated 24 November 2016 for an order dismissing or staying the immediate judgment application (the "stay application")

AND UPON considering whether the jurisdiction application and the immediate judgment application should be heard in one hearing or the jurisdiction application should be heard separately from and before the immediate judgment application

AND UPON considering the preliminary skeleton arguments served by the 3rd Claimant and the Defendant

IT IS HEREBY ORDERED THAT:

1.The stay application is dismissed.

2. The jurisdiction application and the immediate judgment application will be heard together on a date to be fixed.

3. The Claimants should forthwith proceed with their immediate judgment application and the Defendant should respond thereto in accordance with the Rules of the DIFC Courts ("RDC").

4. The Defendant should forthwith proceed with its jurisdiction application and the Claimants should respond thereto in accordance with the RDC.

Issued by:

Amna Al Owais

Deputy Registrar

Date of Issue: 2 January 2017

At: 10am

REASONS

The background to the proceedings

1.The Claimants' claim is for recognition and enforcement by the DIFC Courts of the judgment of the Supreme Court of New York issued on 25 August 2016 for US$ 171,769169.00 ("the New York Judgment") obtained by the Claimants against the Defendant.

2. The claim leading to the New York Judgment was to enforce a guarantee up to US$200 million given by the Defendant in respect of a loan made by the Claimants to Essar Steel Minnesota LLC. On 23 February 2016 a Notice of Acceleration declaring that USD 412,132, 810.00 was immediately due under the agreement for the loan was issued and on 18 March 2016 the Defendant issued a Notice of Confession in respect of the sum of USD 201,575,000.00 plus interest. On 24 August 2016, the Claimants filed a request for judgment based on the Notice of Confession and the New York Judgment for USD 171,769,169 was issued the next day on 25 August 2016.

3. The Defendant had 30 days to appeal the New York Judgment but did not do so.

4. On 4 October 2016, the Claimants served a Part 7 Claim Form on the Defendant at its Cayman Islands address. On 31 October 2016, the Defendant filed an Acknowledgment of Service pursuant to RDC 11.2(3) indicating an intention to contest the jurisdiction of the DIFC Courts to hear and determine the proceedings.

5. On 6 November 2016, the Claimants issued the immediate judgment application and on 11 November 2016, the Defendant filed a motion to vacate the New York Judgment on the grounds of "fraud, misrepresentation and/or other misconduct of the Third Claimant". The Defendant has also stated that it intends to challenge the

New York Judgment on the grounds that no notice of its entry was given pursuant to the New York Procedural Rules and that it violates the due process required by New York Procedural Rule 3218 in that it has been entered without there being a default.

6. On 14 November 2016, the Defendant issued the jurisdiction application and on 24 November 2016 it issued the stay application.

7. The Defendant contends that the New York Judgment is not a "final and conclusive judgment on the merits" as required by Rule 42 propounded in Dicey, Morris and Collins, **The Conflict of Laws**, that Rule being concerned with the enforceability of foreign judgments under the common law. The Defendants argue that: (i) the New York Judgment is not a judgment, but "an administrative act"; (ii) it was not "on the merits"; and (iii) it is not final and conclusive given the application to vacate the New York Judgment in the New York Courts.

8. The Defendant also contends that the enforcement of judgments is a matter of foreign affairs and that Article 24(a)(1) of Law No. 10 of 2004 (the DIFC Courts Law) and Articles 5A(1)(e) and 7(6) of Law No.12 of 2004 (the judicial authority law) which the DIFC Courts of Appeal held in *DNB Bank ASA v Gulf Eyadh Corporation et al* [2016] CA 007/2015 authorise the DIFC Courts to enforce foreign judgments, conflict with Article 120 of the UAE Constitution which reserves to the UAE Federation "matters of foreign affairs". It follows (argues the Defendant) that an individual Emirate (in this case Dubai) cannot legislate independently of the Federation to allow a court of that Emirate to recognise and enforce judgments of foreign courts; and since the Federation has not entered into a treaty for the enforcement of judgments given in the New York Courts, the aforementioned Articles 5A(1)(e) and 7(6) are unconstitutional and any doubt about this contention should be determined by the Union Supreme Court.

9. The Defendant further argues that the *DNB Bank* case was wrongfully decided both with respect to the interpretation placed on Article 7(6) of the Judicial Authority Law and Article 24(1)(a) of the Court Law and with respect to the conclusion that the absence of assets in the DIFC was no obstacle to recognising the foreign judgment.

10. The Claimants contend that the enforcement of foreign judgments is not a matter of foreign affairs and is not reserved to the Union. On the contrary, UAE civil and constitutional law has been disapplied in the DIFC in a manner expressly authorised by the UAE Constitution. Further, even if enforcement of foreign judgments was somehow a matter of foreign affairs, the issue would be not one of jurisdiction but the substantive test to be applied in deciding whether to order enforcement.

11. The Claimants further contend that the New York Judgment is final and conclusive unless and until it is set aside and that the underlying assertions made in the Defendant's Motion to Vacate the New York Judgment are demonstrably wrong.

Is the Defendant entitled to insist that its jurisdiction application should be heard and determined before any further steps can be taken by the Claimants to enforce the New York Judgment?

12. The Defendant's central submission is that the Court should adopt and follow the decision of Lewison J (as he then was) in *Speed Investments Limited et al v Formula One Holdings Limited* [2004] EWHC 1772 (Ch). The question for decision there was whether an application for summary judgment could procced against foreign Defendants who had been served outside the jurisdiction but who contested the jurisdiction of the court. The applicable rules of the CPR are the same today as they were on 19 July 2004 when the case was decided. A defendant who wishes to contest the jurisdiction of the court may file an acknowledgement of service and must do so if he challenges the jurisdiction under Part 11, see Rule 10.1(3) and Rule 11(2). However, by Rule 11(3) a defendant who files of an acknowledgement of service in compliance with Rule 11(2) does not lose any right that he had to dispute the court's jurisdiction. If the court does not accede to a defendant's jurisdiction challenge his acknowledgement of service ceases to have effect and he may file a further acknowledgement of service within 14 days or such other period as the court may direct, see Rule 11 (7)(a) & (b). If he does file a further acknowledgment of service he is treated as having accepted that the the court has jurisdiction to try the claim (Rule 11(8)). Under Rule 24.4, a claimant may not apply for summary judgment until the defendant has filed an acknowledgment of service or a defence unless the court gives permission or a practice direction provides otherwise (Rule 24.4(1)).

13. Lewison J followed the approach of Rix J (as he then was) in *European Capital Trade Finance Limited v Antenna Hungria RT* (unreported, 27 March 1995) where the claimant sued a foreign defendant for money due and applied for summary judgment after the defendant challenged the court's jurisdiction. In that case Rix said:

> "Under the current Order 12, however, that previous procedure has been changed, and one of the purposes of the change was to give a foreign defendant who wished to challenge the jurisdiction a real opportunity to decide whether or not to submit to the jurisdiction of the English court after his challenge to the jurisdiction had been heard and decided.
>
> When, therefore, a challenge to jurisdiction fails, if it does, the defendant has another 14 days to decide whether it wishes to submit to the jurisdiction by lodging a further acknowledgment of service. At that point, the defendant may prefer (as the Philadelphia Chewing Gum Corporation had sought to do) to allow the action to proceed against it by default on the basis that it has no assets within the jurisdiction and no intention of bringing assets within the jurisdiction and that without its submission to the jurisdiction a default judgment rendered against it in England cannot be enforced against it in its home jurisdiction. .
>
> For these reasons, the philosophy and the language of the new post-1979 Order 12 are at one. Judgment cannot be obtained against a defendant who has unsuccessfully challenged jurisdiction under Order 12, Rule 8 until that defendant has been given a further opportunity to decide whether he wishes to submit to the jurisdiction by lodging a further acknowledgment of service, and that is equally so of summary judgment as of default judgment. Indeed, if it were otherwise, the defendant who was challenging the jurisdiction of the court would be compelled to prepare not only submissions but also evidence to meet a claim for summary judgment at a time when he was saying that the court had no jurisdiction over him. That might not be unacceptable where the challenge to jurisdiction fails, but it is plainly contrary to principle where the challenge is a valid one and, at the time when preparations would have to be put in hand, it would not be known whether the challenge would succeed or fail. It may seem unfortunate to a plaintiff with an unanswerable claim that a foreign defendant may hold up summary judgment first by a challenge to the jurisdiction and then by insisting on a further period to lodge his second acknowledgment of service. That, however, is the price such a plaintiff must pay out of regard for all those foreign defendants who, for reasons of comity, are to be allowed to challenge the jurisdiction of these courts without prejudicing or pre-empting their defence on the merits or their decision as to whether, if their jurisdictional challenge fails, they wish nevertheless to submit to the jurisdiction of the English courts."

14. As Longmore LJ explained in *Moloobhoy & Anor v Kanani* [2013] EWCA Civ 600 (paras 15 & 16) the former Order 12 Rule 8 referred to by Rix J permitted a defendant to lodge a second acknowledgment of service in the event that his challenge to the court's jurisdiction was rejected. Before this new procedure, a defendant lodged a conditional appearance but, if the challenge to the jurisdiction was rejected, that appearance became an unconditional appearance and was treated as a submission to the jurisdiction. Longmore LJ also pointed out that Rix J's judgment was given against the background of the old RSC Order 14, which only allowed an application for summary judgment to be made after a defendant had given notice of intention to defend, which he would not do in his acknowledgment of service challenging the jurisdiction but would do, if he wished, in the second acknowledgment of service filed once the jurisdiction challenge had failed.

15. Lewison J also cited the following passage in para 5.31 of Briggs and Rees on Civil Jurisdiction 3rd edition (2002) dealing with the question whether a claimant may seek summary judgment in the face of a jurisdiction challenge:

> "The answer ought to be, in general at least, that is not open to him. Although it is obvious that if the defendant feels compelled to put in evidence in answer to the application for summary judgment this cannot be seen as submission on his part, it is contrary to principle that a defendant who contends that the court has no jurisdiction over him should be drawn into an investigation of, or a contest in relation to, the merits of the claim. There is nothing clear in the rules to prevent an

application from being made on these grounds. Although as the acknowledgment of service -- the filing of which is a precondition of seeking summary judgment under Part 24 -- will certainly lapse at the determination of the application to dispute the jurisdiction, and it would be a welcome step for a court to rule that an acknowledgment of service which has been followed by an application under CPR Part 12 is not to be seen as an acknowledgment of service for the purposes of an application for summary judgment, at the very least the court will presumably be obliged to hear the jurisdictional challenge before the application for summary judgment, even if the claimant has contrived to have his application listed earlier or at the same time."

16. In paragraph 16 of his judgment, Lewison J noted that the filing of an acknowledgment of service was not a pre-condition of seeking summary judgment since the court can under CPR Part 24 can give permission for a summary judgment application to be made where no acknowledgement of service has been filed.

17. In paragraph 18, Lewison J said:

"Although, therefore, I accept that the court does have the power to permit an application for summary judgment to be made before an outstanding challenge to the jurisdiction has been determined, it seems to me that it will be a very rare case in which the court exercises that power. In general terms, as Mr Justice Rix says, the price that a claimant must pay for being able to bring foreign defendants before the court is that they have a real opportunity to decide whether or not to submit to its jurisdiction".

18. Lewison J's approach that it will only be in a rare case that an English court will exercise the power it has under CPR Rule 24.4(1) to permit an application for summary judgment against a foreign defendant who is challenging the jurisdiction of the court was approved by the Court of Appeal of England & Wales in *Moloobhoy & Anor v Kanani* (cited in paragraph 15 above.) In that case, however, it was held that an application for summary judgment could be made in the same hearing of a jurisdiction challenge since the defendant had clearly shown that he was going to contest the claim against him if his jurisdiction challenge failed and therefore he did not need 14 days in which to decide whether to submit to the jurisdiction or allow judgment to be entered in default.

19. The provisions in the CPR relevant to Lewison J's decision that are recited in paragraph 13 above are replicated respectively in the RDC rules as follows: 11.2(3); 12.2; 12.3; 12.8; 12.9; and 24.4.

20. It is submitted on behalf of the Defendant that: (1) given the similarity between the relevant provisions of the CPR and the RDC, the approach formulated by Lewison J in *Speed Investments* should be applied by the DIFC courts; and (2) pursuant to that approach the jurisdiction application should be heard and determined before the immediate judgment application because the instant proceedings have no exceptional features that justify a departure from the usual rule.

21. I decline to accept this submission. In my judgment, Lewison J's approach in *Speed Investments* has no application to this case. There, foreign defendants faced being sued to judgment in a contest on the merits in advance of the determination of their challenges to the jurisdiction of the English court, which judgments would likely be more readily enforceable in multiple jurisdictions outside England and Wales than if the defendant had simply allowed judgment to be entered in default. They would be more readily enforceable because the defendants would be held in those foreign jurisdictions to have submitted to the jurisdiction of the English courts. In the instant case, however, the claim is for the enforcement of a foreign judgment in the DIFC, possibly with a view, pursuant to the decision of the Court of Appeal in *DNB Bank,* to seeking a further order that the DIFC Courts enforcement judgment be referred to the Dubai Courts for execution in mainland Dubai. Submission to the jurisdiction of the Dubai Courts, however, is irrelevant to whether a foreign judgment should be enforced in the DIFC and I am aware of no authority (certainly none has been cited by the Defendant) that submission to the jurisdiction of the DIFC courts would have any bearing on whether a "foreign judgment' referred to the Dubai courts for enforcement would be enforced by those courts in mainland Dubai.

22. Enforcement of the New York Judgment via enforcement of an enforcement judgment of the DIFC Courts elsewhere than in Dubai and the DIFC is extremely unlikely, if not inconceivable. Instead, separate enforcement judgments founded on the New York Judgment would be sought in those of other jurisdictions.

23. In addition, the Defendant's defence to the immediate judgment application strongly appears to overlap entirely with what it claims to be part of its jurisdiction challenge, namely, its grounds for vacating the New York Judgment which will be advanced in the New York courts. Thus, it seems highly likely that if the jurisdiction and the immediate judgment applications were heard together, the Defendant's defence to the latter application would in any event be disclosed in its jurisdiction challenge.

24. In short, I am satisfied on the material before me that, for the reasons given in paragraphs 22 -24 above, if the immediate judgment application and the jurisdiction application are heard together, the Defendant will not suffer the adverse consequences sought to be avoided by the *Speedway Investments*

Conclusion

25. On the face of it, unless and until the New York Supreme Court vacates the New York Judgment, the Defendant owes the Claimants the very large sum of USD 171,769,169.00 and in these circumstances, given my conclusion that the *Speedway Investments* approach is inapplicable, I have no hesitation in ordering that the jurisdiction application and the immediate judgment application should be heard together, this being an arrangement which, depending on the outcome on the jurisdiction application, could lead to speedier justice and is one which equiperates both to that adopted in the *DNB Bank case* at first instance and to the normal practice in the DIFC Courts where applications to enforce arbitration awards are resisted by a cross-applications for setting aside the award.