Claim No: CFI 026/2009

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

BETWEEN

(1)RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) AMRAH ALI ABDEL LATIF AL HAMAD

(3)ALIA MOHAMED SULAIMAN AL RIFAI

Claimants

and

(1)BANK SARASIN-ALPEN (ME) LIMITED

(2)BANK SARASIN & CO. LTD

Defendants

ORDER OF JUSTICE ROGER GILES

UPON reviewing the Order dated 3 February 2015 granting permission for the First and Second Defendants to appeal;

AND UPON reviewing the Claimants' and the Second Defendant's submissions on conditions to be applied to the Second Defendant's appeal;

IT IS HEREBY ORDERED THAT:

1.Subject to order 2, the Second Defendant pay into Court any further sums ordered to be paid by it by way of compensation to the Claimants or as costs under the judgment or judgments in these proceedings currently under appeal or subsequently appealed pending final determination of such appeals subject to credit for any sums paid by the First Defendant in respect of the same liability.

2. In the event that the Claimants seek an order in different terms, liberty to do so within seven days by letter not exceeding two pages stating the terms of the order sought and the reasons therefor, the Second Defendant to respond by letter not exceeding two pages within a further seven days.

3. Costs of the application additional to those the subject of the orders made on 3 February 2015

4. Up to 11 February 2015, to be costs in the appeal;

5. On and from 11 February 2015, to be paid by the Claimants to the Second Defendant.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of issue: 5 April 2015

At: 4pm

REASONS

1.On 6 November 2014 the Defendants filed applications for permission to appeal from the judgments of the Deputy Chief Justice of 21 August 2014 and 28 October 2014 (the latter issued on 30 October 2014). The judgments resulted in orders that the Defendants pay the Claimants (in round figures) USD 10.44 million as damages and USD 1 million on account of costs ("the interim moneys"), payment to be made within 14 days. A further hearing was to take place in early 2015 to determine whether the Claimants were entitled to additional damages ("the quantum hearing").

2. I requested submissions from the Claimants, and the submissions filed on 15 January 2015 included that, if permission to appeal were granted to the Second Defendant, there should be

".an order that any sums ordered in the first instance to be paid by the Second Defendant should be paid into court (as and when they become due) as a condition of the Second Defendant being permitted to pursue any appeal".

3. On 3 February 2015 I granted permission to appeal, in the case of the Second Defendant subject to determination of whether such an order should be made. I considered that I should hear from the Second Defendant, and gave directions for any further submissions from the Claimants, responsive submissions from the Second Defendant, and submissions in reply from the Claimants on a timetable which (as later modified) concluded on 8 March 2015.

Other events

4.On 6 November 2014, on the application of the Claimants' litigation funder, HE Justice Ali Al Madhani ordered that the interim moneys be paid into Court by the Defendants.

5. On 9 November 2014 the Defendants filed an application for a stay of the Deputy Chief Justice's orders. I heard the application on 13 November 2014 and in reasons issued on 20 November 2014 refused it.

6. On 28 November 2014 the Second Defendant paid nearly USD 5.4 million into Court. The interim moneys were payable by the Defendants jointly and severally, and presumably this represented half the interim moneys and the other half was paid into court by the First Defendant; the Claimants' submissions included that the interim moneys "have now been paid".

7. Proceedings were also brought against the Claimants by their former lawyers, claiming fees and disbursements. They resulted in a consent order on 9 February 2015 providing for payment by instalments of approximately USD 2 million to the lawyers for fees and disbursements, in part from the money paid into court. The order purported to provide that any further damages resulting from the quantum hearing would be paid into Court by the Defendants, and that the second instalment would be paid from that money; however, it does not appear that the Defendants were parties to the proceedings or the agreement underlying the consent orders.

8. The quantum hearing took place on 2 and 3 March 2015. The Claimants sought additional damages in excess of USD 35 million. The Defendants recognised a liability in the order of USD 6.5 million, in the case of the Second Defendant it seems in the order of USD 14 million. Judgment was reserved. For present purposes accurate figures do not matter; it may be accepted that a significant additional amount will become payable ("the further moneys").

Application for different orders

9.In the Claimants' further submissions they departed from the order initially sought. The application was for new orders

> "1. If and to the extent that the Second Defendant does not pay any further sums ordered to be paid in the first instance proceedings, then (without prejudice to all the Claimants' other rights), the appeal shall be stayed until payment.
>
> 2. The Second Defendant should provide security for the Claimants' costs of the appeal by making payment into Court in respect of those costs."

10. In the submissions it was clarified that payment for the purposes of the first order meant payment to the Claimants, not payment into Court.

11. The further submissions foreshadowed "witness statement evidence with regard to the quantification of the security requested". No such evidence was provided.

Power

12.By Rule 4.3 of the Courts' Rules, the Court may make an order "subject to conditions, including a condition to pay a sum of money into Court", and may specify the consequences of failure to comply with the condition.

13. By Rule 44.22 (2), an order giving permission to appeal "may.be made subject to conditions". By Rule 44.89 (3), the appeal Court "may.impose.conditions upon which an appeal may be brought". The latter rule is qualified by Rule 44.90, providing that the Court "will only exercise its powers under Rule 44.88 [sic: 44.89] where there is a compelling reason for doing so".

14. It is not necessary to consider the relationship between the general Rule 4.3, the specific but unqualified Rule 44.22 (2) and the specific but qualified Rule 44.89 (3). The Second Defendant did not dispute that the grant of permission to appeal could be made subject to conditions, and the Claimants accepted that a compelling reason was required before conditions for the Second Defendant's appeal could be imposed. (See in this respect Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd [2004] EWCA Civ 993 at [5]).

15. A condition may be imposed that an appellant pay the judgment debt into court, see for example Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065, Bell Electric Ltd v Aweco Appliance Systems GMBH Co KG [2002] EWCA Civ 1501 and recently Sebastian Holdings Inc v Deutsche Bank AG [2014] EWCA Civ 1100 in relation to the equivalent English rules. There is no reason why the power should not extend to payment of the judgment debt to the respondent to the appeal, and that was ordered in Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd.

16. The Claimants submitted that a condition could also be imposed that an appellant provide security for costs; that also was done in Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd. There is provision for ordering security for the costs of an appeal in Rule 25.105, in the particular circumstances set out in Rule 25.102 (1) and on the test in Rule 25.101 that it is just to order the security. In Sebastian Holdings Inc v Deutsche Bank AG at [13] it was accepted by the parties that the power to impose such a condition was to be exercised by reference to the tests applicable to ordering security for costs. In the present case no submissions were addressed to this, but the Claimants submitted that in any event security for costs could be ordered because one of the circumstances in Rule 25.102 (1) was fulfilled, namely, that the Second Defendant

was resident out of the UAE.

The Claimants' further submissions

17. At the heart of the Claimants' submissions was that the Second Defendant, a Swiss corporation, had denied and continued to deny the jurisdiction of the DIFC Courts. It had mounted a challenge to jurisdiction at the commencement of the proceedings, which was dismissed in the Court of Appeal. Its Defence had nonetheless included that it objected to the Court's jurisdiction and participated "without prejudice to its rights to object to the recognition or enforcement of any judgment or order" (para 2). The objection was repeated a number of times thereafter, including in the submission at trial that "we maintain our jurisdiction challenge", and was continued in the skeleton argument in support of permission to appeal

> "The Second Defendant objects to the jurisdiction of the DIFC Courts over these proceedings. The Second Defendant maintains that Switzerland is the exclusive forum for all claims by the Claimants against the Second Defendant. Consequently all steps in these proceedings including all statements of case made herein are taken by the Second Defendant subject to its objection to the international jurisdiction of the DIFC Courts to hear the claim against it, without submission to the jurisdiction of the DIFC Courts and without prejudice to its rights to object to the recognition or enforcement of any judgment and order."

18. The Claimants submitted that this was a case for the orders as conditions attached to the permission to appeal because the Second Defendant

- was resident outside the UAE and did not appear to have assets within the jurisdiction (there is no evidence one way or the other as to this, but the Second Defendant did not appear to contest it);
- had made it clear that it would resist the enforcement of any judgment in the Swiss courts by disputing the jurisdiction of the DIFC Courts;
- had shown that it was unwilling to comply with the orders for payment made against it, first by resisting payment of the interim moneys by the stay application; and then upon dismissal of the stay application by delay in paying the interim moneys and only paying when winding-up proceedings had been issued against the First Defendant.

19. The Claimants pointed out that permission to appeal had been granted on the basis of Rule 44.8 (2), not on the Rule 44.8 (1) basis of a real prospect of success, and submitted that

> "[t]he Second Defendant is effectively adopting a `*heads I win, tails you lose*' approach to this litigation where the Second Defendant wishes to take advantage of any success that it has before the DIFC Courts but refuses to face the consequences of losing (see Calltel Telecom v HM Revenue and Customs [2009] Bus LR 513 at [41] and Contract Facilities Ltd v The Estate of Rees Deceased [2003] EWCA Civ 1105 at [27]".

20. It was submitted that the Second Defendant should not "have the indulgence of the Court of Appeal in reviewing the decision of DCJ Chadwick in circumstances where the Second Defendant is only willing to recognise the DIFC Courts's jurisdiction if it wins and not if it loses", and that the conditions should be imposed "to ensure that [the Court of Appeal's] jurisdiction is not being abused".

21. As to payment to the Claimants rather than into Court, it was submitted that the "logic and effect" of the judgment refusing a stay in relation to the interim moneys "operate as much for any further instalments ordered to be paid at the. quantum hearing as they did for the first instalment of the liabilities".

22. No submissions were specifically directed to security for costs.

The Second Defendant's response

23. The Second Defendant said that "as a responsible financial institution" it was willing to consent to an order as originally sought by the Claimants; however, it opposed the new orders sought in the further submissions. It proffered a draft order in the terms

> "The Second Defendant do pay into Court any sums ordered to be paid by it by way of compensation to the Claimants or as costs under the judgment or judgments in these proceedings currently under appeal or subsequently appealed pending final determination of such appeal(s) subject to credit for any sums paid by the First Defendant in respect of the same liability".

24. The Second Defendant submitted that the Claimants' application for the new orders should not be entertained, as no permission had been sought or given to apply to have the different conditions imposed on the grant of permission to appeal. I see no reason, however, to refuse to permit the Claimants to vary the proposed condition(s), provided that the Second Defendant is not disadvantaged in responding; and the Second Defendant made submissions on the merits without suggesting any disadvantage.

25. The Second Defendant emphasised the need for a compelling reason, and submitted that a condition of payment into court was not the general rule (citing Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd at [24] - [25]) and would be imposed only in an "unusual and perhaps rare case": this was sourced in the reasons of Tomlinson LJ in Sebastian Holdings Inc v Deutsche Bank AG at [31] -

> "In Dumford Trading AG v OAO Atlantrybflot [2004] EWCA Civ 1265 Clarke LJ, sitting alone, emphasised that it will be an unusual and perhaps rare case in which it will be appropriate to require payment into court of all or part of the judgment sum as a condition of permitting an Appellant to proceed with an appeal. Furthermore, Clarke LJ stressed that the court will adopt a cautious approach and will only impose such a condition for compelling reason."

26. The Second Defendant further drew attention to the observation of Tomlinson LJ at [34]

> "I unhesitatingly accept that all these cases indicate that it is inappropriate to use the power to impose conditions on an appeal simply as a means of securing enforcement of the judgment debt. That plainly is not the touchstone. The touchstone is rather the taking of steps out

of the ordinary course of business with a view to frustrating the normal enforcement process".

27. It was submitted that there was no reason, compelling or otherwise, for the condition of payment to the Claimants. It was accepted that the Second Defendant was resident outside the UAE, but it was said (correctly) that there was no question as to its ability to meet its obligations. The stay application, it was said, was brought "in the usual way". The payment into court was made eight days after the judgment refusing a stay, and only a day late because the operation of the order dismissing the stay application was suspended for seven days (this is incorrect, see later); it was said that there was scarcely a contumelious failure to obey the Court's orders. The Claimants having chosen to proceed against it in the DIFC Courts, when the Second Defendant had no presence in the DIFC, they could not properly complain of having to enforce any judgment in Switzerland, and there was no suggestion that the Second Defendant had taken or would take steps to frustrate the normal enforcement process. But, it was said, that did not arise because of the Second Defendant's willingness to pay into court. Further, it was submitted, payment to the Claimants rather than payment into court would expose the Second Defendant to the risk that it could not recover the money if the appeal were successful, given the claims upon the Claimants by the litigation funder and the former lawyers, which would subvert the purpose of the Rule(s).

28. As to security for costs, the Second Defendant submitted that although it was resident out of the UAE, it was not just to make an order for security as required under Rule 25.101. Observing that the Claimants were also resident out of the jurisdiction, it repeated that there was no question of its ability to meet its obligations. The Second Defendant submitted that the Claimants had not identified any difficulty of enforcement in Switzerland, a developed and stable jurisdiction, other than the objection to jurisdiction, to which the Claimants had exposed themselves by choosing to sue in the DIFC Courts, and had not explained why that would represent an obstacle to enforcement. It referred to Nasser v United Bank of Kuwait [2001] EWCA Civ 556 at [63] - [64], where it was said that there must be a proper basis for considering that obstacles to enforcement may exist, they will not necessarily be assumed, and in some cases -

> ".it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden, meriting the protection of an order for security for costs."

The Claimants' reply submissions

29. The Claimants said that, given the Second Defendant's willingness to make payment into court, the only issue as to the first order was whether it should provide for payment to the Claimants or payment into court.

30. They submitted, in summary, that there should be payment to them because the Deputy Chief Justice had not been asked to order payment into court and the reasons for refusing a stay in November 2014 would equally mean that the Second Defendant could not resist immediate payment of any further judgment sum and costs ordered to be paid. Perhaps departing from what they suggested was the only issue, they said that enforcement of the judgment in Switzerland was "a critical issue" and submitted (with some repetition of their further submissions, and again I summarise) that it was clear that the Second Defendant intended to resist enforcement in Switzerland and, because it would not accept the result if it lost an appeal, it was adopting the "heads I win, tails you lose" approach and should have to pay the Claimants as the price for pursuing its appeal.

31. As to security for costs, the Claimants submitted that "the principle underlying Nasser" arose out of the European Convention on Human Rights, and was not applicable. They simply asserted that it is just to order security for the costs of the appeal, and noted that security had been ordered in Dumford Trading AG v OAO Atlantrybflot [2004] EWCA Civ 1265.

Discussion

32. A feature of the Claimants' application is that, the interim moneys having been paid into court, it is addressed to damages and costs ordered to be paid in the future. It is odd to seek to direct the destiny of the further moneys ahead of the circumstances at the time at which it is ordered that they be paid. I do not by this observation accept the Second Defendant's submissions so far as it was said that ordering payment of the further moneys would prejudge whether an appeal from the judgment following the quantum hearing should be conditional. The present appeal challenges liability and thus liability to pay the further moneys. But the reasons for dismissal of the stay application do not necessarily govern in the circumstances at the later time, when evidence may be materially different; and the futurity means also that, if a condition that the further moneys be paid to the Claimants be imposed, any application by the litigation funder in relation to those moneys will be obstructed or at the least complicated.

33. I do not accept that maintaining the objection to the jurisdiction of the DIFC Courts means that the Second Defendant is abusing the Court of Appeal's jurisdiction, or adopting a "head I win tails you lose" approach to the litigation. It was brought into the DIFC Courts by the Claimants, and suffered judgment against it. It applied for permission to appeal, as it was entitled to do, and cannot be expected to abandon its objection in order to seek to have the judgment set aside within the jurisdiction into which it was brought. The Claimants' reliance on Calltel Telecom v HM Revenue and Customs and Contract Facilities Ltd v The Estate of Rees Deceased is misplaced. The language of "heads I win tails you lose" there found is referable to the financing of the litigation by a third party, when the appellant itself could not pay.

34. The ultimate question is whether compelling reason has been shown for the Court, for the purpose of doing justice between the parties, to place a fetter upon an entitlement to appeal which is otherwise recognised. As the Claimants' submissions suggest, difficulty in the respondent exercising the normal mechanisms of enforcement is an important consideration, but it is generally associated with unexplained failure of the appellant to pay the judgment debt amounting to flouting the orders of the court. Thus in Bell Electric Ltd v Aweco Appliance Systems GMBH Co KG a major consideration was that the appellant "demonstrate[d] its intention to ignore the orders of the court and to rely upon the expense or other practical difficulties which confront the respondent in seeking enforcement of the judgment abroad" (at [26]), and refusal to comply with the court's orders was of significance in, for example, Hammond Suddard Solicitors v Agrichem International Holdings Ltd (see at [41] - [42]), Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd (see at [24] - [29]) and Sebastian Holdings Inc v Deutsche Bank AG (see at [39]). That is, imposing a condition is not an ordinary means of assisting a respondent faced with difficulties of enforcement. More is required before justice as between the parties warrants that course, see the observations concerning an unusual and perhaps rare case earlier noted.

35. So far as it might otherwise have been a consideration, at least for the first order difficulty in exercising the normal mechanisms of enforcement has been taken out of consideration by the Second Defendant's willingness to pay into court. It may be accepted that the Second Defendant, if

unsuccessful on appeal, might have resisted enforcement in Switzerland of orders to pay the further moneys. But that does not arise if the Second Defendant pays the further moneys into court. It will not be ignoring the Court's orders and relying on difficulties of enforcement in Switzerland.

36. In any event, even if the Second Defendant had not been willing to pay into court, in my view it has not been shown that justice between the parties would have called for a condition of payment into court.

37. In relying on its objection to jurisdiction in the Swiss courts the Second Defendant would have exercised an entitlement open to it, made known from the beginning of the Claimants' steps to obtain judgment against it in the DIFC Courts; it would not have "cynically based [failure to pay] upon the practical difficulties for the respondent in seeking enforcement in a foreign jurisdiction" (Bell Electric Ltd v AWECO Applicance Systems GMBH & Co KG at [22]. The Claimants have not attempted to explain, by evidence or in their submissions, any practical difficulties in enforcement in Switzerland, or in particular the regard the Swiss Courts may have to the objection to jurisdiction. That objection has been left as a spectre, and the observations in Nasser v United Bank of Kuwait, with which I respectfully agree, are relevant here as well as in relation to security for costs. I do not accept that they turn on the European Convention on Human Rights.

38. Nor has the Second Defendant's response to the order to pay the interim moneys been such as to attract the condition. The Second Defendant applied for a stay, but that is not an unusual course and it is unremarkable that it did not pay the interim moneys before the application was determined. It is not correct that the order dismissing the application was suspended for seven days; the only suspension was of the costs order. There may have been a misunderstanding, but at worst the delay in payment until 28 November 2014 was not a gross disregard of the Court's orders. It appears that the winding-up proceedings against the First Defendant were issued on 30 November 2014, and on the present evidence I do not accept the Claimants' assertion that the Second Defendant was thereby caused to make payment; it paid beforehand.

39. Nor has a case for a condition of payment to the Claimants been made out, for like reasons and also because, as indicated earlier in these reasons, the further moneys are not yet payable. Any issue over payment to the Claimants should be for when they are ordered to be paid or subsequent application.

40. In my opinion, no compelling reason appears whereby the first order should be made as a condition of the grant to the Second Defendant of permission to appeal.

41. As to security for costs, the willingness to pay into court does not extend so far; but for the reasons thus far given I am not persuaded that it is just to require that the Second Defendant provide security for the costs of its appeal.

Costs

42.&#65533;The Second Defendant submitted that the costs of the application should be costs in the appeal up to 11 February 2015 (the date of the Claimants' further submissions, that is, when they asked for the new orders), and thereafter its costs payable on an indemnity basis.

43. The Claimants submitted that their application (in context, the application for the new orders) was well-founded and the Second Defendant was not entitled to costs at all. They did not grapple with costs if the application was not successful, except perhaps by the assertion that the Second Defendant was not entitled to indemnity costs. They added that my orders granting permission to appeal included that the costs of the applications would be costs in the appeals, and although not expressly they appeared to submit that no other order could now be made.

44. The question of conditions is no doubt part of the application for permission to appeal, but the costs order earlier made plainly did not extend to the costs of that outstanding and future question. The Claimants' application succeeded, as a practical matter, in eliciting the willingness to pay into court. The Claimants nontheless sought the new orders, and have failed to obtain them. I consider that the Second Defendant should have the costs it seeks, that is, costs on and from 11 February 2015; but I do not regard the Claimant's application for the new orders, or its maintenance after receiving the Second Defendant's willingness to pay into court, as conduct warranting indemnity costs.

Orders

45.&#65533;The Claimants made no submission as to the terms of the draft order proffered by the Second Defendant, and it seems that they were content with it in the event that they did not obtain payment to themselves. However, although the Second Defendant presented it as fulfilment of the order originally sought, it differs from that order. The terms of the order now made will govern, and I will give the Claimants the opportunity at their own cost to ask that the order should be in different term: the costs of any such request and its resolution will fall within the costs to be paid by the Claimants to the Second Defendant.

46. I do not think the order should purport to govern the payment of the interim moneys; they have been paid into court for other reasons. I have modified the order to refer to "further" sums.

47. I make the following orders:

(1)&#65533; Subject to order 2, the Second Defendant to pay into court any further sums ordered to be paid by it by way of compensation to the Claimants or as costs under the judgment or judgments in these proceedings currently under appeal or subsequently appealed pending final determination of such appeals subject to credit for any sums paid by the First Defendant in respect of the same liability.

(2)&#65533; In the event that the Claimants seek an order in different terms, liberty to do so within seven days by letter not exceeding two pages stating the terms of the order sought and the reasons therefor, the Second Defendant to respond by letter not exceeding two pages within a further seven days.

(3)&#65533; Costs of the application additional to those the subject of the orders made on 3 February 2015

(a) &#65533;up to 11 February 2015, to be costs in the appeal;

(b) on and from 11 February 2015, to be paid by the Claimants to the Second Defendant.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of issue: 5 April 2015

At: 4pm