IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) AL SOOR INVESTMENTS LLC
(2) AL BARAKA INVESTMENTS LLC
(3) SARI INVESTMENTS LLC

Claimants

and

(4) JULIUS BAER (MIDDLE EAST) LIMITED
(5) BANK JULIUS BAER & CO LTD
(6) MR EMAD ODEH
(7) MR NICO TSCHUI

Defendants

ORDER OF H.E JUSTICE ALI AL MADHANI

UPON considering the Applicants' application for pre-action disclosure pursuant to RDC r. 28.48 filed on 12 December 2019 (the **"Disclosure Application"**)

AND UPON considering the Second, Third and Fourth Defendants' (the **"Respondents"**) application disputing the Court's jurisdiction to decide the Disclosure Application or, in the alternative, arguing that the Court should not exercise its jurisdiction filed 30 November 2020 (the **"Jurisdiction Application"**)

AND UPON hearing leading counsel for the Respondents and for the Applicants at the hearing of the Jurisdiction Application on 9 March 2021

IT IS HEREBY DECLARED:

1. RDC r. 12.5(1) is not apt to confer upon the Court jurisdiction.

2. The jurisdiction test to be applied in the Disclosure Application is not the "good arguable case" test but rather a "beyond argument" test (explained at [31] of Schedule of Reasons). So long as the Applicants' case on the Court's substantive jurisdiction is not "beyond argument", the Court's jurisdiction is sufficiently established to make an order for pre-action disclosure pursuant to RDC r. 28.48.

3. The remaining issues to be decided in the Disclosure Application.

4. Costs in the case.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 2 March 2022
At: 9am

SCHEDULE OF REASONS

Introduction

1. This is the Second, Third and Fourth Respondents' application disputing the Court's jurisdiction to determine the Applicants' RDC r. 28.48 application for pre-action disclosure -no substantive proceedings have yet been commenced. The question before the Court, therefore, is whether the Court has or should exercise jurisdiction to make an order for pre-action disclosure, not whether the Court would have or should exercise jurisdiction over the prospective claim intimated by the Applicants.

2. In response to the Jurisdiction Application, counsel for the Applicants advanced two arguments that I understand to be novel. First, that the correct test to be applied in jurisdictional challenges to pre-action disclosure applications is not the "good arguable case" but rather a "beyond argument" test. Second, that RDC r. 12.5(1)-"If the Defendant files an acknowledgment of service and does not make an application disputing the Court's jurisdiction within [14 days]: (1) he is to be treated as having accepted that the Court has jurisdiction to try the claim"-is apt to confer jurisdiction upon the Court for the purposes of the jurisdictional gateway at Article 5(A)(1)(e) of Dubai Law No. 12 of 2004, being the Judicial Authority Law (the **"JAL"**).

3. I consider these two arguments suitable for determination as preliminary issues in this application and I begin with the second argument as, if RDC r. 12.5(1) is apt to confer jurisdiction upon the Court and its criteria are met, that would be a sufficient source of jurisdiction for the Court to decide the Disclosure Application such that there would be no need to go further. Both are pure questions of law of which the background facts in

the dispute are not determinative. I therefore cut straight to the legal arguments.

The Preliminary Issues

RDC r. 12.5(1) combined with Article 5(A)(1)(e) of the JAL as a source of jurisdiction

4. The Applicants' general position is that the Respondents have submitted to the jurisdiction of the Court by not disputing the Court's jurisdiction within time. The Respondents say in response that submission cannot create jurisdiction in the DIFC Court, unlike in the English courts. The effect of submission is rather to waive any personal objection that party might otherwise have had to jurisdiction such as invalid service. But where there is no jurisdiction over a claim derived from Article 5(A) of the JAL there is no jurisdiction over that claim; a Defendant's conduct cannot change that. Hence, in *IGPL v Standard Chartered Bank* [2015] CA 004 (19 November 2015), Defendants were permitted to raise non-facultative grounds for challenging jurisdiction, notwithstanding that they had expressly conceded jurisdiction at first instance ([64]).

5. In oral submissions in response to the Jurisdiction Application, leading counsel for the Applicants argued-apparently for the first time-that RDC r. 12.5(1) is a DIFC regulation which can, where its criteria are met, confer jurisdiction upon the Court in combination with Article 5(A)(1)(e) of the JAL. Counsel relied on *Nest Investment Holding Lebanon S.A.L. & Ors v Deloitte & Touche (M.E.)* [2018] DIFC CA 011 where the Court made such a finding in respect of RDC r. 20.7.

6. Leading counsel for the Respondents rejected this submission. He argued that in Nest the test was whether the RDC rule was apt to confer jurisdiction on the Court. The question is: does the rule intend to confer jurisdiction on the Court? All that RDC r. 12.5(1) says is that, where the criteria are met, the Defendant "is to be treated as having accepted that the Court has jurisdiction to try the claim". The effect of the Defendant's acceptance that the Court has jurisdiction, counsel argued, is not itself dealt with by RDC r. 12.5. Moreover, the Court is bound by the Court of Appeals decision in IGPL: submission to the Court's jurisdiction "cannot extend the scope of that jurisdiction" ([58]).

Discussion

7. I would be hesitant to dismiss the Applicants' proposition that RDC r. 12.5(1) is apt to confer jurisdiction upon the Court on the basis of the ruling in IGPL. In that decision, the Court of Appeal considered whether submission could extend the scope of the Court's jurisdiction. The Applicants' argument, however, is that submission under RDC r. 12.5(1) would be submission within the scope of the Court's jurisdiction-no "extension" being required-specifically the scope of Article 5(A)(1)(e) of the JAL. And IGPL is of course a pre-Nest decision. The Court was not asked to decide whether the RDC is a DIFC regulation nor whether RDC r. 12.5(1) is apt to confer jurisdiction on the Court for the purposes of Article 5(A)(1)(e) of the JAL.

8. But I otherwise agree with the Respondents' arguments. As counsel stated, RDC r. 12.5(1) does not explain what the effect of a Defendant's acceptance that the Court has jurisdiction to try the claim is. I would add to this a query about the consequence of a Defendant only being "treated" as having accepted the Court's jurisdiction. Neither words, "accepted" and "treated", in my judgment, indicate a conferral upon the Court of authority. Both words point, instead, to a categorisation of the Defendant. The Court deems him to be a Defendant who accepts its jurisdiction to try the claim against him as opposed to a Defendant who disputes the Court's jurisdiction or who considers that the Court should not exercise its jurisdiction, irrespective of whether the Defendant was in the latter category before the conditions of RDC r. 12.5 became satisfied. Presumably the consequence of a Defendant being treated as having accepted that the Court has jurisdiction will be different from case to case. In the English Court of Appeal decision *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 120, which the Court was not taken to, for example, a Defendant treated as accepting that the court should exercise its jurisdiction was treated as having abandoned its application to set aside an order extending the time for service of a claim form ([29]). I think the effect of the Court treating a Defendant as accepting that the Court has jurisdiction or should exercise jurisdiction will generally be limited to the sphere of personal objection to the Court's jurisdiction and such a Defendant will be deemed to have abandoned any objections previously made or perhaps as not intending to subsequently make any.

9. For these reasons, I reject the Applicants' proposition that that RDC r. 12.5(1) is apt to confer upon the Court jurisdiction for the purposes of Article 5(A)(1)(e) of the JAL.

The test to be applied in jurisdictional challenges to pre-action disclosure applications

10. Jurisdiction challenges invariably occur at the interim stage of an action. The Court will generally ask whether the Claimant has a "good arguable case" that the claim falls within one or more of the jurisdictional gateways set out in the JAL (*Akhmedova v Akhmedov* [2018] DIFC CA 003 (19 June 2018) at [18]; *Bank Sarasin v Al Khorafi* [2011] DIFC CA 003 (5 January 2012) at [47], [49] and [72]). This much is trite law not in dispute between the parties. The parties disagree, however, on whether the same test applies in the context of applications for pre-action disclosure.

The Applicants' arguments

11. The Applicants submit that the "good arguable case" test ordinarily applied in jurisdiction challenges is so formulated in acknowledgement of the fact that an interlocutory hearing is not normally an appropriate forum for determining disputed issues of fact, nor an appropriate forum in which the Court should consider the substantive merits of a claim. That applies with even greater force in the context of an application for pre-action disclosure, the Applicants contend, where the issues in the case are not yet fully known.

12. The Applicants rely on the English Court of Appeal decision *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 which they submit is authority for the proposition that there is no arguability threshold when the court's jurisdiction to order pre-action disclosure under CPR r. 31.16, RDC r. 28.48's English counterpart, is determined. At [23], Lord Justice Underhill stated:

> I accept Mr Huckle's submission that there is no jurisdictional "arguability threshold", and I think I can fairly say that Mr Kinnier was not by the end of his oral submissions seeking to persuade us that there was. The jurisdictional requirements for the making of an order under CPR r 31.16 are expressly set out at heads (a)-(d) in paragraph (3) of the rule, and they say nothing about the applicant having to establish some minimum level of arguability. If such a requirement exists it can only be implicit, and I see no basis for making any such implication. If heads

(a)-(b) required an applicant to show that it was likely that proceedings would be commenced I could see an argument that that necessarily involved showing that the putative proceedings had some chance of success (because people are not likely to start hopeless cases). But it is clear from *Black v Sumitomo Corpn* [2002] 1 WLR 1562 that there is no such requirement: all that has to be shown is that it is likely that the respondent would be a party to such proceedings if commenced: (see para 71 of Rix LJ's judgment-para 10(4) above. I accept of course that it cannot have been the intention of the rule-maker that a party should be entitled to pre-action disclosure in circumstances where there was no prospect of his being able to establish a viable claim; but in such a case disclosure could and no doubt would be refused in the exercise of the discretion which arises at the second stage of the inquiry.

13. The Applicants rely also on the English Court of Appeal decision in *Total E & P Soudan SA v Edmonds and others* [2007] EWCA Civ 50. The respondent had argued, amongst other things, that the potential claim underlying the application for pre-action disclosure was not justiciable in the English Court and that the English Court would not be the appropriate forum for resolution of the dispute in any event. At [29] to [31], Lord Justice Tuckey explained his rejection of those arguments:

29. I do not think such arguments are relevant to this application or appeal. Generally when considering an application under CPR 31.16 the court does not need to and therefore should not embark upon a consideration of arguments of this kind. Such applications are in the nature of case management decisions requiring the judge to take a "big picture" view of the application in question. This obviously involves the judge taking a broad view of the merits of the potential claim, but should not necessitate an investigation of legally complex and debateable potential defences or grounds for stay. That is what the Respondents' arguments are in this case and I need say no more about them than that. Mr Greenwood conceded that the situation would be different if a respondent could show beyond argument that the claim was hopeless or non-justiciable or if disclosure of the documents themselves raised non-justiciable issues such as sovereign confidentiality. I agree, but that is not this case.

30. For the same reasons I do not think the court should consider arguments about appropriate forum on an application under CPR 31.16.

31. Of course arguments about justiciability and forum can be raised after proceedings have been started. This is preferable because the issues are then better defined. Non-justiciability is highly fact specific and has to be determined on an issue by issue basis. It may not be possible to decide such issues until after disclosure or even until trial. Arguments about forum are also issue dependent.

14. The Applicants submit that the "beyond argument" test is justified in the context of pre-action disclosure applications on the basis that such applications are intended to assist potential Claimants in knowing and pleading their cases. Until a case is pleaded, the Court is necessarily precluded from understanding the full ambit of each potential claim that may be raised against a potential Defendant. The Court in the context of a pre-action disclosure application is not, therefore, in the same position it would be in after substantive proceedings have been commenced, and so a test commensurate to the actual position, not the prospective position, should be applied. It should be asked whether it has been shown that an applicant's case is "beyond arguable", the Applicants submit, and if it has not been the application should be allowed to proceed to the next stage.

The Respondents' reply

15. The Respondents disagree that *Smith* is authority for there being no arguability threshold where the court determines its jurisdiction to entertain a pre-action disclosure application. The reference to "jurisdiction" in the above-cited passage is not a reference to the court's authority to hear and decide a case-the type of jurisdiction Article 5(A) of the JAL and therefore the parties presently are concerned with-but rather to the requirements of CRP r. 31.16(3) which must be met before an order for pre-action disclosure can be made. In other words, the Court of Appeal in *Smith* held that there was no additional requirement-no implied (e) alongside the express "jurisdictional requirements" at CPR r. 31.16(3)(a) to (d)-that a Claimant must establish that the potential claim has a prospect of success in order for the court's discretion-"The court may make an order under this rule only where."-to be enlivened.

16. As to *Total E & P*, counsel highlighted that the question before the Court of Appeal in that case was whether, when exercising his discretion, the judge below failed to give sufficient weight to certain arguments, including on justiciability and forum, because his assessment of their merits was wrong. *Total E & P* does not, therefore, address personal or subject-matter jurisdiction and deals instead with the second, discretionary stage of an application for pre-action disclosure.

17. The Respondent submits that there is no freestanding jurisdiction for the Court to order pre-action disclosure. The Court's jurisdiction is derived in its entirety from Article 5(A) of the JAL. There is no proper comparison between the ways that jurisdiction is established for the DIFC Court and for the Courts of England and Wales. An applicant under RDC r. 28.48 must demonstrate, in the usual way, that his claim falls within at least one of the jurisdiction gateways. And *Akhmedova* and *Al Khorafi* require that as a minimum it be established that there is a good arguable case that a DIFC Court claim falls within a gateway.

Discussion

18. I agree with the Respondents' counsel's reading of *Smith*. That decision is clearly concerned with the court's power to order pre-trial disclosure-and more specifically the criteria which when met vests the court with discretion to make an order, and the questions whether an "arguable case" test is part of that criteria or, if not, whether a prospective case's arguability is in some other way relevant to the whole enquiry-rather than the court's jurisdiction-in the sense of authority-to consider an application for pre-trial disclosure at all. The Court of Appeal ruled that there was no implicit requirement that an applicant establish an arguable case alongside the express requirements of CPR r. 31.16(3)(a) to (d). Where the express criteria are met, the court's discretion to order pre-trial disclosure is enlivened. If an applicant does not have an arguable case, that is a factor relevant to the court's discretion at the second stage of the enquiry and weighs against making an order. The Court in *Smith* was not deciding whether there was personal or subject matter jurisdiction over the claim-that type of jurisdiction was not in issue-*a fortiori* the degree to which a court should be satisfied of the presence of such jurisdiction before ordering disclosure.

19. I agree with counsel for the Respondents' observation about *Total E & P* also. The relevant part of that decision concerns whether, when considering an application for pre-action disclosure, and particularly at the second, discretionary stage, the court should embark upon consideration of arguments about justiciability, appropriate forum and other such "legally complex and debateable potential defences or grounds for

stay" ([29]). The Court said it should not, though the situation would be different if a respondent could show "beyond doubt" that a claim was hopeless. As far as jurisdiction is concerned-in the sense of the authority-two of the respondents to the claim were resident in the UK and the third's place of business was in the UK also. The court's jurisdiction was founded as of right and was not in issue. Like *Smith*, then, in Total E & P, personal or subject matter jurisdiction was not being decided.

20. With that said, in my judgment there is policy discernible in *Smith* and Total E & P which is relevant to the question whether the "good arguable case" or instead another test should be applied in a jurisdictional challenge to an application for pre-action disclosure in this Court. It may be asked, in circumstances where pre-action disclosure might be sought in order to enable a prospective Claimant to know whether he in fact has a case, on what basis should such a Claimant be required nevertheless to demonstrate, as a precondition, that he has a good arguable case? I think both *Smith* and *Total E & P* say he should not.

21. In *Smith* this policy can be seen in [28]: "I would myself avoid the language of "arguability", which is more apt to the case where proceedings have started and may strike rather the wrong note in the present context: after all, it could be said that one of the reasons for seeking pre-action disclosure may be to enable a Claimant to find out whether he has an arguable case". In *Total E & P* it is reflected in connection with specific potential defences and bases for a stay in [31]: "Of course arguments about justiciability and forum can be raised after proceedings have been started. This is preferable because the issues are then better defined. Non-justiciability is highly fact specific and has to be determined on an issue by issue basis. It may not be possible to decide such issues until after disclosure or even until trial. Arguments about forum are also issue dependent".

22. It is correct that the jurisdiction of the DIFC Court of First Instance is derived in its entirety from Article 5(A) of the JAL. But the jurisdictional gateways of Article 5(A) only define the circumstances in which the Court has jurisdiction; they do not prescribe the extent to which the Court should be satisfied that those circumstances in fact exist. On a strict reading of Article 5(A), it could be said that the Court's jurisdiction to even begin hearing a claim only arises when a claim is, that is, *in actual fact*, a claim within one of the jurisdictional gateways. But it has never been the practice of the Court to defer exercising jurisdiction until such a time as there is absolute certainty that the Court has jurisdiction in accordance with Article (5)(A) of the JAL.

23. Where the Court's jurisdiction is determined at the interim stage, it is sufficient that a Claimant has a good arguable case that an Article 5(A) gateway is engaged as the interim stage-usually before disclosure and cross examination-is generally unsuitable for the final determination of disputed issues of fact (see: *Akhmedova* at [18]). If a higher standard applied, there would be risk of cases being dismissed, not for actual lack of jurisdiction, but because jurisdiction was not adequately proven when examined. But where the Court has the necessary background evidence to determine jurisdiction, the normal approach is for the Court to get on and determine the question rather than treating it as a question of whether there is a good arguable case (*ibid*). As such, both at trial and in the interim stage when the evidence permits, the Court's jurisdiction is instead decided by applying the ordinary civil standard of proof, that is, on the balance of probabilities.

24. If the Court has been willing to apply two different tests for jurisdiction, each deemed appropriate for the stage of proceedings in which it is applied-the final or interim stage-or the condition of the evidence going to the issue of jurisdiction, why should it not apply a third test for a third stage-that of pre-action-if the reason for adopting the "balance of probabilities" or "good arguable case" tests militate in favour of applying another test elsewhere? With the exception of Article 5(A)(1)(a) of the JAL, the terms of the Court's jurisdictional gateways, concerned as they are with circumstances, are such that there is usually close overlap in a case between facts going to jurisdiction and the facts which underlie the substantive case. If an application for pre-action disclosure met the requirements of RDC r. 28.48 notwithstanding, applying Smith and Total E & P, that the prospective substantive case was not yet a good arguable case, but the application was nevertheless dismissed on the basis that there was not a good arguable case on jurisdiction specifically, in my opinion that would be like giving someone permission to turn up to an event with his cake mixture in a tin on the basis that there were time and facilities available to bake it on site, but only on condition that one slice was at least semi-baked. If it is acceptable for the purposes of a pre-action disclosure application that an applicant's case is less than a good arguable case, in my view that should apply to all of his case, including the part going to jurisdiction.

25. I think it is also useful to consider the consequences of a finding of jurisdiction at each of the three stages. At trial, the court will decide the rights and obligations of the parties, and so a higher degree of certainty that the Court has the authority to do that is appropriate. At the interim stage, a finding of jurisdiction results in the court continuing to entertain the claim, and so a lower jurisdictional threshold is justified. In the context of a pre-action disclosure application, the consequence of a mis-finding of jurisdiction is that a respondent will be required to defend the application on the merits. In a worst-case scenario, an unsuccessful respondent will be ordered to disclose certain documents. But the order will be confined only to documents or classes or documents which the Court would have directed him to produce if proceedings had been started (RDC r. 28.48(3)). Moreover, it will have been established by that point that the respondent and the applicant are likely to be a party to subsequent proceedings (RDC r. 28.48(1) and (2)) and that the production is desirable in order to either dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings or save costs (RDC r. 28.48(4)(a) to (c)). In other words, while pre-action disclosure is intended to assist prospective Claimants, in a way the procedure seems rigged in favour of respondents. Hence, the Court in *Total E & P* noted at [35] that "Orders for pre-action disclosure are unusual".

26. I think a lower degree of certainty that the Court has the jurisdiction to entertain an application for pre-action disclosure is justified in such circumstances. And so two further questions arise: what is the standard and at what stage of the enquiry should it be applied? I will start by looking at RDC r. 28.48 itself.

27. It will be recalled that the first two jurisdictional requirements of RDC r. 28.48 provide that "The Court may only make an order where: (1) the respondent is *likely to be a party to subsequent proceedings*; [and] (2) the applicant is also *likely to be a party to those proceedings*.". At [71] of *Black v Sumitomo Corporation* [2002] 1 WLR 1562 ([2001] EWCA Civ 1819), cited with approval at [10(4)] of *Smith*, the English Court of Appeal stated that the words I have italicised mean "that the persons concerned are likely to be parties in proceedings if those proceedings are issued"; in other words, the proceedings itself does not need to be likely. While this explanation at first glance weighs against finding a jurisdiction test in RDC r. 28.48(1) and (2), in the context of the DIFC Court there will be no proceedings if there is no jurisdiction under any of the Article 5(A) gateways and so, in my view, it can only ever be said that a respondent and an applicant are likely to be parties in proceedings, if proceedings are issued, if the Court would have jurisdiction over those subsequent proceedings.

28. If it said in response to this proposition that an applicant could in theory later issue proceedings against the respondent even if the Court would not have jurisdiction over the intimated claim, thereby satisfying the "subsequent proceedings" requirements of RDC r. 28.48(1) and (2) technically, the application for pre-action disclosure would, in my judgment, fall at the next hurdle, RDC r. 28.48(3), as the Court would not make the document production order if those intimated proceedings had been started. The proceedings would instead be dismissed. I think, therefore, as part of the tests of RDC r. 28.48(1) and (2)-or RDC r. 28.48(3) if necessary-in this Court the "subsequent proceedings" referred to has to be construed as meaning "subsequent proceedings over which the Court would have jurisdiction in accordance with Article 5(A) of the JAL".

29. For these reasons, I think a jurisdiction test is already present in RDC r. 28.48(1) and (2) and/or (3). Unless the Court has jurisdiction in accordance with the Article 5(A) jurisdictional gateways, it is not correct to say that the respondent and the applicant would likely be party to subsequent proceeding and/or if proceedings had started that the Court would make the document production order. I would examine the Court's jurisdiction to order pre-action disclosure as part of the RDC r. 28.48 test itself.

30. Having an application for pre-action disclosure and the Court's jurisdiction to order disclosure determined at the same time has the advantage also of saving time and resources for the parties, a point the Respondents, who suggested this approach to the Applicants, the Court was told, appear to have been alive to. In a worst-case scenario, a determined Defendant might even be able to run substantially the same arguments on jurisdiction first in an application disputing the Court's jurisdiction to decide a pre-action disclosure application, thereafter in the Court of Appeal when challenging the Court of First Instance's adverse decision, again when addressing the Court's discretion in the pre-action disclosure application itself, yet again in an application disputing the Court's jurisdiction to decide the substantive claim after proceedings have been issued and finally in the Court of Appeal once more when challenging the Court of First Instance's decision to try the claim, all conceivably without issue estoppel intervening as in each case a different test applies. As cited above, at [29] of *Total E & P*, Tuckey LJ stated that a pre-action disclosure decision is comparable to a case management decision. I think the pre-action disclosure procedure should be as inexpensive and expeditious as possible. Having pre-action disclosure and the Court's jurisdiction to order it determined at the same time will promote this.

31. As to the standard to be applied, I think the jurisdictional test should be easily satisfied. In *Smith*, Underhill LJ stated at [28] that, rather than assessing "arguability", a court should ask whether "the applicant has shown some reason to believe that he may have suffered a compensatable injury". Only where there is no such reason it would not be right to order pre-action disclosure. In *Total E & P*, the Court stated at [29] that a court should "take a `big picture' view of the application" and that unless a respondent could show that a prospective claim was "beyond argument", the application should not fail on that basis. Transposing these principles into the present context, I would say that where the Court finds, taking a broad view of the application, some reason, with at least a minimum level of arguability, to believe that the DIFC Court has jurisdiction under Article 5(A) of the JAL, the Court should go on to entertain the application for pre-action disclosure. Perhaps this can be abbreviated to a "beyond arguable" test. (I am aware that I have deployed principles concerned with the discretionary stage of the enquiry into the jurisdictional stage, but it seems clear to me from the second sentence of [28] of *Smith* that the same considerations can, in principle, arise at both stages and I think that they do in this case.)

32. Of course, there would be nothing preventing the Court from, having found jurisdiction to the requisite standard at the first stage of the enquiry, exercising its discretion to deny the application on jurisdictional grounds at the second. For example, an applicant's case on jurisdiction may disclose a minimum level of arguability, thereby passing the jurisdictional hurdle, but in circumstances where that case cannot be improved by the disclosure sought, such that the applicant will, if proceedings are commenced, necessarily be unable to demonstrate a good arguable case, as required at that stage. On the other side of the spectrum, the Court may have before it evidence sufficient to establish that it would not have jurisdiction to try the prospective claim. No doubt there will be many factors relating to jurisdiction appropriate for placement in the discretionary balance.

33. Before concluding this discussion, I note that, in my judgment, some of the Article 5(A) jurisdictional gateways in the Arabic version of the JAL-which is the "ultimate and dominant text" of the JAL (*Al Khorafi* at [58])-have been mistranslated in the English translation familiar to all users of the Court. I explained my contention in detail in a recent decision in a private case ([2022] DIFC CFI 032 (22 December 2021) at [208] to [216]). Suffice it to say here that, in my view, the words in the Arabic version of the JAL corresponding to "claims and actions" in the English translation-"*Al talabat wa al da?awa*"-are accurately translated into English as "applications and claims (in the broad sense of "cases")". The objects over which the Court has jurisdiction under the relevant gateways of JAL when their respective criteria are satisfied-applications and cases-are therefore more encompassing, in my view, than the English translation imparts: a claim in the sense of "case", for example, can be comprised of many claims in the narrower sense of "claims to remedies", though presumably the gateways according to the Arabic text as I read it should be regulated with something like a necessary and proper party test-for example, is there is a real issue to be tried against the anchor Defendant and is the secondary Defendant a necessary and proper party to the claims against the anchor Defendant?-to prevent parties from being able to invoke the DIFC Court's jurisdiction at will by asserting baseless claims against Defendants who somehow fall within a DIFC gateway.

34. To conclude, it seems to me that with the jurisdictional test being easily satisfied in the pre-action disclosure context, as I have found it to be, the vast majority of the Respondents' arguments against the Court ordering pre-action disclosure are likely to be of more importance at the discretionary stage of the enquiry. I am not sure whether having issues relevant to the Court's discretion in the second stage of the enquiry decided in some way could interfere with that discretion or instead be irrelevant to it. In either case, however, it is seems that those determinations would be unhelpful. Underhill LJ stated at [24] of *Smith*, "It is inherently better that questions about the likelihood of the applicant being able in due course to establish a viable claim are considered as part of a flexible exercise of the court's discretion in the context of the particular case". I apply this observation.

35. Of course, the jurisdiction test that I have concluded arises in the first stage of the enquiry, the question whether there is a reason with at least some arguability to believe that the DIFC Court has jurisdiction under Article 5(A) of the JAL, could be addressed here without interfering with the discretion of the judge who will decide the Disclosure Application. But I think it is preferable to defer that question too. On the one hand, at the time the Jurisdiction Application was heard, I had not formed my current view on the translation of the words "*al talabat wa al da?awa*" in the English version of the JAL, which I think impacts the position in the present case, and so the Respondents have not had an opportunity to respond to it. Moreover, separating issues that can be decided together only increases the chances of delays and increased costs, and unnecessarily so when the points made in this application will almost certainly feature somehow in the Disclosure Application. If the parties jointly disagree with this approach, they can inform the Court of the same and I will proceed to deciding the question.

Costs

36. Costs in the case.