THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

MUZOON HOLDING LLC

Claimant

and

ARIF NAQVI

Defendant

JUDGMENT OF JUSTICE ROGER GILES

Hearing : **6 October 2021**

Counsel : Amr Bajamal instructed by Amal Advocates & Legal Consultants for the Claimant
Sulakshana Senanayake instructed by Afridi & Angel for the Defendant

Judgment : **26 October 2021**

UPON reviewing the Defendant's Application No. CFI-080-2018/4 dated 1 August 2021 to contest the Dubai International Financial Centre Courts' jurisdiction and the evidence filed in support (the **"Application"**)

AND UPON reviewing the Claimant's evidence in reply to the Application dated 17 August 2021

AND UPON reviewing the Defendant's evidence in reply to the Application dated 29 August 2021

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant at the hearing on 6 October 2021

IT IS HEREBY ORDERED THAT:

1. The Application is dismissed.

2. The Defendant shall pay the Claimant's costs of the Application to be assessed by the Registrar on the standard basis, if not agreed.

3. The Claimant shall file and serve its particulars of claim within 28 days from the date of this Order.

Issued by:
Amna Al Owais
Chief Registrar
Date of issue: 28 October 2021
Time: 2pm

JUDGMENT

1. In its Claim Form, the Claimant gave the "Brief Details of Claim":

> "The Defendant misappropriated funds from the Claimant in a sum AED 20,000,000 [sic] by causing the Claimant to transfer the funds for the purpose of investing in a private placement in the transport company `Careem'. The Defendant then failed to return the invested sums, and the profit and interest incurred to the Claimant."

2. The relief claimed was a declaration that the sums the Defendant had received were held on a constructive trust for the Claimant, damages, and some consequential matters.

3. Default judgment was obtained against the Defendant, following an order permitting service of the Claim Form by sending it to an email address and in the absence of an acknowledgement of service. For the reasons in a judgment issued on 1 July 2021 (the **"Set Aside Judgment"**), the default judgment was set aside. The reasons included that it was open to the Defendant to object to the Court's jurisdiction.

4. This is the Defendant's application contesting jurisdiction. The order sought is that the claim be dismissed for lack of jurisdiction, rather than a declaration that the Court has no jurisdiction as described in RDC 12.1(1) or a further order pursuant to RDC 12.7. The substance is the same, and I treat the Application as made in accordance with RDC 12.1(1), pursuant to Article 44 of the DIFC Court Law, DIFC Law No 10 of 2004, and RDC 4.51.

5. The Application is supported through two witness statements of Mr Tyne Hugo of the Defendant's lawyers and opposed through a witness statement of Ms Logaina Omer of the Claimant's lawyers. I have had the benefit of reading the skeleton arguments and hearing oral submissions from Mr Sulakshana Senanayake for the Defendant and Mr Amr Bajamal for the Claimant.

The Jurisdictional Gateway

6. The Claimant relied on the gateway in Article 5(A)(1)(c) of the Judicial Authority Law, Dubai Law No 12 of 2004:

> "The Court of First Instance shall have exclusive jurisdiction to hear and determine:
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> .
>
> (c) Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities;
>
> .".

7. There are two limbs of the gateway which must be satisfied: first, that the claim or action arises out of or relates to an incident or transaction which has been wholly or partly performed within the DIFC; and secondly, that the incident or transaction is related to DIFC activities. In *Al Khorafi v Bank Sarasin-Alpen (ME) Ltd* [2011] DIFC CA 003 (5 January 2012) (**"Al Khorafi 2012"**) the Court of Appeal said of these requirements:

> "[63] The claim or action has to arise out of or relate to either an incident or a transaction. The meaning to be accorded to `incident' . comprehends any of the essential elements of conduct or the incidence of loss or damage necessary to give rise to a cause of action in tort or for breach of statutory duty. The meaning to be accorded to `transaction' is any commercial relationship between the Claimant and defendant [sic] giving rise to mutual rights and obligations, including, but not limited to, a contractual relationship. Whereas it is meaningful to speak of a `transaction' as being `performed' in a particular place, that is not so of an `incident'. Accordingly, the word should be understood as referring to an incident which has occurred within the DIFC.
>
> [64] The requirement that the transaction or incident shall be `related to DIFC activities' simply means that such incident or transaction should have been in furtherance of or as a result of a particular commercial activity carried on in the DIFC."

8. While these remarks in part spoke of a cause of action in tort or for breach of statutory duty, they are applicable also to the essential elements for a contractual cause of action or a claim to equitable relief.

The Claimant's Claim or Action

9. The Claimant has not yet filed particulars of claim (see RDC 12.6). It is necessary to find the basis for its claim from the evidence in the witness statements and the submissions.

10. The Defendant was the founder of and principal shareholder in the Abraaj Group (the **"Group"**), a private equity institution prominent in the Middle East. A member of the Group, Abraaj Capital (DIFC) Ltd (**"AC"**) was incorporated in the DIFC and was licensed in the DIFC to carry out a variety of financial services including arranging investments, managing assets and providing fund administration. It carried on an international business from the DIFC through multiple entities and offices. Its parent company was Abraaj Investment Management Ltd (**"AIML"**), a Cayman Islands company, which was in turn owned by Abraaj Holdings Ltd (**"AH"**), also a Cayman Islands company.

11. Within the Group, the Defendant was Vice Chairman and Group Chief Executive of AH. In a Complaint filed against the Defendant by the Securities and Exchange Commission in New York (the **"Complaint"**), it is alleged that he was a director of (inter alia) AC, AIML and AH, and that he was Chairman of the Global Investment Committee (the **"GIC"**), the body which evaluated investment opportunities for the Group's private funds and had a veto power in the GIC.

12. The Claimant was the investment manager on behalf of H.E Mohammed Abdullah Al Gergawi (**"Mr Al Gergawi"**). He is described as a shareholder in the Claimant, and it can be taken for this Application that it acted on his instructions.

13. According to the witness statement of Ms Omer, the Defendant was introduced to Mr Al Gergawi and "over time, the Defendant's image and the prominence of the Group caused a level of trust", and that the Defendant "encouraged Mr Al Gergawi to invest AED 20 million on behalf of the Claimant".

14. On 29 October 2015, the Defendant writing as "Vice Chairman and Group Chief Executive, Abraaj Holdings)", wrote to Mr Al Gergawi under the heading "Investment with Abraaj". The letter was on the letterhead "The Abraaj Group" with the name of AH and a Cayman Islands address at its foot. He asked that "[f]urther to our discussions yesterday" Mr Al Gergawi remit AED 10 million to an account of AIML with the Royal Bank of Scotland, Dubai. The letter was sent to Mr Al Gergawi as an attachment to an email from Mr Rafique Lakhani, over his description "Managing Director, The Abraaj Group", on its face an email from AC in the DIFC.

15. The AED 10 million was remitted by Mr Al Gergawi to the named account on 5 November 2015, the payment being described as "towards investment". Mr Lakhani acknowledged receipt by an email dated 9 November 2015. In an email to the Claimant on 2 September 2015, Mr Lakhani said that USD 1.5 million of the investment had been "allocated. to Careem", and that "[w]e are currently in the process of finalising a couple of new investment opportunities and the remainder of your investment will be allocated to these investments when they are consummated". Careem was a transport company operating in the UAE.

16. An investment statement as of 31 December 2017 referred also to an investment of USD 1 million in "Modist", and showed income of over USD 2 million from the investments. In March 2017, Mr Lakhani emailed the Claimant that a further USD 300,000 had been invested in Careem and the investment of USD 1.8 million was valued at USD 4.46 million.

17. On 17 May 2017, in circumstances otherwise unexplained in evidence and submissions but perhaps influenced by the remarkable investment return advised to the Claimant, the Claimant wrote to Mr Lakhani (as "Managing Director, The Abraaj Group, Dubai"), enclosing a cheque for a

further AED 10 million "towards additional investment under the discretionary investment mandate he has with Abraaj". The cheque was drawn by Mr Al Gergawi in favour of AIML. Although without express evidence, it can be assumed that it was banked to an account of AIML.

18. Without going into the detail, the Claimant persistently enquired over the period from March to July 2018 about the state of the investments but received no substantive reply. The enquiries included emails to the Defendant, who at one point replied that he would look into it and later that one of his colleagues would respond. The email chain includes a footer of sending on behalf of AC, with its DIFC regulative details and DIFC address.

19. In fact, the Group was in financial difficulty. Part of the Claimant's evidence in the Application is a book entitled "The Key Man", the Defendant being so described and the tale being a less than flattering account of his rise and fall. With respect to the authors, it is written in what might be called investigative journalist style rather than as a work of scholarship. The account includes, from purported leaked emails, that the Group was in financial difficulty from early 2014, in part due to the Defendant's use of its money to fund a lavish lifestyle, and that the Defendant was directing the misuse of funds to quell its problems and otherwise.

20. In July 2018, the Group collapsed and provisional liquidators were appointed. The Claimant immediately enquired of the liquidators, who said that they were "not aware of any cash holdings in the name of [the Claimant], but that is not to say it does not exist ". The evidence in the Application went no further, but the Claimant's case is that the money remitted was not invested by placement with Careem or otherwise but was misappropriated and has been lost.

21. This was a provision of money to the Group, more specifically to AIML, for investment. How is it said that the Defendant, rather than an entity in the Group or more specifically AIML, is liable for the loss? From the submissions, I do not think that by its reference to misappropriation the Claimant meant that the Defendant necessarily took the money for himself, into his own pocket, and a constructive trust is not necessarily the remedy to which its case is tied. Its principal case, I think, was that the Defendant was responsible for the loss of the money either because he induced the investment by the Claimant without any intention that the money would be duly invested, or because after its receipt he brought that the money was not duly invested; intending that the money be used for the general purposes of the Group or brought to use for its general purposes, as the case may be, in its then financial difficulty, so that the money was in fact not invested but was lost. This did not exclude a subsidiary case that the intended use or the actual use was for the Defendant's own purposes.

The First Limb: Incident or Transaction Wholly or Partly Performed Within The DIFC

22. The Claimant submitted that the incident or transaction, for the purposes of the gateway, was either or both of (a) the solicitation by the Defendant, himself and later through the Group employees, of investment of the money through the Group; and (b) the misappropriation of the money, meaning as I understand it the failure to invest the money and its use for the general purposes of the Group and/or for the Defendant's own purposes. These were more apt to the reference in the gateway to an incident: neither created a commercial relationship between the Claimant and the Defendant. On whatever legal basis it may be contended that the Defendant is responsible for the loss of the money, the Claimant's claim of responsibility and its action in these proceedings arises out of one or both of those incidents and is clearly related to them - the words "relating to" are wide, requiring only some connection. I do not think the Defendant really contested this. The principal contest was over whole or part performance, that is occurrence, within the DIFC.

23. I do not think that the location of either the Claimant or Mr Al Gergawi was the subject of evidence, but it was not the DIFC. The Claimant's submission was that both the solicitation and the misappropriation took place within or from within the DIFC. Central to its submissions were Decision Notices issued by the Dubai Financial Services Authority (the **"DFSA"**).

24. Primary reliance was placed on a Decision Notice dated 19 July 2019 (the **"AIML Decision Notice"**), by which a substantial fine was imposed on AIML for carrying on financial service activities in and from the DIFC when not licensed to do so and for engaging in misleading and deceptive conduct when doing so. The findings in the detailed reasons in the Decision Notice included:

(a) the Group offices in the Cayman Islands were "mere paper offices", and AIML was "perceived as being `headquartered' or `based' in Dubai" (para 32);

(b) AIML was not permitted to, and did not, carry on any business from its registered office in the Cayman Islands, but instead "carried on its activities from Dubai and primarily operated from the Abraaj Group Offices in the DIFC "(para 33);

(c) AH, AIML and AC shared common senior management, and all of AIML's senior management were based at the Abraaj Group Offices in the DIFC (para 36);

(d) from 2009, AIML and AC operations were headquartered in various offices inside the DIFC, and the majority of both firms' staff and their core IT and telecommunications infrastructure were located in those offices (para 71);

(e) from at least September 2009, AIML and AC "were co-located in premises inside the DIFC" (para 72), and the staff interviewed by the DFSA identified themselves as employees of "Abraaj" with no distinction made between AIML or AC (para 73);

(f) AIML made all investment and divestment decisions in relation to Abraaj Group Funds in the DIFC (para 102);

(g) The Abraaj Group "finance team" which managed cash flow was based in the DIFC (para 113).

25. In line with this was a Decision Notice dated 16 July 2019 (the **"AC Decision Notice"**) by which a substantial fine was imposed on AC for, amongst other things, being knowingly concerned in the activities of AIML in carrying on financial services in and from the DIFC without a licence.

26. The Claimant submitted that it should be concluded that, whatever the label to the names in the emails, the Group communications took place from within the DIFC using infrastructure in the DIFC, and that sending the email of 29 October 2015 and the discussion to which it referred were acts within the DIFC purportedly in carrying on financial services activities in and from the DIFC. It pointed specifically to the footer to the 2018 email, and implicit in its submission was that the use by the Defendant of the AH label in the email of 29 October 2015 meant nothing because AH,

like AIML, could not and did not operate in the Cayman Islands and should not be distinguished from AC and AIML. It submitted also that it should be concluded that the misappropriation was carried out wholly or partly in the DIFC because the recipient AIML was in fact, although unlicensed, carrying on its financial services activities in and from the DIFC, with the same senior management and finance team as for the DIFC company AC and with investment decisions (and implicitly, decisions by default or otherwise to misuse funds for general purposes or otherwise) being made there.

27. The Defendant's skeleton argument did not well address the Claimant's argument in these respects, although the argument had been foreshadowed in the witness statement of Ms Omer. It was submitted that the letter of 29 October 2015 was signed in the Defendant's capacity as an officer of AH, a Cayman Islands company, and that the money on both occasions was remitted to AIML, also a Cayman Island company. It was said that there was no evidence that the Defendant encouraged the investment from the DIFC and that whatever he did was as agent of AH or AIML, not of the DIFC company AC. It was submitted that there was no evidence at all that the Defendant misappropriated any of the money. The broad assertion was made that there was no evidence as to how the Defendant was personally responsible for the loss of the money, with the statement as an apparent consequence that there was no basis for jurisdiction over him. The only reference to the Decision Notices was the equally broad assertion that they were irrelevant or unreliable because they had "no reference to even [the Defendant], much less any facts relating to the Claimant's claim". The book "The Key Man" was said to "have no evidential value".

28. In oral submissions, it was maintained that there was no "direct evidence" of solicitation by the Defendant, and no evidence that the money remitted by the Claimant had been misappropriated by the Defendant. To the extent that these submissions challenged jurisdiction for want of proof of the claim, which was not clear but appeared to underlie them, I do not accept them. The gateway refers to an incident or transaction out of which the claim or action arises or to which it is related. What must be shown is the connection, and it is not necessary, and could not be necessary, to prove the claim or action in order to establish jurisdiction in the face of an objection to jurisdiction. In the exercise of jurisdiction, the Court may determine that the claim fails, including that it is not in law well founded in the incident or transaction.

29. A claim without any "coherent allegation" against the defendant will not engage jurisdiction (*Hardt v Damac* [2009] DIFC 036 (4 April 2010) at [60]), and in *Al Khorafi* at [74] the Court referred to a claim having "sufficient substance" for the exercise of jurisdiction. The legal basis for the Defendant's responsibility for loss of the money has not been laid out: deceit and breach of fiduciary duty were raised in oral submissions. But as next considered, the Claimant has a case for solicitation and misappropriation, and whatever the extent of consideration of substance their Honours had in mind (and I respectfully see little beyond showing the connection), I am satisfied in this case that there is sufficient substance if jurisdiction is otherwise made out - to repeat, including jurisdiction to determine that the claim fails.

30. These submissions were, I think, more directed to proof of the incidents as part of establishing jurisdiction. In *Akhmedova v Akhmedova* [2018] DIFC CA 003 (19 June 2018) at [18] the Court of Appeal endorsed the test of a good arguable case for establishing jurisdiction, noting that the question is often one of mixed fact and law and an interlocutory hearing is generally not suitable for resolving contested issues. In that connection, in *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 (**"Brownlie"**) at [7] the Supreme Court in England affirmed a three-element test:

> ". (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage maybe such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

31. I was not addressed on these cases, or the test at all. I note that in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA* [2018] 1 WLR 3514 at [74] the discussion of Brownlie tended to equate the three element test with a good arguable case, and I adopt the good arguable case test; consideration of its development should await another occasion with full argument. But that test must be applied with appreciation that it is applied at interlocutory stage, when ideal evidence may not be available and should not be required, and since the exercise of jurisdiction includes granting summary judgment, it is a lesser test than that of a real prospect of success.

32. The letter of 29 October 2015 refers to prior discussions, and the remittance of funds did not come out of the blue and can be inferred to have been the result of discussions in which the Defendant at the least invited and encouraged the placement of funds with the Group for investment. The subsequent remittance of funds arguably flowed from it and the encouraging investment returns told to the Claimant. While the Decision Notices do not refer to the Defendant specifically, they are the result of a considered investigation by the DFSA and provide a basis for concluding, of course ultimately depending on the evidence as a whole at a trial, that the Defendant at the least was instrumental in the destination of the remitted money within the Group. The allegations in the Complaint are allegations, not findings like the matters in the Decision Notices, but are allegations of relatively formal matters going to the Defendant's position within the Group and likely to have been correctly made, and they provide some further support. Even without them, there is sufficient for a good arguable case of the incidents for jurisdictional purposes.

33. There is also sufficient for a good arguable case that the solicitation and misappropriation were within or from the DIFC. Adequacy of proof includes regard to the ability of the party with the burden of proof to bring forward evidence. The Claimant is not presently in a position to provide direct evidence of the Defendant's location and movements at the time of the discussions referred to in the letter of 29 October 2015, or when the destinations of the remitted money within the Group were decided. But the Decision Notices provide a sound basis for at least some of the discussions taking place from the DIFC and for the decisions being made in the DIFC, where AIML in particular was located, all senior management was based, and all investment and divestment decisions for the Group were made. On the evidence in the application, there is a good arguable case that that was the locus of the Defendant's activities, and that if there was solicitation the DIFC was from where it took place and if there was misappropriation the DIFC was where it took place. In this regard, it may be noted that *Al Khorafi* 2012 at [67]-[69] described the giving of advice and the sending of letters by Ms Naz and Mr Kerry and said, "In as much as Ms Naz and Mr Kerry operated from the Sarasin Dubai offices in the DIFC, there were relevant `incidents' in the DIFC which form one of the components of the claims for misrepresentation and negligence against Sarasin Switzerland".

34. I do not accept the Defendant's submission that the Decision Notices are irrelevant or unreliable. They are undoubtedly relevant, and the

Defendant's oral submissions were more directed to their weight. A number of reasons were given, addressed to the AIML Decision Notice but the AC Decision Notice is in the same position. One was that there was no reference to the Defendant himself; that is correct, but the findings are still relevant. Another was that it was said in the AIML Decision Notice (paragraph 3) that it was addressed to AIML alone and the opinions expressed were without prejudice to the position of any third party. I am unable to see why that detracts from the reliability of the factual matters found and stated. Another was that the Defendant had not had the opportunity to be heard in the DFSA investigation leading to the Decision Notice; this may have had more significance if there had been evidence from the Defendant before me, but the factual matters found and stated remain reliable. The last was that it was not said that all AIML's activities were within the DIFC, which is also correct but other evidence enables the inference that the Claimant's investment was a DIFC matter.

35. Nor do I accept the Defendant's submission that the book "The Key Man" has no evidential value. The Claimant relied on it for the limited purpose of the purportedly leaked emails part of the authors' account, indicative of financial difficulty and misuse of funds over the period the money was remitted. The weight is open to debate, but it is overstated to say that there is no evidential value. I consider that, for the limited purpose and in this Application, some support is provided to the good arguable case: but I am satisfied in that respect even without regard to the book.

36. In my view, this limb of the gateway is satisfied.

The Second Limb: Incident or Transaction Related To DIFC Activities

37. This does not need extensive discussion. The solicitation and the misappropriation alleged were in furtherance of or as a result of a commercial activity carried on in the DIFC, as the limb is explained in Al Khorafi 2012, being the financial service activity carried on by AIML (although unlicensed), alternatively the activity of AC in being knowingly concerned in AIML's financial activity, or more widely the Group activities. Any solicitation was on the face of the letter of 19 October 2015 purportedly on behalf of AIML, and any misappropriation was a wrongful carrying on of its activities or those of AC or the Group as a wrongful dealing with the remitted money. It may be noted that the expression in the gateway is "related to DIFC activities", and the explanation in *Al Khorafi* 2012 must, with respect, defer to the width of that expression; on any view, there is a relationship.

38. In his skeleton argument, the Defendant said as to relating to a DIFC activity only that AIML was not a DIFC entity and that Careem and Modist, in which the statements of accounts showed that the money was invested, were not DIFC activities. There is nothing in these points.

39. In my view, this is limb of the gateway is also satisfied.

40. I should deal with a separate submission by the Claimant, in the terms that there was jurisdiction over the Defendant because there was jurisdiction over the Abraaj entities which he controlled and used to carry out the acts giving rise to the Claimant's claim. The submission was founded on Al Khorafi v Bank Sarasin-Allen (ME) Ltd [2015] DIFC CA 003 (3 March 2016) (**"Al Khorafi 2016"**) at [267]- [271], [323].

41. In Al Khorafi 2016 the relevant issue was whether Bank Sarasin, in Switzerland, had been carrying on activities constituting a financial service in and from the DIFC, in contravention of the regulations. The Court of Appeal upheld the trial judge's finding in the affirmative. Bank Sarasin carried out its banker-client relationship with the claimants through employees of the Sarasin-Alpen joint venture in the DIFC, and the employees' dealings with the Claimants, done in and from the DIFC, were attributable to it.

42. However, that is not this case. The Defendant was not in the position of Bank Sarasin, a business entity carrying on business through personnel in the DIFC. The question is not whether the Defendant was carrying on business in the DIFC through the Abraaj entities, but whether the solicitation and misappropriation alleged were in or from the DIFC. The Claimant's submission should not be accepted.

Costs

43. It was common ground at the hearing of the Application that costs should follow the event, and the Defendant should pay the Claimant's costs. Statements of Costs were filed, but as in the Set Aside Judgment the amount claimed by the Claimant appears to be excessive and I will not make an immediate assessment. Costs should be assessed by the Registrar if not agreed. In the Set Aside Judgment, an order was made that the Claimant pay the Defendant's costs of that application. There is the opportunity for sensible discussion and avoidance of assessments.

Orders

44. I make the following orders:

1. Dismiss the Application.

2. The Defendant shall pay the Claimant's costs of the Application, to be assessed by the Registrar if not agreed.

3. The Claimant shall file and serve its particulars of claim within 28 days.