Claim No. CFI 041/2021

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) ABRAAJ INVESTMENT MANAGEMENT LIMITED (IN OFFICIAL LIQUIDATION)
(2) ABRAAJ CAPITAL LIMITED (IN OFFICIAL LIQUIDATION)

Claimants

and

(1) KPMG LOWER GULF LIMITED
(2) LIUND
(3) KPMG LLP

Defendants

ORDER OF JUSTICE SIR JEREMY COOKE

UPON the First Defendant having made an application to the Joint Judicial Committee

AND UPON the Registrar having issued a decision on 5 May 2021 refusing a stay of these proceedings under Article 5 of Dubai Decree 19 of 2016 (the **"Decision"**)

AND UPON the First and Third Defendants' application by application notice issued on 10 May 2021 for a de novo review of the Decision and, if that decision is upheld, a case management stay pending an appeal to the Court of Appeal (the **"Application"**)

AND UPON the application of the First and Third Defendants for permission to rely on the Affidavit of Fatima Zohra Toul sworn on 10 May 2021 as well expert evidence on the correct translation of Dubai Decree 19 of 2016

AND UPON the Court considering the Witness Statements of Rita Catherine Jaballah dated 10 May 2021, the Witness Statement of Ian Burrell Hammond and the said Affidavit of Fatima Zohra Toul and their exhibits.

IT IS HEREBY ORDERED THAT:

1. Permission to rely on the Affidavit of Fatima Zohra Toul sworn on 10 May 2021 is granted.

2. The Decision of the Registrar is upheld.

3. The Defendants' Application for a de novo review of the Registrar's Decision to a Judge of the Court of First Instance is refused.

4. The Defendants' Application to appeal to the Court of First Instance, is refused.

5. The Defendants' Application to appeal this decision to the Court of Appeal is refused.

6. The Defendant's Application for a case management stay of their challenge to the jurisdiction of the DIFC Courts is refused.

7. The Defendants shall pay the Claimants the costs of this Application for de novo consideration.

8. Unless the Defendants seek, in reasoned written submissions to the Court, to contest the sum claimed for such costs within 7 days hereof, the Claimants costs are assessed in the sum of US$18,918.00. If they are so contested, the Claimants shall make such written submission as they may be advised within 7 days thereafter and the Court will make an assessment on the basis of such submissions.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 19 May 2021
Time: 2pm

SCHEDULE OF REASONS

1. The history of the proceedings in this court and the on-shore Dubai Court is set out in paragraphs 9 to 15 of the Witness Statement of Ms Jaballah. The current state of play in the DIFC Court is that the First and Third Defendants' challenge to jurisdiction awaits determination, whilst a challenge has been mounted by the First Claimant to the jurisdiction of the on- shore Dubai Court.

2. On 27 April 2021 the First and Third Defendant made an informal request to this Court to stay the proceedings on the basis of their application to the Joint Judicial Committee on 26 April, which was refused by the Registrar on 5 May 2021 on the basis of the Court of Appeal decision referred to below. An application was made by the First and Third Defendants on 10 May 2021 for a de novo review of her decision under

paragraph 2 of PD No. 3 of 2015.

3. The Court of Appeal decision of 8 April 2021 in *Phoenician Technical Services LLC v Five Real Estate Development LLC* [CA-001-2012] which is referred to as *Lakhan v Lamia* [2021] DIFC CA 001 in the Witness Statements filed in this action is binding on the Court and is indistinguishable from the present case. The ratio of that decision, as set out in paragraphs 29-37 directly applies to this case, even though in the case under consideration in the Court of Appeal, no acknowledgement of service had been filed by the defendant.

4. The ratio turns on the wording of Article 4 in the Arabic, where the Court of Appeal considered three different English translations but concluded that the effect was the same on the point at issue - see paragraphs 30-37. The translation now put forward by the Defendants in this matter does not change the position. Under this translation, Article 4 requires neither court to "waive hearing" the action or both courts to "waive hearing" the action or for contradictory judgments to be entered "thereon". Whilst the Court of Appeal did not expressly decide whether the final phrase and the word "thereon" meant inconsistent judgements on the merits of the action or inconsistent judgments on the jurisdiction issue, the position of the Defendants here would not be advanced whichever interpretation was adopted.

5. A court will continue with a claim filed with it, unless a challenge is made, or it becomes obvious to the court that is does not have jurisdiction or should not exercise it. This requires the court to decide whether to "waive hearing the action" or not to "waive hearing the action. For a court to "waive hearing" an action requires a positive decision on its part to do so. For both courts not to waive hearing an action still requires a positive decision on the part of each court, when faced with a challenge to its jurisdiction. The question of waiver does not arise without such a determination as paragraph 35 of the Court of Appeal judgment makes clear.

6. If the last phrase in the Article refers to a decision on the merits of the action, as I consider it does in the light of the distinction drawn in Article 1.1 and 1.2 and in Article 5.1 and 5.2, then the point made at the end of paragraph 33 of the Court of Appeal judgment is emphasised.

7. There is no basis for the matter to be reconsidered by the Court or Court of Appeal in the light of the new translation adduced by the Defendants. The judgement referred to above is a very recent decision of the Court of Appeal. Whilst that judgment may conflict with prior practice, that practice has drawn heavy criticism for the reasons expressed by the Court of Appeal at paragraphs 32 and 36, which the Claimant says, rightly or wrongly apply here. There is no good reason for the Court of Appeal to change its mind and no basis upon which the CFI Court could take a different view. Permission to appeal this decision is therefore refused.

8. Additionally, as pointed out by the Claimants, there is a problem about the identity of the parties in each of the two actions. In the DIFC action, there are two Claimants and three Defendants, but in the Dubai action begun by the First and Third Defendant there is no claim against the Second Defendant, so that there is no basis for any conflict of jurisdiction in relation to the Second Claimant and the Second Defendant in any event and they are not included in the Application to the JJC.

9. The challenge to the jurisdiction of the DIFC Courts in respect of the other parties should be determined as soon as practicable. At that point there will be a decision of the DIFC Court as to whether or not to "waive jurisdiction", within the meaning of the translation put forward by the Defendants.

10. As to costs, the First and Third Defendants have failed in their application and must bear the costs. The Claimants have submitted a schedule claiming US$ 18,918 which on its face seems reasonable, but I have heard nothing from the Defendants on this. in consequence, I order that, unless the Defendant contests the figure claimed, within 7 days in writing to this Court, with reasons, the Claimants' recoverable costs are assessed at US$18,918.