Claim No: CFI-036-2014

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

BETWEEN

VANNIN CAPITAL PCC PLC

for and on behalf of protected cell - Project Ramsey

Claimant

and

(1) MR RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) MRS AMRAH ALI ABDEL LATIF AL HAMAD

(3) MRS ALIA MOHAMED SULAIMAN AL RIFAI

(4) KBH KAANUUN LIMITED

(5) BANK SARASIN-ALPEN (ME) LIMITED

(6) BANK J. SAFRA SARASIN LTD (FORMERLY BANK SARASIN & CO LIMITED)

Defendants

ORDER OF JUSTICE SIR RICHARD FIELD

UPON reviewing the application of the First Three Defendants for permission to appeal against the Order of H.E. Justice Ali Al Madhani dated 28 January 2016 and the Points of Appeal dated 11 February 2016 and the skeleton argument dated 25 February 2016 filed in support thereof.

AND UPON reviewing the Order and Reasons of H.E. Justice Ali Al Madhani dated 28 January, the written submissions and evidence relied on by the parties at the hearing on 29 July 2015 of the applications issued by the First Three Defendants on 9 June 2015 and the application issued by the Claimant issued on 11 June 2015.

AND UPON reviewing the transcript of the said hearing on 29 July 2015

AND UPON reviewing the Orders and Reasons of H.E. Justice Omar Al Muhairi dated 10 November 2014 and 18 February 2015, the skeleton arguments and evidence relied on by the parties in respect of the Claimant's application issued on 3 November 2014 and the application of the First Three Defendants issued on 4 November 2014.

AND UPON reviewing the transcript of the hearing on 6 November 2014 of the said application of the Claimant issued on 3 November 2014.

AND IN ACCORDANCE WITH Part 44 of the Rules of the DIFC Courts.

IT IS HEREBY ORDERED THAT:

The First Three Defendants' application for permission to appeal the order of H.E. Justice Ali Al Madhani be dismissed.

Issued by:

Maha Almehairi

Deputy Registrar

Date of Issue: 11 April 2016

At: 4pm

SCHEDULE OF REASONS

Introduction

1.The First Three Defendants ("the Khorafis") apply for permission to appeal the decision of H.E. Justice Ali Al Madhani given on 28 January 2016 dismissing three applications respectively for: (i) an order that USD 945,593.00 paid into court as part of a larger sum pursuant to an order of H.E. Justice Omar Al Muhairi dated 10 November 2014 be paid out of court to the Khorafis and their lawyers Hamdan Al Shamsi ("HAS"); and (ii) orders staying arbitration proceedings brought against the Khorafis by the Claimant ("Vannin") (DIFC/LCIA D-L-14043).

The background to the application

Vannin's successful application for the grant of interim relief

2. E. Justice Omar Al Muhairi's order dated 10 November 2014 was preceded by an order he made at the end of a hearing on 6 November 2014 ordering that the sums awarded to the Khorafis by DCJ Chadwick on 28 October 2014 in CFI No. 026/2009 should be paid into court within 14 days. These sums totaled USD 11,445, 049 ("the awarded sum").

3. E. Justice Omar Al Muhairi's orders of 6 and 10 November 2014 were made on the application of the Claimant ("Vannin") by way of a Part 8 Claim Form issued on 3 November 2014 (CFI 036/2014).

4. Vannin is party to a Restated Litigation Funding Agreement made on 21 April 2013 ("the RLFA") which provided in Clause 10.1 thereof that the Khorafis had to pay Vannin two sums - the "Distributed Fund" and the "Funding Premium" -- immediately on the event of their winning their claim or any part of it against the 5th and 6th defendants, Bank Sarasin-Alpen (ME) Limited and Bank J Safra Sarasin Ltd (formerly Bank Sarasin & Co Limited ("the Sarasin parties") in CFI No. 026/2009 ("the main action"). The sums due in respect of the Distributed Fund and Funding Premium following DCJ Chadwick's order of 28 October 2014 were USD 2,843,349.80 and USD 7,108,374 respectively.

5. By virtue of Clause 31.1 of the RLFA, the sums due under clause 10.1 were to be held in a designated account opened by the Khorafis' then solicitors ("KBH") on which fund Vannin was granted a right of first and third call. And under Clause 31.2 and 31.3, the Khorafis' solicitors and any other person who comes into possession of thereof hold the Recovered Costs and Recovered Damages on trust for Vannin.

6. The evidence put before the judge by Vannin disclosed that: (i) following DCJ Chadwick's order of 28 October 2014, Vannin had a good arguable case that it had a secured contractual right to be paid under clause 10.1; and (ii) the Khorafis were evincing an intention not to pay the awarded sum to Vannin at all or at least were dragging their feet over paying the awarded sum into a designated account and thereby protect Vannin's right of first call.

7. On 28 August 2014, just seven days after DCJ Chadwick's judgment in favour of the Khorafis on liability was handed down, the Khorafis had terminated KBH's retainer and appointed in their place HAS. Under separate contractual arrangements, KBH also had a right to be paid in respect of their "basic costs" and a "success fee" following DCJ Chadwick's order of 28 August 2014. How the recovered sums were to be distributed as between Vannin and KBH was governed by a waterfall provision contained in Clause 7 of the RLFA. The awarded sum was sufficient to meet both Vannin's entitlement to be paid the "Distributed Fund" and KBH's right to paid their "protected basic costs", but it was not enough to cover Vannin's right to the "Funding Premium" and KBH's "success fee" in full and thus the balance was due to be shared ratably between Vannin and KBH under Clause 7.

8. Faced with the termination of KBH's retainer, Vannin's solicitors, Messrs Clyde & Co, had proposed that the awarded sums be paid into an account held by them that would operate as an escrow account but HAS did not agree to this proposal. Indeed, at one point, Mr Al Shamsi of HAS told Clyde & Co ("Clydes"), that the money should be paid out to those who needed it most and his firm and the Khorafis Counsel were a priority.

9. In resisting Vannin's application, the Khorafis relied on a witness statement made by Ms Gayle Hanlon, a partner in HAS, on 4 November 2014. In this statement Ms Hanlon submitted that the court lacked jurisdiction to hear Vannin's application on the basis that: (i) the RLFA contained an English jurisdiction clause; (ii) Vannin's recourse, if any, was arbitration proceedings pursuant to an arbitration agreement contained in Clause 17.1 of the RLFA and no such proceedings had been initiated; and (iii) in any event, no arbitration proceedings could be started by Vannin since the parties had not considered mediation which, under Clause 17.1.3 of the RLFA, was a pre-condition to the right to bring such proceedings.

10. Clauses 17.1 and 17.3 of the RLFA provide:

> "17.1 If there is a dispute between the Parties as to how this [Amended LFA] should be applied, then subject to the right of any person to ask the court to resolve the matter, the following procedure will apply:
>
> 17.1.2 ..
>
> 17.1.3 Quantum or principle (final): If the dispute relates solely to amounts payable under this [Amended LFA] which are final payments, then the parties are required to consider mediation. If that does not work, then the parties will be at liberty to have the matter decided by arbitration pursuant to the DIFC-LCIA Arbitration rules. The arbitrator's decision shall be final and legally binding and judgment may be entered thereon."

11. KBH also applied to the court for a protective order. The return date for both applications was 6 November 2006. On 4 November 2014, the Khorafis issued a cross-application supported by the aforesaid witness statement made by Ms Hanlon seeking an order that the court had no jurisdiction to determine Vannin's application. The following day, 5 November 2014, Vannin initiated arbitration proceedings (D-L-14045) claiming an entitlement to be paid the sums due under Clause 10.1 of the RLFA and enforcement of its right to security under Clause 31.

12. At the hearing on 6 November 2014, Mr Reed QC for Vannin argued that it had a good arguable case that it was entitled to immediate payment of the sums due in respect of the Distributed Fund and the Funding Premium out of the recovered sums and that there was a real risk that those sums would be dissipated by the Khorafis.

13. Ms Hanlon for the Khorafis told the judge that her clients had had insufficient time to mount a substantive defence and were not even ready to proceed with their jurisdiction challenge. She sought to reserve the right to serve further evidence and submitted that the Khorafis had not threatened to breach the RLFA. On the contrary, she stressed that her clients did not challenge the validity of the RLFA. All they insisted on was the opportunity to scrutinize KBH's costs before making any payment to that firm. She also told the court that HAS objected to the awarded sums being paid into an account held by a Western law firm because of a risk of co-mingling of monies. HAS had tried to negotiate the establishment of an escrow account with Emirates NBD but these attempts had failed. Her clients would not object to the awarded sums being held by a DFSA financial institution.

14. At the conclusion of submissions, H.E. Justice Omar Al Muhairi observed before rising for 10 minutes that there was a miscommunication between the parties and wondered if there was any hope of agreement before the court issued an order. During the ensuing adjournment the parties (including KBH) agreed that the awarded sums should be paid into court but there was no agreement as to the costs of Vannin's application nor to the final wording of the order. Faced with continuing differences as to costs and the wording of the order, H.E. Justice Al Muhairi proceeded to order that: (i) the time for service would be abridged; (ii) the awarded sums should be paid into court; (iii) the parties should submit written submissions on all outstanding matters which would be dealt with on paper.

15. In his formal order issued on 10 November 2014, H.E. Justice Omar Al Muhairi ordered that the awarded sums should be paid into court by 11 November 2014 "to be held until further Order of the Court as to whom and in what amount payments shall be made, such an order to be in the form of an order made by consent of [Vannin, the Khorafis and KBH] as parties to an Amended Restated Litigation Funding Agreement dated 21 April 2013 and/or (in so far as it relates to the respective entitlements of [Vannin, the Khorafis and KBH] pursuant to an order of any competent court and/or an arbitration award."

16. E. Justice Omar Al Muhairi also ordered that the Khorafis were to file their evidence in support of their jurisdiction challenge by 13 November 2014. In purported compliance with this direction, the Khorafis served on that date a Statement of Defence to Vannin's Part 8 Claim together with a second witness statement of Ms Hanlon that not only dealt with the jurisdiction challenge but also responded on the merits of Vannin's claim. When this approach to the evidence was challenged by Clydes, Ms Hanlon maintained that it was clear from the transcript of the 6 November 2014 hearing that the judge had intended to allow the Khorafis to serve further evidence of the substantive merits of Vannin's claim. However, in a judgment dated 18 February 2015, H.E. Justice Omar Al Muhairi dismissed the Khorafis' jurisdiction challenge and in so doing made no reference to Ms Hanlon's evidence or the Statement of Defence. The irresistible inference must be that H.E. Justice Omar Al Muhairi thought that this part of Ms Hanlon's evidence and submissions was inadmissible both to the question of jurisdiction and as to the appropriateness of his order dated 10 November 2014.

The Khorafi/KBH consent order made on 9 February 2015

17. On 27 October 2014, the Khorafis started an action (CFI-035-2014) against KBH for production of the files maintained by KBH in the main action and for a declaration that a lien KBH were exercising over the files pending payment of overdue fees was invalid.

18. On 9 February 2015, KBH and the Khorafis were parties to a consent order under which: (1) the Khorafis accepted that they were liable to pay KBH USD 4,000,000 by way of fees, USD 948,593 by way of third party disbursements and USD 60,114 by of KBH's disbursements; and (2) USD 2,000,000 out of the USD 4,000,000, plus the USD 948,593 disbursements were to be paid out of the awarded sums held by the court.

19. It is to be noted that under the consent order KBH was to receive more from the awarded sum than it is entitled to pursuant to the waterfall clause (Clause7) in the RLFA.

The orders made by Justice Roger Giles on 3 February and 5 April 2015.

20. On 3 February 2015, Justice Roger Giles sitting as a single member of the Court of Appeal gave the Sarasin parties permission to appeal DCJ Chadwick's judgment of 21 August, subject to determination of whether the grant of permission should be conditional on payment intoCourt of any judgment sum(s) and costs ordered to be paid at first instance.

21. On 5 April 2015, Justice Roger Giles ordered Bank Sarasin & Co Ltd to pay intoCourt 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 the main action 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.

The first Khorafi application issued on 9 June 2015 and heard by H.E. Justice Ali Al Madhani on 29 July 2015.

22. The first Khorafi application heard by H.E. Justice Ali Al Madhani (hereinafter "the judge") on 29 July 2015 was for an order varying the order made on 10 December 2014 so that: (i) USD 9,455,930.00 out of the total sum of USD 11,445,049 paid into Court under the earlier order be now paid out to the Khorafis and their lawyers, HAS; (ii) USD 2,000,000.00 be held in Court (at the discretion of the Court) representing the first tranche payment due to KBH under the consent order dated 9 February 2015; and (iii) only insofar as any further damages are awarded against and paid by Bank Sarasin should such further sums be held in Court as security for the claims of Vannin and KBH.

23. The application was supported by a witness statement made by Mr Mohammed Nour Abdullah Mohammed Nour who is employed by the first applicant ("Mr Khorafi") as an Office Manager and Advisor.

24. The Khorafis argued that they were making an interim application to which RDC 25.6 and 25.7 applied and that it was in the interests of justice that the order sought should be granted. Even assuming that the RLFA was valid and binding (an assumption the Khorafis disputed in a later part of their argument, see below) it was submitted that it was in the interests of justice that the application be granted because Mr Khorafi had incurred unpaid debts totaling USD 2,414,767.00 in pursuing the claims in the main action and was unable to fund resisting the Sarasin parties'

upcoming appeal out of the cash flow available to him. In particular, the Khorafis were unable to pay the fees agreed with counsel for the appeal (USD 425,835) without jeopardizing the cash-flow arrangements Mr. Al Khorafi had in place to allow him to continue making payments in the long term. If the first application were not granted, the appeal on liability then due to be heard in late September 2015 would have to be adjourned. In the meantime, the Khorafis' counsel were insisting on being paid the fees due to them before they resumed work on preparing for the liability appeal.

25. The Khorafis also contended that the reason lying behind the interim payment of their costs ordered by DCJ Chadwick - to reduce the time a party awarded costs is kept out of his money - applied equally to the awarded sums held in court. Further, there was no need for the Khorafis to give a cross-undertaking in damages because if the Khorafis lost the liability appeal, Vannin would have no entitlement to any payment under the RLFA and if they won the appeal far more money by way of damages and costs would be awarded after the quantum hearings than would be needed to pay Vannin the USD 9.9 million to which they were laying claim.

26. In the alternative, the Khorafis submitted that: (1) the original Legal Funding Agreement dated 12 January 2012 ("the LFA") had been wrongfully repudiated by Vannin by a notice dated 27 March 2013, which repudiatory breach was accepted by the Khorafis; and (2) they were entitled to rescind the RLFA or otherwise set it aside on the grounds that:

> (a) The wrongful repudiation of the LFA, and subsequent conduct of Vannin was intended to force the Khorafis to enter into the RLFA in circumstances of economic duress;
>
> (b) The consent of the Khorafis to the RLFA was not informed consent;
>
> (c) Essential terms of the RLFA are unlawful and evidence deceit, or other unlawful conduct by Vannin;
>
> (d) Vannin has not acted in good faith in the performance of the RLFA.
>
> (e) No Independent Legal Advice had been provided in respect of the RLFA.

27. These alternative submissions were made by reference principally to a Draft Statement of Case ("the DSoC") intended to be filed in accordance with RDC 25.7 (3) and also, to a lesser extent, by reference to Mr Noor's witness statement. In other words, the Khorafis were intending to exercise the option conferred by Clause 17 (1) of the RLFA of having the court decide its claim that the RLFA was void and unenforceable rather than simply referring this claim to arbitration, notwithstanding that they also intended to plead the averments and contentions made in the DSoC in the arbitration by way of a Defence and Counterclaim.

28. In their submissions the Khorafis noted that Vannin was entitled to terminate the original Legal Funding Agreement dated 12 January 2012 ("the LFA") on 14 days' notice pursuant to Clause 27.3.1 thereof if there had been a material change in circumstances such that there was a significant change in merits of the Claim as determined by a written legal opinion from an independent Queen's Counsel stating the prospects of success of the liability Claim to be less than 50%.

29. In the DSoC it was alleged that on 6 March 2013 Vannin confirmed the budget allocation down to trial in the amount of USD 3,902,900.00, but from about 11 March 2013 Vannin refused to pay sums due under the budget plan. And it was on that date that Vannin instructed Mr. Jeremy Cousins QC to provide an opinion as to the prospects of success of the Khorafis' claim.

30. Cousins's opinion was produced on or about 20 March 2013 to which he added a Further Note dated 22 March 2013. In Mr. Cousins's view, the Khorafis case on misrepresentations had no more than a 35% chance of success and their claim on the balance of the liability issues had no more than a 40% chance.

31. On 27 March 2013 Vannin gave formal notice of termination of the LFA.

32. On 4 April 2013 negotiations for an amended LFA began between Vannin, the Khorafis and KBH which culminated in the execution of the RLFA on 24 April 2013. Under that agreement, Vannin was to continue funding the litigation but was free to reduce its ongoing contribution from USD 1,659,550.20 to USD 600,000; and if it contributed further funds or the Khorafis failed to pay on the due date their agreed contributions (including USD 350,000 in two instalments), Vannin was entitled to a 500% uplift.

33. The Khorafis alleged in the DSoC that Mr. Cousins's opinion was not such as to confer a right on Vannin to terminate the LFA for a number of reasons including: (i) Mr. Cousins was not independent of Vannin but had a close personal, professional and financial relationship with a Mr. Rowles Davies who was employed by Vannin; (ii) Mr. Cousins took direction from Mr. Rowles Davies as to the scope of what he was to do; (iii) Mr. Cousins's opinion was wrong in fact and in Law, irrational, unreasonable and reckless and took into account irrelevant considerations.

34. The Khorafis further contended in the DSoC that: (i) Vannin's refusal to pay invoices from 6 March 2013 was unlawful, arbitrary and capricious and constituted illegitimate pressure at a critical time in the proceeding in that at the same time (4 April 2013) as Vannin was proposing revised terms for the LFA under which it would continue to provide funds, Vannin was continuing to refuse to pay sums due under the LFA which left the Khorafis with no other practical choice than to accept the restated terms provided by Vannin in the RLFA; (ii) the terms of the RLFA were capricious, unconscionable, unfair and punitive and reflected the unequal bargaining power between the parties; (iii) Clause 3.38 of the RLFA (which provided for the "protected success fee") breached the terms of the English Conditional Fee Agreements Order 2013 and was otherwise unlawful; (iv) between 4 and 21 April 2013 Vannin made material misrepresentations, the dominant purpose of which was to induce the Khorafis to enter into the RLFA; (v) the overall effect of the RLFA, and the Conditional Fee Agreement made between the Khorafis and KBH dated 4 April 2010 was that, for every USD 1.00 spent, the Khorafis were required to repay USD 5.00, plus a margin of USD 1,750,000.00 in undisclosed fees to KBH, yet the Khorafis received no independent advice on these agreements as Vannin knew or ought to have known.

35. The Khorafis further "pleaded" in the DSoC that they had the following causes of action in contract against Vannin: (i) breach of the obligation of good faith; (ii) repudiatory breach of the LFA in seeking an opinion from a QC as to the prospects of success in the main action when there had been no material change in circumstances; (iii) breach of the LFA in failing to ensure that the QC sought to provide an opinion on the prospects of

success in the main claim was independent; (iv) breach of the LFA in that Mr Cousins' opinion was misdirected, wrong in fact and in law, irrational and unreasonable and Vannin's instructions to him and its use of his opinion was dishonest; (v) breach by Vannin of an essential term of the LFA by refusing to pay all accounts approved under the Budget Plan, or otherwise as reasonable when they fell due; (vi) rescission of the RLFA on the ground that it was executed by the Khorafis under economic duress caused by the actions of Vannin which were deliberate, contumelious and egregious; (vii) Vannin acted in breach of the LFA in that it encouraged, suggested, persuaded, aided, assisted, or abetted KBH to insert Clauses 3.37 and 3.38 into the RLFA and to enter into a contingency fee which is not allowed under the DIFC Mandatory Code of Practice; (viii) a claim for rescission and damages for misrepresentation of the nature and effect of the RFLA; (ix) a claim for rescission of the RFLA by reason of Vannin's failure to require the Khorafis to obtain proper, independent advice as to that agreement.

The second and third Khorafi applications issued on 9 June 2015 and heard by the judge on 29 July 2015.

36. By their second and third applications, the Khorafis sought a stay of the arbitration proceedings begun by Vannin on 5 November 2014 or a declaration that the arbitral tribunal lacked jurisdiction to determine the reference served by Vannin on the grounds respectively that the right to have the dispute as to payment out of the awarded sums determined by arbitration had not accrued at the date Vannin served its Request for Arbitration.

37. Under Clause 10.1 of the RLFA, on the Khorafis "winning", Vannin was entitled to the immediate payment of the "Distributed Fund" and the "Funding Premium". Under Clause 3.48, a Win is defined as:

> "A Win will mean that any part of the claim is Concluded in the [Khorafis'] favour in that the [Khorafis] are . able to recover damages from the Opponents, or the [Khorafis are] . awarded any other remedy which is of value; if it is sufficiently significant, an award of Costs may be regarded as a Win."

38. "Concluded" is defined as:

> "Concluded" means the Claim (or relevant part of it) has been won or Lost, and that: if the Claim (or where appropriate, part of it) has been Won, the Opponent .Has Lost any appeal."

39. In the second application, the Khorafis submitted that a Claim has not been Won until the Opponent has Lost an Appeal and thus Vannin had no accrued entitlement to use the Clause 17 arbitration machinery when it served its Request for Arbitration. That Request was therefore premature and accordingly the tribunal had no jurisdiction to decide Vannin's reference.

40. In the third application, it was submitted that the pre-condition in Clause 17.3 that the parties had considered mediation and this had not worked had not been satisfied and thus, for this reason too, Vannin's Request for Arbitration was premature and the tribunal had no jurisdiction to determine Vannin's reference.

Vannin's cross-application issued on 11 June 2015

41. On 11 June 2015, Vannin issued a cross-application seeking: (i) service of the Khorafis' first application in redacted form on the Sarasin parties; and (ii) dismissal of the Khorafis' second and third applications on the ground that the court did not have jurisdiction to grant the relief sought.

42. This cross-application was heard by the judge on 29 July 2015 at the same time as he heard the Khorafis' applications.

Vannin's case resisting the Khorafi applications

43. Briefly put, Vannin's case in answer to the first application was that properly analysed it was an application based on financial need, in particular the need to pay debts already incurred in prosecuting the main action especially Counsels' fees. It was incumbent on the applicants to show that there had been a significant change in circumstances since the order made on 10 November 2014, and this they had failed to establish. Financial need had featured in the application heard on 6 November 2014 when the future legal costs were all too predictable. Moreover, there was no evidence that the Khorafis lacked the resources to pay the debts they faced. On the contrary, Mr Nour made it plain in his witness statement that Mr Khorafi had the means to pay the debts even if the Khorafis lost the liability appeal. The only subsequent developments were the orders of Justice Giles giving the Khorafis permission to appeal and making that permission conditional on payment into court of all future recoveries, both of which were highly likely events when Vannin's preservation application was heard on 6 November 2014.

44. The contentions made in the DSoC that the RLFA agreement was void and/or rescindable were available to the Khorafis first time round, at least in the sense that they could have applied for an adjournment to consider the enforceability of the RLFA and to contend thereafter that no debt at all was owed to Vannin under the RLFA. Further, it would only be if the court were to uphold the contentions in the DSoC that the Khorafis would establish an entitlement to have paid to them all the monies in court and it was inconceivable that the court could try those contentions in the context of the first application. At their highest, the contentions could only be regarded as arguable, and that was not enough for the first application to succeed. In any event, the Khorafis ought not to be allowed to deploy the DSoC what with it being unsigned and lacking a statement of truth. This was not a case where the urgency of the situation justified reference to a draft pleading: the applicants had had plenty of time to produce and serve a Statement of Case in proper form.

45. As to the second and third applications, Vannin submitted that the court lacked jurisdiction to determine the same. Arbitration proceedings were under way following Vannin's Request for Arbitration dated 5 November 2014 and, under the law of the DIFC, it was for the arbitral tribunal alone to determine whether it had jurisdiction to determine the reference.

H.E. Justice Ali Al Madhani's decision dated 28 January 2016

The first Khorafi application

46. In paragraph 16 of his judgment, the judge found that the DSoC was not relevant to the first application. It was unsigned and contained no statement of truth. Why it was being submitted was not clear to anyone; it did not deal with the application at hand and had no reference to it; nor did it put forth any grounds or reasoning as to why the Khorafis were entitled to the remedy they were seeking in the first application.

47. Relying on RDC 2.10 (3), the judge adopted in paragraph 43 of his judgment the approach of the CPR and the English Courts to applications to vary interim orders. Thus he observed that the rule in Henderson v Henderson [1843] 3 Hare 100; 67 ER 313 applies so that a party cannot make repeated successive applications where the grounds relied upon in the later applications existed and were available at the time of the application, and still less when those grounds were relied upon, but were rejected by the court.

48. The judge also: (i) adopted in paragraph 44 the view of the English High Court in Lloyds Investment (Scandinavia) v Ager-Hanssen [2003] 3 All ER (D) 258 that the Court's general jurisdiction under CPR 3.1(7) should not be used to vary its orders for the purpose of enabling a party to re-argue any application, relying on submissions and evidence available to them at the time of the earlier hearing; and (ii) in paragraph 45 quoted with approval the following well-known passage from the judgment of Buckley LJ in Chanel v Woolworth & Co [1981] 1 WLR 485 at 492H-493A:

> "Even in interlocutory matters, a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."

49. In paragraphs 46 and 47, the judge said:

> "46. One cannot imagine that parties may be allowed to continue fighting over the same issues surrounding an order without end. The judicial orders must provide stability and some sort of finality to the issues between the parties even if the issue is not on the merits of the case.
>
> 47. Deciding otherwise could lead to endless appeals on the varying of orders where the losing party would drag the application before a court for long periods that would defeat the court's objectives to deal with cases justly, fairly and in a reasonable period."

50. The judge then considered whether there had indeed been a material change of circumstances since the order of 10 November 2014 and concluded that the answer to this question was no. The updated financial information supplied in Mr. Nour's witness statement was not a new material circumstance since the expense of the litigation and its ongoing cost were a matter available at the hearing on 6 November 2014. The only change was that permission to appeal had been granted but this and the costs associated therewith had been anticipated at the earlier hearing.

51. In paragraph 50, the judge concluded:

> "Having established that the Khorafis have put forward no material change of circumstances or events since the Preservation Order was granted, this Court sees no ground on which it can revisit the Order."

The second Khorafi application.

52. The judge held that the court had no jurisdiction to determine whether the claim referred by Vannin to arbitration was in respect of a "final" payment and therefore within the reach of Clause 17.3 of the RLFA. In reaching this conclusion, the judge cited Articles 10 (1) and 23 (1) of the DIFC Arbitration Law:

> 10 (1) In matters governed by this Law, no DIFC Courts shall intervene except to the extent so provided in this Law.
>
> 13 (1) If an action is brought before the DIFC Courts in a matter which is the subject of an Arbitration Agreement, the DIFC Courts shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, dismiss or stay such action unless it finds that the Arbitration Agreement is null and void, inoperative or incapable of being performed.
>
> 13(2) Where an action referred to in paragraph (1) of this Article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the DIFC Courts.
>
> 23 (1) The Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the Arbitration Agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not by itself determine the invalidity of the arbitration clause.

53. In paragraph 94, the judge found that since the Khorafis had not sought to establish that Clause 17.3 was null and void, inoperative or incapable of being performed, the second and third applications must fail.

54. In paragraphs 95, 96 and 97 he said:

> 95. The further question in the Second Application is whether Vannin's immediate right to payment arises under Clause 10.1 of the Agreement.
>
> 96. It is beyond doubt that what the Khorafis are trying to do in their Second Application is to ask this Court to step on the selected Arbitral Trinbunal's toes by looking at the merits of the case referred to arbitration and interpreting the agreement, then to conclude that the arbitral tribunal has no jurisdiction.
>
> 97. Even if the Khorafis manage to establish before this Court that there is still no "win" to justify Vannin's claim, which has nothing to do with the Arbitration Clause in any event, the request put forward still must be seen as requiring the Court to cross the jurisdiction of another selected forum. The Court is restrained from doing so by Article 13 (1) of the DIFC Arbitration Law, and this request is denied.

The third application

55. As recorded in paragraph 53 above, the judge decided in paragraph 94 of his judgment that the third application must fail as well as the second application because in neither were the Khorafis seeking to establish that Clause 17.3 was null and void, inoperative or incapable of being performed.

56. In paragraph 99, the judge said that he could see that mediation as a pre-condition is something to do with the validity of the Arbitration Clause itself, unlike the argument in the second application that related to the meaning of the word "win" in the body of the RLFA. However, relying on paragraphs 18.13 and 18.14 in Joseph Jurisdiction and Arbitration Agreements and their Enforcement,[1] he went to hold that the Court must not construe an ADR or mediation provision in an arbitration clause but should instead ask if there is in existence an arbitration agreement within the meaning of the relevant legislation.

57. In the view of the judge, the decision of Mr. Justice Colman in Cable & Wireless PLC v IBM UK Ltd [2003] 1 BLR 89 cited by the Khorafis was distinguishable because it was not there suggested that the English court lacked jurisdiction to determine the effect the ADR provision in question. (I would add that the English court had jurisdiction because the ADR provision was not contained in an arbitration clause but was part of a scheme identifying what steps the parties had to take before judicial proceedings could be started).

58. The judge also criticised the Khorafis' reliance on paragraph 18.03[2] of Joseph's work without drawing the Court's attention to paragraphs 18.13 and 18.14.

59. The judge then went on to agree with Vannin's submission that the effect of the mediation provision could be left over to be dealt with if the winning party sought recognition of the award under Article 44.1.a (iii) of the DIFC Arbitration Law.

The substance of the Khorafis' proposed grounds of appeal.

The first application

Ground 1.

60. The judge erred in holding that RDC 4.7 and CPR 3.1(7) restricted the Court's discretion in respect of the first application. Instead, the judge should have treated the first application as if it were pursuant to a "liberty to apply" under the 6 November 2014 order and should have found that it was in the interests of justice to amend the original order as sought with Vannin still having a protected right on the basis that the Khorafis had a good arguable case and a pressing need.

Ground 2.

61. RDC 4.7 and CPR 3.1(7) only apply to subsequent or successive applications seeking the same or substantially the same relief and the Khorafis had not sought the same relief as requested in the first application dated 9 June 2015 on any previous occasion. The judge did not, in fact, identify any previous application made by the Khorafis, but only arguments which were "available to them to put forth" at 6 November 2014.

Ground 3.

62. The judge wrongly considered that assertions made outside of court proceedings in correspondence and a file note(s) in respect of a further funding agreement constituted "a previous application" or should be considered as such. The right of the Khorafis to use the Fund in the manner set out in the Application dated 9 June 2015 was not adjudicated on by the 6 November 2014 Order.

Ground 4.

63. Even if RDC 4.7 and CPR 3.1(7) governed the first application, the proper application of those Rules should nevertheless had led to the finding that the Court did have jurisdiction to consider the first application, as it involved material changes in circumstance. In any event, it was appropriate to consider the first application, as the circumstances of the 6 November 2014 hearing did not allow the Khorafis to present their arguments properly, or at all.

Ground 5.

64. The judge erred in failing to consider evidence of a good arguable case. The Khorafis' application was ancillary in nature and required a substantive claim to be produced, even if in draft. RDC 25.6(1), RDC 25.7(2)(b) and RDC 25.7(3) [para 17] provide for the use of a draft document. The use of a DSoC was appropriate, and in accordance with the DIFC Courts' overriding objectives, where there were arbitration proceedings afoot and the judge ought to have considered both it and the witness statement of Mohammed Nour dated 9 June 2015. In particular, the judge should have found that the Khorafis had a good arguable case in the (intended) substantive claim on the basis of the matters and contentions pleaded in the DSoC.

Ground 6.

65. The order dated 6 November 2014 ought now be set aside in its entirety (albeit with a provision that provides security for Vannin's claim and payments sought in the first application) as the order was an injunction, or in the nature of an injunction, which was granted in the absence of any undertaking for damages being given by Vannin due to default by Vannin who were obliged to furnish an undertaking. The fact that this is a new point not taken either on 6 November 2014 or 29 July 2015 should not prevent it being taken since it is a "knock out" point and arises out of a procedural default on the part of Vannin at the 6 November 2014 hearing.

The second and third applications.

Ground 7.

66. The judge wrongly held that the court had no jurisdiction to grant the relief sought in the second and third applications. Instead, the judge should have held that the court had jurisdiction pursuant to Article 5 of Dubai Law No.12 of 2004 (as amended by Dubai Law No. 16 of 2011) which confers on the DIFC Courts the unlimited powers of a Court of Higher Record necessary for the administration of justice and to prevent abuses of process. Article 13 of the DIFC Arbitration law deals with the "usual" position where court proceedings are sought to be stayed in favour of an arbitration. The second and third applications were not in breach of any underlying commitment to arbitrate but rather, were supportive of the commitment to arbitrate in seeking to prevent an arbitration commenced in breach of Clause 17.1.3 of the RLFA. Any reference to arbitration which pre-empts essential contractual pre-conditions is a matter for the courts to determine, not by arbitration.

Ground 8.

67. The judge erred in refusing to consider whether there was a dispute over a "final" payment within the meaning of Clause 17.3. As a matter of fact and law, Vannin's claim for payment was not "concluded" at the time of the making of the Arbitration Claim on 5 November 2014 and thus Vannin had no right to refer its "claim" to arbitration under Clause 17.3.

Ground 9.

68. The judge erred in not finding that the court did not have jurisdiction to determine whether the mediation pre-condition in Clause 17.3 had been complied with. Art 44.1(a)(iii) of the DIFC Arbitration Law 1998 cannot later resolve any complaint that the Khorafis had as to Vannin's failure to satisfy the pre-condition.

69. What the judge should have done was to find that the court did have jurisdiction to decide this issue and then gone on to find that: (i) the pre-condition required a joint temporal consideration of mediation which "[did] not work"; and (ii) there had been no so such joint temporal consideration of mediation so that the pre-condition had not been satisfied. Misleading information had been given by Vannin to the Acting Registrar of the DIFC-LCIA by letter dated 20 on the question of mediation.

All three applications

Ground 10.

70. The lead-up to the hearing on 29 July 2015; the hearing itself; and the delay in delivering the judgment, were all characterized by procedural unfairness to such a degree that the outcome of the case was prejudicially affected. The case attracted a multiplicity of issues which could have been resolved by the Court prior to the hearing: viz (i) whether service had been effected; (ii) the appropriate allocation of hearing time; (iii) the involvement of the Sarasin parties and their attempts to obtain a de-facto stay; (iv) the extent to which the substantive issues in the draft DSoC needed to be considered; (v) applicable law; (vi) privacy of the Arbitral Provisions; and (vii) redaction of documents ordered to be served on Sarasin parties.

71. Despite being directed to file a Defence by 8 July 2015, Vannin did not plead a substantive Defence, other than as to the meaning of "Final Payment" and to rely generally on the DIFC Arbitration Law 2008. In particular, Vannin did not plead the point that they succeeded on in respect of the first application (see Grounds 1-4 above) until the filing of its Skeleton at 2.08 p.m. on 28 July 2015, the day before the hearing.

Discussion and decision

72. Pursuant to RDC 44.8, permission to appeal may be given only where:

(1) the Court considers that the appeal would have a real prospect of success; or

(2) there is some other compelling reason why the appeal should be heard.

73. A "real prospect of success" means a "realistic" as opposed to a "fanciful" prospect of success, see Swain v Hillman [2001] 1 All ER 91, followed and applied in Khorafi et al v Bank Sarasin-Alpen (ME) Limited (CFI-026-2009) and DNB Bank ASA v (1) Gulf Eyadah Corporation; and (2) Gulf Navigation Holding PJSC (9 September 2015) CFI-043-2014.

Grounds 1-5

74. In my judgment none of these grounds has a real prospect of success on appeal. The judge's adoption of the hostile approach found in the CPR and decisions of the English High Court and Court of Appeal such as Chanel v Woolworth & Co (above); Lloyds Investment (Scandinavia) v Ager-Hanssen; Tibbles v SIG plc [2012] 1 WLR 2591) to interlocutory applications seeking to vary or discharge interim orders on the basis of matters or evidence that were raised or adverted to or could have been raised or adverted to at earlier hearings is unassailable. Further, this approach clearly applies whenever the applicant seeking a variation or discharge of the earlier order was a party to the proceeding in which the earlier order was made and however the later application is made, whether by a free-standing application within the original proceeding, or under a liberty to apply, or, as in the instant case, under a free-standing application made ancillary to a substantive claim.

75. Leaving aside for the moment his approach to the DSoC, I am also of the view that the judge's finding that the first application did not rest on any material change of circumstances or contention that had not been available within the hearing held on 6 November 2014 is beyond successful challenge. True it is that the Khorafis' liabilities for costs in the main action had increased in the period 6 November 2014 to 29 July 2015 and that at this later date the Khorafis' counsel were refusing to prepare for the liability appeal unless they were paid the fees due to them, but financial difficulties due to shortage of cash flow rather than lack of assets had figured in the earlier hearing and it was plainly envisaged that further costs would be incurred for the quantum hearings and if there were an appeal on liability. Moreover, the evidence at the first hearing and at the later hearing was that Mr Khorafi owned valuable assets and was in a position to pay the legal fees incurred in the main action and the sums payable under the RFLA, even if the Khorafis lost the liability appeal. And the fact that some of this evidence may have emerged from the negotiations on further funding following the termination of the LFA is nothing to the point (Ground 3).

76. Further, as found by the judge, the subsequent grant of permission to appeal to the Sarasin parties by Justice Roger Giles was not a material change of circumstance since there was at the time of the first hearing a strong likelihood that the Sarasin parties would be granted permission to appeal Chadwick DCJ's liability findings. As for the order made by Justice Giles on 5 April 2015 ordering the Sarasin parties to pay into court pending the determination of their appeals any further sums awarded by the Court of First Instance, that was not a material change of circumstance as is borne out by the fact that the order sought by the Khorafis expressly provided that it was to be "read together with, and in any event subject to, the Order of Justice Roger Giles made in CFI-026-2015 and dated 5 April 2015."

77. Turning to the judge's approach to the DSoC, I think that it is reasonably arguable that he ought not to have dismissed this document out of hand as he did in paragraph 16 of his judgment. All or almost all of the many causes of action pleaded in it were based on serious allegations of improper conduct on the part of Vannin, allegations that ought only to have been made in a pleading endorsed with a statement of truth and signed by the pleader after having concluded that there was a proper basis for making the allegations. At the end of the DSoC appeared the electronic signature of the Khorafis' counsel, Mr. Roger Bowden, who told the judge it was he who drafted the pleading. The pleading was not endorsed with a statement of truth as it ought to have been and there appeared to be no justification for not having filed and served the pleading prior to the hearing. However, Mr. Noor had quite a lot to say in paragraphs 28 - 50 of his witness statement about the allegations the DSoC contained.

> "28. As stated, I was involved with this case from the beginning and was the only point of contact between Mr. Al Khorafi and Vannin and KBH during the time period of the renegotiation of the Litigation Funding Agreement which I would term as being between 11 March 2013 and 25 April 2013 when we paid the second payment of USD 225,000.00 to KBH.
>
> 29. I have been involved in the preparation of the Affirmative Defence and Counterclaim in D-L-14045 which sets out in detail the allegations that the Al Khorafi parties make, and which forms the basis of the draft Statement of Case. Indeed, the material which informs the claim came principally from me.
>
> 30. I have had substantial telephone and email correspondence with HAS over the last month as the document was prepared, as well as a three hour meeting in May 2015, together with a further three hour final attendance on Thursday 4 June 2015 where I went through the document in considerable detail. In addition, Mr. Al Khorafi met with HAS staff for three hours to discuss the arbitration defence and this intended application. I attended that meeting as well. To the best of my knowledge, the statements contained in the Statement of Case, are correct and reflect what actually happened.
>
> 31. Annexed to this witness statement and marked with the letter "A" is a number of emails which were exchanged, variously between KBH, Vannin and myself. The first emails date from 3 January 2012 but the bulk emanate from March and April 2013.
>
> 32. It is obvious from the emails that there were a number of discussions directly between KBH and Vannin, to which I was not a party, and which are not included in Annexure "A"."
>
> 33. The first email annexed is from 3 January 2012 and dealt with the consequences of entering into the LFA dated 12 January 2012. I accept that we were given appropriate legal advice at that time although it does need to be said that the legal advice was received from lawyers who stood to benefit from the Agreement.
>
> 34. Later emails in from October 2012 to January 2013 deal with Eversheds LLP requests for payment after their retainer was terminated. We believed that it was a matter for KBH and Eversheds to resolve in terms of the fee sharing agreement which they had. In any event it was not a matter of such moment that it should have affected the operation of the LFA and certainly did not affect the prospects of success for the Claim.
>
> 35. The simple point was that Vannin was only required to pay for items set out in the budget, or which were otherwise reasonable, and Eversheds account was not in the budget.
>
> 36. I do not believe that we were initially advised of the review by Mr. Cousins QC. The first notification we had of it was Tuesday 26 March 2013 followed by formal notification on 27 March 2013. The fact that the Vannin were withdrawing funding came as a total shock. I spoke to the late Mr. Kaashif Basit about it. I specifically asked if we had lost the 13 January 2013 Pre Trial Case Management Conference. Mr. Basit said that we had not and seemed as surprised as we were.
>
> 37. Following the Notice of Termination, matters moved at a very fast pace. Mr. Basit attempted to make Vannin pay outstanding accounts but Vannin refused. Accounts which had already been delayed for months, became urgent. Our Counsels' retainer was cancelled. Vannin terminated the LFA and the KBH terminated their retainer as well.
>
> 38. We were not kept well informed and there was very little that we could do. By 4 April 2013, it seemed that all was lost.
>
> 39. Almost as quickly, the case was back on again.
>
> 40. Whereas before Vannin had indicated that there was little chance of success, they were next enthusiastically telling us that we could all share in the damages.
>
> 41. New conditions were proposed, but the effect of the new terms was not explained to us.
>
> 42. KBH never explained the agreement to us. KBH, in fact became very difficult and uncommunicative. Mr. Basit was ill at the time with an illness that led to his unfortunate passing. I was, however, in frequent contact with him at the time and the proposed RLFA was the topic of conversation. The conversations were not about how the RLFA would affect us, but what we could do to comply with Vannin's demands, or what we could do if they did not comply with the terms of the RLFA. We had to ask for the RLFA ourselves and only received it on 21 April 2013. That is despite the fact that KBH had received it from Vannin on 9 April 2013. We read it ourselves and in circumstances of great urgency. It is not an easy document to read at any time.

43. The urgency was brought about by the requirement to make 2 payments:

(a) The first installment of USD 125,000.00 was required to be paid, on 2 days' notice, and prior to the RLFA even being agreed (we simply paid in faith); and

(b) The second installment was required to be paid by 25 April 2013 which was one day after the RLFA was signed by KBH. This payment date was progressively moved from 5 May 2013, to 30 April 2013 and then to 25 April 2013, again with very little notice.

44. In addition, we were informed of a new provision, that if we did not pay the monies exactly on time we would face a 500% uplift or 6 times Vannin's investment.

45. Not set out in the RLFA, was an additional requirement that we pay Counsel USD 130,000.00 so they could keep working. I now know that these charges were occasioned by Vannin's delay. We achieved all of this but it took all our time and severely strained Mr. Al Khorafi's resources at a time when he was being aggressively pursued by Bank Sarasin and ABK Bank.

46. We did, around 16-17 April 2013, approach HSBC in London for funding through an additional mortgage on Mr. Al Khorafi's home. They made promising noises but wanted to have lawyers review the proceeding. We had exactly one month to trial at that time and no room for even a few days delay. In the event, there simply was not time to set up an alternative funding mechanism. We advised the parties that we were looking at alternate funding on 17 April 2013, just to get things moving. The reality was we, had no chance. We took the RLFA, firstly, because we had no idea how bad it was (what we did know was bad enough), and secondly, because whatever it did cost, our losses were going to be so much worse if we did not go to Trial.

47. Throughout this process, the only advice that we received on the RLFA was from Vannin. They told us that KBH were making an investment and they we would all share in the repayment of that investment. I had no idea that the KBH "investment" was in fact a book entry and that they were not making any investment at all, not even a reduction in fees. We had no idea until we saw the explanation of Mr. Singh from KBH in his First Witness Statement in this proceeding and the KBH Revised Statement of Account, as to what the fees were.

48. Even during the preparation of this affidavit, I confess that I have had to seek additional explanation for the USD 500,000.00 investment and the USD 1,250,000.00 margin which was applied to it. I was unable to believe it before I saw each piece of paper for myself. I can categorically state that neither Vannin nor KBH explained anything of the sort. Annexed hereto and marked with the letter "B" is a copy of the 5 November 2014 KBH Statement of Account which sets out the margin to be applied.

49. Vannin also advised, on 17 April 2013, that all the steps taken by Vannin were legitimate. As this advice came from Mr. Rowles-Davies, whom we knew to be an experienced and prominent lawyer, and, as we had no other advice, we were minded to accept it.

50. As stated, I have briefly mentioned, in the context of an application for interim orders, some of the matters which I have personal knowledge of, and which I experienced. I certainly believe, based upon my extensive knowledge of the affairs of Mr. Al Khorafi, my being involved at the time, and a detailed review of the relevant documents, that all of the other allegations in the draft Statement of Case are entirely correct.

78. I also think that it is arguable that the case pleaded out in the DSoC was not a case that was "available" at the hearing on 6 November 2014. At that hearing the Khorafis were at pains to assure the Court that they regarded the RLFA to be a binding agreement under which Vannin was entitled to be paid the sums it was claiming were due to it. They advanced this position before they and their legal team had had an opportunity to consider the legal implications of the manner in which the LFA was terminated and the RLFA put in its place. In this connection, it is notable that Mr. Reed QC for Vannin did not argue that the Khorafis could have advanced the contentions made in the DSoC at the 6 November 2014 hearing. Instead, he submitted that these contentions were "available" to the Khorafis first time round in the sense that they could have applied for an adjournment to consider the enforceability of the RLFA and then have contend thereafter that no debt at all was owed to Vannin. In my judgment, it is reasonably arguable that the Khorafis failure to apply for an adjournment at or shortly after the hearing to consider their legal position quoad Vannin and the fact that they only served the DSoC on 9 June 2015 ought not to mean that they should have been disbarred from advancing the case made in the DSoC at the 29 July 2015 hearing.

79. I also think that it is reasonably arguable that the judge should have found that the Khorafis had a good arguable case based on the contentions pleaded in the DSoC.

80. I must now turn to the final and crucial question that has to be considered, namely whether, if the Khorafis have a good arguable case based on the DSoC, is it arguable that they therefore should be granted their application to amend the original order.

81. In my judgment, the contention that the Khorafis are entitled to have the original order amended because they have a good arguable case that the RLFA is invalid would have virtually no prospect of success in the Court of Appeal. In short, I am entirely satisfied that the Khorafis do not have a real prospect of persuading the Court of Appeal to grant their 9 June 2015 application on the ground that they have a good arguable case that the RLFA is invalid. I say this because I consider it unimaginable that the Court of Appeal would conclude on the available material and without oral evidence that the Khorafis' case was so strong that Vannin should lose the protection afforded by the original order to their prima contractual right to payment under Clause 10.1. On the contrary, it is virtually certain in my view that the Court of Appeal would conclude that justice requires that all the money now in court should remain there until further order.

82. I would add that, even if it were arguable that the judge erred in holding that the updated financial position of the Khorafis as at 9 July 2015 and their difficulty in paying the fees due to their Counsel constituted a material change of circumstances, I would not grant leave to appeal on this point for the same reason I decline to grant permission to argue that the judge erred in failing to conclude that the Khorafis had a good arguable case that the RLFA was invalid. As I have said, at the end of the day, the Court of Appeal would almost certainly uphold the original order.

83. Accordingly, I conclude that all of Grounds 1 - 5 have no prospect of success in the Court of Appeal; nor is there some other compelling

reason why there should be an appeal based on these grounds. Accordingly, I decline to grant the Khorafis permission to advance these grounds on appeal.

Ground 6

84. In my opinion, this ground of appeal would be bound to fail and there is no compelling reason why it should be argued before the Court of Appeal.

85. The hearing on 6 November 2014 was not an ex parte but an inter partes hearing at which the Khorafis were represented by Ms Hanlon who addressed the court at some length. This being the case, it was not for Vannin to raise the question of a cross-undertaking in damages. Rather, if the point was going to be taken, it should have been taken by Ms Hanlon either during the hearing itself or in response to Justice Al Muhairi's direction at the end of the hearing that submissions on the form of the order should be sent to him in writing. And, given that the point was not taken at the hearing on 29 July 2015, even though the Khorafis addressed the question in their own skeleton argument whether they should give a cross-undertaking in damages, it is now far too late for this ground of appeal to be advanced.

Grounds 7 - 9

86. None of these grounds of appeal has a real prospect of success. As the judge noted, Article 10 of the DIFC Arbitration Law provides explicitly that "[i]n matters governed by this Law, no DIFC Courts shall intervene except to the extent provided in this Law." The DIFC Courts's power to intervene in arbitrations governed by the Arbitration Law are then set out in Article 11 of that Law by reference to Articles 19 (3), 24 (2), 34, 41, 42, 43, 44, 14, 17 (3), 20 (1), 21 (1), 23 (3) and 39 (5). None of those powers permits the DIFC Courts to stay any arbitration proceedings or make declarations as to an arbitral tribunal's lack of jurisdiction in advance of the arbitral tribunal itself determining that issue. Further, as Justice Williams said in International Electromechanical Services LLC v Al Fattan Engineering LLC (14 October 2012) CFI 004/2012, the DIFC Courts' inherent jurisdiction exists "only in so far as necessary to enforce existing rules and to prevent abuse of those rules and of the processes of the Courts."

87. It follows, in my opinion, that the judge's decision that the Court did not have jurisdiction to grant the second and third applications was undoubtedly correct and there is no real prospect of this decision being overturned on appeal; nor is there a compelling reason for Grounds 7, 8 and 9 to be argued in an appeal.

88. Even if the Court did have power to stay the arbitration proceedings or grant a declaration that the arbitral tribunal lacked jurisdiction, that power would be a discretionary one, and given that Article 23.1 of the Arbitration Law confers on an arbitral tribunal the power to determine its own jurisdiction, the Court of Appeal would inevitably in this case refuse to grant a stay or make a declaration of no jurisdiction in favour of the appointed tribunal deciding whether Vannin had an accrued right to refer its claim for payment to arbitration under Clause 17.3 of the RLFA.

Ground 10

89. In paragraph 107 of the Khorafis' skeleton argument in support of their application for permission to appeal it is stated that the remedy sought under this ground of appeal "is simply that the Court of Appeal approach the hearing with these factors in mind and adopt a remedial approach under re-hearing principles." I find this statement makes it unclear whether Ground 10 is intended to be a free-standing ground whose success is intended to lead to the setting aside of the order of Justice Ali Al Madhani and the Court of Appeal deciding for itself whether the original order should be amended; or whether this ground is intended to be no more than a plea to the Court of Appeal to bear in mind the difficulties that are claimed to have confronted the Khorafis when they made their application on 29 July 2015. If the former intention is meant, I say at once that this ground of appeal too has no real prospect of success. The time allowed for the Khorafis to present their case was not so short as to be unfair. Their skeleton argument having been served in advance of the hearing, there was enough time for the main points to be articulated orally and questions from the Bench answered. Indeed, it is clear from the judge's summary of the Khorafis' case in his judgment that he understood what that case was. As for the late service of Vannin's skeleton argument, although this was no doubt annoyingly inconvenient, it was not in my opinion productive of injustice. The points taken therein were all predictable, including the contention that the Khorafis could not show that there had been a material change or circumstance since 6 November 2014. And as for the delay in giving judgment, whilst it is regrettable that it took as long as 5  months for judgment to be handed down, I am quite satisfied that this was not productive of such unfairness or prejudice as would require the setting aside of the judge's judgment. I say this because the judge had available detailed skeleton arguments and a verbatim transcript of the hearing and it is plain that he fully understood each party's submissions and did not overlook any of the material points relied on.

90. There is also no compelling reason why there should be an appeal on this Ground 10.

91. If the intention behind Ground 10 is that the Court of Appeal should take into account the pleaded difficulties alleged to have been faced by the Khorafis, I can say that in considering this application for permission to appeal I have borne these matters in mind but they have not persuaded me to grant the permission sought.

Conclusion

92. For the reasons given above, this application for permission to appeal the order of H.E. Justice Ali Al Madhani is refused.



Issued by:

Maha Almehairi

Registrar

Date of Issue: 11 April 2016

At: 4pm