Claim No: CFI 013/2019

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

BETWEEN

HEXAGON HOLDINGS (CAYMAN) LIMITED

Claimant/Applicant

and

(1) DUBAI INTERNATIONAL FINANCIAL CENTRE AUTHORITY
(2) DUBAI INTERNATIONAL FINANCIAL CENTRE INVESTMENTS LLC

Defendants/Respondents

ORDER OF JUSTICE ROBERT FRENCH

UPON the Applicant's application by notice dated 13 May 2022 for permission to appeal (the **"Permission Application"**) against the Order and Judgment dated 2 March 2022 of Justice Sir Jeremy Cooke (the **"Order"** and **"Judgment"** respectively)

AND UPON reviewing documents on the Court's file

IT IS HEREBY ORDERED THAT:

1. The Permission Application is refused.

2. The Applicant pay the Respondents' costs of the Permission Application, on an indemnity basis, to be assessed by a Registrar if not agreed.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 4 August 2022
Time: 1pm

JUDGMENT

Introduction

1. This is an application for permission to appeal against the Judgment of Justice Sir Jeremy Cooke in CFI-013-2019 in which he dismissed the Applicant's claim for damages, restitution, declaratory relief, interest and costs against the Respondents. The Applicant applied to the Court of First Instance (**"CFI"**) for permission to appeal the decision. That application was refused by Order of Justice Cooke made on 22 April 2022.

2. The Applicant now applies to the Court of Appeal for permission to appeal the judgment pursuant to RDC 44.9, which provides:

> "44.9 Where the lower Court refuses permission to appeal, a further application for permission to appeal may be made to the appeal Court in an appellant's notice."

3. The criteria for the grant of permission to appeal are set out in RDC 44.19 which provides:

> "44.19 Permission to appeal may only be given where the lower Court or the appeal Court considers that:
>
> (1) the appeal would have a real prospect of success; or
>
> (2) there is some other compelling reason why the appeal should be heard."

4. It will be noted that the criteria are not expressed as conditions, the satisfaction of which mandates the granting of permission to appeal. In the ordinary course, where one of the two grounds is made out, in the opinion of the Court, permission to appeal will be granted.

5. The first criterion requires a realistic rather than fanciful prospect of success. That does not mean that the applicant for permission must show that an appeal is more likely than not to succeed. On the other hand it is not sufficient that the appeal is arguable. As Justice Giles said in *Dattani v Damac Park Towers Company Limited,*[1] "[a] real prospect of success does not mean probability, but more than mere arguability and a realistic as opposed to fanciful prospect of success." An arguable point does not mean that the appeal has a realistic prospect of success. It may be that arguable error is demonstrated by the trial judge on one point but, because of determination on other points, there are little prospects of success. In the end what is required is an evaluative judgment.

6. The "other compelling reasons" criterion is disjunctive and raises the question - what kind of compelling reason would warrant the grant of permission to appeal where the appeal had no real prospect of success? It has been suggested that there may be a public interest in clarifying the construction of an important statute.[2]

7. In this case the Applicant made the following suggestion:

> "There are other compelling reasons why permission to appeal should be granted. Put simply, the DIFC Court has been called upon to judge two of its own institutions in a high value case involving the credibility of its employees (past and present) and compliance with obligations in good faith. That is not to say every case involving DIFC entities as parties must be subject to appeal or that the Judge was incapable of forming an independent view. Rather it is the unique circumstances of this case that require special attention. For justice to be done a review of the judgment is imperative not just in the interests of fairness to the Appellant but more importantly to maintain the public's confidence in the DIFC Courts as an independent and impartial arbiter of commercial disputes. The public in this context include international parties and foreign investors who engage in commerce in the DIFC and are (or elect to be) subject to the jurisdiction of the DIFC Court."

8. That is an extraordinary submission. It is emphatically rejected. It appears to amount to an invitation to the Court to favour the grant of permission to appeal for fear that this Court or the Court of First Instance would be seen as less than impartial in cases involving DIFC entities.

9. Having regard to the first criterion in RDC 44.19, I am not satisfied that the appeal would have a real prospect of success and on that basis will refuse permission to appeal. RDC 44.21 requires notification to the parties of that decision and brief reasons for it.

10. There are seven proposed grounds of appeal in the Notice of Appeal, each of which is extensively elaborated in that Notice. They are as follows:

Ground 1: The Judge decided the case on a point that was not raised by any of the parties and pre-determined the issue.

11. This was directed to the Judge's finding that there was no obligation on the parties to agree to the terms of a Shareholders' Agreement that differed from the terms of the Amended Joint Venture Agreement (the **"AJVA"**) because such an obligation would amount to an agreement to agree. According to the Applicant, both parties' pleadings were silent on the issue.

12. The Respondents pointed out that in the course of his judgment, the Judge rejected the Applicant's case which was unpleaded but asserted in the course of the trial that the relevant obligations under the AJVA imposed on the Respondents an obligation to negotiate certain terms of the AJVA. The Judge said:

> "As a matter of construction of the AJVA, the good faith/best endeavours duty cannot require a Party to vary the terms of the AJVA, whether or not it is effective in relation to efforts to seek agreement on ancillary matters in the Shareholders Agreement which are not catered for in the AJVA. The obligation, as framed, however is an obligation which can only oblige the Parties to achieve the result provided for in clause 3.1.3 in relation to the Shareholders Agreement, namely to execute such an agreement `in a form prepared by Nexus in accordance with the provisions of Schedule D."[3]

The Respondents pointed out that the Applicant's case failed at the first hurdle because no qualifying Shareholders' Agreement was ever presented for execution, as appears from the judgment at paragraphs 52 and 57.

12. Further, the Judge held that if clause 3 had purported to do what the Applicant said it did, it would amount to an agreement to agree. The relevant full sentence from the judgment was:

> "Moreover, if any duty of the kind suggested could arise, untrammelled by the AJVA, it could only be an obligation to negotiate, amounting to an agreement to agree, without content."[4]

On its face, the ground is without merit.

Ground 2: The Judge disregarded material evidence.

13. Here the Applicant asserted that the Judge wrongly disregarded material evidence and/or misconceived the Applicant's submissions as to material evidence. It is not necessary to traverse the detail of the argument to observe that this is as the Respondents contend an invitation to the Court of Appeal to revisit the evidence.

14. There were five somewhat disparate complaints made under this ground. Neither individually nor collectively do they support the proposition that there are realistic grounds for the prospect of success in the proposed appeal.

Ground 3: The Judge erred in his production order.

15. This ground concerned an interlocutory decision refusing to require the production of certain documents pre-dating 2012 sought by the Applicant. The order complained of was made on 13 June 2021. Any appeal against it had to be made within three weeks of the decision. There is no prospect of success on this ground. Further, the impact of the documents sought is speculative.

Ground 4: The Judge erred in his finding that the Applicant affirmed the AJVA.

16. Under this ground it was said the Trial Judge was wrong to disregard the Applicant's reservation of rights given that it maintained express reservations throughout 2012-2018 and given that authorities clearly recognise that reservation of rights are effective in precluding affirmation. The Judge's conclusion that everything that was said and done by the Applicant amounted to an affirmation did not benefit from any identification by the Judge of the conduct and/or words from which he drew that conclusion.

17. As pointed out by the Respondents, the Judge considered the reservation of rights' case and noted that the Applicant had asserted an "occasional" reservation of rights. However, on the totality of the Applicant's conduct he found there was affirmation. The judgment is, as the Respondents contend, a multi-factorial assessment with which a Court of Appeal would be reluctant to interfere.[5]

18. The Respondents also pointed out that the Judge had found that regardless of affirmation, the right to terminate was lost by the passage of time by reason of DIFC Law. Ground 4 does not disclose any reasonable prospect of success on appeal.

Ground 5: The Judge erred in determining that the Respondents withdrew the Renunciation prior to the Appellant's termination of the AJVA.

19. This determination was said to have been wrong because it contradicted other material findings by the Judge. However, as the Respondents pointed out, the question whether they had withdrawn their renunciation of the AJVA depended upon the Judge's assessment of the facts. The factual evidence is canvassed in both Skeleton Arguments at some length. On the face of it, this is another invitation to the Court to retrace the evidence and come to a different conclusion from that reached by the Trial Judge.

20. There is no reasonable prospect of success on this ground.

Ground 6: The Judge erred in determining that the Appellant failed to terminate the AJVA within a reasonable time.

21. As the Respondents contended in their Skeleton Argument on the Application for Permission, the assessment of whether more than a reasonable time has passed is a multi-factorial assessment with which the Court of Appeal will not interfere unless there is some error of principle.

Ground 7: The Judge ignored alternative indicators of value presented by the Applicant.

22. This was a complaint about the Judge's approach to quantum and his consideration of expert evidence. As the Respondents pointed out, the Applicant did not cross examine the Respondents' expert witness nor was the Respondents' expert challenged on essential inputs in the loss calculation.

Conclusion

23. The case before the Primary Judge failed on a variety of fronts, not all of which are canvassed in the proposed Grounds of Appeal. In my opinion, there is no reasonable prospect of success on this appeal, nor are there compelling reasons to grant permission to appeal. The application for permission is refused.

Costs

24. In his Schedule of Reasons for refusing the Application for Permission to Appeal, the Primary Judge pointed, in paragraph 3, to a number of findings, each of which had to be overturned for the appeal to succeed. In my opinion, this is a meritless application in which indemnity costs should be ordered.