Claim No. CA 009/2021

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

BEFORE CHIEF JUSTICE ZAKI AZMI, H.E. JUSTICE ALI AL MADHANI, JUSTICE WAYNE MARTIN

OMAN INSURANCE COMPANY PSC

Appellant/Defendant

and

GLOBEMED GULF HEALTHCARE SOLUTIONS LLC

Respondent/Claimant

JUDGMENT

Hearing : **20 October 2021**

Counsel : Rupert Reed QC assisted by Tim Killen instructed by Al Tamimi & Co on behalf of the Appellant
Edward Knight instructed by Clyde & Co. on behalf of the Respondent

Judgment : **26 December 2021**

UPON reviewing the application of the Appellant to re-amend the Defence dated 2 February 2020 (the **"Application"**)

AND UPON reviewing the Respondent's reply to the Application dated 1 March 2020 (the **"Response"**)

AND UPON hearing counsel for the Appellant and counsel for the Respondent at a hearing on 23 October 2021

AND UPON reviewing all other relevant case documents filed in this matter

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed and the Appellant is allowed to re-amend its Defence as it had filed it in the Court of First Instance.

2. This matter is remitted to the Court of First Instance and the Appellant is granted leave to file its application to re-amend its Defence.

3. Costs in favour of the Appellant to be assessed by the Registrar unless otherwise agreed.

Issued by:
Amna Al Owais
Chief Registrar
Date of Issue: 26 December 2021
Date of re-issue: 28 December 2021
At: 3pm

JUDGMENT

CHIEF JUSTICE ZAKI AZMI

Introduction

1. This appeal was filed pursuant to the order of the judge in the first instance refusing the Appellant's (Oman Insurance Company, or "OIC") application to re-amend its Defence. This application to re-amend was filed on 2 February 2020, more than two years after the filing of the claim and almost two years after filing the Defence. Much water has passed under the bridge since the filing of the claim. The time taken for the application to re-amend the Defence and what had taken place during this period are factors to be weighed in determining whether this appeal should be allowed or not.

2. For the purposes of this judgment, I shall be referring to the Appellant in this appeal as either the "Appellant" or the "Defendant" (in CFI-051-2017). The Respondent shall be referred to either as the "Respondent" or the "Claimant" (in CFI-051-2017).

3. This application to re-amend the Defence was made during case management by the judge at first instance. The dates for the hearing had been fixed but vacated twice due to the intervening applications.

4. It is interesting to note that the judge in the first instance after hearing submissions by both parties, held that the Appellant had real prospect of success in his appeal, if permission were granted, "albeit by a narrow margin". Notwithstanding this conclusion, the learned judge went on to refuse the application to re-amend and reading through his judgment (it would seem) that he was influenced by the allegation that the Defendant/Appellant

was, in fact, employing delay tactics. We will discuss this at length later.

5. When considering such an application for re-amendment, the question of prospects of success is not the only consideration to be taken into account. The cause or causes of delay and other factors must be weighed against the delivery of justice and fairness, which this Court and all judges are sworn to uphold. This court's duty is to make a finding in law and facts on whether the judge in the first instance was correct in refusing the application. Generally, the relevant facts in this case are not in dispute. The learned judge said he was exercising his discretion to refuse the application for re-amendment. The question now is whether he exercised his discretion correctly or not. I recognize the comments given by Lord Hoffman in *Biogen Inc. v Medeva PLC* (1997) RPC 1 in regard to interference with judges' discretions.

Facts

6. Now in more detail, the Appellant's application was dated 2 February 2020 and was for:

(a) permission to re-amend its Defence pursuant to RDC 18.12;

(b) permission to bring a counter claim pursuant to RDC 21.8(2); and the additional claim be heard and the case managed within the main proceedings.

7. The Respondent by its application dated 1 March 2020 applied to strike out the Application; and/or for an order of dismissal of the application by way of immediate judgment of the additional claim against the Respondent/Claimant pursuant to RDC 24.11(2); and/or 4.16(1); and/or 4.16(2) and (3).

8. The Respondent's further application dated 30 March 2020 was for strike out and/or dismissal for immediate judgment against an additional claim as against GlobeMed pursuant to RDC.11(2) and/or 4.16(1) (please note one is striking of against GMGHS and the other one against GlobeMed).

9. I do not propose to go into very detailed elucidation of the facts but I will mention facts which are relevant to my decision.

10. The Appellant/Defendant, OIC, is a company registered in the onshore jurisdiction of Dubai and operates as a major insurer in the GCC insurance market. Synergize is a company registered in the TECOM free zone in Dubai. It is an investment/holding company wholly owned by OIC.

11. The Respondent/Claimant, GlobeMed is a BVI registered company holding a Lebanese group of companies operating within the healthcare benefits management sector.

12. Kharma Holding is a Lebanese registered company whose Chairman, Mr. Mounir Kharma, has been for many years both the Chairman and the CEO of GlobeMed. GMGHS is also a company registered (onshore) Dubai.

13. The shareholdings of the parties in this Memorandum of Understanding (**"MoU"**) / Joint Venture are the Appellant and the Respondent. This is relevant to the issues at hand. Had the agreement proceeded, and the terms executed in full, any profit generated by the joint venture would be split so that OIC would receive 51% through its holding company Synergize; and the other party to the joint venture, GlobeMed/Kharma Holding, would receive the minority balance of 49% (as more particularly explained below). The parties to the joint venture were required to sign the necessary papers and perform the necessary actions to complete the sale of the shares before the relevant authorities in the UAE within a maximum period of 6 months as of the date of the MoU. OIC and GMGHS signed a document titled `TPA Services Agreement' dated 13 January 2015 (the **"TPA Agreement"**) whereby GMGHS was to provide the TPA Services (as defined in the TPA Agreement) in respect of OIC's insurance portfolio within the UAE. GMGHS claims that this TPA Agreement was to commence on a `launch date' of 25 May 2015.

14. It is also common ground that the interpretation of both the MoU and TPA Agreement is (by express provision of the parties in each of those agreements) a matter of UAE law and subject to the jurisdiction of the DIFC Courts.

15. Four days before the `launch date' (i.e. 21 May 2015) OIC wrote to GMGHS informing it that OIC would not be pursuing the intended `joint activities'. GlobeMed (part of GMGHS group) had also failed to affect the share transfer by 13 July 2015. This share transfer is a reference to a term of the MoU whereby Synergize would acquire a total of 51% of GMGHS's shares from GlobeMed for a consideration of USD 1.00. To do so GlobeMed would relinquish 46.435% of its shares in GMGHS (equating to 23,218 of the total shares in GMGHS) to Synergize; and Kharma Holding would relinquish 4.5645%, (equating to 2,082 of the total shares in GMGHS) to Synergize. In short, the effect of these share transactions, had they taken place by 13 July 2015, would have meant that Synergize would own 51% in GMGHS (equating to 25,500 shares); GlobeMed would own 44.6145% in GMGHS (equating to 22,207 shares); and Kharma Holdings would hold 4.358% in GMGHS (equivalent to 2,193 shares). The result would have been that OIC would hold the majority shareholdings in the TPA joint venture entity. The transfers for USD 1.00, as earlier stated, did not take place because, as mentioned earlier, on 21 May 2015, the Appellant/Defendant wrote to GMGHS informing that it would not be pursuing the parties' joint activities. In short, the Appellant /Defendant at the last minute backed out of the arrangements.

16. As a result of OIC's actions, GMGHS (which is the Claimant in CFI-051-2017 and Respondent in this appeal), filed a claim for USD36,561,314.00 against OIC. OIC (the Applicant in this appeal and the Defendant in CFI-051-2017) denies the claim. The defences that OIC wishes to rely upon are set out in its Defence, but OIC now wishes to amend this to include the argument that GMGHS is a nullity under the UAE law on the ground that under UAE law any business joint venture requires at least 51% of the business to be held by a UAE citizen, or a company wholly owned by UAE nationals.

17. This is the crux of the matter before this court: whether the TPA Agreement is null and void. OIC wishes to include in its defense that the TPA Agreement did not commence or take effect and that, therefore, the claim by the GMGHS is irrecoverable as damages under the UAE law. The Appellant/Defendant also counterclaims for a declaration on the aforementioned nullity issue. It further claims that GlobeMed and Kharma Holding failed to affect the share transfer in breach of the TPA Agreement and therefore any damages received by GMGHS would partially be paid to Synergize. OIC and Synergize also seek a declaration that OIC is entitled under UAE law to set off that portion of damages paid to Synergize

against any sum awarded to GMGHS in the main claim.

18. The issue in this appeal is also whether the Appellant/Defendant had abused the process of law by taking actions which allegedly delayed the case. It would be necessary for me to spell in detail the chronological order of the different events that have taken place since the filing of the action by the Respondent/Claimant, GMGHS. From the learned judge's reasoning from paragraphs 18 to 37 these were what had taken place during that period:

"18. On 16 November 2017, GMGHS issued its claim against OIC in CFI-051-1027 for breach of the TPA Agreement averring that it had not accepted OIC's renunciation of the agreement and claiming US$ 36,561,314 damages 6 of 34 calculated by reference to precontractual projections set out in Appendix 2 of the MoU.

19. Paragraph 1 of the Particulars of Claim pleaded: The Claimant is a limited liability company incorporated in the Emirate of Dubai under registration number 112 4714. The Claimant is domiciled in Dubai and conducts business as a provider of third-party administration services to healthcare insurance providers. At all material times the Claimant was licensed to provide such services throughout the United Arab Emirates.

20. Following an extension of time for its service, OIC's Defence was served on 15 January 2018.

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22. On 5 March 2018 there was a CMC that was followed by a CM Order setting down a comprehensive timetable down to a trial to take place on 24 February 2019.

23. Thereafter the Particulars of Claim were amended with respect solely to the earliest termination date of the TPA Agreement and there were differences between the parties over the disclosure of documents with the result that GMGHS served its Document Production Statement on 26 June 2018 and OIC served its Document Production Statement on 16 September 2018.

24. On 7 November 2018, in light of further delays in settling witness statements and an application for leave to call additional expert evidence, an amended CM Order was issued vacating the original date for the trial and substituting therefor 22 September 2019.

25. On 3 January 2019, without warning to GMGHS and in the face of the provision in the TPA Agreement conferring exclusive jurisdiction on the DIFC Courts, OIC started proceedings in the Dubai Court of First Instance seeking a declaration that, pursuant to Article 10 of the Commercial Companies Law No 2 of 2015, GMGHS was a nullity. This Article requires that at least 51% of a company registered in the UAE is owned by a UAE national or nationals and OIC asserted that the true owner of 51% of GMGHS was GlobeMed, a BVI entity, and not Mr Adel Ebrahim El Helou, who held the 51% of GMGHS on trust for GlobeMed.

26. On 20 January 2019, GMGHS applied for an unless order in respect of OIC's disclosure and OIC applied to be allowed to redact documents on the ground of confidentiality.

27. On 30 January 2019, OIC applied to the JJC for a ruling that the Dubai Court should determine whether GMGHS was a nullity and GMGHS's claim in CFI051-2017 was stayed on 7 February 2019.

28. On 20 June 2019, the JJC dismissed OIC's application observing: It must be noted that the Appellant [OIC] critically failed to refer to Articles 31(3) and 31(5) of the Procedure Code which is integral in establishing the jurisdiction of the Dubai courts. The Appellant's attempt at inventively interpreting the provisions of the Procedure Code in establishing jurisdiction of the Dubai courts amounts to no more than procedural tactics that only seek to create a conflict of jurisdiction. There is to a contrived extent a dispute of jurisdiction that the Tribunal regards it as an artificial dispute created by the Appellant solely for the purpose of avoiding or at least delaying resolution of the merits of the claim.

29. The parties were not notified of the JJC's decision until 23 September 2019.

30. On 24 October 2019, the disclosure applications were settled and 4 days later OIC filed an application for security for costs.

31. On 30 October 2019 OIC, through their lawyers, Al Tamimi, gave notice that "the Defendant intends shortly to seek the Claimant's consent to file and serve a Re-amended Defence and Counterclaim."

32. On 15 January 2020, GMGHS agreed to provide security for costs by way of a UAE bank guarantee.

33. On 20 January 2020, the detail of the proposed Re-amended Defence and Counterclaim was fleshed out in a further letter sent by Al Tamimi.

34. On 23 January 2020, OIC served the draft Re-Amended Defence and Counterclaim for which permission is now sought; the RCMC was vacated; and OIC was ordered to apply to amend by 30 January 2020.

35. On 30 January 2020, OIC applied to re-amend and issued its new claim in CFI011-2020.

36. On 2 February 2020, OIC served its reamendment application.

37. On 18 May 2020, OIC served its new (CFI-011-2020) claim in draft."

19. Under the DIFC RDC 18.2 which is identical to the English CPR 17.1 (2) `no amendment to the pleadings is allowed except with the written consent of all the other parties or with the permission of the court.'

20. English authorities, which the DIFC Courts rely on heavily, are clear that the Applicant must show a real prospect of success of the case in favour of the party making the application to amend, should the amendment be allowed. The burden on the Applicant is not that heavy as to require it to show to the court that it is probable.

21. Learned counsel of the Appellant asked this court not to forget Part 1 of the RDC, in particular RDC 1.6 on the overriding objective. If one were to read RDC 1.6 it requires the court to consider the overriding objective of enabling the courts to deal with cases justly. Dealing with a case justly includes considering the amount of money involved, as well as ensuring that the case is dealt with expeditiously and fairly (among other things).

22. I believe both parties will agree that the law relating to permission to amend under RDC 18.2 is well established in the DIFC Courts and more so in the English courts. The test is the applicant must show that it has a real, as opposed to a fanciful, prospect of success and with such an amendment the applicant would be able to show that he has more than an a merely an arguable case. The case must carry some degree of conviction. There are other criteria set out in various cases (see Slater and Gordon [UK] 1 Limited v Watchstone Group PLC [2019] EWHC 2371 and Three Rivers TC v Bank of England (3) [2001] 2 AER 513). In Swaine v Hilman [2001] 1 AER 91 the judge also held that the court is not expected to conduct a mini trial to determine whether the applicant has or has not the real prospect of success.

23. The factors to be considered are well laid out by Justice Roger Giles in Nest Investments Holding Lebanon S.A.L. and Ors v Deloitte & Touche and Anor [2016] CFI-027. There are many other authorities that I do not need to cite here.

24. One can notice that the trend of commercial courts, such as the DIFC Courts, is to not be too liberal about granting amendments at the last minute as such amendments would disrupt as well as delay the hearing and prejudice the other parties. It also reflects the objective of RDC1.6 (i.e. the overriding objective) which is to balance fairness with efficiency. We must do justice but at the same time the court must be efficient to ensure cases are disposed of on time. In fact, an inefficient court can cause injustice to one or all the parties. As the adage goes, time is money. Delay can contribute to increase of expenses. Timelines have been set by the Rules of the Court at a level which is considered fair, practical and reasonable. Efficiency in this context means that the parties are expected to comply with the timelines set by the RDC. Anything to be done outside that timeline will be strictly enforced and allowed only in the interests of justice and fairness to the parties. Usage of the words "justice" and "fairness" depends upon many facts, some peculiar to each set facts and circumstances that come before this court. An innocent party should not be penalised. Where previously an applicant could argue that a respondent would be compensated by cost, this practice does not apply today. When amounts of claim are especially large and every delay contributes to large expenses, the litigation costs awarded to the innocent party may not be sufficient to compensate him for delay.

25. In Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm), Mrs. Justice Carr DBE had this comment to make when dismissing an application for permission to amend:

> *".This maybe seen as a harsh decision given its consequence for Ms. Quah. But this is modern-day commercial litigation. Very late applications for permission to amend in circumstances where a) there is no good reason for the delay and (b) amendment would result in real disruption or prejudice to the parties and/or the Court are unlikely to be allowed, irrespective of the merits of the proposed amendment."*

Thus, we can see that commercial courts are more strict than they have been historically. The courts are perhaps even stricter in considering applications made out of time in cases involving commercial matters.

26. Against that, all strict conditions to be considered before deciding to grant or not to grant an application to amend, lies another principle: the principle of fairness. As I said earlier, the Court must not forget its duty is to do justice and as any judge would agree that doing justice is the most difficult part of our duty as judges. While there are black and white areas of justice, there are also wide grey areas. This is where a judge would exercise his judicial discretion. The appellate courts do not normally wish to interfere in such exercise of discretion, but at the same time it cannot close its eyes when it finds that a lower-level judicial opinion or order is not right. It will not interfere if it is satisfied that the judge, whose decision is appealed from, has considered matters which would be considered by another judge in his or her situation. Normally, it does not wish to punish any parties for the oversight of his solicitor or counsel. It cannot be denied that while trying to deliver justice to one party, the other party or parties may see it as injustice to it or them. There are situations where we, as judges, have to apply a balancing act and arrive at a decision which we consider to be most fair to all parties.

27. Let us now go and consider the facts of the present case in the context of this issue.

28. As I had briefly mentioned earlier on the learned judge of the first instance, at paragraph 57 concluded, after hearing submissions on the real prospect of success from both counsel as follows:

> *"Does the claim proposed to be pleaded by OIC have a real prospect of success notwithstanding the points made by Mr. Knight? After much anxious consideration, I have concluded that the proposed claim does, albeit by a narrow margin, satisfy the prospect of success test. I have reached this view in light of the wording of Article 16(1) and the first sentence of Article (2) of CCL 2015, together with Mr. Reed's contention that the preference given to a third party under Article 16 (1) CCL 2015 who would otherwise be a debtor of the company under Article 16 (3) was deliberately intended to deter failures to comply with requirements of the Commercial Companies Laws 1984 and 2015."*

29. Notwithstanding this, his final conclusion was to refuse the application to re-amend. From my reading of the judgment I sensed that he was influenced by the fact that there were delays and these delays were said to be caused by OIC. Amongst the reasons that he gave in his conclusion was the comment by the Joint Judicial Committee (the **"JJC"**) in this same case. This matter was referred to the JJC as a result of the Applicant filing an action in the onshore Dubai Courts. The JJC had commented that the Applicant had caused delay by filing an action in the (onshore) Dubai courts to determine the nullity or otherwise of the Respondent. The Appellant's explanation for doing so was that since the company was incorporated at onshore Dubai Registry that the question as to whether company is null and void because of its shareholding should be decided by the onshore Dubai Courts. That was the justification given by counsel on behalf of the Appellant. I would not like to make any comment on

whether the JJC should have made those remarks or not.

30. In support of his submission, counsel for the Respondent/Claimant said that what the learned judge of the first instance had done was exercise his discretion in a case management context to refuse the application to re-amend. He argued that the hearing took two days and therefore this Court should not disturb that Order unless it finds that the learned judge has made a decision which no other reasonable judge could have reached. He contends that what counsel for the Appellant/Defendant did was to provide a detailed explanation of the background. Perhaps what he meant was that the judge had conducted a mini trial. He, by inference, suggested that the judgment of the learned judge of the first instance was a robust and fair case management decision which this Court should not interfere with. In support he cited the speech of Lord Hoffman in *Biogen Inc. v Medeva PLC* (1997) RPC 1:

> *"An appellant court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of a judge by narrow textual analysis which enables them that he misdirected himself."*

31. In that particular case, the judgment was reversed and the judge wrote a 24-page long reversing order of the subordinate court. He submitted that the judge was correct in holding that to permit the re-amendment would be contrary to fairness and justice and at the same time would be unfair for OIC to be allowed at this stage to plead its nullity claim. According to that judge, the defence of nullity has no higher than a reasonable prospect of an arguable case. The judge had also taken into consideration the size of the claim, which is in excess of USD39 million. The learned judge concluded that it would be unjust to allow the re-amendment. Learned counsel also pointed to us that the amendment would be substantial as it would involve about four and a half pages worth of additional pleadings and it would involve complex issues of UAE law. Such an amendment would involve the application of considerable resources and court time. In support he cited the case of *Essex CC v UBB Waste (Essex) Ltd* [2019] EWEC 819 (TCC), quoting Mr. Justice Pepperall:

> *".there is essentially one rule on any application to amend. Parties should be allowed to amend their statements of case to bring forward intelligible and apparently credible claims where the balance of injustice to the applicant is refused outweighs the injustice to the other party and to litigants in general if the amendment is permitted.*
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> .
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> *11.2 The timing of the application is an important factor:*
>
> a) Plainly the earlier amendment is sought, the more likely it is that the court will conclude that the applicant's interest in being able to argue its full case outweighs any prejudice to the opponent or to litigants in general.
>
> b) Conversely, the later the amendment is made, the more likely it is that the court will find that the balance of injustice favours disallowing the amendment. Very late amendments that, if allowed, are likely to lead to the adjournment of a trial date are frequently disallowed not so much because there is some special rule in such cases but because the obvious prejudice to the opponent and to the administration of justice in losing the trial date often weighs more heavily in the balance than the prejudice to the applicant in refusing the amendment."

32. I repeat that the Appellant was accused of applying delaying tactics. Looking at the chronology of events that was cited at the earlier part of this judgment, one would notice that the two periods that could be considered "long" were when the Appellant filed its claim in the Dubai Courts seeking a declaration on the nullity issue (i.e. whether they were considered as unlawful body since the majority of the shares in the company were not held by UAE citizens). It was filed in the Dubai Courts on 3 January 2019 and on 3 February 2019 OIC made application to the JJC for a decision as to whether there was a conflict of jurisdiction between the DIFC Courts and the Dubai Courts and which court would have jurisdiction to decide on the issue. According to the decree setting up JJC, the decisions of cases referred to JJC were to be decided within one month, but in practice this is rarely the case. So, by virtue of that application the matter before the DIFC Courts were stayed pending the decision on the application to the JJC. Ten days later (on 17 February 2019) the Appellant filed a response to the JJC application. It was not until 23 September 2019 (i.e. almost seven months after the JJC application) that the DIFC Courts Registry wrote to the parties informing them that the JJC had issued its decision on the application, finding that DIFC Courts was the competent court to entertain the issues raised in the matter at JJC.

33. Perhaps we should note that the judgment of the learned judge who is a member of the JJC said that it took about two weeks for the decision of JJC to be notified to the DIFC Courts Registry. On 20 October 2019, the Appellant filed an application for security for costs against the Respondent. It was refused by the Respondent and after lengthy negotiation between the parties, it was finally decided that the Respondent agreed to provide a security which it only did after the period of two months that the Respondent finally provided the UAE bank Guarantee. After all these happenings, the Appellant applied to re-amend its Defence and the Respondent filed the Counterclaim. The CMC, which was listed on 26 January 2020, had to be vacated when the request for the re-amendment of Defence was not agreed to by the Respondent as a result of which it had to be filed in court to decide whether the re-amendment should be allowed or not. Hence is this matter which we now have to decide.

34. Looking at the time from the date the main suit was filed on 16 November 2017; the Defence served on 15 January 2018, and months later the Appellant sought the (onshore) Dubai Court's decision on the status of the Appellant; and then (as I said earlier) after over 7 months later was the matter decided that it fell within the jurisdiction of the DIFC Courts. Then there was an application for security of costs which started negotiation on 20 October 2019. Almost three months later, the security for costs was agreed to by way of a UAE bank guarantee. The court finally decided to refuse the application for re-amendment until 4 October 2020 which meant a further lapse of almost ten months.

35. In my opinion, the Appellant cannot be accused of employing delay tactics. Part of the delay was caused by it having filed the action at the onshore Dubai Courts to determine the nullity or otherwise of the Appellant. Following this the Appellant took the matter to JJC. We cannot blame the Appellant for doing so. Delay at JJC was beyond the control of the Appellant, as the additional two months delay was caused by JJC taking time to inform DIFC Courts Registry. On the time delay caused by the Appellant to provide security for costs, again we cannot blame the Appellant. It was the Respondent who took time to provide security for costs.

36. For myself, I abhor parties delaying cases, but in this case, on the facts, I am of opinion that justice will served on all parties, if the appeal is

allowed and if the Appellant is allowed to re-amend its Defence as it had filed in the Court of first Instance.

37. For these reasons, it is my opinion that this matter be sent back to the court of first instance with an order that OIC be allowed to file its application to re-amend its Defence.

JUSTICE WAYNE MARTIN

Introduction

38. I have had the advantage of reading in draft the reasons to be given by the Chief Justice for allowing this appeal. I agree that the appeal should be allowed, generally for the reasons given by the Chief Justice. However, I desire to add some observations of my own, which can be briefly expressed having regard to the comprehensive procedural context provided by the Chief Justice.

39. The judge at first instance applied conventional principles to the question of whether the amendments to the Defence and Counterclaim should be allowed. In particular, he observed that OIC was required to satisfy the Court that:

(a) assuming the facts alleged in the new pleading are established at trial, the amended plea has a real, as opposed to a fanciful prospect of success which is more than merely arguable and carries some degree of conviction; and

(b) this is a suitable case for the Court's discretion to be exercised in favour of the application to amend having regard to *inter alia*:

(i) the impact of granting the application on GMGHS and the impact on OIC if the application is refused;

(ii) the delay in bringing forward the new case;

(iii) the explanation (if any) for not pleading the amendment from the outset; and

(iv) the overriding objective of the RDC as defined in RDC 1.6.[1]

40. The judge resolved the first issue in favour of OIC "albeit by a narrow margin".[2]

41. However, the judge resolved the second issue against OIC and concluded that the discretion should be exercised against the grant of the application, notwithstanding his conclusion that the proposed defence had real prospects of success. It must be said that refusing to allow OIC to advance a defence with a real prospect of success to a claim of USD36m when there was no trial date listed is a very significant sanction for OIC's perceived procedural misdemeanours.

42. The judge gave the following reasons for his conclusion:

(a) delay by OIC between filing its Defence in this Court, and commencing the proceedings raising the nullity point in the Dubai Courts approximately one year later;

(b) as a result of the commencement of the proceedings in the Dubai Courts by OIC, and the consequent application to the JJC, the trial date fixed for 22 September 2019 was lost;

(c) OIC had created a jurisdiction dispute solely for the purpose of avoiding or at least delaying resolution of GMGHS' claim;

(d) consequently it would be contrary to fairness and justice for the Court to condone OIC's conduct in launching the Dubai claim when it did and to allow it now to plead the very same nullity claim;[3]

(e) prolongation of these proceedings beyond September 2019 might well have resulted in Court time not being available to other litigants;[4]

(f) OIC culpably delayed in issuing the application after having notice of the JJC's decision and the unresolved dispute with respect to the provision of security for costs by GMGHS provided no justification for that delay.

43. Clearly the first relevant period of delay - namely, the period of delay between filing the Defence in this Court, and the commencement of the proceedings in the Dubai Courts is significant. However, it would be surprising if that period of delay was, in itself, sufficient to deny a party the opportunity to raise a defence to a claim for USD36 million which has a real prospect of success. It is clear from the judge's reasons that the factor which tipped the balance against the exercise of discretion in favour of OIC was the conclusion that OIC had created a jurisdiction dispute for the purpose of avoiding or at least delaying GMGHS' claim and which had the consequence of aborting the schedule substantive hearing.

The grounds of appeal

44. There are numerous grounds of appeal which essentially come down to the following propositions:

(a) the judge was wrong to conclude that OIC had commenced the Dubai proceedings for the purpose of delaying or avoiding the claim in this Court, and should have concluded that commencement of proceedings in the Dubai Courts was reasonable, given that the issue concerned the validity of a company incorporated in the UAE (Dubai) under UAE law;

(b) the consequences of the commencement of the proceedings in the Dubai Courts, and in particular the delay in the resolution of the JJC proceedings was not a matter for which OIC could be held responsible;

(c) it was reasonable for OIC to wait until the issues with respect to the provision of security for costs had been resolved before moving to amend its Defence in this Court;

(d) the judge failed to consider the relative prejudice to the parties, and in particular that the prejudice to OIC was to deny it the opportunity to advance a defence which had a real prospect of success to a very significant claim whereas the prejudice to GMGHS was minimal, given that no hearing date had been listed.

45. The most significant issue within the grounds of appeal turns upon the question of whether the judge was justified in concluding that OIC's commencement of proceedings in Dubai was unreasonable and undertaken for purely tactical purposes. Because of the importance of that issue, the Court directed the parties to exchange written submissions on that subject subsequent to the oral hearing.

46. In OIC's submissions it draws attention to the evidence given in support of the application to amend given by Mr. Kishore, who holds the office of Head of Transactional Affairs (Legal and Corporate Secretariat) at OIC. In that evidence Mr. Kishore stated:

> *"The nullification claim is a claim under UAE law against a UAE company outside the DIFC, and OIC took the view that the Dubai Courts was the correct forum in which to bring the action. This was why the nullification claim was raised but not developed in the original Defence. Following the JJC decision, OIC therefore had no alternative but to bring the same cause of action in the DIFC Courts, which it is now doing.[5]"*

47. OIC's submissions also draw attention to a passage in *Dicey, Morris & Collins on the* Conflict of Laws referring to the jurisdiction of the English Courts to rule on the nullity of companies incorporated in England which is, pursuant to Article 22(2) of the Brussels Regulation and also the Lugano Convention exclusive of the jurisdiction of other courts. OIC contends that this principle should be applied by analogy within the UAE, and by analogy to the established principles of conflicts of laws to the effect that an English Court will give considerable weight to the decisions of a court in the country of incorporation in relation to matters involving the internal management of a foreign corporation.

48. OIC also prays in aid the proposition that the law applicable to questions as to the constitution of a company is the law of the place of incorporation of the company.[6] Reliance is also placed on observations in Oates v Consolidated Capital[7] to the effect that the extent of the duties owed by a director of a foreign company is governed by the law of the place of incorporation such that the courts of that place are very likely to be the appropriate forum, but not necessarily the exclusive forum.

49. OIC submits that the seat of GMGHS is inarguably onshore Dubai where it was incorporated, licensed by the UAE Insurance Authority and the Dubai Health Authority. There is no evidence of GMGHS ever having any presence or assets in DIFC.

50. For these reasons OIC submits that it was entirely reasonable for it to form the view that the proper forum for the resolution of its argument that GMGHS was not validly incorporated was th Courts of Dubai.

51. GMGHS submits that where a Court is seized of a contractual dispute, that Court is the competent Court to decide any relevant dispute as to the legal existence or capacity of a party, although it will apply the law of the place of incorporation. Further, GMGHS draws attention to the fact that in the Dubai proceedings, although OIC asserted the lack of juristic personality of GMGHS, it did not advance a claim for a declaration as to the nullity of the company, as compared to the claim made in the proposed amendment in the DIFC proceedings. Rather, in the Dubai Courts OIC sought a declaration that the contract with GMGHS was null and void.

52. GMGHS also draws attention to observations in Dicey to the effect that:

> *"Whether an entity exists as a matter of law must, in principle depend upon the law of the country in which it is formed. That law will determine whether the legal entity has a separate legal existence. The law of that country will determine the legal nature of the entity so created ."[8]*

And:

> *"All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."[9]*

53. However, GMGHS draws a distinction between the applicable law, which is undoubtedly the law of the place of incorporation, and jurisdiction, submitting that where the question of the validity of an entity's incorporation arises in the context of contractual proceedings, the Court having jurisdiction to determine the contractual issues can resolve the issues relating to incorporation by the application of the law of the place of incorporation. However, GMGHS concedes that a Court exercising such jurisdiction can be subject to a challenge on the ground of forum non conveniens, although it is submitted that in this case the exclusive jurisdiction provision in the contract would have overcome any such challenge.

54. GMGHS further submits that because there was an exclusive jurisdiction clause in the agreement, and OIC had already submitted to the jurisdiction of the DIFC, OIC could not reasonably have considered the Dubai Courts to be the appropriate forum.

55. It its written submissions in reply, OIC asserts that while the relief sought in the Dubai Court was formally a declaration of the invalidity of the agreement, the exclusive basis for seeking that relief was clearly put as being because GMGHS was itself null and void. OIC refers to the following passage from its assertions in the Dubai Courts, namely:

> "The foregoing means that the Defendant is a null company and does not have the legal capacity and competence to conclude the Insurance Services Management Agreement."

56. OIC further submits that a careful analysis of the principles enunciated in Dicey reveals a distinction between issues relating to the capacity of a corporation to enter into a legal transaction, which are properly determined by the law and the courts of the country governing the transaction in question, and issues with respect to the existence of the corporation which are properly determined by the law and the courts of the jurisdiction in which the corporation is registered.

57. OIC further asserts that conspicuously omitted from GMGHS' submissions is any authority for the assertion that a court seized of a contractual dispute has jurisdiction to determine any relevant dispute as to the existence of a party, apart from the decision of the JJC in this case, which of

course post-dated OIC's commencement of proceedings in Dubai.

58. Further, OIC draws attention to Article 33 of the UAE Civil Procedure Code which provides:

> *"In actions relating to companies or associations existing or in liquidation or private establishments jurisdiction shall be vested in the court in whose area they have their head office."*

and also Article 35 which provides:

> *"Jurisdiction over claims relating to commercial bankruptcy shall be vested in the court in whose area the business premises of the bankrupt is located."*

Analysis

59. The issue which is to be determined is not whether the Dubai Courts had exclusive jurisdiction to determine the contention that GMGHS is a nullity. That question has been resolved authoritatively against OIC by the JJC, which has determined that this Court has jurisdiction to resolve that issue. Rather, the question is whether the decision taken by OIC to commence the Dubai proceedings was so unreasonable that an inference of improper purpose can be drawn from OIC's conduct.

60. The general principles relating to conflict of laws, the cases and the provisions of the UAE Civil Procedure Code to which OIC has referred compel the conclusion that there was a reasonable basis for the conclusion to which Mr. Kishore refers to the effect that the Dubai Courts were the most appropriate forum in which to raise an issue with respect to the validity of the incorporation of GMGHS, given that onshore Dubai is clearly the seat of that company. Although the JJC later took a contrary view, it was reasonable for OIC to take the view that the clause in the contract conferring jurisdiction upon the DIFC Courts was concerned with claims under the contract, and that claims relating to the existence of GMGHS were appropriately brought before the courts in that company's seat, namely onshore Dubai.

61. I reiterate that the question is not whether OIC's view as correct, but whether it was reasonably held at the time. As there was a reasonable basis for the view, it cannot be safely concluded that the Dubai proceedings were commenced solely for the purpose of delaying or evading the proceedings which had been commenced in this Court.

62. As the judge was wrong to draw that conclusion on the basis of the material before him, what appears to have been the most significant factor in the exercise of his discretion against OIC falls away. It also follows that the consequences of the decision to commence proceedings in Dubai, in terms of the inevitable stay while the conflict of jurisdiction was resolved by the JJC cannot be said to be matters for which OIC must take specific responsibility. The time taken by the JJC to resolve those issues were matters within its control.

63. Once it is concluded that OIC's decision to commence proceedings in Dubai was not so unreasonable as to support a conclusion of improper motive, the consequences of that decision take on quite a different perspective. Viewed from OIC's perspective, having decided to commence proceedings challenging the existence of a company in its seat, nine months later it was told by the JJC that it had commenced proceedings in the wrong forum. However, when it endeavoured to raise the same issue in the forum which the JJC had determined to be the appropriate forum, it was denied the ability to raise that issue. So, the penalty for making what the JJC later considered to be the wrong forum, was the inability to advance a defence with a real prospect of success in any forum.

64. Of course I do not overlook the judge's findings with respect to the delay between the time at which OIC was informed of the JJC's decision, and its application to amend its Defence and Counterclaim - a period of three months or so. However, with respect to the judge, in my view it was reasonable for OIC to wait until issues with respect to its application for security for costs had been resolved before launching its application to amend.

65. For these reasons the judge was wrong to conclude that all of the delay between the time at which OIC commenced the Dubai proceedings and the time at which it launched its application to amend was culpable delay incurred for purely strategic purposes which justified the decision to preclude OIC from advancing a defence which had a real prospect of success.

66. When that factor is taken out of the balance of competing considerations for the purposes of the exercise of the discretion, one is left with a significant period of initial delay in the commencement of the Dubai proceedings on the one hand, as compared to the prejudice flowing to OIC from denying it the opportunity to advance a defence with a real prospect of success to a claim of USD36 million on the other, in a context in which the allowance of the amendment would not have disrupted any scheduled hearing. When those factors are placed in the balance, the only reasonable conclusion available is that the amendment should have been allowed.

H.E JUSTICE ALI AL MADHANI

67. I concur with my learned colleagues.