Claim No. CFI-027-2016

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) NEST INVESTMENTS HOLDING LEBANON S.A.L.

(2) JORDANIAN EXPATRIATES INVESTMENT HOLDING COMPANY

(3) QATAR GENERAL INSURANCE AND REINSURANCE COMPANY P.J.S.C.

(4) GHAZI KAMEL ABDUL RAHMAN ABU NAHL

(5) JAMAL KAMEL ABDUL RAHMAN ABU NAHL

(6) TRUST COMPASS INSURANCE S.A.L.

(7) TRUST INTERNATIONAL INSURANCE COMPANY (CYPRUS) LIMITED

(8) HIS EXCELLENCY SHEIKH NASSER BIN ALI BIN SAUD AL THANI

(9) FADI GHAZI ABU NAHL

(10) HAMAD GHAZI ABU NAHL

(11) KAMEL GHAZI ABU NAHL

Claimants

and

DELOITTE & TOUCHE (M.E.)

Defendant

JUDGMENT OF JUSTICE ROGER GILES

UPON the Judgment of Justice Roger Giles dated 12 February (the "Judgment")

AND UPON Claimants' Application No. CFI-027-2016/10 dated 26 August 2018 seeking permission to amend the particulars of claim

AND UPON reviewing the submissions filed and exchanged by the parties on 16 September 2018

AND UPON publication of the reasons below

IT IS HEREBY DIRECTED THAT the parties bring in draft orders in conformity with the reasons within 21 days.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of Issue: 30 September 2018

At: 9am

SCHEDULE OF REASONS

1. Following decision of DTME's strike out/immediate judgment application (see Nest Investments Holding Lebanon SAL v Deloitte & Touche (ME), 12 February 2018: "the February judgment"), the Claimants proposed amendments to the particulars of claim directed to (a) claiming under Lebanese law instead of DIFC law as the law by which the parties' rights and liabilities are to be determined; (b) clarifying their case concerning the audits of Tabadul; and (c) clarifying their case for DTME being responsible for DTL's performance of the audits of LCB and LCBIH.

2. The proposed amendments were refined in the course of extensive correspondence between the legal representatives, to the point that DTME

consented to the majority of the amendments (while reserving its rights in various respects), and it was agreed that I should rule on the disputed amendments on written submissions. An application to amend was filed on 26 August 2018, supported by the Third Witness Statement of Carlo Fedrigoli. The current draft Re-Amended Particulars of Claim are an annexure to the witness statement. Written submissions were exchanged on 16 September 2018.

3. The disputed amendments relate to the Claimant's case concerning the audits of Tabadul, being paras 319, 325, 333, 338, 376K.1, 376L.6 and Annex 4. That case was touched on in the February judgment -

> "8. The particulars of claim appeared also to raise claims in relation to the audits of the financial statements of a sub-subsidiary of LCB, Tabadul Company for Shares and Bonds LLC (`Tabadul'). However, it was explained in submissions that the claimed losses flowed from failure to recognise in LCB's audits matters which should have been ascertained in Tabadul's audits, not from breaches of duties in relation to Tabadul's audits themselves. Breaches of duties as auditor in relation to Tabadul's audits do not arise."

4. The proposed amendments include para 310A, to which DTME consents, said by Mr Fedrigoli to "set[] out the case in respect of the Tabadul and LCBIH audits" -

> "310A. In summary and without prejudice to the detailed points set out below, in its capacity as auditor of LCBIH the Defendant adopted and incorporated the audited financial statements of Tabadul, which had themselves been carried out by the Defendant, in its capacity as auditor of Tabadul, into the audited financial statements of LCBIH without taking any or proper steps to verify whether Tabadul's financial statements, and the audit thereof, complied with applicable international and local requirements. Whilst the Claimant's claims are pursued against the Defendant in its capacity as auditor of LCB and LCBIH, not as auditor of Tabadul, the Claimants aver that the audits of Tabadul were inadequate as traversed below, a fact which was or ought to have been known to the Defendant, and their incorporation rendered the LCBIH audits inadequate as further detailed below."

5. I go first to paras 319, 325, 333, and 338 and Annex 4.

6. Para 317 alleges that DTME's audit opinion for the 2007 audit of Tabadul made no reference to trading breaches and an enforcement warning from ESCA; para 318 alleges that the warning was known to DTME; and para 319 then alleges -

> "319 In those premises, in its capacity as auditor of Tabadul, the Defendant was in breach of the Professional Standards set out in Annex 5 and the relevant provisions contained in U.A.E. Companies Law as set out in Annex 4."

7. Annex 4, as indicated, sets out a number of matters which it is said the U.A.E. Companies Law required of DTME as auditor of Tabadul.

8. Paragraphs 333 and 338 follow similar allegations of failures to refer in relation to the 2008, 2009 and 2010 audits of Tabadul, and state that para 319 is repeated. Para 325 also repeats para 319, but "In the premises of the facts set out in Part 5 above..". For present purposes, the paragraphs follow the fortunes of para 319.

9. DTME objected to para 319 so far as it alleges that it acted in breach of "the relevant provisions contained in the U.A.E. Companies Law as set out in Annex 4". It expressly did not object so far as the paragraph alleges breach of the Professional Standards set out in Annex 5. It submitted that, the Claimants having eschewed breaches of duties in relation to Tabadul's audits, only breaches of duties in relation to LCB/LCBIH's audits arose, and that the applicable law for those audits was Lebanese law together with any applicable international standards, not U.A.E. law: U.A.E. law was not relevant. As part of the submission, it said that it cannot be the duty of the auditor of LCB/LCBIH in Lebanon to check that the audits of related companies in the U.A.E. had been carried out in accordance with U.A.E. law.

10. I do not think this properly appreciates the case the Claimants seek to make out. At the heart of the Claimants' submission was that as auditor of LCB/LCBIH, DTL should have considered whether the audits of Tabadul had been carried out in accordance with international standards and local requirements, relevantly requirements of U.A.E. law, and that DTL knew or ought to have known that the audits were flawed in those respects but, by carrying the Tabadul financial statements into the LCB/LCBIH financial statements without comment, it caused the latter financial statements to be misleading. The Claimants submitted that the position in relation to the Tabadul audits would be the same if some other auditor, not DTME, had carried them out.

11. Whether it is correct that the Lebanese auditor should have gone into the adequacy of the Tabadul auditing is a matter for evidence, including whether it should have checked compliance not only with international standards (which DTME appears to accept, as a pleaded case) but also with requirements of U.A.E. law. That may be informed by evidence of what DTL in fact knew of Tabadul's circumstances and the Tabadul audits. It cannot be excluded as a pleaded case. Although the Claimants eschewed breaches of duties in relation to Tabadul's audits as causes of action, it is not inconsistent therewith to assert as material facts that the audits were flawed, including in failing to comply with the requirements of U.A.E. law.

12. Accordingly, the words in para 319 to which DTME objected should stand. However, I suggest that there is a difficulty in para 319, related to DTME's submission, which should be addressed, in the words "in its capacity as auditor of Tabadul, the Defendant was in breach". Those words may be objectionable as raising a false issue, because breach of duty by the Defendant as auditor is not relevant, as recognised in the Claimants' submission that the position would be the same if someone other than DTME had carried out the Tabadul audits: indeed, the language of breach of duty may be thought inappropriate when what matters, on the Claimants' case, is the fact of non-compliance with international standards and requirements of U.A.E law. I will return to this.

13. I go then to paras 376K.1 and 376L.6. The sub- paragraphs are part of a collection of allegations, in paras 376J - 376P, in support of the proposition that the auditor's defaults were intentional.

14. In para 376K it is alleged -

> "376K. In respect of Tabadul, the Claimants will say that, at all material times. The Defendant (as auditor of LCBIH from information

provided to it by, inter alia, the audits of Tabadul) knew and understood:

376K.1 The obligations on an auditor set forth in the U.A.E. Companies Law (set out in Annex 4);

376K.2 The extent of losses suffered by Tabadul..".

15. DTME's submissions described para 376K.1 as alleging breaches by the auditor of U.A.E. law. It does not: it alleges knowledge and understanding of the requirements of the law. If the Claimants' case earlier described is made out, the knowledge and understanding could go to whether the alleged defaults were intentional, and as a pleaded matter this should be allowed to stand.

16. In para 376L it is alleged -

"376L. Despite the matters set out in paragraphs 376J and 376K above:

..

376L.6 The Defendant gave opinions that LCBIH's audits were accurate in circumstances where, taking into account the conduct of the Tabadul audits, the audits of LCBIH could not have amounted to a fair and true representation of LCBIH's financial position."

17. DTME's submissions described para 376L.6 as alleging that the auditor of LCBIH in Lebanon "failed to take account of the conduct of Tabadul's audits being conducted in the U.A.E. by [DTME] as auditor of Tabadul". Strictly it does not, although that underlies the allegation. The description appears to be linked with the submission that it could not have been the duty of the auditor in Lebanon to check that the audits in the U.A.E. were carried out in accordance with U.A.E. law, but the implicit submission seems to go further and take issue even with compliance with the Professional Standards. It is sufficient to repeat that whether the Lebanese auditor should have taken into account the conduct of the Tabadul audits, including their compliance with U.A.E. law, is a matter for evidence.

18. I return to para 319. The difficulty abovementioned could be met by reframing the opening words of the paragraph to the effect, "In those premises,[illegible] the audit was carried out in breach of the .". Corresponding amendments to Annex 4 could be made by replacing "the Defendant (as auditor of Tabadul)" with "the auditor of Tabadul".[illegible] Since the difficulty was not raised by DTME and the parties have not had occasion to consider it, I will publish these reasons and invite them to do so.

19. In the result, subject to any reframing of para 319, leave should be granted to amend the particulars of claim to the form of the Re-Amended Particulars of Claim annexed to the witness statement of Mr Fedrigoli. I understand from the correspondence that it is agreed that the Claimants should pay the costs of and arising from the amendments. If the parties are unable to agree on the costs of the amendment application itself, brief written submissions would be appropriate. Draft orders should be brought in within 21 days. The Registry should be notified of any disagreement, which I will resolve through correspondence.

20. The only order at present is to direct that the parties bring in short minutes in conformity with these reasons within 21 days