THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) TRANSASIA PRIVATE CAPITAL LIMITED
(2) TA PRIVATE CAPITAL SECURITY AGENT LTD

Claimants

and

(1) MADOS TRADING COMPANY LLC
(2) MADOS GLOBAL FZE
(3) MR. SRIDHAR MELARKODE VAIDYANATHAN
(4) MS. MINU SRIDHAR
(5) MR. RAJESH KAMATH

Defendants

ORDER WITH REASONS OF JUSTICE MICHAEL BLACK

UPON the Claimants' Application No. CFI-079-2021/1 dated 5 January 2022 seeking immediate judgment (the "Claimants' Application")

AND UPON the Defendants Application No. CFI-079-2021/3 dated 7 December 2022 seeking to adjourn the Claimant's Application (the "Defendants' Application")

AND UPON considering the evidence and submissions filed and recorded on the Court file in support of the Claimants' Application and the Defendants' Application

AND UPON hearing Counsel for the Claimants and the Fifth Defendant in person on behalf of himself and all the other Defendants at the hearing on 14 December 2022 (the "Hearing")

IT IS HEREBY ORDERED THAT:

1. The Defendants' Application is refused.

2. The Claimants' Application is granted.

3. There will be judgment in favour of the Claimants against the Defendants and each of them -

    a) in the sum of USD 10,940,025 in respect of the unpaid balance of the principal of the loan under the Faciality Agreement;

    b) in the sum of USD 7,759,119.66 in respect of interest accrued thereon up to and including 14 December 2022;

    c) for an enquiry into the amount of the costs and expenses (including legal fees) incurred by the First Claimant in connection with the enforcement of or the preservation of any rights under any Transaction Document and the Security and any proceedings instituted by the First Claimant as a consequence of taking or holding Security or enforcing these rights and an order for payment of the amount found due if not agreed;

    d) for the Claimants' costs of the claim to be the subject of a detailed assessment if not agreed; and

    e) for a payment on account of the Claimants' costs pending assessment in the sum of USD 70,000.

4. The judgment sums shall bear simple interest as follows until payment in full:

    a) on the sum of USD 10,940,025 at the rate 20.5% from 15 December 2022;

    b) on the amount of any costs and expenses incurred by the First Claimant at the rate of 9% from the date ascertained or agreed; and

    c) on the payment on account of costs of USD 70,000 from 15 December 2022 and on the amount of any further costs, at the rate of 9% from the date of assessment or agreement.

Issued by:
Delvin Sumo
Assistant Registrar
Date of Issue: 20 December 2022
Time: 10am

Schedule of Reasons

INTRODUCTION

1. On 26 September 2021 (1) TransAsia Private Capital Limited ("TransAsia"), a company incorporated in Hong Kong and (2) TA Private Capital Security Agent Ltd ("TA"), a company incorporated in the British Virgin Islands commenced proceedings against (1) Mados Trading Company LLC ("Mados Trading"), a company incorporated in Abu Dhabi, (2) Mados Global FZE ("Mados Global"), a company incorporated in the Jebel Ali Freezone and (3) Mr Sridhar Melarkode Vaidyanathan, (4) Ms Minu Sridhar and (5) Mr Rajesh Kamath, all of whom have residence in Dubai.

2. The Claimants brought the following claims under:

1. A facility agreement dated 12 March 2019, entered into between TransAsia (the "Lender"), TA (the "Security Agent) and Mados Trading and Mados FZE (the "Borrowers") (the "Facility Agreement") for USD 11 million (USD 6.8 million of which had been disbursed between December 2018 and February 2019 under an agreement dated 10 December 2018 and subsequently agreed to be governed by the terms of the Facility Agreement) plus USD 4,958,902.80 interest as at 22 September 2021 and accruing thereafter until payment in full at the rate of 20.5% per annum plus all costs and expenses (including, but not limited to, legal fees) incurred by the Lender in connection with the enforcement of its rights under the Facility Agreement;

2. A deed of corporate guarantee by Mados Trading in favour of TA (as security agent for the Lender) and dated 12 March 2019 ("MTC Guarantee");

3. A deed of corporate guarantee by Mados FZE in favour of TA (as security agent for the Lender) and dated 30 July 2019 ("MGF Guarantee");

4. A deed of personal guarantee by Mr Vaidyanathan in favour of TA (as security agent for the Lender) and dated 12 March 2019 ("Sridhar Vaidyanathan PG");

5. A deed of personal guarantee by Ms Sridar in favour of TA (as security agent for the Lender) and dated 12 March 2019 ("Minu Sridhar PG"); and

6. A deed of personal guarantee by Mr Kamath in favour of TA (as security agent for the Lender) and dated 12 March 2019 ("Rajesh Kamath PG").

3. The sums claimed under the guarantees are the unpaid sums claimed to be due under the Facility Agreement. By the Corporate Guarantees the Guarantors absolutely, irrevocably and unconditionally guaranteed the full and punctual payment of any and all amounts, due and demandable, whether of principal, interest, fees or charges, if any, payable by the Borrowers to the Lender or to the Security Agent on its behalf, pursuant to the Facility Agreement and the other Transaction Documents on demand. By the Personal Guarantees the Guarantors irrevocably or unconditionally guaranteed to the Lender or to the Security Agent acting on its behalf, the payment of any of the Guaranteed Obligations (including all loans, interest and expenses incurred) in the event that the Borrowers are unable to pay.

4. On 24 October 2021, Mados Trading, Mados Global and Mr Kamath acknowledged service indicating and intention to defend all of the claim, as did Mr Vaidyanathan and Ms Sridar on 1 November 2021.

5. On 25 November 2021 Mr Kamath wrote to the Court enclosing a defence and 25 exhibits *"on behalf of the borrowers and defendants"*. The defence was some 13 pages of single-spaced type and contained 51 paragraphs (not counting sub-paragraphs). In summary it alleged:

1. A term sheet was executed on 4 December 2018 between TransAsia and Mados Trading for the funding of a mining joint venture in India;

2. There were delays in disbursing the loan monies that adversely affected the joint venture;

3. The Facility Agreement is subject to a Framework Agreement that was never executed and is therefore unenforceable;

4. There was no meeting of minds with regard to the Facility Agreement;

5. The Defendants signed the Facility Agreement on the tacit understanding that it would be adjusted at or after the final drawdown;

6. On 30 August 2020 the Claimants granted a three-month extension of the loan;

7. The late disbursement of facilities, once in a 100-year monsoon flooding of the mine workings and COVID 19 should be treated as Disruption Events within the meaning of the Facilities Agreement;

8. The facility is "intertwined" with the joint venture agreement;

9. "The defendant is not claiming that monies were not lent, or the interest rate and tenor was not agreed, the defense representation is that without the Framework Agreement the Facilities Agreement is bare and does not take into consideration the operative conditions of the Framework Agreement which is just not for reference's sake as the Facilities Agreement is SUBJECT TO the terms of the Framework Agreement."

10. The Guarantees also make reference to the Framework Agreement and were subject to disruption events.

6. On 5 January 2022, the Claimants applied for immediate judgment under Part 24 of the DIFC Court Rules.

7. On 10 March 2022, it was ordered by consent that the immediate judgment hearing was vacated, and the proceedings were stayed until 30 June 2022 or until the Claimants requested a new date for a hearing of the Claimants' Application.

8. On 25 July 2022, the stay was extended by consent until 31 August 2022 or until the Claimants request a new date for a hearing of the Claimants' Application.

9. On 11 October 2022, the Claimant applied to amend the Particulars of Claim to update the accrued interest claimed as at 16 September 2022 to USD 7,204,673.12 and to plead that the parties entered into a Payment Deed on 1 March 2022 which provided that the Borrowers and Personal Guarantor acknowledged the debt of USD 11,000,000 and agreed a schedule of repayments which would have seen a minimum repayment by 30 June 2022 of USD 300,000 failing which the Lender would be entitled to reinstate the proceedings against the Defendants. It was pleaded that in the event the Borrowers only re-paid USD 59,975 and the Lender terminated the Payment Deed. Permission to make the amendment was given on 10 November 2022.

10. In the meantime, on 21 October 2022, the Claimants had issued an amended application for immediate judgment and also on 10 November 2022, the Court directed that the Hearing of Claimants' Application take place on 14 December 2022.

11. On 29 November 2022, the Defendants intimated an application to adjourn the Hearing by email which was acknowledged by the Court on 30 November 2022.

12. On 7 December 2022 the Defendants filed the following application:

> 1. The Defendants Application made pursuant to Part 25.16 and or 23 of RDC 2014 for interim remedy from all proceedings with this court is granted with leave to refile the defence within XX days of this order
>
> 2. The Claimants to reply to refiled defence within XX days
>
> 3. The hearing for Immediate Judgement Application is adjourned *sine die*
>
> 4. The Claimants are ordered not to initiate or execute any Freezing Orders from any other jurisdiction till this matter is before this court
>
> 5. The Claimants are jointly and severally liable to pay and shall pay the Defendants costs of this Application.

13. On 8 December 2022, the Claimants filed the Third Witness Statement of Nicholas Sharratt in opposition to the Defendants' Application and on the following day a skeleton argument in support of the opposition to the Defendants' Application and in support of their application for Immediate Judgment.

14. On 9 December 2022, the Court directed that the Hearing on 14 December 2022 would commence 30 minutes earlier in order to allow the Defendants' Application to be heard. The Court stated that the Judge would first hear the Defendants' Application and thereafter the Judge would decide on whether he would proceed with the Claimants' Application or not. The Defendants were advised to be prepared to argue the Claimants' Application in the event the Judge proceeds to hear it.

15. On 12 December 2022, the Defendants filed the Second Witness Statement of Raj Kamath in reply to the Third Witness Statement of Nicholas Sharratt.

16. On 13 December 2022, the Claimants filed the Fourth Witness Statement of Nicholas Sharratt. It was directed to addressing new arguments raised by Mr Kamath in his witness statement of the previous day, in particular the allegation that the Claimants (and by necessary implication their lawyers) perpetrated a fraud as set out at paragraph 24(4) below. Given the novelty and seriousness of the allegation I permitted the witness statement to be taken under consideration. The Claimants also served their Statement of Costs.

THE DEFENDANTS' ADJOURNMENT APPLICATION

17. The Defendants' Application is supported by a professional-looking witness statement of Mr Kamath dated 29 November 2022.

18. The witness statement complained that unbeknown to the Defendants the Claimants applied for and were granted through the Abu Dhabi court an *ex-parte* freezing order on the sole operating bank account with Bank of Baroda Dubai; the *ex-parte* order was never served. The freezing order was discovered when cheques bounced. The approximate month of freezing was September 2021 and `unfrozen' strictly as a condition subsequent to signing the Payment Deed in March 2022.

19. The witness statement claimed that the First Defendant's entire operation came to a standstill along with the lives and livelihoods of the Third, Fourth and Fifth Defendants. It was said that the Defendants could not obtain legal representation and had to file a self-represented defence on 25 November 2021.

20. The Defendants seek an order staying proceedings under RDC Part 25.16 and Part 23 in order to permit it to refile their defence.

21. I pause to observe that Part 25 arguably may not the appropriate Part under which to bring the Defendants' Application, the more appropriate rules would be rules 4.2(6) and 18(2). These are inconsequential errors and cause no prejudice. The Court is content to cure them under rule 4.51(2).

22. The witness statement sets out the grounds for the Defendants' Application:

> 1. The rule that a company cannot be self-represented by its officers and must be represented by lawyers, advocates, solicitors and barristers, only in extremely exceptional cases under narrow scope are officers of the company allowed to represent the company. The witness statement cited a number of non-DIFC cases (without producing copies) and referred to RDC rule 35.44;

2. The Claimants by their actions of the unserved ex-parte Freezing Order being executed with Bank of Baroda Dubai September 2021 onwards to March 2022:

(a) Took these rights away from Defendants to hire and pay for a competent solicitor to represent the company and file a proper defence. The Claimants then relied on this forced self-represented defence filing to apply for immediate judgement citing RDC part 24 and especially Part 24 (2);

(b) The Defendants before filing their defence sought DIFC pro-bono lawyers which was denied wherein the undersigned pleaded for assistance as Defendants did not know the legal language or whom to address the defence to something basic which any lawyer would know;

3. The Third, Fourth and Fifth Defendants wish to file separate defences relying on Article 6 of the Human Rights Act 1998. The personal savings and assets of these Defendants were already under personal guarantee agreements and could not be further liquidated to launch a proper defence. With the freezing of the only active bank account of their primary employer the Defendants could not draw salaries to be able to pay for living expenses let alone pay for legal representation and assistance;

4. It would be a travesty of justice if the defence filed by unrepresented Defendants was used against them, when the cause of being unrepresented was the Claimants' action in another UAE jurisdiction despite agreeing to DIFC as the exclusive jurisdiction.

23. The Claimants' evidence in response stated the following:

1. The attachment order was issued by the Abu Dhabi Courts on 20 October 2021. At the time the attachment was made, only AED 4,948.53 (USD 1,347.29) was in the First Defendant's bank account;

2. The attachment order was lifted in March 2022 following the entry into the Payment Deed;

3. The defence was filed on 24 November 2021, if the Defendants needed more time to file the same to instruct counsel, they should have done so at the time or at the very least shortly after the defence was filed not 2 weeks before the hearing of the immediate judgment application;

4. The Defendants missed the deadline to file a response to the Claimants' immediate judgment application (which was 4 November 2022 as set by the Court), notwithstanding the fact that they had 6 weeks to prepare the same. On 12 October 2022, they had stated in an email *"please wait for our answer on or before 10th of November 2022 per RDC 23.46(2) by email which has been accepted as the mode of service by both parties"*. This was repeated on 13 October 2022 stating, *"This time though we have managed to get legal representations whose forms are being filed and we believe with over 241 pages from evidence from the claimants side alone and defendants reply which will include other supportive evidence will also be the substantial. As such time needs to be provided to defendants as required by RDC 23.46 (2) to file a reply by the 10th of November."* However, a response was never filed;

5. It was only after a hearing date was fixed by the Court, on 8 November 2022, that the Defendants then changed their position by indicating that they will be filing an application under Part 23 to re-file their defence and that the immediate judgment application should be withdrawn entirely;

6. The Defendants submitted to the Registry that they intended to appoint "Senior Counsel" based in India to represent the Defendants at the immediate judgment hearing and accordingly used this as a basis to try and push back the hearing date until as late as 20 December 2022 onwards -

(a) On 25 October 2022 the Defendants wrote to the Court

"In India October and sometimes November is festival season, with courts and its officers also on vacation. Accordingly, our counsel is coming back from vacation 30th of October; but since it was your direction to respond by the 25th October 4pm we have chased down his scheduler in Kolkata to give us chunks of dates December 2022 to January 2023 per your email of the 17th. We have been advised that for December and January 2023 he will be available December 20th onwards and all of January 2023 as required subject to final confirmation on timings. Senior Counsel hopes to be representing defendants by Video Conference (VC) for which we request your kind permission, we also seek your understanding to reconfirm these dates once Senior Counsel is back from vacation."

(b) And on 26 October 2022

"We had asked the dates for December and January 2023 per your direction of 17th of October, and scheduler of Senior Counsel has given the dates 20th December to 31st of January 2023 as the blocks. Subject to reconfirmation once Counsel is back. The senior counsel in question not only represents commercial cases in the High Court of Calcutta and Supreme Court of India but is also qualified in UK/English Law where he is currently on break."

(c) And on 2 November 2022

"Per our email on the 27th October we are trying to get the 12th of December date for hearing, the senior counsel is trying to give those dates by moving his schedule. At this stage we have managed to agree for 19th of December onwards for the said Senior Counsel to attend to the hearing. He has just come back from vacation as courts have just opened and trying his best to accommodate registry date of 12th December onwards. It would be extremely prejudicial to force a date upon the defendants where counsel is not present."

(d) And on 7 November 2022

"I am having a call tomorrow being the 8th of November again at 7PM India time to get exact time required for the hearing from

Counsel. Today he mentioned 2-3 days for the same but exact time he has requested a day to analyse and inform ... We are submitting application for part 23 by tomorrow the 8th of November hopefully, we believe this will have an effect on the current application 01. Do please grant us the leave to do so".

(e) And on 8 November 2022

"That defendants are in the process of putting together a Part 23 application and submission for the revised claim submission which covers a lot more than earlier anticipated. There has been a lot that has come to light after counsel was hired in this case which will require ventilating of this at a proper trial, defendants plan on calling witnesses not only from claimants' side but also from third parties who are part of the various agreements."

24. In his Second Witness Statement Mr Kamath submitted that:

1. Clauses 35.6 and 35.6 of the Facility Agreement is in the following terms:

31.5. JURISDICTION

If the Parties have not resolved the matter in dispute within the period provided for in Clause 31.4, such matter in dispute shall be referred to the DIFC Courts. The Parties agree to submit to the exclusive jurisdiction of the DIFC Courts. Any decision passed by the DIFC is deemed final and binding on the Parties.

31.6. The Lender and/or the Security Agent, as the case may be, may, however, bring proceedings in connection with this Facility Agreement (including their existence) in any court of competent jurisdiction and, to the extent allowed by law, take concurrent proceedings in any number of jurisdictions.

which amounted to *"an attempt at an Asymmetric Jurisdictional Clause [that] fails miserably"* because for this to be an Asymmetric Jurisdictional Clause, it should have restricted one party to an exclusive jurisdiction while allowing the other party the liberty to sue in any jurisdiction, but the Faciality Agreement fails to achieve this by tying all parties to the exclusive jurisdiction of DIFC Courts whose decisions are final and binding on the parties;

2. By executing an interim freezing order/Provisional Attachment Order from the Abu Dhabi courts and by initiating proceedings in Indian courts the claimants are in successive breach of this jurisdictional clause. In *AMT Futures Ltd v Boural & Ors* [2018] EWHC 750 (Comm) despite all parties agreeing to the exclusive jurisdiction of English courts one of the parties commenced action in German courts, the English court ruled that the aggrieved party can bring counter claims against this breach and is also entitled to seek damages against the lawyers for allowing such successive breaches when the matter is in pendency with the English courts;

3. Per Article 114 of UAE Civil Procedure Law once an Interim/provisional attachment Order is issued within 8 days a full-fledged case/claim is to be lodged and served in the competent court having issued the order and failure to do so nullifies the attachment order. The Claimants' intent in concealing this breach appears to cripple the defence either to get a quick default judgement or in aid of an immediate judgement application or to force Defendants into signing the `payment deed' which was proposed just after the Application for Immediate Judgment was made on the 29th of December 2021 or some other *malafide* intentions other than recovery of debt;

4. The Claimants fraudulently misled, misrepresented, and concealed information that having NOT filed a case/claim in competent UAE Onshore court within 8 days the attachment order had no effect; the Claimants committed wilful sabotage and fraud causing Defendant financial losses and impaired ability to settle the debt with the Claimant;

5. Why did the Claimants not apply to the DIFC Courts for a freezing order under Article 22(2) of the DIFC Court Law?

6. The fact that there was only AED 4948.43 in the frozen account was *"just a momentary cashflow trough that happens in business especially in September 2021 when India was just coming out of second COVID19 wave"* and *"redacted bank statements for the past 10 years of the said bank accounts which shows a total of 19m USD in credits in the USD account and over 30m AED in the AED accounts"*. Why did the Claimants not lift the Freezing Order once they discovered there was so little in the accounts?

7. When the said order was lifted in March 2022, it was the Defendant intentions as can be seen in good faith to completely settle Claimants monies;

8. The Third, Fourth and Fifth Defendants poured personal assets and money into the Joint Venture and so *"the Claimants suggestion as repartee to this application that Defendants 3-5 should have used personal assets to raise a defence is ludicrous";*

9. The Defendants were prevented from seeking legal representation by the freezing order and have since been trying in earnest to get legal representation. The Indian Senior Counsel having come back from leave in early November spent time perusing the case files, and the part 23.46 filing to be filed by the defendants per 8th November 2022 correspondence was to extend the time required to file a reply to the updated claim documents. This part 23 application came about when Senior Counsel upon perusing the documents came up with the fact that defence filing was not filed in the formats and did not cover points that a legal counsel would include in the filings;

10. The point of law is that the jurisdictional provisions of the Facility Agreements were breached and not disclosed despite requests, in a manner that Bank of Baroda was fraudulently misled to believe that the attachment order had permanency and could only be vacated upon Claimants notification. Procedural rights to counsel were denied by this breach which resulted in Defendants forced to file defence without representation;

11. It is also worth noting that multiple efforts to settle this loan before and after maturity has been attempted by the defendant, the latest being the Letter of Intent sent on the 22nd of November 2022 to offer settlement which claimant has not conclusively confirmed or declined, other

than stating their intent to continue with legal action to what end with what intention is unknown.

25. The Defendants requested that:

1. the Claimants' Application be vacated as it is inchoate, premature and void ab *initio* as defendants had already flagged the breach last year and requested for representation to file a proper defence;

2. the Defendants be allowed to refile defence under guidance of counsel;

3. adequate time be given for Defendants' Auditors to assess the real money impact of this freezing order so that counterclaims can be lodged;

4. given the complexities of the case with questions on jurisdiction, fraudulent misrepresentation, successive breaches, banking and other witnesses to be cross examined which require proper ventilating that this be consigned to a full trial instead of an immediate judgement Hearing.

THE PARTIES' SUBMISSIONS ON THE ADJOURNMENT APPLICATION

26. The Claimants refer to RDC rule 26.91 which states:

The Court will not postpone any other hearing without a very good reason, and for that purpose the failure of a party to comply on time with directions previously given will not be treated as a good reason.

27. They also direct the attention of the Court to Al Rihab v Emirates NBD Bank [2020] DIFC CA 006 (05/04/21) in which the Court of Appeal observed:

120. More particular considerations apply to the adjournment of a hearing on the basis of an application made at the last minute. In such a case, Steel J observed in Corinth Pipe-works SA v Barclays Bank PLC:

Unquestionably, the Court approaches an application for an adjournment in the circumstances with a considerable degree of caution if not scepticism.

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124. It is also submitted that the Judge erred by entertaining grave doubts with respect to the bona fides of the application. However, that view was well within the range of views reasonably open to the Judge on the materials before him. No reasonable explanation had been given for the failure to take any action in response to service of the proceedings, viewed in a context in which the evidence established that there had been no meaningful response to notices served on Al Rihab in January and February 2020 which are themselves to be viewed in a context in which Al Rihab had been in default of repayment of principal for more than four years, and in default of payment of interest for more than three years. As the Judge noted, the submissions made by Ms Al Jaber were inconsistent - first she stated that a month was required to properly pre-sent Al Rihab's case, but she then indicated a week would be sufficient.

125. It is also significant that when the Judge expressly requested Ms Al Jaber to advise the Court of the nature of Al Rihab's defence to the claim, no meaningful response was provided. There was nothing on the papers before the Judge to suggest that there was any possible line of defence open to Al Rihab, and indeed, two appeal hearings and many months later there has never been any indication of any defence to ENBD's claim under the mortgage - the most that has been said, more than six months after the hearing before the Judge, is that the Court should have given ENBD more time before ordering foreclosure - a proposition not advanced by Ms Al Jaber.

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127. In all the circumstances the Judge was quite entitled to view the last-minute application for an adjournment with considerable scepticism and to entertain serious doubts with respect to its bona fides. The Judge does not say so expressly, but we would expect that he also took into account the policy evident in RDC 29.60, [sic - it should be 26.90] to the effect that adjournment of hearings is a last resort. If this Court were to adopt a practice of condoning complete inaction following service of legal proceedings, without any cogent reason or justification, and then reward such inaction with the grant of an adjournment of a listed hearing following an application brought at the last minute, the orderly business of the Court would become shambolic, to the detriment of all litigants before the Court and to the detriment of the efficient utilization of the limited resources of the Court. Irrespective of whether the Judge took this aspect of this matter into account, it is amongst the reasons why we consider this ground of appeal is entirely without substance.

28. The Claimants submit that the Defendants' Application should be dismissed as the Court should treat it with extreme scepticism and as lacking bona *fides* in that it has been made very late in the day and the issues raised by the Defendants' Application could have been raised at any point before or after the original defence was filed over a year ago. The Claimants point out that the freezing order only froze AED 4,948.53 in Mados Trading's account with Bank of Baroda and the order was in any event lifted in March 2022 and so cannot account for the Defendants' inaction thereafter.

29. The Claimants say that there is no impediment to a company filing a defence in its own name. The Claimants suggest that *"The restriction on companies representing themselves, in RDC 35.42, is limited to representation at trial"*. This statement is not entirely accurate. RDC rules 35.42 to 35.46 provide:

35.42

A company or other corporation may be represented at trial by an employee who is not otherwise authorised to appear before the Court if:

(1) the employee has been authorised by the company or corporation to appear at trial on its behalf; and

(2) the Court gives permission.

35.43

Where a party is a company or other corporation and is to be represented at a hearing by an employee, the written statement should contain the following additional information:

(1) The full name of the company or corporation as stated in its certificate of registration;

(2) The registered number of the company or corporation;

(3) The position or office in the company or corporation held by the representative; and

(4) The date on which and manner in which the representative was authorised to act for the company or corporation, e.g. _____ 20____: written authority from managing director; or _____ 20____: Board resolution dated _____ 20____ .

35.44

Although Rule 35.42 allows a company or other corporation with the permission of the Court to be represented at trial by an employee, the complexity of most cases in the Court will make that unsuitable. Accordingly, permission will be given only in unusual circumstances.

35.45

Permission under Rule 35.42 should be obtained in advance of the hearing from the Judge who is to hear the case. If it is for any reason impracticable or inconvenient to do so, the permission should be obtained from any Judge by whom the case could be heard.

35.46

The permission may be obtained informally and without notice to the other parties. The Judge who gives the permission should record in writing that he has done so and supply a copy to the company or corporation in question and to any other party who asks for one.

The section of the RDC is headed "Representation at trial of Companies or Other Corporations 35.41 - 35.47", but I would be inclined to apply the provisions to other hearings too. Rule 35.42 does not contain a restriction, it is to the opposite effect, it is permissive. The Rule is qualified by Rule 35.44 which provides some guidance as to how the Court's discretion might be exercised, but it does not fetter it. Rules 35.45 and 35.46 indicate that the Court will exercise its discretion flexibly to ensure that a company is not denied access to justice.

30. The Claimants note that the Fifth Defendant's witness statement cites various cases, but those cases were not decided under RDC 35.42 and in any event the onus was on the First and Second Defendants to regularise the position in a timely manner. The defence was validly served on behalf of the Third to Fifth Defendants, whose bank accounts were not frozen and who are entitled to represent themselves.

31. The Claimants submit that the Defendants have had the benefit of counsel's advice but have not produced an amended defence nor have they given any indication of any defence that they might file. This is indicative of there being no valid defence and, in any event, the Defendants should not be entitled to rely on their own delays to prevent the Claimants' Application from being heard.

32. At the Hearing, Mr Kamath disclosed that the Defendants were represented by 2 counsel in India in connection with proceedings brought by the Claimants there. They are apparently being paid by the Defendants' Indian entity. The Court asked why the same lawyers being paid to deal with the same claims could not be instructed in the DIFC. Mr Kamath said that DIFC lawyers are more expensive and said first that both lawyers had pending claims for admission for rights of audience in the DIFC, then he said the Senior Counsel refused to apply for rights of audience because he regarded the process as an offence to his *"prestige or honour"* and then he said that neither counsel had made application to appear before the DIFC courts but the junior counsel was willing to do so.

33. The Court finds these explanations unconvincing as to why the Defendants are represented in India but not in the DIFC. Not only are they internally contradictory but the Court finds it odd that counsel should charge fees at one level in India and at a higher level for the same work in the DIFC. If senior counsel does genuinely regard it as beneath his dignity to appear before this Court, there are advocates in numerous jurisdictions who do not share the same extraordinary view.

34. Mr Kamath disputed that the Defendants' Application was "last minute" but I find that assertion contrary to the facts.

CONCLUSIONS ON THE DEFENDANTS' ADJOURNMENT APPLICATION

35. The threshold question is whether any hearing should be allowed to proceed without any of the Defendants appearing by way of legally-qualified representation.

36. It is clear that the corporate defendants have had and certainly do now have the benefit of legal advice.

37. The defence filed on 25 November 2021 was a lengthy and comprehensive document making cogent points about the inter-relation between

the Facility Agreement, the unexecuted Framework Agreement and the joint venture agreement the finance of which was the object of the loan transaction - in particular that the impact of COVID19 and monsoon flooding amounted to Disruption Events within the meaning of the Facility Agreement and Guarantees.

38. The sophistication of the Defence persuades me that either Mr Kamath is personally quite able to represent the corporate defendants (an impression confirmed by his fluency at the oral Hearing) or he had legal assistance or both.

39. It is also clear that from at least 13 October 2022 the Defendants have had legal representation as they so informed the Court by email (see paragraph 23.4 above) and from at least 2 November 2022 the Defendants had retained Senior Counsel in India (see paragraph 23.6(c) above).

40. The Defendants have chosen not to instruct counsel to attend the Hearing. I do not accept that it would be impossible for them to have found competent counsel. In my judgment this is a deliberate attempt to maintain the fiction that they continue to be unrepresented and to exploit the guidance in RDC 35.44 that complex matters usually make it unsuitable for companies to be represented by their employees. This takes the situation out of the ordinary run of cases where (for example) a company representative might attend court after the recent service of proceedings to be advised that the company should obtain legal representation given the nature of the claim.

41. I therefore had no hesitation in permitting Mr Kamath to represent the corporate defendants at the Hearing. So far as the Third and Fourth Defendants are concerned, the Fifth Defendant has the right to address the Court as a litigant in person and his interests are identical to theirs, consequently I was content to accept his submissions on behalf of all of the human defendants. I regard the situation as quite different from the so-called "McKenzie Friend" (a lay advisor assisting a litigant in person) seeking permission to address the court when the court would likely be reluctant to grant such permission.

42. I turned then, having considered Mr Kamath's submissions, to decide whether or not to adjourn the Claimants' Application.

43. I was not minded to adjourn the Claimants' Application. The primary reason was that before the Court would be willing to adjourn the Claimants' Application, it would have to be satisfied that that the Defendants had a defence to the claims rather than (as the Claimants contend) indulging in *"a transparent attempt to prevent or delay the immediate judgment application":* Al Rihab [125].

44. The Court of Appeal in *Al Rihab* spoke of *"any possible line of defence",* but I do not think they were purporting to lay down any sort of test. In my view, the test must be the disclosure of a defence with a realistic prospect of success. This is the same test as that for immediate judgment and I will shortly address what that entails, but for present purposes, in summary, the defence must be more than merely arguable. Where there is a last-minute application to adjourn a trial or a hearing that may have significant adverse consequences for the applicant it seems to me that requiring the demonstration of a defence with a realistic prospect of success gives practical effect to the necessary degree of caution or scepticism.

45. If that is right, the application for adjournment merges with that for immediate judgment: if the Defendants are able to show a defence with a realistic prospect of success, they will succeed in resisting the application for judgment and would be entitled to seek permission to file an amended defence in the normal away. If they are not able to show a defence with a realistic prospect of success, the Claimants will be entitled to judgment and the adjournment would only serve to keep the Claimants out of their entitlement.

46. The Defendants' evidence addresses both the Claimants' Application and the Defendants' Application. While there is a degree overlap the principal grounds advanced for the adjournment are: first, that the corporate defendants cannot be self-represented by its officers and must be represented by lawyers, advocates , solicitors and barristers; only in extremely exceptional cases under narrow scope are officers of the company allowed to represent the company; secondly, that the *ex-parte* Freezing Order prevented the Defendants from hiring and paying for a competent solicitor to represent the company and file a proper defence; and thirdly, the Third, Fourth and Fifth Defendants wish to file separate defences relying on Article 6 of the Human Rights Act 1998. The personal savings and assets of these Defendants were already under personal guarantee agreements and could not be further liquidated to launch a proper defence. The freezing of the only active bank account of their primary employer meant the Defendants could not draw salaries to pay for legal representation and assistance.

47. The issue of self-representation is now moot as I have given permission for Mr Kamath to represent the First and Second Defendants.

48. I am unable to accept that the Freezing Order ever prevented the First and Second Defendants from appointing legal representation. There were minimal funds in the frozen account. The Dependants have produced redacted bank statements of Mados Trading in an attempt to show that the account was active and when frozen there was a *"momentary cashflow trough"*.

49. On the face of the documents produced, the AED statement shows no activity in the 8 years between January 2013 and August 2022 and the USD statement shows a similar picture between December 2012 and August 2022. On their face, if the statements evidence anything it is that the accounts were dormant when frozen in September 2021 and activity only resumed 5 months after the Freezing Order was lifted in March 2022.

50. In his oral submissions Mr Kamath said this was a misleading impression because he only produced the first and last pages of the statements. That is not what he said at page 5 of his Second Witness Statement: *"Defendants submit (Pgs 64-67) the redacted bank statements for the past 10 years of the said bank accounts which shows a total of 19m USD in credits in the USD account and over 30m AED in the AED accounts." "The redacted bank statements for the past 10 years"* would indicate that the production is a comprehensive bundle. Also, there is no apparent page numbering of the statements.

51. Whether or not the bank statements are comprehensive they have been redacted to show only the total of credit payments whereas the debits and balances have been obscured, consequently I regard the statements as without any evidential value.

52. The English Human Rights Act 1998 has no application in the DIFC. The Third, Fourth and Fifth Defendants have produced no evidence to show they were prevented from instructing legal representatives.

53. In any event, on their own admission, the Defendants do appear to have had the benefit of legal representation since at least 13 October 2022

paid for by their trading entity in India - whose finances have not been disclosed to the Court.

54. Thus, if I am wrong about the test to be applied in relation to demonstration of a defence when making the application to adjourn, I do not consider that an evidential basis for the adjournment has been made out and consequently I would also refuse the Defendants' Application on that basis.

THE APPLICATION FOR IMMEDIATE JUDGMENT - ASSERTED DEFENCES

55. The test for immediate judgment is set out in RDC 24.1:

> The Court may give immediate judgment against a claimant or defendant on the whole of a claim, part of a claim or on a particular issue if:
>
> 1) it considers that:
>
> a) that claimant has no real prospect of succeeding on the claim or issue; or
>
> b) that defendant has no real prospect of successfully defending the claim or issue; and
>
> 2) there is no other compelling reason why the case or issue should be disposed of at a trial.

56. The Claimants referred me to *Estate of Christos Papadopoulos v Standard Chartered Bank* CFI-004-2017 (27/02/18) at [16] (per Justice Sir David Steel)

> *16. There was as might be expected no dispute on the correct approach to an application for immediate judgment. The issue was considered in a judgment of Justice Roger Giles dated 18 October 2016, GFH Capital Limited v David Lawrence Haigh [2014) DIFC CF1 020. In summary, I adopt his approach that the elements to be taken into account in the DIFC are as*
>
> follows
>
> *(a) An application for immediate judgment may be based on a point of law, the evidence which can reasonably be expected to be available at trial or the lack of it, or a combination of these, as provided by RDC 24.2;*
>
> *(b) The Court must consider whether the respondent to an application for immediate judgment has a "realistic" as opposed to "fanciful" prospect of success; where a fanciful claim is one that is entirely without substance;*
>
> *(c) A realistic prospect of success requires some degree of conviction and not one that is merely arguable;*
>
> *(d) The Court should avoid conducting a mini-trial without disclosure or oral evidence;*
>
> *(e) The Court is not required to take everything that a party says in its witness evidence at face value and without analysis. Factual assertions may have no real substance, particularly where they are contradicted by contemporaneous documents;*
>
> *(f) The Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process;*
>
> *(g) The Court must take account of evidence actually placed before it on the application for immediate judgment and the evidence reasonably expected to be available at trial;*
>
> *(h) Allegations of fraud may pose particular problems;*
>
> *(i) The overall burden of proof remains on the claimant to establish that there are no real prospects of success and no compelling reason for trial;*
>
> *(j) The Court should hesitate to make a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case;*
>
> *(k) There will be a compelling reason for trial where there are circumstances*
>
> *that ought to be investigated.*
>
> *See also Nest Investments Holding Lebanon et al v. Deloitte & Touche et al Claim No: CFl-027-2016.*

57. The Claimants also direct my attention to the *GFH Capital* case ([2014] DIFC CFI 020 at [9]) to indicate that the principles set out in the preceding paragraph are derived from English law and that the English Courts regularly warn against arguments based on *`a Micawberish speculation that something will turn up'* (see, for example, *Elite Property Holdings Limited v Barclays Bank PLC* [2017] EWHC 2030 (QB) at [47] (per HHJ Waksman QC [as he then was]).

58. The Defendants have admitted the loan and the failure to repay the same:

> 1. In the defence it is said *"The defendant is not claiming that monies were not lent, or the interest rate and tenor was not agreed . "* (paragraph 5.9 above);
>
> 2. Paragraph 1.4 of the Payment Deed dated 1 March 2022 stated:

1.4 Each of the Borrowers and the Personal Guarantor hereby acknowledges and agrees that the aggregate outstanding principal owing to Lender pursuant to the Facility Agreement as at 8 February 2022 is US$11,000,000 (the Outstanding Principal) and has agreed, on joint and several basis, to make payment of the Outstanding Principal, together with interest and/or other fees incurred pursuant to the Facility Agreement (together with the Outstanding Principal, the Outstanding Amount) on the terms and subject to the conditions set out in this Deed.

3. In his Second Witness Statement Mr Kamath stated:

(a) When the said order was lifted in March 2022 it was the Defendant intentions as can be seen in good faith to completely settle Claimants monies (paragraph 24.7 above); and

(b) multiple efforts to settle this loan before and after maturity has been attempted by the defendant (paragraph 24.11 above).

59. In my judgment, it is strongly arguable that taken together the foregoing amount to an admission of liability on the part of all of the Defendants, but I will nevertheless consider each of the potential grounds of defence that emerge from the pleaded defence and from the witness statements as filed. They may be summarised as follows:

1. There were delays in disbursing the loan monies that adversely affected the joint venture;

2. There was no meeting of minds with regard to the Facility Agreement;

3. The Facility Agreement is subject to a Framework Agreement that was never executed and is unenforceable;

4. The late disbursement of facilities, once in a 100-year monsoon flooding of the mine workings and COVID 19 should be treated as Disruption Events within the meaning of the Facility Agreement;

5. The facility is "intertwined" with the joint venture agreement;

6. By executing an interim freezing order/Provisional Attachment Order from the Abu Dhabi courts and by initiating proceedings in Indian courts the Claimants are in the jurisdictional clause in the Facility Agreement;

7. The Claimants fraudulently misled, misrepresented, and concealed information that having NOT filed a case/claim in competent UAE Onshore court within 8 days the attachment order had no effect; the Claimants committed wilful sabotage and fraud causing Defendant financial losses and impaired ability to settle the debt with the Claimant;

8. A "roll-over" of the Facility Agreement was agreed;

9. The Guarantees also make reference to the Framework Agreement and were subject to Disruption Events.

Both Mr Kamath and Mr Temple (Claimants' counsel) agreed that this was a fair summary of the defences. I have reordered the list in this judgment slightly to reflect a more logical order than I provided during the Hearing.

60. There is no evidence that there were delays in disbursing the loan monies under the Facility Agreement. It is asserted in the defence, but not addressed in either witness statement. I have examined the exhibits to the defence and note that the Term Sheet which it is alleged the Claimants contravened was no more than a statement of *Indicative* Terms and Conditions. Consequently, it gave rise to no binding obligations on the Claimants.

61. In addition, the defence makes reference to, but does not exhibit, the Transaction Finance Agreement dated 10 December 2018. The Facility Agreement records that pursuant to the Transaction Finance Agreement and Facility Increase Letters dated 10 January and 20 February 2019 the Lender had disbursed USD 6.8 million between 10 December 2018 and 20 February 2019. It was agreed that the Facility Agreement would override and substitute the Transaction Finance Agreement with an effective date of 10 December 2018. Section 6 of the Facility Agreement provided for the actual drawdown dates as the Drawdown Schedule and for subsequent drawdowns to be decided by the Lender. I do not agree with the Claimants' submission that the pre-facility advances are irrelevant to the Facility Agreement as the Agreement's effective date caught those advances. However, given that the contractually agreed dates for those advances were the actual draw downs it is impossible for there to be any claim for alleged delay in making them. The allegations of delay are therefore unarguable.

62. The allegation that there was no meeting of minds with regard to the Facility Agreement is hard to understand. Reference is made in the defence to Exhibit 12 which contains emails evidencing pre-contractual negotiations but since the Facility Agreement was executed thereafter it is hard to see anything in this point. In oral his submissions, Mr Kamath suggested that while it is true the Defendants signed the Facility Agreement as drafted it did not reflect what had been agreed but they were induced to do because during a telephone call (which he accepted had not been previously mentioned nor which is otherwise evidenced) the Claimants said that no more money would be forthcoming unless the Defendants signed the Facility Agreement. The Claimants were not bound to make any further funds available to the Defendants and so even if what Mr Kamath said were true it would provide no basis for a defence to a claim under the Facility Agreement.

63. Mr Kamath also sought to suggest that the Facility Agreement was entered into on the basis that there would be in addition a Framework Agreement and that the absence of the Framework Agreement rendered the Facility Agreement voidable for mistake (albeit he admitted that this was a new point and no attempt had been made to avoid the agreement) and unworkable.

64. It is true that there are multiple references to the Framework Agreement in the Facility Agreement and Guarantees and that no Framework Agreement exists. In the Facility Agreement:

1. Recital B refers that the Lender has agreed the provide the facility *"subject to the terms of the Framework Agreement";*

2. Recitals D and I say that the Facility Agreement shall be read with the Framework Agreement;

3. Recital J states that the recitals contained in the Framework Agreement shall be incorporated by reference into the Facility Agreement;

4. Clause 1.1 provides that unless otherwise expressly stated, capitalized terms and expressions used in the Facility Agreement (including in the above Recitals and attached Schedule) shall have the meaning ascribed to them in the Framework Agreement;

5. Clause 3.1.4 makes it a breach of the Facility Agreement if any part of Facility is used for a purpose other than provided in the Facility Agreement read with the Framework Agreement;

6. The signature clause actually refers to the Facility Agreement as the Framework Agreement.

65. The MTC Guarantee repeats that that the recitals contained in the Framework Agreement shall be incorporated by reference, that unless otherwise expressly stated, capitalized terms and expressions used in the Facility Agreement (including in the above Recitals and attached Schedule) shall have the meaning ascribed to them in the Framework Agreement, that clause 1.2 (Construction) of the Framework Agreement and any other provision of the Framework Agreement which, by its terms, purports to apply to all the Transaction Documents shall apply to this Corporate Guarantee as if set out in it and that Guarantor confirms that he has read and agrees to all the terms of the Framework Agreement.

66. The MFG Guarantee provides that the recitals contained in the Framework Agreement shall be incorporated by reference, that unless otherwise expressly stated, capitalized terms and expressions used (including in the above Recitals and attached Schedule) shall have the meaning ascribed to them in the Framework Agreement and that the Framework Agreement is included in the definition of Transaction Documents.

67. The Personal Guarantees provide that all recitals contained in the framework agreement entered into between the Lender, the Security Agent and the Borrowers dated [sic] ("Framework Agreement") shall be deemed incorporated by reference, that unless otherwise expressly stated herein, capitalized terms and expressions used in the Personal Guarantee (including in the above Recitals and attached Schedule) shall have the meaning ascribed to them in the Framework Agreement, that clause 1.2 (Construction) of the Framework Agreement and any other provision of the Framework Agreement which, by its terms, purports to apply to all the Transaction Documents shall apply to the Guarantee as if set out in it, that Guarantor confirms that he has read and agrees to all the terms of the Framework Agreement and any notice or other communication required to be given to any party shall be addressed and delivered to the place of business of such party set out above or to such other address of facsimile number as stated in the Framework Agreement.

68. The question is whether these references render the Facility Agreement or Guarantees unenforceable. The Defendants have not pointed to any respects in which the Facility Agreement has been made unworkable. The Claimants submit that it is fanciful to suggest that the absence of the Framework Agreement would provide a defence to the non-repayment of the debt as the Facility Agreement is clear on all relevant terms (interest, tenor, etc). Mr Temple submitted that the focus of DIFC contract law is to ascertain the intention of the parties (see Article 49 of the Contract Law 2004) and that the Facility Agreement is the complete expression of the intention of the Claimants to lend money at interest to the corporate defendants. The Defendants have been unable to identify any lacunae in the agreement rendering it unworkable.

69. In response, Mr Kamath produced a new document. I permitted him to refer to it. It was a letter from the lawyers retained to draft both the Facility Agreement and Framework Agreement dated 26 January 2019 addressed to TransAsia. The lawyers describe the proposed Framework Agreement in the following terms:

> *A Framework Agreement shall be the Principal Agreement that shall set out in detail the purpose of this transaction, the steps involved in giving effect to this transaction, reference to various transaction documents setting out the rights and obligations of the parties as discussed in detail in the opinion circulated by Emirates legal, and the manner in which Parties agree to conduct this transaction. This Framework Agreement shall be a Tripartite Agreement between ATTF2 the lender and the joint borrowers, namely Mados and the SPV. This document is the interpretative document that sets out in detail the entire transaction and must be executed as a first step.*

70. As Mr Temple submitted, it is plain that in the two months between the date of this letter and the execution of the Facility Agreement the parties' intentions changed. The Framework Agreement was not executed as a first step and the Facility Agreement itself set out the rights and obligations of the parties and the detail of the entire loan transaction.

71. Mr Kamath suggested that the Facility Agreement was "bare" without the Framework Agreement but did not explain what the word implied. He certainly did not suggest that there was no agreement for a loan. His suggestion appeared to be that the Framework Agreement would have made reference to the underlying joint venture so as to create some sort of relationship with the Facility Agreement whereby disruption to the joint venture's works would have some undisclosed effect on the Facility Agreement. Mr Temple pointed out that the effect of Articles 82 and 83 of the Contract Law is that *force majeure* would not normally apply to obligations to pay money. He did not suggest that it would be impossible to agree that *force majeure* could apply to an obligation to pay money but in the light of the Contract Law it would require specific provision.

72. The submission based of the missing Framework Agreement is hopeless, it requires accepting that a non-existent agreement varied the terms of a written agreement in undefined ways.

73. Further, the point is ultimately self-defeating, if the Facility Agreement were ineffective, given that the Defendants admit the making of the loan and the liability to pay intertest they would be left with a simple liability to repay on demand.

74. While I accept that the Facility Agreement and the Guarantees do refer to an intended Framework Agreement, the drafting seems to be the legacy of a different proposed contractual structure, and the contractual documents as executed are complete, self-contained and perfectly workable. There is nothing in the absence of the Framework Agreement that could conceivably provide a defence to repayment of the loan and interest.

75. The argument that the absence of the Framework Agreement arose from a mistake that renders the Facility Agreement voidable is also

hopeless, not least because even if it were correct, Mr Kamath accepts that the Defendants have made no attempt to avoid the agreement. However, there is no evidence of any mistake merely an evolution from the intention expressed in the lawyers' letter of January 2019 and as Mr Temple points out it is in any event no longer open to the Defendants to avoid the Facility Agreement (or indeed dispute liability) following the Payment Deed of 1 March 2022 which provided:

> *4.1 The Lender shall discontinue any and all ongoing proceedings against the Borrowers and Personal Guarantors in United Arab Emirates, India and Australia with no order as to costs on or before 10 July 2022, provided that the following conditions have been fully satisfied:*
>
> .
>
> *(iii) The Lender shall have received a minimum of USD300,000 in aggregate payment(s) from the Borrowers and/or the Personal Guarantors between 1 January 2022 to 30 June 2022 in cleared funds.*
>
> *4.2 Notwithstanding anything set out herein, if the Borrowers and/or the Personal Guarantors fail to satisfy the conditions set out in Clause 4.1 . the Lender shall be entitled (in its absolute discretion) to immediately by written notice terminate this Deed without any liability to the Lender and:*
>
> *(iv) demand immediate repayment of the Outstanding Amount; and/or*
>
> *(v) without prejudice to any other rights of the Lender arising as a result of termination of the Deed, commence, reinstate or join any legal, arbitration or other proceedings in any jurisdiction whatsoever (including, but not limited to, any of the proceedings discontinued pursuant to Clause 4.1) or take any enforcement step or action against any of the Borrowers and the Personal Guarantors (whether in respect of the Facility, the Security Documents or otherwise).*
>
> *4.3 If any of the Borrowers and/or any of the Personal Guarantors fail to satisfy any of the conditions set out in Clause 4.1 . notwithstanding and without prejudice to the fact that the Lender discontinued proceedings pursuant to Clause 4.1, each of the Borrowers and the Personal Guarantors unconditionally and irrevocably agree;*
>
> *(i) that the Lender may commence or re-commence (as applicable) proceedings in any relevant jurisdiction pursuant to this Deed or any of the other Transaction Documents, including in those jurisdictions where it had previously commenced proceedings; and*
>
> *(ii) not to challenge any application by the Lender to the relevant court for permission to bring such claims and/or commence and/or recommence such proceedings*
>
> *A payment made by any of the Borrowers and/or any of the Personal Guarantors pursuant to terms of this Payment Deed, the Facility, the Security Documents or otherwise shall be received by the Lender without prejudice to any of the Lender's rights under clauses 4.2 and 4.3 of this Payment Deed.*

76. It is accepted that the Borrowers did not make the payment of USD 300,000 under clause 4.1(iii) of the Payment Deed. The Borrowers and Personal Guarantors have agreed that the Lender was entitled to (and did) terminate the Payment Deed and to demand immediate repayment of the Outstanding Amount under clause 4.2 (iv). The Outstanding Amount was defined in clause 1.4 (see paragraph 58(2) above) as USD 11 million together with interest and other fees. It must follow that even if (prior to the Payment Deed) the Defendants had the right to avoid the Facility Agreement, it was irrevocably lost by the entry into the Payment Agreement which had the effect of affirming the Facility Agreement. Mr Kamath's attempted answer to the point was that the Payment Deed was not a stand-alone document and he attempted to link it to the absence of the Framework Agreement but this makes no sense and is unsupported by any evidence.

77. The next ground of defence raised by the Defendants is that the late disbursement of facilities, once in a 100-year monsoon flooding of the mine workings and COVID 19 should be treated as Disruption Events within the meaning of the Facility Agreement.

78. *"Disruption Event"* is defined in the Facility Agreement as:

> *"Disruption Event" means either or both:*
>
> *a. a material disruption to those payments or communication systems or to those financial markets which are, in each case, required to operate in order for payments to be made in connection with the Facility (or otherwise in order for the transactions contemplated by the Transaction Documents to be carried out) which disruption is not caused by, and is beyond the control of any of the Parties; or*
>
> *b. the occurrence of any other event which results in a disruption (of a technical or systems-related nature) to the treasury or payments operations of a Party preventing that, or any other Party:*
>
> i. from performing its payment obligations under the Transaction Documents; and/or
>
> ii. from continuing with other Parties in accordance with the terms of the Transaction Documents;
>
> (and which (in either such case)) is not caused by, und is beyond the control of, the Party whose operations are disrupted;

79. Clause 22.5 *"DISRUPTION TO PAYMENT SYSTEMS ETC"* provides:

> *If either the Lender determines (in its reasonable discretion) that a Disruption Event has occurred, or the Lender is notified by the Borrowers that a Disruption Event has occurred:*

22.5.1. the Lender may, and shall if requested to do so by the Borrowers, consult with the Borrowers with a view to agreeing with the Borrowers such changes to the operation or administration of the Facilities as the Lender may deem reasonably necessary in the circumstances;

22.5.2. the Lender shall not be obliged to consult with the Borrowers in relation to any changes mentioned in Clause 22.5.1 if, in its opinion, it is not practicable to do so in the circumstances and, in any event, shall have no obligation to agree to such changes;

22.5.3. any such changes agreed upon by the Lender and the Borrowers shall (whether or not it is finally determined that a Disruption Event has occurred) be binding upon the Parties as an amendment to (or, as the case may be, waiver of) the terms of the Transaction Documents; and

22.5.4. the Lender shall not be liable for any damages, costs or losses whatsoever (including, without limitation, for negligence, gross negligence or any other category of liability whatsoever but not including any claim based on the fraud of the Lender) arising us a result of its taking, or failing to take, any actions pursuant to or in connection with this Clause 22.5.

80. The Defendants do not allege that there was a material disruption to any payments or communication systems, or financial markets required to operate in order for payments to be made in connection with the Facility or that there was a disruption of a technical or systems-related nature to their treasury or payments operations preventing them from performing their payment obligations under the Transaction Documents. On any view, the late disbursement of the facilities, once in a 100-year monsoon flooding of the mine workings and COVID 19 affecting the joint venture cannot qualify as Disruption Event within the meaning of the Faciality Agreement.

81. Mr Kamath retreated from the initial submission that they did qualify, instead contending that the Framework Document had been intended to import the *force majeure* provisions of the joint venture agreement into the Facility Agreement thereby modifying the definition of Disruption Event. This point was a development during the course of Mr Kamath's oral submissions of the hitherto unparticularised allegation that the facility is *"intertwined"* with the joint venture agreement. There is no evidence to support the point. It is not suggested anywhere in the contemporaneous documents that it was intended that the terms of the joint venture were to amend the Facility Agreement.

82. Even if clause 22.5 were modified to include matters that affected the operations of the joint venture as opposed to disruption of payment systems, clause 22.5.4 absolved the Lender of any liability for failing to take any actions pursuant to or in connection with clause 22.5.

83. In the circumstances the argument that any disruptions to the business of the joint venture (of which I note no evidence has been produced other than assertion by the Defendant) affect the payment obligations under the Facility Agreement is hopeless.

84. It should be noted that the Facility Agreement does in fact incorporate a mechanism whereby the repayment date can be extended as at the request of the Borrowers in clause 7.2:

In the event that any part of the Loan cannot be fully paid by the end of 18 months, the payment for the amount outstanding can be extended for a maximum of 6 months upon a request made in writing by the Borrowers given to the Lender at least 5 Business Days before the expiry of 18 months and the receipt of a written approval from the Leader for such extension. This amount shall be subject to the increased interest as stipulated under Clause 9.1.3;

85. This option was in fact exercised when on 30 August 2020, the Borrowers requested an extension of 3 months on the following grounds:

1. The commencement of coal production was later than envisaged;

2. The early onset of once in a 100 years monsoon rainfall; and

3. The impact of COVID19.

An extension was granted from 4 September to 4 December 2020 and the Borrowers acknowledged and agreed that the Laon Documents would remain enforceable at all times.

86. This procedure was far more beneficial to the Borrowers than treating those matters as Disruption Events since the effect of a Disruption Event is only to give the Obligor an additional 3 business days within which to make a payment in accordance with clause 17.1 of the Facility Agreement:

17.1. NON-PAYMENT

An Obligor does not pay on the due date any amount payable pursuant to a Transaction Document at the place at and in the currency in which it is expressed to be payable unless:

17.1.1. Its failure to pay is caused by:

17.1.1.1. Administrative or technical errors or

17.1.1.2. A Disruption Event; and

17.1.2. Payment is made within three Business Days of its due date.

87. The next point (which was raised in Mr Kamath's Second Witness Statement) claims that clauses 31.5 and 31.6 of the Facility Agreement (set out at paragraph 24(1) above) are miserably failed attempts to produce an Asymmetric Jurisdictional Clause as these clauses tie all parties to the exclusive jurisdiction of DIFC. I disagree.

88. This Court, based as it is in a Financial Freezone, is very familiar with asymmetrical jurisdiction clauses (e.g. in *Khoury v Mashreq Bank PSC* [2022] DIFC CA 007 (28 November 2022) said that *"such clauses are familiar as a matter of international banking practice . In our judgment there is no reason not to uphold a clause of this nature in accordance with its true construction.").* While Clause 35 may not be the most elegantly drafted example of the genus, I consider it on its true construction to be effective.

89. Clause 31.5 *does* provide that the Parties agree to submit to the exclusive jurisdiction of the DIFC Courts, but clause 31.6 says that the Lender and/or the Security Agent may, *however,* bring proceedings in connection with the Facility Agreement in any court of competent jurisdiction. On a plain reading of those provisions clause 35.6 is providing for a clear exception to the submission to the exclusive jurisdiction of the DIFC Courts on the part of the Lender and the Security Agent.

90. Mr Kamath argues that clause 31.5 provides for an absolute submission to the jurisdiction of the DIFC Courts and that clause 31.6 cannot amount to a carve-out for the benefit of the Lender and the Security Agent because the latter clause does not use the word "notwithstanding" and must therefore be ignored as meaningless. The argument has no merit, "however" and "notwithstanding" are, in the context of the two clauses, unarguably and obviously, synonyms.

91. The Claimants also draw my attention to English authority in from of paragraph 12-077 *of Dicey, Morris & Collins on the Conflict of Laws* (16th Ed), which states: *`An important practical point is that normally, in the absence of clear wording, a jurisdiction clause will not be interpreted to preclude applications brought solely for the purpose of obtaining security in some other forum'.*

92. The Defendants' point however cannot provide a defence to the claim for repayment of the loan and interest in this Court. At its highest, it would provide the basis for a claim for damages for breach of the jurisdiction clause. Nothing is preventing or has ever prevented the Defendants from bringing that claim. While I am of the firm view that any claim for breach of clause 31.5 based on the Claimants having sought the order from the Abu Dhabi Courts would be bound to fail, if I am wrong and even if it were brought as a counterclaim, it could not prevent the Claimants from entering judgment on the claim. It could not prevent the Claimants from entering judgment on the claim because clause 22.1 of the Facility Agreement provides:

> *All payments to be made by an Obligor under the Transaction Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim.*

93. The Defendants allege that not only were the Claimants in breach of the jurisdiction clause in seeking the Freezing Order in Abu Dhabi, but they were guilty of fraud. While the allegation does not go to primary liability and therefore does not fall within Justice Roger Giles's point (h) in *GFH Capital* (paragraph 56 above), it is a serious allegation, and it is right that I address it.

94. The allegation appears to be that the Claimants abused the procedure of the Abu Dhabi Courts to obtain an invalid freezing/attachment order and then knowingly used the invalid order to trick the Defendants' bank into freezing their accounts.

95. I am satisfied that there is no substance in the allegation and that the Claimants' lawyers in particular have behaved with absolute propriety:

1. The relevant UAE Federal legislation to be found in Cabinet Decision 57/2018 which provided in translation -

   Article 113

   1-If the debtor does not hold any writ of execution or if his debt is not of a specified amount, the magistrate of summary justice may order the imposition of provisional seizure and temporarily estimate the debt of the judgment creditor based on a grounded petition submitted by the seizure applicant. Prior to issuing the order, the judge may carry out a brief investigation should he deem that the documents supporting the application are insufficient.

   2-In the case of seizure of a property, an official copy of the title deed of the property required to be seized shall be submitted together with the petition.

   3-If the lawsuit was previously filed the competent Court, the seizure order referred to in clause (1) of this article may be requested by the Court hearing the case.

   Article 114(2)

   2- The judgment creditor shall, within eight days at most from the date of issuance of the seizure order, file before the competent Court the action for the establishment of the right, in cases where the seizure is ordered by the magistrate of summary justice, otherwise, the seizure shall be deemed void ab initio.

2. Having regard to clause 31.5 (and indeed the Defendant's own case) "the competent court" must mean the DIFC Courts;

3. Article 113(3) contemplates existing proceedings as the basis for a request for a provisional seizure order;

4. Indeed, the Abu Dhabi court requested proof of existing proceedings in the DIFC Courts. This was provided by a letter from the Registrar in the Arabic language dated 20 October 2021. I am confident that if the Abu Dhabi court had considered the application to be defective it would not have granted the order, but even if the order were defective that would be a matter to taken up with the Abu Dhabi court not this Court. I asked Mr Kamath whether he did so, and I found his answer evasive and unsatisfactory, but he did eventually admit that no application had been made to discharge the order;

5. The suggestion that having obtained the order, the Claimants were then obliged to commence proceedings to commence substantive proceedings in the Abu Dhabi courts is misconceived. Such proceedings would create a conflict of jurisdiction given that there were already pending proceedings before the DIFC Courts, and Article 114(2) of the Cabinet Decision can only be understood to mean that proceedings

must be commenced within 8 days before the competent court (i.e. in this case the DIFC Courts) if they have not already been commenced as contemplated in Article 113(3);

6. It follows that there is no basis for alleging that the Abu Dhabi order was irregular in any sense or that the Defendants' bank could have been misled into believe that it was a valid order when it was not.

96. Mr Temple drew my attention to a suggestion by the Defendants that a "roll-over" of the Facility Agreement was agreed based on an email dated 8 June 2021. In that email Mr Kamath made proposals for restructuring the debt or extending the tenor. There is no evidence that either proposal was accepted, and Mr Kamath admitted that any roll-over discussion ultimate "collapsed" because it was not possible under Indian law for the Claimants to take further security by way of an assignment of the shares in the Defendants' Indian operating entity. There is nothing in the point, but it is notable that the email of 8 June 2021 ends with following words:

Lastly, we will always be grateful for the monies lent by TA Capital and it is our intention to repay all your loans with interest at the earliest. All our correspondence is aimed at coming up with a win-win for both of us please do not misconstrue anything said in the email as anything but said with gratitude.

97. Finally, it was suggested that the Guarantees also make reference to the Framework Agreement and were subject to Disruption Events. Since the arguments in relation to both are without substance, they cannot affect the liability of the Guarantors; however even if there were grounds to impugn the validity of Facility Agreement it would not assist the Guarantors. Each of the Corporate Guarantees contains the following provision at clause 3.4:

3.4. The Guarantee shall not be subject to any prior demand upon or action against the Borrowers, and shall not be released, discharged or otherwise effected or impaired by any of the following:

.

3.4.5. Any invalidity or unenforceability of the Facility Agreement or any of their respective provisions.

Each of the Personal Guarantees contains the following provision at clause 3.4:

3.4. If any amount which would otherwise be claimed by the Lender or the Lender through the Security Agent, under Clause 2 is for any reason not recoverable thereunder on the basis of this Personal Guarantee, the Guarantor shall as a principal debtor and primary obligor, indemnify the Lender and the Security Agent immediately on demand against any cost, loss or liability which the Lender or the Security Agent might incur or suffer as a result of another Obligor not paying any amount when (if such amount was recoverable from another Obligor) it would have been due under or in connection with any Transaction Document;

98. In a last-ditch attempt to attack the Guarantees in his oral submissions, Mr Kamath sought to rely on provisions of Australian statutory law. I pointed out to him that Australian statute law did not apply in the DIFC. This led to Mr Kamath making further submissions by email following the Hearing. In fairness to him, I allowed them to be taken into consideration and also allowed Mr Temple the opportunity to respond.

99. In his first email he still suggested that he relied on the Australian National Consumer Credit Protection Act 2009 - Schedule 1. I cannot see how this might assist him even if it were apply in the DIFC (which it does not) as it is directed to consumer transactions with natural persons.

100. More pertinently, he made reference to The Implied Terms in Contracts and Unfair Terms Law, DIFC Law No. 6 of 2005, as amended by DIFC Laws Amendment Law DIFC Law No. 2 of 2022 and the test of reasonableness (Article 40) but the test only applies to terms which purport to exclude or restrict any relevant liability and that is not case here as was pointed out by Mr Temple in his reply email.

101. Mr Kamath then had another attempt in a further unsolicited email in which he claimed that the Facility Agreement was a contract for the supply of services within the meaning of Law No.6 of 2005 as amended. He alleged that:

1. The Claimant owed a duty of care to the Defendants in which they have failed in undisclosed ways;

2. When the Claimants threatened to advance no further sums unless the Defendants signed the Transaction Documents they were acting breach of the test of reasonableness.

102. Mr Temple submitted that:

1. the Facility Agreement is not a contract for the supply of services but a contract of loan;

2. the conduct relied on by Mr Kamath pre-dated the Facility Agreement and it is fanciful to suggest that it discloses any fault by the Claimants, still less any fault that would undermine the claim for repayment of sums advanced;

3. the Facility Agreement was not on standard terms of business, it was plainly a contract tailored to this particular facility; and

4. the reasonableness test only applies to exclusion and similar clauses, the Claimants rely on no such clauses.

103. I agree with Mr Temple's points. The attempted reliance on Law No. 6 of 2005, as amended is unarguable.

IMMEDIATE JUDGMENT - OVERALL CONCLUSION

104. There was a telling exchange between Mr Kamath and the Court. He said that it was his wish to renegotiate the loan and had tried to obtain refinancing. That is far from saying the loan is irrecoverable.

105. I am willing to accept that the Indian coal mining joint venture may have experienced difficulties, although the Defendants' Indian entity clearly has generated sufficient funds to enable all of the Defendants to retain Indian lawyers including Senior and junior counsel. I do not accept that the Defendants' failure to instruct legal representatives in this Court is anything but a device in an attempt to win more time by adjourning the Claimants' Application.

106. Even without the benefit of the presence of counsel, Mr Kamath has proved himself more than capable of presenting the Defendants' case. He admits that he has had the assistance of the lawyers retained in India. I have had the opportunity to consider those arguments in detail. I have to say that they are all, without exception, lacking in any merit or substance. They are a transparent attempt to buy time and avoid payment of a debt admitted to be due on multiple occasions.

107. In all the circumstances, I find that none of the Defendants has a real (or any) prospect of successfully defending the Claimants' claims. There is no other compelling reason why the case should be disposed of at a trial and none has been suggested.

QUANTUM & PRE-JUDGMENT INTEREST

108. The Claimants are entitled to recover the principal sum of USD 11 million less credit for two payments of USD 10,000 and USD 49,975 on 8 April 2022 and 6 July 2022 respectively whereby the outstanding principal is USD 10,940,025.

109. The Claimants also claim "other fees" in the sum of USD 327,637.86 as "enforcement costs" under clause 12.3 of the Facility Agreement which provided:

> *The Borrower shall, within 3 Business Days of written demand, pay to the Lender the amount of all costs and expenses (including legal fees) incurred by the Lender in connection with the enforcement of, or the preservation of any rights under, any Transaction Document and the Security and any proceedings instituted by or against the Lender as a consequence of taking or holding Security or enforcing these rights.*

The Claimants accept that these costs will have to be the subject of assessment.

110. So far as interest in concerned clause 9 of the Facility Agreement provides:

> *9.1. CALCULATION OF INTEREST*
>
> *9.1.1. The rate of interest for the Loan shall be calculated at the rate of 15% p.a. net of withholding taxes;*
>
> *9.1.2. The Supplemental Interest Rate, being the rate of interest for any late payment, shall be calculated at the rate of 2.00% p.a. over and above the rate of interest as specified in Clause 9.1.1 ., which shall accrue from the date any amount payable is not paid until the actual payment for the proceeds to be paid by the Borrowers to the Lender;*
>
> *9.1.3. In the event the time periods for repayment of the Loan is extended beyond the scheduled time of 18 months, as under Clause 7.2, the amount outstanding at that time will be subject to a step-up interest of 3.5% p.a. over and above the normal rate of interest of 15% p.a. and the Supplemental Rate of Interest of 2% p.a.;*
>
> *9.2. INTEREST PERIOD AND PAYMENT*
>
> *9.2. INTEREST PERIOD AND PAYMENT*

111. The pleaded claim for interest is set out at paragraphs 26 of the amended particulars of claim, after having pleaded the terms set out under the preceding paragraph:

> *Accordingly, from 5 September 2020 (being the day after the original end date of the 18-month period of the Facility Agreement), the aggregate rate payable on the outstanding Loan Amount is therefore 20.5%, which shall accrue daily until such time as repayment is made in full. As at 22 September 2021, the total amount of interest accrued is US$ 4,958,902.80 and as at 16 September 2022 the total amount of interest accrued is not less than US$7,204,673.12 and increasing at a rate of not less than 20.5% per day.*

112. The Claimants updated the calculation in a spreadsheet (page J1 of the e-bundle) to the date of the Hearing (14 December 2022) resulting in a total out of outstanding principal and interest of USD 18,699,144.66.

113. I invited Mr Kamath to comment on interest. He said they it was patently high and the Framework Agreement meant there should be a rebate.

114. I can see no reason why the Defendants should not be liable for the contractual interest.

COSTS

115. Having decided that there should be judgment on the claim, there appears to be no reason (and none was suggested) why the general rule in RDC rule 38.7(1) should not apply and the Defendant be ordered to pay the Claimants' costs of the claim.

116. The Claimants produced a statement of costs in the sum of USD 208,866.65. It did not contain a great deal of detail and Mr Temple was unable to confirm whether it evidenced the costs of the application or (as I suspect) those of whole proceedings. Also, Mr Temple indicated that the basis of assessment was complicated as some of costs are claimed under a contract and should be assessed differently from the standard basis (see RDC rule 38.69). In the circumstances, I do not consider it possible to embark on an immediate assessment of the Claimants' costs and the costs will have to be the subject of a detailed assessment.

117. I will however make an order under RDC rule 38.13 for an amount to be paid on account before the costs are assessed. Practice Direction No. 5 of 2014, DIFC Courts' Costs Regime, suggests at paragraph 5 that where the Court has ordered a party to pay costs subject to detailed assessment unless agreed, it will order 50% of the amount claimed in the statement of costs to be paid on account before the costs are assessed, unless the Court sees fit to order otherwise. In present case, I am unaware whether the costs claimed are those of the application or the whole claim. If they are the former, I consider that they would require some justification and therefore I am not minded to follow the "50% rule" and will direct a payment on account in the sum of USD 70,000.

POST-JUDGMENT INTEREST

118. Mr Temple submits that under Practice Direction No 4 of 2017, interest shall accrue from judgment at the rate of 9% or such other rate as the judge may prescribe but where there is a contractual rate of interest, the Court will ordinarily order interest at that rate: *Caterpillar Financial Services (Dubai) v Omer Transport* (CFI 047/2019) (05/04/22) at [29] (per Justice Roger Giles).

119. I will follow Justice Giles's guidance because, as he says, the contractual rate is what the parties agreed. I will therefore order the payment of simple interest on the judgment amount at the prevailing contractual rate of 20.5% until payment. That rate of interest applies to the Loan. It does not apply to accrued interest. Clause 9 of the Facility Agreement does not provide for interest on interest. Mr Temple recognises that it also does not apply to the contractually recoverable "enforcement costs". He suggests that I follow PD 4/2017 in awarding 9% simple interest. I agree.

ORDER

120. I order as follows:

1. The Defendants' Application to adjourn the Claimants' Application for immediate judgment is refused;

2. The Claimants' Application made under Part 24 of RDC 2014 for immediate judgment against the Defendants is granted;

3. There will be judgment in favour of the Claimants against First and Second Defendants under the Facility Agreement dated 12 March 2019 and the Deeds of Corporate Guarantee dated 12 March 2019 and 30 July 2019 respectively and against the Third, Fourth and Fifth Defendants under their Deeds of Personal Guarantee all dated 12 March 2019 and each of them -

    (a) in the sum of USD 10,940,025 in respect of the unpaid balance of the principal of the loan under the Faciality Agreement;

    (b) in the sum of USD 7,759,119.66 in respect on interest accrued thereon up to and including 14 December 2022;

    (c) for an enquiry into the amount of the costs and expenses (including legal fees) incurred by the First Claimant in connection with the enforcement of or the preservation of any rights under any Transaction Document and the Security and any proceedings instituted by the First Claimant as a consequence of taking or holding Security or enforcing these rights and an order for payment of the amount found due if not agreed;

    (d) for the Claimants' costs of the claim to be the subject of a detailed assessment if not agreed; and

    (e) for a payment on account of the Claimants' costs pending assessment in the sum of USD 70,000;

4. The judgment sums shall bear simple interest as follows until payment in full:

    (a) on the sum of USD 10,940,025 at the rate 20.5% from 15 December 2022;

    (b) on the amount of any costs and expenses incurred by the First Claimant at the rate of 9% from the date ascertained or agreed; and

    (c) on the payment on account of costs of USD 70,000 from 15 December 2022 and on the amount of any further costs, at the rate of 9% from the date of assessment or agreement.

POSTSCRIPT

121. The Court welcomes the enthusiasm of its Registered Practitioners and recognises that correspondence between parties may at times become heated. It is however inappropriate for parties to vent their frustration on the Registry when the Registry is doing its best to act fairly between parties, especially when dealing with litigants in person. The Claimants may wish to review the terms of the email to the Registry of 8 November 2022 timed at 13:22 and ensure that future correspondence is expressed in more measured terms.