Claim No: CFI 026/2009

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BEFORE H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

(1) MR RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) MRS AMRAH ALI ABDEL LATIF AL HAMAD

(3) MRS ALIA MOHAMED SULAIMAN AL RIFAI

Claimants

and

(1) BANK SARASIN-ALPEN (ME) LIMITED

(2) BANK SARASIN & CO. LTD

Defendants

ORDER OF H.E. JUSTICE OMAR AL MUHAIRI

UPON reviewing the First Defendant's Application Notice CFI-026-2009/30 dated 5 November 2015, seeking a stay of the Quantum Order of Deputy Chief Justice Sir John Chadwick issued on 3 November 2015 ("the Application");

AND UPON reading the relevant material in the case file;

AND UPON hearing Counsel for the Claimants and Counsel for the First Defendant on 6 January 2016;

IT IS HEREBY ORDERED THAT:

1. The First Defendant's Application for a stay is dismissed.

2. The First Defendant shall pay the sum of USD 35,028,474 into Court within 14 days.

3. The First Defendant shall pay the costs of this application, to be subject to a detailed assessment if not agreed.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 18 January 2016

At: 10am

SCHEDULE OF REASONS

Background

1. On 5 November 2015, the First Defendant filed Application Notice CFI-026-2009/30 seeking an order pursuant to Rule 44.4 of the Rules of the DIFC Courts (RDC) that a stay be granted of the payments ordered by paragraphs 1 and 4 of the Order of Deputy Chief Justice (DCJ) Sir John Chadwick issued on 3 November 2015 ("Quantum Order") in CFI 026/2009 until the order made by the Court of Appeal following the determination of the liability aspects of appeal CA 003/2015 or until further order of the Appeal Court. The First Defendant also seeks an order that the Claimants pay the First Defendant's costs of the current application.

2. This Application stems from a 2009 case brought by the Claimants against the First and Second Defendants in relation to USD 200 million in allegedly bad investments structured by the Defendants and sold to the Claimants. On 21 August 2014 DCJ Sir John Chadwick found that the First and Second Defendants were guilty of mis-selling the investments to the Claimants ("Liability Judgment") and in an Order dated 28 October 2014 ordered the Defendants to pay USD 10.4 million to the Claimants, as well as a further USD 1 million in costs and set a timetable for the determination of the final damages claims ("Liability Order"). The Defendants sought to appeal the Liability Order on 6 November 2014 ("Liability Appeal").

3.In the Quantum Order of 3 November 2015, DCJ Sir John Chadwick ordered that the First and Second Defendants jointly and severally pay further damages to the Claimants in the amount of USD 24,583,425 and that the First Defendant pay additional damages in the amount of USD 35,028,474. Additionally, the Defendants were ordered to pay interest on the losses jointly and severally from 8 October 2008 until 11 November 2014. This Quantum Order came down as a result of the judgment of 7 October 2015 ("Quantum Judgment") following the Quantum Determination hearing.

4.On 22 October 2015, the Defendants sought permission to appeal the Quantum Order which was granted on 9 November 2015 by Chief Justice Michael Hwang.

5.Consequently, the First Defendant filed the current Application on 5 November 2015 seeking a stay of the Quantum Order, particularly paragraphs 1, 2 and 4 pending the Court of Appeal's judgment on the Liability Appeal in CA 003/2015.

Permission to Stay the Appeal

6.The First Defendant argues in its Skeleton Argument that according to English case law, the Court must consider all the circumstances of the case and weigh the risks in refusing a stay against the risks of granting the stay and opt for the course which presents the lesser risk. The risk according to the First Defendant is that the Claimants will be unable or unwilling to repay any sums paid by the First Defendant under the Quantum Order. The Defendant also adds that it has a "very strong appeal against" the Quantum Judgment.

7.In response to this, the Claimants maintain that a stay of a first instance order is the exception rather than the rule and that the burden is on the applicant to demonstrate that there are solid grounds for the Court to depart from usual practice and order a stay. Citing DEFRA v Downs [2009] EWCA Civ 257, the Claimants argue that the applicant must show that there would be "some form of irremediable harm if no stay [was] granted."

8.As to the argument that the Claimants will be unable or unwilling to repay any sums paid by the First Defendant, the Claimants in their Skeleton Argument point out that they have accepted that the First Defendant can "pay the money due under the Quantum Order into Court, pending the outcome of the appeal." In regards to the argument regarding the strength of the First Defendant's appeal, the Claimants note that this Court has not been provided with the First Defendant's Skeleton Arguments in support of its appeal and therefore cannot make an allegation one way or the other as to the strength of the appeal. As such, the Claimants ask that the Court dismiss this Application and rule that the sums due by the First Defendant under the Quantum Order be paid into the Court within 7 days.

Discussion

9.Pursuant to RDC 44.4, unless there is an order otherwise, an appeal does not operate as a stay of any order or decision when permission to appeal has been sought. According to Article 33 of the DIFC Courts Law 2004 (DIFC Law No. 10 of 2004), the Court may stay any decision, order or proceeding "if it considers it appropriate." The stay is not automatic; rather, there is a general discretion that may be exercised in making an order to stay a judgment pending an appeal when appropriate.

10.I am not satisfied that the First Defendant made an argument nor provided evidence strong enough to warrant a stay of the Quantum Order of DCJ Sir John Chadwick issued on 3 November 2015 pending the Liability Appeal. The main issues cited in favour of a stay were the risk that the Claimants may be unwilling or unable to repay the damages paid by the First Defendant, as well as the argument that there is a very strong appeal against the Liability Judgment.

11.As explained by the Claimants' Skeleton Argument, the Claimants have stated that the First Defendant may pay the money due under the Quantum Order into the Court's escrow account. As to the strength of the Liability Appeal as well as the appeal to the Quantum Order, the purported strength of an appeal that has not yet been litigated much less submitted to the Court has no bearing as to whether a stay of an order is appropriate.

12.As a result, the First Defendant's Application is denied in full and I order the First Defendant to comply with the Quantum Order requiring it to pay the remaining sum of USD 35,028,474 into the Court within 14 days.

13. As an aside, the Claimants suggest that not only should this Application be dismissed, and that the First Defendant should pay into the Court the full amount due under the Quantum Order but also that the First Defendant should not be entitled to any credit for sums paid by the Second Defendant into Court as condition of the Second Defendant's appeal. This reasoning is incorrect. As DCJ Sir John Chadwick states in paragraph 3 of the Quantum Order, "The Defendants are to be *jointly and severally liable* for payment of USD 24,583,425.The First Defendant alone is to be liable for payment of USD 35,028,474." [Emphasis added]. The Second Defendant has previously paid the amount of USD 24,583,425 into the Court, relieving the First Defendant of this amount. The amount still owed (and owed solely by the First Defendant) is the USD 35,028,474 that should be paid into Court within ---14 days.

Costs

14.The final issue to be decided is the question of costs. According to RDC 38.7, if the Court decides to make an order on costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. I am satisfied that the First Defendant, as the unsuccessful party in this case, should pay the costs, and be subject to a detailed assessment if not agreed.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 18 January 2016

At: 10am