IN 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, JUSTICE SIR JEREMY COOKE AND JUSTICE WAYNE MARTIN

LURAL

Claimant/Appellant

and

(1) LISTRAN
(2) LOKHAN

Defendants/Respondents

REASONS OF JUDGMENT ISSUED ON 3 FEBRUARY 2021

Introduction

1. At the conclusion of the hearing on 1 February 2021, the Court made an order allowing the appeal and declaring that the DIFC Court has, pursuant to Article 5 (A)(1)(a), Article 5 (A)(1)(b) and Article 5 (A)(2) of Dubai Law No. 12 of 2004 (as amended)(being the Judicial Authority Law)(the **"JAL"**), exclusive jurisdiction over both the dispute referred to the DIFC Court in respect of the breach of the exclusive jurisdiction clause in the agreement between the Appellant (**"Lural"**) and the Respondents and over the dispute determined by the Abu Dhabi Court, which related to an investment which had led to significant losses on the part of the First Respondent, allegedly as a result of breaches of contract and/or duty by Lural. The Court made ancillary orders in relation to costs and stated that its reasons would follow. These are the reasons for the Court's decision.

2. A late application was made by the Respondents with a Respondents' Notice seeking to uphold part of the Order made by the Judge at first instance on 30 November 2020 on additional grounds and for permission to appeal against another part of that Order. The Court refused to permit the late application because, not only did it fall foul of the Rules as to time, but the whole basis of it ran counter to the manner in which the Respondents had not only run their case in the Abu Dhabi courts but also the manner in which the case had been run in the DIFC Court at first instance. The case pursued by the Respondents had always been on the basis that a contract existed between Lural (as opposed to Lural Suisse, which is a separate entity) and the Respondents and that the contract contained an exclusive jurisdiction clause in favour of the courts of DIFC. Had the case been run on any different basis in the court below, there is no doubt that additional evidence of fact would have been adduced by Lural to meet the points which the Respondents now wished to advance in this Court. On principles which are too well-known to require repetition, such a course is impermissible on an appeal, where new points of law may often be advanced but where new grounds which depend upon factual considerations not raised in the court below may not be pursued.

3. In the result, this appeal turns on the proper construction and application of Article 5(A)(4) of the JAL, which provides, in its 2017 amended form:

"The Court of First Instance may not hear or adjudicate any Civil, commercial or labor claims or action in respect of which a final judgment was rendered by another court."

4. The learned Judge in the Court below held that this provision excluded the DIFC Courts from making any determination of the matters in dispute in the Abu Dhabi Courts because a final judgment had been rendered in those courts, in a second decision of the Court of Appeal there, despite the then undisputed existence of an exclusive jurisdiction clause in the agreement between the parties in favour of the courts of the DIFC. The critical point at issue is whether the reference to *"a final judgment. rendered by another court"* means a judgment which falls to be recognised by the DIFC Courts as a matter of its own conflicts of law principles or whether it means any judgment at all, whether of a foreign court or a court elsewhere in the UAE.

Article 5 of the JAL

5. it is undisputed that the UAE Civil Procedure Law 1992 (the **"CPC"**) has no application in the DIFC and that the DIFC Courts' jurisdiction is determined solely by the JAL, which is part of the law of Dubai, as one of the Emirates within the UAE. It was submitted by the Respondents that different principles of construction should be applied to the JAL because it was part of a civil law system, although the JAL took effect as part of the law in the common law jurisdiction of the DIFC. It was pointed out that Article 5(A)(4) is a unique provision in the UAE and operates in only one direction to limit the jurisdiction of the DIFC and not the other courts in the Emirates. It was said that the Article does not prevent the court ruling on its own jurisdiction but provides a limit on it. It was said that the Article is categoric and unqualified in its terms and should not be read down by reference to any common law principles of private international law. A "court" is a "court", wherever it may be located and the only qualification or restriction on a final judgment of any kind from any court which could operate to prevent the application of Article 5(A) (4) would be an overriding consideration of UAE public policy. For the reasons which appear hereafter we are unable to accept that submission or much of the argument which underlies it.

6. It is unnecessary to set out the terms of Article 5(1) which sets out the "gateways" by which the DIFC Courts are given *"exclusive jurisdiction"* to hear and determine various kinds of dispute relating to civil or commercial claims and, by amendment in 2017, to labour claims. It is sufficient to say that jurisdiction is established in the DIFC Courts in respect of the claims brought by Lural for breach of the jurisdiction clause and for declarations that the DIFC Court has jurisdiction in respect of the underlying dispute under Article 5 (1) (a), (b) and (c) of that clause. Under Article 5 (2), jurisdiction is also conferred by reason of the exclusive jurisdiction clause in the agreement between Lural and the Respondents. That clause provides:

"the Court of First Instance may hear and determine any civil or commercial claims or actions falling within its jurisdiction if the parties agree in writing to file such claim or action there, whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions."

7. In its original form, Article 5(4) contained additional prefatory words referring specifically to Article 5(A)(2). "Notwithstanding Clause (2) of Paragraph (A) of this Article, the Court of First Instance may not hear or determine..". Because the parties had not focused on Article 5 (A)(4) at the hearing, the learned Judge asked for written submissions from the parties on the clause after the hearing had finished. In his reasons, he referred to the clause and placed reliance upon the prefatory words to the earlier version of the clause as demonstrating that the existence of an exclusive jurisdiction clause was specifically overridden by a "final judgment" of "another court". As those introductory words do not appear in the current form of the clause, that point disappears. As the provision now reads, Article 5 (A)(4) contains no specific reference to any previous clause in the Article, but is of general application and, as the Respondents submit, has the effect of limiting the jurisdiction of the DIFC Courts which is otherwise provided in the preceding clauses in Article 5 (A) (1) and (2).

8. There remains the question whether or not any such "final judgment" must be one which the DIFC Courts must recognise or one which is capable of recognition by it. It is Lural' case that, in order to qualify under Article 5 (A)(4), such a final judgment must be one which the DIFC Courts would recognise; that a judgment obtained in breach of an exclusive jurisdiction clause is not entitled to recognition in the DIFC; and that the Abu Dhabi judgments were obtained in breach of such an exclusive jurisdiction clause. It is said that the terms of the relevant clause in the Article amounted to a codification of common law principles and that the words "final judgment" can only mean a judgment which the DIFC Courts recognise as such. Without that, all there would be is a piece of paper emanating from a foreign court.

9. The basis upon which this Court proceeds is that such an exclusive jurisdiction clause existed in the agreement between Lural and the Respondents, as has been common ground until the application referred to in paragraph 2 above and that, of necessity, by reason of its existence, the claim made by the Respondents in the Abu Dhabi Courts was brought in breach of contract. The questions which remain are whether a judgment obtained in breach of an exclusive jurisdiction clause does fall to be recognised in the DIFC and whether Article 5(A)(4) applies to a judgment which is not so recognised.

The need for recognition

10. The fundamental point which is made by Lural is that a judgment which is not "recognisable" in the DIFC Courts is not truly a judgment at all, so far as the DIFC Courts are concerned. Whether or not another court, by its own conflicts of law principles, considers that it has jurisdiction, such a judgment is not to be considered as a judgment for the purposes of Article 5 (A)(4), or for any other purpose, if it does not comply with the requirements of DIFC law for recognition. This Court considers the contrary proposition to be unarguable.

11. There is no distinction to be drawn between "recognisability", entitlement to recognition and actual recognition. Whilst judgments from another jurisdiction may be recognised for the purpose of enforcement against assets in the DIFC, "recognition" is a much wider concept which is critical for the purposes of disputes about res judicata, cause of action estoppel, issue estoppel and the rule in Henderson v Henderson. If a DIFC Court is to take note of a judgment of another jurisdiction for any purpose, it must, in the view of this Court, be a judgment which the Court "recognises" as a valid judgment. A judgment which is recognisable for one purpose must be recognisable generally and the corollary must also apply. A judgment which is incapable of recognition for the purposes of enforcement cannot be recognised for other purposes such as Article 5 (A)(4). Were it otherwise, a successful litigant in Abu Dhabi might be unable to enforce its judgment in the DIFC (because it was not entitled to recognition for that purpose) but would not be able to bring a fresh action in the DIFC against the same defendant by reason of Article 5 (A)(4). The principles of recognition are unitary.

12. It is, as Lural submits, trite law that, absent a statutory regime for automatic recognition or registration, recognition at common law is necessary for a judgment from another jurisdiction to have legal effect for any purpose and not just for enforcement, including the establishment of res judicata or issue estoppel - see lutin's conflicts of laws 15th edition at paragraph 14 -002 and 14 -005,

13. It was common ground between the parties that the rules governing recognition and enforcement of judgments from outside Dubai are set out in Article 24 of the DIFC Courts Law and Article 7 (6) of the JAL. This Court has held in *DNB Bank ASA v Gulf Eyadah Corporation and another* [2015] DIFC CA 007 (25 February 2016) at paragraph 96 that, in the amended JAL, *"Articles 7(4) to 7(6) provide for the enforcement within the DIFC of judgments, decisions and orders and ratified Arbitral Awards rendered by Dubai Courts or any court other than the Dubai Courts"* and that it is *"by virtue of Article 24 (1) (a) of the DIFC Courts Law, read with Articles 7(4) to 7(6) of the JAL"* that the DIFC Courts have jurisdiction to hear claims for recognition and enforcement of foreign judgments. The references to *"any court other than the Dubai Courts"* and *"foreign judgments"* are to be noted.

14. It was Lural' case that a judgment of the court of another Emirate was to be treated in the same way as a decision of a foreign court in every respect unless there was a statute to govern the position, as was the case with on-shore Dubai. The Respondents' position was that no distinction was to be drawn between the final decisions of foreign courts and the final decisions of Emirati Courts, whether in the context of enforcement under these provisions, or in the context of Article 5 (A)(4), but that the rules relating to enforcement could lead to one conclusion where Article 5 (A)(4) led to another. Unenforceability of a judgment on the basis of DIFC principles of conflicts of laws did not mean that Article 5 (A) (4) did not apply to the same judgment. There is no logic or principle in that argument.

15. It is clear that the same principles apply to Emirati judgments as to foreign judgments where ratification and enforcement is concerned as appears from the terms of Article 24 of the DIFC Court Law and Article 7 of the JAL.

(a) The former reads:

"24. Ratification of judgments

(1) pursuant to Article 7. of the Judicial Authority Law, the Court of First Instance has jurisdiction to ratify any judgment, order or award of any recognised:

(a) foreign court

(b) Courts of Dubai or the United Arab Emirates".

(b) The latter reads at Article 7(6):

"all judgments, decisions, orders and ratified Arbitral Awards rendered outside DIFC by any court other than Dubai Courts shall be executed within DIFC in accordance with the procedure prescribed in the Rules of the Courts."

16. If, however, there is no material distinction between recognition for enforcement purposes and recognition for other purposes, whether in respect of res judicata or other matters, as set out in paragraphs 11 and 12 above, the conclusion that a judgment must be capable of recognition in the DIFC Courts to qualify as a judgment at all is inescapable. There cannot be, in the view of this Court, judgments which are recognised or incapable of recognition for the purposes of enforcement, but which are treated differently for other purposes. The submission made on behalf of the Respondents that, because "recognition and enforcement" is dealt with in a different law (namely DIFC Courts Law, Article 24) and a different Article in the JAL (Article 7 (6)) from "jurisdiction" in Article 5 of the JAL, recognition is irrelevant in the construction of Article 5 (A)(4), simply does not meet the point that, in order to treat a final judgment of another court as effective, it must be a judgment which is capable of recognition and recognised as such.

17. Whilst it is accepted by both parties that there is no statutory guidance for the principles which apply in relation to the recognition or enforcement of judgments of another jurisdiction in the DIFC, Lural submit, and this Court accepts, that the "waterfall" provisions of Article 8 (2) (e) of DIFC Law No. 3 of 2004 (being the Law on the Application of Civil and Commercial Laws in the DIFC) lead to the application of the principles of English/common law/conflicts of laws in relation to that issue.

18. It is possible to posit any number of situations where exotic courts may purport to exercise exorbitant jurisdiction for entirely arbitrary reasons and where the judgments of such courts in such circumstances would not be capable of enforcement under common law principles of conflicts of laws. The idea that the DIFC Court would be bound to accept such a judgment under Article 5(A)(4) as res judicata or as a judgment preventing the DIFC Court from exercising its own jurisdiction in accordance with its own private international law rules has only be stated to be dismissed. It is not suggested that the Abu Dhabi courts did not exercise their own jurisdictional powers in accordance with their conflicts of law rules or that there is anything arbitrary about those rules, but the fact remains that the DIFC courts must apply their own conflicts of laws rules to determine whether or not a judgment from a foreign court or any court other than the on-shore courts of Dubai (for which there is special statutory provision) is to be treated as a valid judgment.

Judgments obtained in breach of an exclusive jurisdiction clause and the DIFC principles of conflicts of laws.

19. Exclusive jurisdiction clauses are enforceable in the DIFC Courts and it has not been contended otherwise. The DIFC Courts, like the English courts, will give effect to exclusive jurisdiction clauses in favour of another jurisdiction absent "strong cause" not to do so. The strong policy that parties must abide by their agreements, whether as to choice of law, choice of jurisdiction or other matters, is obvious, whether the choice is in favour of DIFC law or jurisdiction or the law and jurisdiction of another forum.

20. It is accepted by the Respondents that anti-suit injunctions can be issued by the DIFC Courts in relation to such clauses which operate in favour of the courts of the DIFC and it was submitted that this was the course which Lural should have adopted in order to prevent the Abu Dhabi courts proceeding to a judgment which had the effect of depriving the DIFC Courts of their own jurisdiction under Article 5 (A)(4). It is also accepted, as a matter of principle, that a claim for damages will run for the breach of an exclusive jurisdiction agreement. The effect of the Respondents' argument in relation to Article 5 (A)(4), however, is that once a judgment has been entered in proceedings brought in breach of such an exclusive jurisdiction agreement, that judgment is binding on the parties and not only bars the bringing of proceedings in the DIFC but constitutes res judicata/issue estoppel so as to bar any claim in damages in respect of any errant conclusions of that court, whether seeking to apply the chosen law or not. That appears a perverse conclusion to reach in circumstances where, at all times, Lural had objected to the jurisdiction of the Abu Dhabi Courts on the basis of the parties' agreement to the exclusive jurisdiction of the DIFC Courts and sought dismissal of the suit by those Courts on that basis.

21. In the absence of an anti-suit injunction in respect of foreign proceedings, which is harder to obtain than a stay in the foreign court (for reasons expressed in any number of decisions) the parties would otherwise need to engage in an ugly rush to judgment of the kind deprecated in the English authorities relating to forum non-conveniens , in order to gain res judicata status. This Court does not find the reasoning in paragraphs 68 - 72 of the judgment in the Court below to be compelling even if expressed in relation to a policy argument put forward by Lural. If the second decision of the Abu Dhabi Court of Appeal operates to bar the DIFC Courts from exercising jurisdiction under the exclusive jurisdiction clause, there is no room for the operation of a claim for breach of that clause in pursuing the Abu Dhabi proceedings, (other than perhaps in respect of additional costs) since it is inevitable that the decision of that court would constitute res judicata and prevent any challenge on the basis of the substantive merits, which would otherwise be open to Lural if the Abu Dhabi judgment did not meet the criteria for recognition.

22. It appears to this Court that a judgment obtained by virtue of proceedings undertaken in another court in breach of an exclusive jurisdiction clause constitutes a judgment which, under the rules of conflicts of laws of the DIFC, that latter court had no jurisdiction to grant. In the view of the DIFC Court, regardless of the view of the other court in accepting jurisdiction in accordance with its own conflicts of law principles, that other court has accorded to itself a jurisdiction which the parties had specifically agreed could only be exercised by the DIFC Courts. Under DIFC conflicts of law rules, the DIFC Courts alone had jurisdiction by virtue of the parties' agreement. There is powerful academic opinion in support of

this proposition as well as limited support from a Canadian authority, Old North State Brewing v Newlands Services 1998 Can LII 6506 (BC CA) and other authorities which are referred to below.

(a) Professor Adrian Briggs in "Private International Law in the English Courts", states at paragraph 6.189 that "a claimant who may be said to have behaved wrongfully in obtaining the judgment cannot hold the other to the obligation which is said to arise from it". In the following paragraph, he states that if a claimant brings proceedings in breach of a legally binding agreement not to do so - for example, in breach of an exclusive jurisdiction agreement in favour of the courts of another country - he cannot be allowed to take advantage of the foreign judgment. "Such wrongdoing should avoid the obligation to abide by the judgment. A version of this principle is now provided by the Civil Jurisdiction and Judgments Act 1982."

(b) The same author in "Civil Jurisdictions and Judgments" states that while *"in its statutory form, this is a relatively new defence. The common law would not have recognised a judgment in similar circumstances"*, referring to Ellerman Lines v Read [1928] 2 KB 144 (CA).

23. Rule 44 of Dicey (ibid) states that, in English law, *"a court of a foreign country outside the United Kingdom has no jurisdiction.. if the bringing of the proceedings in that court was* contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country and the judgment debtor did not agree to the proceedings being brought in that court. or otherwise submit to the jurisdiction of that court".

24. Decisions in the English Courts such as Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90 and OT Africa Line Ltd v Magic Sportswear Corpn [2006] 1 AER (Comm) 32 reinforce the strength of the view that the parties' choice of jurisdiction should be upheld in preference to a foreign court's view of the unenforceability of such a clause. In the latter, Longmore LJ said at paragraph 32:

"whatever country it is the courts of which the parties have agreed to submit their disputes is the country to which comity is due. It is not a matter of an English court seeking to uphold and enforce references to its own courts; an English court will uphold and enforce references to the courts of whichever country the parties agree for the resolution of their disputes. This is to uphold party autonomy, not to uphold the courts of any particular country".

25. The statutes to which reference was made were said to, and do, codify the common law principles which apply. It is, of course, the case that the judgment of the Abu Dhabi Court is not a judgment of a foreign court. Nonetheless the same common law principles of private international law must apply in the absence of any statutory provision which governs the situation. The position as between the DIFC Courts and the courts of other Emirates than Dubai is not governed by statute, whereas the position between the DIFC Courts and the courts of on- shore Dubai is. The situation is similar to that which obtained between England and Scotland prior to the passing of legislation which confirmed the common law position and the position in Australia between different states prior to legislation in that country which had the same effect. See Dicey (ibid) 15th edition at paragraph 14 -012 and Nygh, *Conflict of Laws in Australia* 2nd Edition (1971) at pp 721-728. The judgments in different jurisdictions of states which form part of a federation or a structure similar thereto fall to be recognised in accordance with common law principles. The effect to be given to exclusive jurisdiction clauses in the context of refusal of enforcement is a matter of established common law which is applicable in the DIFC.

26. The obiter dicta of Moore Bick LJ in *National Navigation Co Ltd v Endesa Generacion, SA, The Wadi Sudr* [2009] EWCA Civ 1397 at paragraphs 124 - 128 were rightly drawn to the Court's attention but do not affect the Court's judgment on this point. The decision was there concerned with the public policy exception to the application of the Regulation on the otherwise automatic recognition of judgments within EU countries. That situation was governed by Convention with limited public policy exceptions which could not be said to apply merely because a court subject to that same Convention had come to a different conclusion in relation to the application of an exclusive jurisdiction clause. The decision does not impact upon the basic common law principle which is set out above.

Conclusion

27. This Court has, therefore, reached the clear conclusion that the second decision of the Abu Dhabi Court of Appeal, by which Lural was found liable to the Respondents, was a decision which was reached as a result of a breach of the exclusive jurisdiction clause in the applicable contract. As such it is not a binding judgment for the purposes of the application of the doctrines of res judicata or issue estoppel in relation to the substantive findings therein, nor does it constitute a judgment for the purposes of Article 5 (A)(4) of the JAL, which for the reasons set out must be construed as meaning a judgment which is recognised as such by the DIFC Courts.

28. In such circumstances, Article 5 (A)(4) of the JAL does not operate to bar the DIFC Courts from exercising their undoubted jurisdiction under Article 5 (A) (1) and (2) of the JAL in respect of the claims for breach of the jurisdiction clause and for declarations that these Courts have exclusive jurisdiction over the substantive dispute which has been determined by the Abu Dhabi Court of Appeal. It follows that Lural is entitled to the declarations sought as set out in the Order and to the costs of this appeal and the costs below.

29. The effect of this is that there are now conflicting decisions of different courts in the UAE as to jurisdiction over the substantive dispute which has already been determined by the second decision of the Court of Appeal in Abu Dhabi. This triggers Article 60 of Law No. 10 of 1973, which, as construed by this Court in *IGPL v Standard Chartered Bank* [2015] DIFC CA 005 (19 November 2015) at paragraph 71, by reference to Case No 10/28 in the Union Supreme Court ("USC") requires a jurisdictional conflict resulting from two conflicting final judgments on jurisdiction in the UAE to be referred to the USC for its resolution of the conflict. Such a conflict only arises when there are conflicting final judgments on jurisdiction, with the result that the point could not have been taken earlier unless Lural had sought an anti-suit injunction and obtained final judgment in relation to it. It cannot be said that Lural were obliged to do this and any failure to do so cannot impact upon the proper construction of Article 5 (A) (4), as set out above.

30. Lural made a previous application to the USC prior to obtaining a final decision of this Court on jurisdiction, but withdrew it following the decision of the learned Judge at first instance who pointed out the necessity for such a final judgment. It is the expressed intention of Lural to refer the matter to the USC and the reason why this matter came on as an expedited appeal was the fear of imminent execution of the second judgment of the Court of Appeal in Abu Dhabi. The matter should be referred to the USC as soon as practicable.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 10 February 2021
Time: 3.30pm