Claim No. CFI-015-2018

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BEFORE H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

(1) ED&F MAN CAPITAL MARKETS MENA LIMITED

(2) ED&F MAN CAPITAL MARKETS LIMITED

Claimants/Respondents

and

(1) SAYYED HUSSAIN

(2) RJ O'BRIEN MENA CAPITAL LIMITED

(3) STEPHEN GHALLAMI

Defendants/Applicants

ORDER WITH REASONS OF H.E. JUSTICE OMAR AL MUHAIRI

UPON reviewing the Applicant's (the "Claimants'") Application Notice Number CFI-015-2018/2 dated 23 September 2018 and supporting documents (the "Application")

AND UPON reviewing the Applicants' (the "Second and Third Defendants'") Application Notice Number CFI-015-2018/3 dated 25 September 2018 and supporting documents (the "Application")

AND UPON reviewing the Applicant's (the "First Defendant's") Application Notice Number CFI-015-2018/4 dated 30 September 2018 and supporting documents (the "Application")

AND UPON reviewing the responding skeleton arguments and supporting documents to each Application

AND UPON hearing the parties' respective submissions at the oral hearing 9 October 2018

IT IS HEREBY ORDERED THAT:

1. The Claimants' Application requesting production of documents is granted as per the attached schedules.

2. The Second and Third Defendants' Application requesting an Order for the Claimants to stay the US Proceedings is dismissed.

3. The First Defendant's Application requesting the exclusion of the telephone recordings and transcripts is dismissed.

4. The Defendants will pay 77% of the Claimants' costs in Application number CFI-015-2018/2 on the standard basis to be assessed by the Registrar if not agreed upon by the parties.

5. The Second and Third Defendants will pay the Claimants' costs in Application number CFI-015-2018/3 on the standard basis to be assessed by the Registrar if not agreed between the parties.

6. The First Defendant will pay the Claimants' costs in Application number CFI-015-2018/4 on the standard basis to be assessed by the Registrar if not agreed between the parties.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of issue: 31 October 2018

Time: 9am

SCHEDULE OF REASONS

Background

1. The Claimants are companies which conduct business in international commodities and financial services with operations in financial centres around the world. The First Claimant is incorporated and registered in the DIFC and the Second Claimant is a company registered in the United Kingdom. Hereon, I shall refer to them collectively as the "Claimants".

2. The First Defendant is the former employee of the First Claimant under a contract of employment dated 10 February 2015 which was governed by the laws of the DIFC. The First Defendant is currently an employee of the Second Defendant.

3. The Second Defendant is a company with a business similar to that of the Claimants in that it is also an international commodity broker and offers financial services in financial centres around the world. The Second Defendant is also licensed in the DIFC. Both the Claimants and Second Defendant describe each other as competitors within their field of business.

4. The Third Defendant is the company secretary and office operations manager of the Second Defendant.

5. The basis of the Claim is related to the resignation of the First Defendant from the Claimants and the actions of the First Defendant in the lead up to his resignation and after his resignation. The Claimants allege that the First Defendant conspired with the Second and Third Defendants to facilitate the taking of the Claimants' clients and employees to the business of the Second Defendant. The Claimants allege that the First Defendant assisted the Second and Third Defendant in securing the business of the Claimant's clients and employees and assisted in providing private and valuable information about the Claimants' business in promise of exorbitant salaries/bonuses.

6. The Claimants have made an application to the Court for an order granting permission to the Claimants to request the Defendants to produce documents.

7. The Claimants have also issued proceedings in Illinois, USA against three parties; 1) The Third Defendant, 2) JVMC who is the parent company of the Second Defendant. JVMC is a company incorporated in the state of Delaware and registered in Illinois, USA and 3) Mr Ouldhadj who serves as JVMC's Chief Operating Officer and is also the Chief Executive Officer and Director of the Second Defendant. The Second and Third Defendants request this Court to make an Order directing the Claimants to stay their proceedings in the USA.

8. The Claimants have telephone recordings and transcripts of recordings of the First Defendant whilst he was in employment at the Claimants. The Claimants wish to include these recordings and transcripts into evidence in these proceedings. The First Defendant requests this Court to make an Order to exclude these recordings and transcripts from the Court file and submitted evidence in these proceedings.

Claimants' Disclosure Application

The Parties Submissions

9. The Claimants have submitted an application to the Court to issue an order pursuant to RDC Rule 28.36 against the First Defendant to produce the documents requested by the Claimants in the Document Production Schedule served upon the First Defendant dated 9 July 2018.

10. The Claimants have submitted another application to the Court to issue an order pursuant to RDC Rule 28.36 against the Second and Third Defendants to produce the documents requested by the Claimants in a Document Production Schedule served upon the Second and Third Defendants dated 9 July 2018.

11. The Claimants refer to the Consent Orders against the respective Defendants dated 3 April 2018 where the parties agreed to the production of documents by list and later, the provision of copy documents.

12. The Claimants submit that although the Defendants submitted a few documents, it was apparent that the documents produced were of marginal significance to the dispute and the Defendants failed to disclose key documents they referred to in their statement of case and failed to disclose other key documents relevant to the dispute. The Claimants submit that this led the Claimants to serve the Defendants with the Document Production Schedules which they served on 9 July 2018.

13. The Defendants submit that they are not obliged to produce the documents listed in the Document Production Schedule because they have already complied with the disclosure directions under the Consent Order. The Defendants submit that they undertook a compromise of a substantive dispute when they agreed the terms of the Consent Order and therefore the Consent Order should be regarded as a binding agreement. The Defendants submit that they are thereby not required to comply with any further document requests.

14. The Defendants further submit that the Claimants have deliberately delayed this application to request documents in the hope that the Defendants are denied their rights to object to the requests. The Defendants submit that the trial date is at risk of being postponed and there is not enough time to permit proper document production procedure.

15. The Claimants in response, submit that the Consent Order does not limit document production to the standard production of documents pursuant to RDC Rule 28.15 nor does it bar the Claimant from requesting production of documents pursuant to RDC Rule 28.17.

Discussion

16. I am not convinced by the Defendants' submissions of compromise in agreeing to the Consent Order as permission to forgo any further obligations/requests to produce documents.

17. If the Claimants wish to request production of documents they must comply with Part 28 of the RDC Rules.

18. The Claimants have submitted one schedule detailing their request to produce documents from the First Defendant and submitted another schedule detailing their request to produce documents from the Second and Third Defendants.

19. I have taken into consideration Part 28 of the RDC Rules and in particular RDC Rule 28.17, which deals with all the requirements a request to produce needs to meet.

20. I will deal with each of the Claimants requests separately.

Claimants' request to produce - First Defendant

21. The Claimants have listed 11 documents in their schedule of request.

22. I accept all documents in the Claimants' schedule of request save for documents one, six, seven and eight. I provide my reasons below.

23. The description for document one is vague. The wording *"pages from which the Second and Third Defendant could have obtained Mr A's contact"* (emphasis added) to be vague and wide and I do not find this request to be reasonable and in line with Part 28 of the RDC Rules.

24. Document request number six is too wide. It is unreasonable to request "*all phone numbers"* and therefore reject this request on the basis it is not in keeping with the spirit of Part 28 of the RDC Rules.

25. Document request number seven is too wide. It is unreasonable to request "*phone records relating to all numbers"* and therefore reject this request on the basis it is not in keeping with the spirit of Part 28 of the RDC Rules.

26. Document request number eight is unclear and vague. The Claimants' reasons for requesting this document are not persuasive. I reject this request on the basis that it is not in keeping with the spirit of Part 28 of the RDC Rules.

Claimants' request to produce - First and Second Defendant

27. The Claimants have listed 15 documents in their schedule of request.

28. I accept all documents in the Claimants' schedule of request save for documents five and six. I provide my reasons below.

29. Document request number five is found to be too wide. It is unreasonable to request "*All phone numbers used"* and therefore I reject this request on the basis it is not in keeping with the spirit of Part 28 of the RDC Rules.

30. Document request number six is found to be too wide. It is unreasonable to request "*phone records relating to all numbers.with a key identifying telephone numbers"* and therefore I reject this request on the basis it is not in keeping with the spirit of Part 28 of the RDC Rules.

Costs

31. The Defendants will pay 77% of the Claimants' costs in Application number CFI-015-2018/2 on the standard basis to be assessed by the Registrar if not agreed upon by the parties. I make this Order on the basis that in total, 20 out of 26 of the Claimants' requested documents for production were granted.

Second and Third Defendants' Anti-Suit Application

The Parties' Submissions

32. The Defendants submit that the Claimants' claim in the USA surmounts to an abuse of process and the Defendant submits that the Court has the power to grant relief where the continuation of the foreign claim would be vexatious and oppressive.

33. The Defendants also submit that the foreign claim will result in extensive and duplicative costs and conflicting decisions regarding the same facts.

34. The Defendants submit that although Mr Oulhadj is a USA citizen he is a resident in the UAE. The Defendants further submit that JVMC is not a trading company.

35. The Defendants submit that the relief of worldwide injunction the Claimants seek against the Defendants in the USA proceedings is fanciful.

36. The Defendants submit that the Claimants brought additional proceedings in the USA in order to harass the Second and Third Defendants.

37. The Claimants agree that the threshold the Defendants must pass in their anti-suit application is to prove that the USA proceedings are vexatious or oppressive.

38. The Claimants rely on English common law which states an anti-suit injunction always requires caution because it involves interference with the process of a foreign court and different judges operating under different legal systems with different legal policies may legitimately arrive at different outcomes.

39. The Claimants submit that the Defendants have been inconsistent with their intention of this application to request an order for the Claimant to stay the USA proceedings temporarily or completely.

40. The Claimants submit that the Defendants Mr Oulhadj and JVMC have neither requested this Court to restrain the USA proceedings nor provided any evidence to this Court in favour of this application to stay the USA proceedings.

41. The Claimants submit that the parties to the USA proceedings are different to the DIFC Proceedings and different relief is sought in the USA proceedings.

42. The Claimants submits that the factual scope of the USA proceedings is different to that of the DIFC proceedings.

43. The Claimants submit that the Defendants have not met the threshold of vexatious and oppressive in their application and therefore their application should be dismissed.

Discussion

44. I found the Defendants submissions to be weak and I find that I agree with the Claimants submissions.

45. The USA proceedings are different to the proceedings in front of this Court as there are different parties to the USA proceedings and the relief sought in the USA proceedings is also different to the relief sought in these proceedings. For these reasons I cannot agree that the two proceedings are identical.

46. I accept the relevant principles in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023. Particularly, I accept that the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive. Accordingly, I find that the Claimants' Claim in front of the US Courts would not be vexatious nor oppressive.

47. I have also taken into consideration that if I refuse to order the Claimant to make a stay application to the USA proceedings, no apparent injustice will be suffered by the Defendants as the Defendants to the USA proceedings are perfectly capable of making a stay application in the USA proceedings themselves.

48. On the balance of considering comity and considering the Defendants intention to make a stay application to the USA proceedings themselves I find there is no compelling reason for this Court to order the Claimants to make an application to stay the proceedings it has brought in the USA. Further, making such an order against the Claimants in circumstances where the Defendants can easily make a stay application themselves will put the parties on unequal footing and thus, I find that making an order against the Claimants would not be in line with the overriding objectives of this Court to ensure the parties are on equal footing.

49. For the reasons mentioned above, I dismiss the application to make an order for the Claimants to stay the USA proceedings.

Costs

50. The Second and Third Defendants will pay the Claimants' costs in Application number CFI-015-2018/3 on the standard basis to be assessed by the Registrar if not agreed between the parties.

First Defendant's Application to Exclude Telephone Recordings and Transcripts

The Parties' Submissions

51. The Claimants wish to rely on evidence consisting of recordings and transcripts of telephone calls made by the First Defendant from the Claimants' office phones.

52. The Defendants wish to exclude this evidence on the basis that it is a criminal offence under UAE law to record a telephone conversation without a person's consent under Article 378 of the Penal Code.

53. The Defendants submit that the First Defendant did not give consent to having his telephone calls recorded and was not aware that his calls were being recorded, therefore, the Claimants have committed a criminal offence. The Defendants submit that the evidence of the telephone calls have been occasioned by means of criminal activity and therefore, this evidence must be excluded.

54. The Claimants submit that the telephone recordings were not obtained through illegal means and in fact the Claimant are obliged to keep such recordings as part of their obligated requirements under the DFSA Rules. Particularly the Claimants rely on Rule 6.7.1 which requires authorized firms to retain recordings of its voice and electronic communications with Clients or others in relation to transactions and instructions. Further the Claimants rely on Rule 6.7.3 which requires them to retain voice and electronic communication recordings for a minimum of six months.

55. The Claimants further submit that telephone recordings were made with the consent as each of the individuals whose recordings they wish to rely on were employees of the Claimant at the time of the recordings. Also, the employee contracts specifically state they consent to the monitoring of their communications by the Claimants during the course of their employment.

56. The Claimants also submit that the terms and conditions of their business expressly provide and clients agree that the Claimants can record telephone calls with clients. Therefore, consent was also given by the clients who are present in the voice recordings.

57. The Claimants submit that in any event, this Court has a discretionary power to hear the evidence it wishes to under RDC Rule 29.9.

Discussion

58. The Claimants were within their rights to record the telephone conversations of their employees during work hours, at a place of work, whilst using work telephones. I find the Claimants had a right to record the telephone communications (and any other form of communication) for the reasons I set out below.

59. The Claimants were legally required by DFSA Rules to make and retain records of voice and electronic communications where communications were with their clients or with regards to persons in relation to transactions and instructions.

60. The Claimants had pre-warned and obtained consent of their employees and clients as to the monitoring of their communications in the employee contracts and they had pre-warned and obtained consent of their clients that all telephone calls can be recorded in the Claimants' terms

and conditions of business.

61. Furthermore, I find the Defendant's submissions in relation to the UAE Penal Code to be weak in face of the Claimant's submissions regarding their legal requirements of the DFSA and the obtained consent of the employees and clients to record their communications.

62. Therefore, I find that the Claimants, in the circumstances set out above, had the right to record the telephone calls of its employees and clients and thereby I order that the application to exclude the telephone recordings and their transcripts to be dismissed.

Costs

63. The First Defendant will pay the Claimants' costs in Application number CFI-015-2018/4 on the standard basis to be assessed by the Registrar if not agreed between the parties.