Claim No. TCD 001/2021

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

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

IN THE TECHNOLOGY AND CONSTRUCTION DIVISION

BETWEEN

ALUCOR LIMITED

Claimant

and

ROHR REIN CHEMIE MIDDLE EAST LLC

Defendant

JUDGMENT OF JUSTICE ROBERT FRENCH

Hearing : **30 August 2021**

Counsel : Marwan Sakr instructed by SAAS Lawyers for the Claimant.
Patrick Dillon-Malone instructed by Al Tamimi & Company tor the Defendant.

Judgment : **7 October 2021**

ORDER

UPON reviewing the Defendant's Application No. TCD-001-2021/1 dated 19 April 2021 (the **"RRCM Application"**)

AND UPON reviewing the Claimant's evidence in answer to the Application dated 16 May 2021

AND UPON reviewing the Defendant's evidence in reply to the Application dated 31 May 2021

AND UPON hearing counsel for the Claimant and for the Defendant

AND UPON reading the submissions for the Claimant and the Defendant filed and recorded on the Court file

IT IS HEREBY ORDRED THAT:

1. On RRCM's Application dated 19 April 2021:

(a) The Application is dismissed in so far as:

(i) it seeks an order that pursuant to RDC 12.1(1), the DIFC Court has no jurisdiction to try the claim;

(ii) in the alternative, an order declaring that pursuant to RDC 12.1(2), the DIFC Court shall not exercise any jurisdiction it may have;

(iii) an order dismissing the claimant's claim;

(iv) an order pursuant to RDC 12.7(1) setting aside the Claim Form;

(v) an order pursuant to RDC 12.7(2) setting aside service of the Claim Form.

2. The Court will not entertain Alucor's claim for the amount of AED 5,171,465.24, being the amount of the Payment Order made by the Dubai Court of First Instance provided that Alucor may proceed with its claim based on alleged breach of the exclusive jurisdiction clause for the costs of the proceedings in the Dubai Courts.

3. RRCM is to pay 50% of Alucor's costs of RRCM's Application dated 19 April 2021 to be assessed by the Registrar if not agreed.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 7 October 2021
Time: 1pm

JUDGMENT

Introduction

1. The Claimant, Alucor Limited (**"Alucor"**) and the Respondent, Rohr Rein Chemie Middle East LLC (**"RRCM"**) entered into a subcontract

agreement on 10 June 2018. Under the Agreement RRCM undertook to do work for Alucor on the Al Taweelah Alumina Refinery Project in Abu Dhabi, United Arab Emirates (the **"Project"**).

2. The Agreement was to be governed by the Laws of England. It included an exclusive jurisdiction clause (**"EJC"**), clause 22, providing that any dispute or difference between the parties, not amenable to amicable settlement, was to be referred to the Courts of the "Dubai International Financial Centre having exclusive jurisdiction to decide on it".

3. The parties fell into dispute and RRCM instituted proceedings against Alucor in the Dubai Court of First Instance (**"Dubai CFI"**) for alleged non-payment of moneys due under the Subcontract Agreement. The application was made ex parte under the Civil Procedures Law of the UAE, as amended by an Executive Regulation passed by Cabinet Resolution No (57) of 2018. RRCM secured a Payment Order on 9 August 2020, of AED 4,701,070.68, interest of 12% and AED 50,000 as compensation for delay in payment of amounts owed under the subcontract. Alucor was not served with notice of the proceeding prior to the Payment Order being sought and made. It was served with notice of the Payment Order after the Order had been made. It was informed by that Notice that it had the right to challenge the Payment Order within 15 days of the date of notification.

4. Alucor filed an appeal in the Dubai Court of Appeal in which it challenged the jurisdiction of the Dubai CFI. However, its appeal was filed out of time and it was dismissed. A further appeal to the Dubai Court of Cassation failed because the appeal to the Dubai Court of Appeal had been lodged after the expiry of the prescribed time limit.

5. Alucor commenced proceedings in this Court on 31 January 2021 for damages for various breaches of the Subcontract by RRCM, arising out of the performance of the contract and damages for breach of the exclusive jurisdiction clause. RRCM, in the application now before this Court, challenges the jurisdiction of this Court to entertain Alucor's application. It also says that, in any event, as a matter of discretion, the Court should not entertain it as both parties had submitted to the jurisdiction of the onshore Dubai Courts.

6. By its application dated 19 April 2021, RRCM seeks the following Orders:

(a) an order that pursuant to RDC 12.1(1) the DIFC Court has no jurisdiction to try the claim;

(b) in the alternative, an order declaring that pursuant to RDC 12.1(2) the DIFC Court shall not exercise any jurisdiction it may have;

(c) an order dismissing the Claimant's claim;

(d) an order pursuant to RDC 12.7(1) setting aside the Claim Form;

(e) an order pursuant to RDC 12.7(2) setting aside service of the Claim Form;

(f) such further order or orders as the Court shall direct; and

(g) an order that the Claimant shall pay the Defendant's costs of the proceedings, including the costs of this application to be immediately assessed in the amount to be advised or alternatively to be assessed by the Registrar if not agreed.

Statutory Jurisdiction of the DIFC Court of First Instance

7. The jurisdiction of the DIFC Court of First Instance is set out in Article 5 of the Judicial Authority Law (**"JAL"**) which provides:

"(A) The Court of First Instance:

(1) The Court of First Instance shall have exclusive jurisdiction to hear and determine:

(a) Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;

(b) Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract;

(c) Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities;

(d) Appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals;

(e) Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations.

(2) The Court of First Instance may hear and determine any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions.

(3) 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 submit to the jurisdiction of another court or action but such court dismisses such claim or action for lack of jurisdiction.

(4) The Court of First Instance may not hear or determine any civil or commercial claim or action in respect of which a final judgment is

rendered by another court.

...

(C) The procedure prescribed in the Rules of the Courts shall apply to all civil and commercial claims and actions hear by DIFC Courts.

(D) DIFC Execution Judge

The Chief Justice of the Courts shall assign one or more of the Courts' judges as execution judge(s)."

In its original form, prior to its amendment in 2017, Article 5(A)(4) read:

"Notwithstanding Clause (2) of Paragraph (A) of this Article, the Court of First Instance may not hear or determine any civil or commercial claim or action in respect of which a final judgment is rendered by another court."

The jurisdiction of the Court relevant to this case is that conferred by clause 5(A)(2), enlivened by clause 22 of the Subcontract Agreement.

8. The JAL distinguishes between "Dubai Courts" and "Courts". Dubai Courts, for the purposes of the JAL are "Courts of the Emirate established pursuant to Law No (3) of 1992", establishing the courts of the Emirate of Dubai and its amendments. The term "courts" in the JAL is defined as:

"The Court of First Instance and the Court of Appeal established pursuant to this Law, and any tribunals established by the Chief Justice of the Courts pursuant to the DIFC Laws."

9. Article 7 of the JAL was relied upon by RRCM as an element of a statutory scheme for the recognition by DIFC Courts of onshore Dubai Court judgments. That Article deals with execution of judgments and provides for an execution judge assigned pursuant to paragraph (D) of Article (5) to have "jurisdiction over execution of the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts if the subject matter of execution is situated within DIFC, and such execution shall be in accordance with the Rules of the Courts." Article 7(2) deals with cases in which the subject matter of execution is situated outside the DIFC and is not material for present purposes. Article 7(3) provides for the execution of judgments of the DIFC Courts through Dubai Courts. Article 7(4), specifically invoked by RRCM, provides for execution of Dubai Court judgments through the DIFC Courts:

"Where the subject matter of execution is situated in DIFC, the judgments, decisions and orders rendered by Dubai Courts or Arbitral Awards ratified by Dubai Courts shall be executed by the execution judge of the Courts subject to the following conditions:

(a) The judgment, decision or order to be executed is final and executory;

(b) The judgment, decision or order is translated into English by the person requesting execution;

(c) Dubai Courts affix the executory formula on the judgment, decision or order."

10. Procedures to be observed in the execution, through the DIFC Courts, of judgments of Dubai Courts and Arbitral Awards ratified by Dubai Courts are set out in Article 7(5).

Relevant Rules of Court

11. Part 12 of the Rules of the DIFC Courts 2014 (**"RDC"**) makes provision for parties to dispute the Court's jurisdiction.

12. Rule 12.1 provides:

"12.1 A defendant who wishes to:

(1) dispute the Court's jurisdiction to try the claim; or

(2) argue that the Court should not exercise its jurisdiction;

may apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have."

13. The Rules require a defendant to first file an acknowledgment of service in accordance with Part 11 (RDC 12.2). The defendant who files such an acknowledgment of service does not thereby lose any right to dispute the Court's jurisdiction (RDC 12.3).

14. RDC 12.7, 12.8, 12.9 and 12.10 provide:

"12.7 An order containing a declaration that the Court has no jurisdiction or will not exercise its jurisdiction may also make further provision including:

(1) setting aside the claim form;

(2) setting aside service of the claim form;

(3) discharging any order made before the claim was commenced or before the claim form was served; or

(4) staying the proceedings.

12.8 If on an application under this Part the Court does not make a declaration:

(1) the acknowledgment of service shall cease to have effect;

(2) the defendant may file a further acknowledgment of service within 14 days or such other period as the Court may direct; and

(3) the Court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.

12.9 If the defendant files a further acknowledgment of service in accordance with Rule 12.8(2) he shall be treated as having accepted that the Court has jurisdiction to try the claim.

12.10 If a defendant makes an application under this Part, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file:

(1) in a Part 7 claim, a defence; or

(2) in a Part 8 claim, any other written evidence."

Relevant Terms of the Subcontract Agreement between Alucor and RRCM

15. The Subcontract Agreement, under which RRCM sued Alucor in the onshore Dubai Courts, was entered into on 10 June 2018 between Alucor as Main Contractor and RRCM as Subcontractor for:

(a) the pigging and air blowing of gas lines and air blowing, pickling/passivation, and chemical cleaning of Duplex/SS lines; and

(b) LB/Condensate lines and Aqua Milling of HP steam Lines forming part of the Project. The Project is located in onshore Abu Dhabi. It has no physical or other connection with the DIFC.

16. Clause 1 entitled "General Provisions" provided, inter alia, that:

"1.1 The Subcontractor shall execute the Scope of Work mentioned in Appendix A (the Works) for the Al Taweelah Alumina Refinery Project (the Site)."

17. Clause 2, headed "Scope of Works" required, in subclause 2.3, that RRCM perform the Works in accordance with specifications and requirements provided in Appendix B (subclause 2.3.1) and to a quality commensurate with good industry practice (clause 2.3.2).

18. Clause 2.3.3 required the subcontractor to perform the Works in accordance with:

"Any and all common law, statute, subordinate legislation, treaty, regulation, decision, by-law, order, demand, decree, injunction, resolution, judgment or recommendation or any government, quasi-government, statutory or regulatory body, court, agency or association in any jurisdiction applicable to or affecting the Sub Contractor including all federal, governmental or municipal orders, decrees and laws having the force of law in the UAE or any part of it (Applicable Laws)."

19. Clause 3 under the heading "Schedule" provided for commencement of the Works, a program by the Subcontractor setting out how it proposed to carry out each stage of the Works (cl 3.2) and provision for variation with the prior written consent of the Contractor (cl 3..3). Clause 3 included provision for Notice of Delay to the program (cl 3.4) and the Subcontractor's guarantee that the Works would be completed in accordance with the program (cl 3.5).

20. Clause 4 required the Subcontractor to maintain complete and accurate records of all Works and to prepare and submit reports and other information as instructed by the Main Contractor's Representative (cl 4.1).

21. Clause 6 entitled "Supervision" required the Subcontractor to work under the direction of the Main Contractor and to ensure that "fair manpower practice was followed in relation to the Subcontractor's manpower" (cl 6.3). The Subcontractor was to provide project engineering and quality control resources to supervise the Works in accordance with Good Industry Practice (cl 6.4).

22. Clause 14 provided for payment by Alucor against monthly invoices.

23. Clause 15 required an Advance Payment Bond to be provided by RRCM. Clause 15.1 provided:

"15.1 **Obligation to Provide**

15.1.1 The Sub Contractor shall, within thirty (30) Days of the Agreement Date, provide to the Main Contractor an advance payment bond (the "Advance Payment Bond") for an amount equal to ten percent (10%) of the total Contract Value as at the Agreement Date and executed by a first class bank or financial institution approved by the Main Contractor and located in the UAE."

24. Subclause 15.2.2 provided:

"If the Contractor fails to deliver to the Main Contractor within thirty (30) Days after the Agreement Date:

15.2.2.1 the Advance Payment Bond in compliance with this Clause 15, the Main Contractor shall be entitled to terminate this Agreement pursuant to Clause 16."

25. Subclause 15.3.1 provided:

"In the event that the Contractor fails to provide the Advance Payment Bond or increase it in accordance with Clause 15.2, the Main

Contractor shall be entitled, in addition to any other rights that it has under this Agreement, to withhold under Clause 15.3 a further amount equal to the value of the Advance Payment Bond and shall be entitled to draw down on any such amount."

26. Clause 16 provided for termination of the Subcontract Agreement and, in particular, Termination for Convenience. Clause 17 related to Subcontractor Events of Default which would give rise to a right on the part of the Main Contractor to terminate the Agreement or part of the Works. One of those Events of Default under clause 17.1.1.6 was failure by the Sub Contractor "to provide, maintain, or replace the Advance Payment Bond in accordance with Clause 15."

27. Clauses 21 and 22 are central to the present application:

"21. GOVERNING LAWS

21.1 This Agreement and the terms and the conditions contained therein shall be governed in accordance with Laws of England.

22. SETTLEMENT OF DISPUTES

22.1 Disputes or differences, if any between the parties to this agreement shall be resolved through reconciliation. Disputes and differences not amenable to amicable settlement shall be referred to the courts of the Dubai International Financial Centre having exclusive jurisdiction to decide on it."

RRCM's Application to the Dubai Court of First Instance

28. In its ex parte application to the Dubai CFI, RRCM contended that it had performed its obligations under the Subcontract but that Alucor had failed to make payment of AED 4,701,070.68 in accordance with the terms of the Subcontract.

29. RRCM sought a Payment Order compelling Alucor to pay the outstanding amount together with interest at a rate of 12% and AED50,000 as compensation for the delay in payments owed under the Subcontract for works completed, which it contended Alucor had failed to pay in breach of the Subcontract.

30. The Application for a Payment Order in the Dubai CFI was made under the Civil Procedure Code as amended by an Executive Regulation passed by Cabinet Resolution No (57) of 2018. The Civil Procedure Code and the Executive Regulation are discussed later in these Reasons. The relevant Articles of the Civil Procedure Code, as amended, establish an ex parte process leading to the issue of Payment Orders. Counsel for RRCM described the Payment Order as a "special jurisdiction which is an exception to the inter partes character of first instance jurisdiction in the Dubai Courts and, indeed, in the UAE courts." Asked why RRCM had commenced proceedings in the Dubai CFI notwithstanding the exclusive jurisdiction clause, counsel simply referred to the jurisdiction of the onshore Dubai Courts to make a Payment Order in "an unambiguous case for enforcement of a commercial contract and where the whole claim of a debt is of a specified amount". Plainly, RRCM's choice of the Dubai CFI in this case was a choice based on the convenience of an ex parte procedure for securing a judgment on a debt claim which the alleged debtor would then have to challenge. RRCM did not disclose to the Dubai CFI the existence of the EJC - clause 22 of the Subcontract Agreement.

31. On 9 August 2020, in case 2867/2020/60, the Dubai CFI ruled in favour of RRCM. It made a Payment Order and required Alucor to make payment of the allegedly outstanding amount together with interest at a rate of 9% per annum from 1 February 2019 until full payment had been made.

32. On 12 August 2020, the Court issued a notification of the Payment Order Decision to Alucor. The notification contained the following statement:

"You have the right to challenge the order or . set out in Article (66) of the Executive Regulations of the Code of Civil Procedure, within 15 days as of the date of notification."

33. Alucor filed an appeal with the Dubai Court of Appeal - Appeal No 418-2020, seeking to set aside the Payment Order. That appeal was dismissed on 6 January 2021 on the ground that Alucor had failed to file the appeal within the time prescribed by UAE Law. On 3 March 2021, Alucor then filed a challenge in the Dubai Court of Cassation seeking to appeal the judgment of the Dubai Court of Appeal. On 7 April 2021, the Dubai Court of Cassation rejected the appeal and upheld the Payment Order and the Dubai Court of Appeal's judgment in favour of RRCM.

The Decision of the Dubai Court of First Instance

34. In a Summary of Case details setting out the decision of the Dubai CFI made on 9 August 2020, it was stated:

". the court has ruled as follows on the commercial matter: First: Enforcing the commercial contract concluded between the parties. Second: Obliging the Defendant (Alucor Limited) to pay the Plaintiff (Rohr Rein Chemie Middle East) an amount of AED (4,701.050.68) (four million, seven hundred one thousand, fifty dirhams and sixty-eight fils) together with the statutory interest at 9% annually as of the maturity date on 01-02-2019 until full payment is made - Charging the Defendant the fees, expenses and two thousand dirhams as attorney fees - Rejecting the other requests."

The Decision of the Dubai Court of Appeal

35. The decision of the Dubai Court of Appeal was given on 6 January 2021. It referred to provisions of the Subcontract Agreement under which Alucor sent RRCM purchase orders requesting it to carry out the Works the subject of the Subcontract Agreement pursuant to the prices agreed between the parties. RRCM approved and accepted the purchase orders issued by Alucor including the prices of the works requested to be performed and the materials requested to be supplied by RRCM. On the facts as summarised by the Court of Appeal the parties had agreed that RRCM would issue its invoices to Alucor pursuant to the prices indicated in the purchase orders. The parties had also agreed that those invoices would indicate the Works performed by RRCM and their amount and value. Alucor was to pay the value of the invoice to RRCM within a

maximum of 45 days from the date on which Alucor received the invoice.

36. The Court of Appeal found, that on the basis of the Subcontract Agreement, RRCM issued its invoices periodically in return for the Works performed and the materials supplied. These were received by Alucor without objection. RRCM performed all of its obligations relevant to implementation of the Works the subject of the Subcontract, established under the purchase orders issued by Alucor and the invoices issued by RRCM.

37. The Court of Appeal noted that Alucor had acknowledged in writing the whole value of the debt payable to RRCM by a letter dated 27 April 2020. Alucor had requested RRCM to confirm that the debt payable was AED 4,701,050.68 and that that amount represented the whole of the sum due to RRCM from Alucor. RRCM confirmed that the amount in Alucor's account book conformed with its records and that it represented the whole of the amount due to RRCM. Nevertheless, Alucor continued to refuse to pay RRCM's dues. RRCM had, on numerous occasions, demanded payment. RRCM had sent Alucor a Notice to Pay. Alucor did not take any action and did not pay the debt. In the Court of First Instance RRCM had submitted a docket of documents which, among other things, contained copies of the purchase orders and copies of the invoices and of the Debt Confirmation Letter and a Notice to Pay.

38. Alucor in its appeal alleged that the Notification of the Payment Order made by the Dubai CFI was invalid for failure to follow procedures prescribed by Article 7 of the Executive Regulations of the Code of Civil Procedure. It also alleged that the Dubai Courts lacked jurisdiction to hear the dispute because of the exclusive jurisdiction clause 22.

39. RRCM's representative argued that the appeal had been filed after the prescribed time limit. Notwithstanding its review of the legal merits of the Payment Order, the Court of Appeal dismissed the appeal on the basis advanced by RRCM that the Appeal Notice had been filed out of time. The Court stated:

> "The appealed order was notified on 12-08-2020. Thus, the appeal time-limit has commenced as of the date following the date of notification. However, the Appellant filed the Appeal by submission of the e-application on 10-09-2020. Since that the prescribed appeal time-limit is fifteen (15) days, therefore, the Appeal was filed after the time-limit prescribed under the law. On this basis, the court, ex officio, rules the forfeiture of the right to appeal due to filing the Appeal after the prescribed time-limit."

40. The ruling of the Court was:

> "- Forfeiture of the Appellant's right to appeal due to filing the Appeal after the prescribed time-limit
>
> - Charging the Appellant the fees, expenses and one thousand dirhams as attorney fees
>
> - Confiscating the security deposit."

As is apparent, and despite the Court of Appeal's review of the factual basis for the Payment Order, its decision did not turn upon any finding of the relevant facts. Alucor failed in its appeal by reason of its default in failing to file its Appeal Notice within the 15 days required by the Civil Procedure Code, as amended by the Executive Regulations of 2018.

The Decision of the Court of Cassation

41. The decision of the Court of Cassation was delivered following a public hearing on 7 April 2021. It may be noted that by the time the matter came before the Court of Cassation, Alucor had initiated its proceedings against RRCM in this Court.

42. The Court of Cassation referred to three grounds of appeal to it:

> (a) Alleged misapplication of the law by the Court of Appeal with respect to its finding that the Appeal Notice had been filed after the due date;
>
> (b) The Dubai Courts were not competent to determine the matter under appeal. The DIFC Courts were the Courts which should consider the case according to the agreement made between Alucor and RRCM.
>
> (c) The judgment under appeal was deficient in stating that the amount shown in the payment order was less than the amount shown in the petition.

43. The Court of Cassation rejected the first ground for reasons set out in its decision, which it is not necessary to repeat here. The arguments in respect of the other two grounds were rejected as irrelevant to the judgment of the Court of Appeal, which had turned on the late filing of the Notice of Appeal.

44. The Court of Cassation dismissed Alucor's challenge and made an order for Alucor to pay the costs of the appeal. The decision, in effect, confirmed the decision of the Court of Appeal that Alucor's appeal failed because of its default in not filing its Notice of Appeal within time.

Alucor's Application in the DIFC Courts

45. On 31 January 2021, Alucor lodged a claim in the DIFC Court of First Instance. RRCM was named as the Defendant. The claim was designated as a Part 7 Claim and was for an amount of USD 2,158,781.63. On 16 May 2021, Alucor made an application requesting that the claim be issued in the Technology and Construction Division. On 20 May 2021, Justice Sir Richard Field made an Order pursuant to RDC 56.12 transferring the proceedings to the Technology and Construction Division.

46. Alucor sought:

> (a) a declaration that RRCM had breached the Subcontract Agreement including and not limited to clauses 2, 3, 4, 6, 15 and 22;

(b) compensation for damages in an amount of USD 739,352.84 and AED 5,213,590.24 as follows:

(i) losses due to the breach of the Subcontract Agreement in an amount of USD 739,352.84;

(ii) losses for breach of applicable law and jurisdiction provisions amounting to AED 42,125 plus AED 5,171,465.24 - a total of AED 5,213,590.24;

(c) interest on all amounts claimed at the legal interest rate until final and complete payment of all sums due under the judgment as determined;

(d) RRCM to bear all the costs of the proceedings including legal and other expenses incurred by Alucor in connection with the proceedings;

(e) any other relief that the Court deems appropriate.

Alucor's Particulars of Claim

47. Particulars of Alucor's claim were filed on 31 January 2021, along with its application. It set out the relevant terms of the Subcontract Agreement, which it characterised as a "re-measurable unit rate contract". Particulars of alleged breaches by RRCM were set out in Part IV of the Particulars of Claim.

48. The first breach alleged was of clause 15 of the Subcontract Agreement requiring RRCM to provide an Advance Payment Bond "for an amount equal to ten percent (10%) of the total Contract Value as at the Agreement Date" which allowed Alucor to withhold the amount equivalent to the Advance Payment Bond as provided for at clause 15.2 of the Subcontract Agreement. RRCM had not submitted the Advance Payment Bond at any time during the Subcontract Agreement and was in breach of clause 15.

49. There followed allegations of breaches of clauses 2, 3, 4 and 6 of the Subcontract Agreement. Alucor alleged that it had submitted several Notification Letters to RRCM as a result of the breaches. The breaches involved delays by RRCM in relation to submission of a Project Schedule, immobilisation, provision of manpower details for site inductions and mobilisation of nitrogen racks and cylinders with appropriate fittings to execute nitrogen purging. Alucor further alleged that RRCM failed to meet a schedule provided by Alucor in default of RRCM's failure to submit its own schedule.

50. Alucor referred to a Variation Order which it had issued on 5 July 2018 requiring mechanical completion of chemical cleaning of LP Steam Lines and Aqua Milling of HP Lines by 15 September 2018 - a milestone which RRCM failed to meet. The Variation Order had stipulated that 5% of the contract value would be paid upon meeting the mechanical completion milestone, but RRCM had not applied for mechanical completion.

51. A Notification of delay had been issued on 2 September 2018 covering RRCM's alleged failure to comply with the original scope of Works in relation to supervision, delays in submission of documents, mobilisation of equipment and mobilisation of faulty and non-compliant equipment. The Notification of Delay also covered RRCM's failure to comply with a Variation Order Scope in relation to chemical cleaning of the LP Steam Lines and Aqua Milling of HP Steam Lines.

52. Alucor alleged that it had made purchases and provided assistance to RRCM, including mobilisation of an additional HATCH Project Engineer to assist RRCM with its Scope. Twenty five additional persons and two more supervisors were deployed after 15 August 2015 to assist RRCM in loop preparation setup.

53. The Particulars of Claim alleged a safety incident attributable to RRCM's lack of supervision causing damage to equipment and considerable loss of time and rework. RRCM had also failed to comply with the Subcontract Agreement by failing to provide timely reports which impacted on the commissioning and handover of piping on the site.

54. Alucor then turned to the alleged breach by RRCM of the exclusive jurisdiction clause. In paragraph 23 of its Particulars of Claim it alleged:

> "In any event, RRC is not entitled to the amount it claimed before the Dubai Courts as it should compensate ALUCOR for the damages the latter suffered due to RRC's breaches."

55. In Part V of the Particulars of Claim, Alucor set out in tabular form the losses said to have been incurred by RRCM's failures and breaches of the Subcontract Agreement which were "provisionally evaluated at USD 739,352.84".

56. Losses for breach of the exclusive jurisdiction clause were quantified at AED 42,125, being the costs of the proceedings in the Dubai Courts. At paragraph 29 of its Particulars of Claim, Alucor alleged:

> "Furthermore, ALUCOR also suffered damages as a result of the enforcement by RRC of the Court of Appeal of Dubai's decision which blatantly violates the applicable law and will be subject to appeal before the Court of Cassation. As developed above, ALUCOR's bank froze its accounts and issued a Manager Cheque as a result of the Court's ordered (sic) received by RRC, for the value of AED 5,171,465.24. Therefore, ALUCOR is entitled to be compensated for this loss, which is provisionally determined at AED 5,171,465.24."

57. Alucor also claimed interest on its damages claims.

58. At paragraph 33, Alucor stated:

> "ALUCOR fully reserves its right to develop its claims and reserves its rights regarding all amounts claimed as they are provisional and may be reconsidered during these proceedings."

The relief sought in the application was then set out.

RRCM's Application Challenging Jurisdiction

59. RRCM's Application filed on 19 April 2021, seeks the orders which have already been set out at paragraph 6 of these Reasons. Its claims for relief were supported by a brief statement of reasons set out in the Application as follows:

> "1. Notwithstanding that the Subcontract the subject of these proceedings contains a jurisdiction clause in favour of the DIFC Court (the "EJC"). in relation to the events here in dispute the Parties have submitted to the jurisdiction of the onshore Dubai Courts. 2. The Claimants' claim (the "Claim") has been fully and finally adjudicated and determined by the Dubai Courts. 3. In the circumstances, the Claim is res judicata. 4. In the alternative, the Claimant is estopped by reason of issue estoppel, or in the further alternative by reason of the rule in Henderson v Henderson, from pursuing the Claim or any element of it before the DIFC Court. 5. The circumstances that give rise to the Claim, including the Parties, have no physical or other connection to the DIFC. 6. There is no other reason why this Court should assume jurisdiction. 7. The claim discloses no cause of action against the Defendant, further the Claim is an abuse of the process of this Court, and in all the circumstances this Court ought to decline any jurisdiction it may have. 8. The Defendant seeks an order in the terms of the Draft Order filed with this Application."

RRCM's Evidence in Support of its Application

60. RRCM supported its Application with a Witness Statement by Davy J Kerens, Managing Director of RRCM.

61. Mr Kerens set out in his statement the factual and procedural background.

62. He stated that the Project was located in onshore Abu Dhabi wholly outside the DIFC and had no physical or other connection with the DIFC. He acknowledged that the Subcontract Agreement was subject to English law and contained an EJC in favour of the DIFC Courts. However, he contended that the parties had submitted to the jurisdiction of the onshore Dubai Courts. He then set out the history of the application to the Dubai CFI, Alucor's appeal to the Dubai Court of Appeal and its appeal to the Dubai Court of Cassation.

63. Mr Kerens added that by way of enforcement of the Payment Order from the Dubai CFI, RRCM had obtained an Attachment Order from the Dubai Courts against Alucor for the amount of AED 5,171,465.24. That Order had the effect of freezing Alucor's bank accounts. On 21 January 2021, the Dubai Courts issued a letter to Alucor's bank inquiring as to the availability of funds and ordering it to attach Alucor's accounts up to the judgment amount. RRCM first became aware of the successful attachment on 25 January 2021 and a few days later, on 31 January 2021, Alucor's bank issued a Manager's cheque to the Dubai Court dated 28 January 2021 in the amount of AED5,171,465.24. It was only after this cheque had been issued, 28 January 2021, that Alucor filed the present DIFC Courts proceedings on 31 January 2021.

64. There followed essentially argumentative statements in support of the proposition that this Court either lacks jurisdiction or should not exercise jurisdiction in the proceedings commenced by Alucor. The points may be summarised as follows:

> (a) the Dubai Courts have already adjudicated the issue of Alucor's liability to RRCM under the Subcontract Agreement;
>
> (b) the Payment Order has been enforced and the judgment debt, including interest, has been discharged accordingly;
>
> (c) the issue of Alucor's liability to RRCM has been fully and finally determined by the Dubai Courts whose decision is final and cannot be reversed;
>
> (d) it is not open to Alucor to come to the DIFC Courts complaining of unspecified breaches when those complaints can and should have been raised by it in the Dubai Courts proceedings by way of objection or part defence to the Payment Order. If Alucor had any cause for complaint, and if those points were to be raised against RRCM, they should have been raised in the Dubai Courts proceedings;
>
> (e) Alucor did not apply in any forum for any urgent court order preventing enforcement of the Payment Order pending these proceedings;
>
> (f) RRCM has never received a complaint from Alucor about its services;
>
> (g) the Works Claim should be struck out in accordance with Rule 4.16 of the RDC on the basis that Alucor has disclosed no reasonable grounds for bringing the DIFC Courts claim, which is an abuse of the Court's process, and alternatively, for failure to comply with the pleading requirements of the Rules, including RDC Part 17. This was said to be a "relevant and compelling consideration for the Court's discretion under the second limb of RDC 12.1".

65. Mr Kerens then referred to costs awarded against Alucor by the onshore Dubai Courts. He contended that the issue of costs arising in the Dubai Court proceedings had been finally determined in favour of RRCM. If Alucor had a genuine complaint or claim in relation to those costs, it ought to have pursued it before the Dubai Courts. Alucor's legal costs as the losing party in the Dubai Court proceedings were not capable of being identified as an item of recoverable loss in any DIFC Courts proceedings.

66. In relation to Alucor's allegation that RRCM had failed to submit an advance payment bond in breach of clause 15 of the Subcontract Agreement, Mr Kerens said the Advance Payment Bond claim was never raised at any time before the filing of the DIFC Courts proceedings. He contended it forms part of the issue of Alucor's liability to RRCM under the Subcontract Agreement that ought to have been raised before the Dubai Courts if it were a genuine and real complaint.

67. Mr Kerens denied the continuing existence of the Advance Payment Bond obligation upon which Alucor relies. Although the Subcontract Agreement as originally agreed provided at Appendix C for the payment by RRCM of an Advance Payment Bond in an amount equal to 10% of the Subcontract value, the obligation was varied expressly and in writing by the parties as evidenced in emails set out in Exhibits to his Witness Statement. As a result of the agreed variation, RRCM was obliged to provide Alucor with two security cheques in the amount of AED 166,808,88 and AED 450,026.35 respectively, which were duly provided and accepted by Alucor. It followed that the Appendix C obligation fell away by express agreement of the parties. Further, the security cheques were eventually returned by Alucor to RRCM on completion of the Works in

recognition of RRCM's due performance under the Subcontract Agreement. RRCM relied upon that fact as additional evidence that no genuine issue arises in these proceedings that could trigger or warrant the intervention of the DIFC Courts.

68. Among the exhibits to Mr Kerens' Statement were receipts dated 17 July 2018 and 1 August 2018 from Alucor acknowledging receipt from RRCM of cheques in the amounts of AED 166,808.88 and AED 450,026.35. In a voucher dated 5 July 2018 accompanying the first cheque, RRCM stated that:

> "Open security cheque against RRCM Advance Payment Invoice No PJ/044/18 Alucar [sic] has to return the security cheque upon 100% recovery of their advance payment."

The receipt voucher described the cheque as "against guarantee". The cheque payment voucher and receipt in relation to the second cheque contained similar statements.

Alucor's Evidence in Opposition to RRCM's Application

69. Alucor filed a Witness Statement by Rahul Bhatia, Vice President of Alucor. After referring to the factual and procedural background, Mr Bhatia set out his contentions that the DIFC Courts have jurisdiction over the dispute. His understanding was that, under the EJC, the DIFC Courts have exclusive jurisdiction to hear the present case, a jurisdiction which cannot be excluded by the judgments of the Dubai Courts. He referred to advice by Alucor's lawyers that the cause of action it raises in the present case is distinct from that in the Dubai Courts case. The legal basis for Alucor's claim was said to be the availability under English law of a cause of action in damages for breach of the EJC. English law is the substantive law governing the Subcontract Agreement.

70. Mr Bhatai also contended that Alucor had never submitted to the jurisdiction of the Dubai Courts.

71. Alucor was not seeking, as suggested by RRCM, to reverse the determination on the merits adjudicated by the Dubai Courts. The claim in the DIFC Courts is a new one in damages for breach by RRCM of the EJC and based on a distinct cause of action. Alucor will, if needed, submit amended particulars of claim in due course. Mr Bhatai's statement about the EJC claim, and a similar statement made in the Skeleton Argument filed on behalf of Alucor, is not to be taken as a statement that the EJC claim is the only cause of action upon which Alucor relies in these proceedings. That is plainly not the case when reference is made to the Particulars of Claim dealing with alleged performance breaches. Counsel for Alucor made that plain in closing remarks on the hearing of RRCM's application to this Court.

72. RRCM's allegation that the issue of Alucor's liability had been fully and finally determined by the Dubai Courts was said to be plainly wrong as Alucor had limited its defence at all stages of the Dubai Courts litigation to the issue of jurisdiction. The question of liability or any other substantive matter was not raised by Alucor because it did not recognise or acquiesce to RRCM's breach of the EJC, nor did it submit to the jurisdiction of the Dubai Courts.

73. Mr Bhatai relied upon the fact that Alucor's appeals in the Dubai Courts were only dismissed because they were time-barred. That was due to a difference in the computation of the time limit to appeal from the Order between the Federal Code of Civil Procedure and changes to those time limits brought about by recent Executive Regulations. The effect of the EJC was never addressed by the Dubai Courts.

74. Alucor was not in a position to seek any injunction against enforcement before the Dubai enforcement court in view of the specificity and rapidity of the enforcement procedure which consisted of a Payment Order addressed to Alucor's bank to transfer the amount which the bank complied with, within 48 hours.

75. Mr Bhatai also contended that RRCM's acknowledgment of service of the Claim Form was out of time. RRCM had 14 days to file a Part 12 Application, as specified in RDC 12.4. He understood that those 14 days were computed as "clear days" (RDC 2.13) and expired on Sunday, 18 April 2021. The Application Form was issued on Monday, 19 April 2021 and so fell outside the period specified and was made out of time. On this basis it was said the Defendant could not challenge this Court's jurisdiction to hear the claim. This aspect of Alucor's argument was not pressed.

76. As to service of the DIFC Claim, the form was served on RRCM, accompanied by an English translation. Service was made by Alucor's lawyers accompanied by a letter delivered by courier which Mr Bhatai understood complied with both RDC and Federal Law applicable to service in Abu Dhabi.

The Civil Procedures Law of the UAE

77. RRCM's application for the Payment Order was governed by the Civil Procedures Law of the UAE. The Civil Procedures Law of the UAE is Federal Law No 11 of 1992, which was amended by Federal Law No 10 of 2014 and by Executive Regulations passed by Cabinet Resolution No (57) of 2018.

78. The Cabinet Resolution is entitled "On the Implementing Regulation of Federal Law No (11) of 1992 on the Civil Procedure Law". Chapter 2 of Book 1 of the Resolution "Filing and Registering Law Suits" contains general provisions for law suits filed before the Dubai Court of First Instance. In Article 16, it sets out requirements for the Statement of Claim.

79. Chapter 3 deals with "Assessment of Case Value" and defines jurisdictional limits by value for minor circuits. It also limits rights of appeal by reference to value (Article 23). Chapter 4 deals with litigants' appearance and failure to appear. Chapter 5 deals with procedures of the session, Chapter 6 with order of the session and Chapter 7 with judgments.

80. Book 2 of the Executive Regulations is entitled "Judicial Orders". Chapter 1 provides for "Orders on Petition". Chapter 2, covering Articles 62 to 68, deals with Payment Orders. It is convenient to set out Articles 62 through to 68 inclusive:

> **"Article 62**

Notwithstanding the general rules for instituting the lawsuit before the first instance court, the provisions of the following Articles shall apply if the right of the creditor is established in writing, either electronically or in a paper format, and falls due for immediate payment, where the creditor's claim relates to a debt amount of a known value or a movable property of a known type and quantity. Appling for the payment order shall not preclude claiming the interests or taking any precautionary measure.

The provisions of the preceding paragraph shall apply where the subject of financial claim is the enforcement of a commercial contract or where the right holder is a creditor of a security."

"Article 63

1. The credit shall first ask the debtor to pay off the debt within at least five days, and shall then apply for a payment order to be issued by the Judge of the Court having territorial jurisdiction over the debtor's place of residence, the court within whose jurisdiction the agreement has been entered into or has been implemented in full or in part, or the Court within whose jurisdiction the agreement shall be implemented. In addition, the right contained in the payment order may not be less than the amount stated in the payment order petition, and the enforcement of payment shall be effected by any means of service specified herein.

2. The payment order shall be issued based on an electronic or paper petition, as the case may be, which shall be submitted by the creditor and accompanied by a proof of debt as well as evidence of the claim for payment. The Case Management Office shall keep the petition submitted until the time limit of appeal lapses.

3. The petition shall include the details of the Statement of Claim set forth in Article (16) hereof.

4. The order shall be issued no later than three days of the date of submission of the petition, indicating the amount to be paid or the movable property ordered to be delivered, as the case may be. It shall also indicate whether it is issued on a commercial matter.

5. The petition referred to in this Article shall give rise to the effects of instituting the lawsuit as of the date of its submission, even if the Court lacks jurisdiction."

"Article 64

The Judge shall decide on the Motion by acceptance or dismissal, wholly or partly, and if he decides dismissal or non-acceptance, such decision shall be substantiated."

"Article 65

1. The debtor shall be served of the payment order issued against him/her in accordance with the provisions and methods set out herein.

2. The payment order issued against the debtor shall be deemed null and void if the same is not served within three months from the issuance date of the order."

"Article 66

1. The litigants may file a grievance against the payment order if the value thereof is within the amount which makes the judgment inappealable by nature of the Court of First Instance within (15) fifteen days of the date of service of the payment order upon the debtor and of the issuance date of the decision in respect of the creditor. The appeal shall be heard by the judge competent to issue the payment order by the ordinary procedures for instituting the Lawsuit. The rules and procedures prescribed before the Court shall be observed upon hearing the appeal. The judge shall adjudicate the appeal by rendering a final judgment on the litigation. Such judgment shall not be the subject to challenge and the grounds thereof shall be filed at the same hearing.

2. Subject to paragraph (1) of this Article, the payment order whose value exceeds the amount which makes a judgment inappealable by nature of the Court of First Instance may be appealed within (15) fifteen days in accordance with the procedures prescribed for appealing judgments.

3. The Court shall adjudicate the appeal in chambers without being prepared by the Case Management Office within one week of the date of complete service of the Notice of Appeal, and it may schedule a hearing to examine the merits, if necessary. The Court may not remand the claim to the Court of First Instance.

4. The rules and procedures of filing a grievance or appeal against the payment order shall apply to precautionary measures issued alongside the order."

"Article 67

Rules of Immediate Enforcement shall be applicable to the payment order according to the provisions of the Law or these Regulations."

"Article 68

If a creditor, under the provision of Article (62) hereof, wishes to apply for garnishment, the ordinary procedures of the garnishment required shall be followed."

81. Article 192 of the Executive Regulations provides:

"Any provision contrary to or inconsistent with the provisions of this Regulation shall be repealed."

This appears to have the effect that the Civil Procedures Law (No 11 of 1992) as amended in 2014, must be read subject to the provisions of the Executive Regulations set out in the Cabinet Resolution No (57) of 2018.

82. Articles 150 and following of the Civil Procedures Law, dealing with appeals against judgments generally, appear to have continued in operation:

> **"Article 150**
>
> (1) No appeal may be brought against judgments save by a person against whom judgment has been passed, or by a person who has acquiesced in a judgment whether expressly or impliedly, or by a person in whose favour judgment has been passed in respect of all his applications, unless the law provides otherwise.
>
> 2. The appellant may not be harmed by his appeal."
>
> **"Article 151:**
>
> "No appeal may be brought against judgments passed during the conduct of the action whereby the litigation does not come to an end, until after the passing of the judgment that puts an end to the whole of the litigation, with the exception of interim and expedited judgments which have the effect of suspending the action and judgments subject to compulsory enforcement, judgments ruling that there is no jurisdiction, and likewise judgments passing ruling that there is jurisdiction if the court does not have power to pass judgment in the action."
>
> **"Article 152:**
>
> 1. Unless the law stipulates otherwise, the date of the appeal in cassation against the judgment shall commence on the day following the date of issuance thereof. This date shall commence from the date of notifying the judgment to the convicted in the cases where he has failed to appear at all the sessions appointed for considering the case and hasn't submitted a defence memorandum, and also if the convicted has failed to attend and submit the memorandum in all the following sessions for urging the case after suspension thereof, for any reason whatsoever.
>
> .
>
> 4. The failure to observe the dates of appeal in cassation against the judgments shall result in the forfeiture of such right and the court shall, sua sponte, decide forfeiture."

The Joint Judicial Committee for the Dubai Courts and DIFC Courts

83. Decree No 19 of 2016 established a Joint Judicial Committee (**"JJC"**) for the Dubai Courts and the DIFC Courts. Broadly, its function is to resolve conflicts of jurisdiction between the DIFC Courts and the Dubai Courts. Its relevance in these proceedings is that, according to RRCM, it was a mechanism that was available to Alucor to raise any complaint that the Dubai CFI was exercising jurisdiction which should have been exercised by the DIFC Court of First Instance. The key provision in the Decree is Article 2, which relevantly provides:

> **"Article 2 Jurisdiction of the Judicial Body**
>
> The Judicial Body shall undertake the following responsibilities and powers:
>
> 1. Determining the court having jurisdiction to hear any action or claim which may be subject to a conflict of jurisdiction between Dubai Courts and the DIFC Courts.
>
> 2. Determining the executable judgment in case conflicting judgments are entered by Dubai Courts and the DIFC Courts on actions involving the same opponents on the same subject of dispute."

84. Article 4 provides for the case in which there is a conflict of jurisdiction between Dubai Courts and the DIFC Courts and allows for a motion for designation of the competent court or the executable judgment to be submitted to be decided by the Judicial Body. Under Article 6, legal time limits are suspended from the date of filing the motion to the Judicial Body. Under Article 7, its decisions are to be "final and non-appealable".

RRCM's Submissions

85. RRCM submitted that the liability of Alucor in respect of the Works under the Subcontract Agreement was finally determined by the Dubai Courts. Alucor's appeal was on jurisdiction, based on the exclusive jurisdiction clause, and on the merits. Its jurisdictional objection was said to have been "dismissed along with its appeal on the merits".

86. RRCM's application relied primarily on the argument that the Dubai Courts judgment must be recognised by the DIFC CFI under the statutory regime for the recognition of Dubai Courts judgments by the DIFC Courts. RRCM relied upon Article 7(4) of the JAL, which relates to execution of judgments in the DIFC Courts.

87. The combination of Articles 5 and 7 of the JAL was characterised by RRCM as a "statutory scheme governing the recognition by the DIFC Court of Dubai Court judgments". This characterisation was offered as an answer to the proposition, not advanced by Alucor, that the common law approach to the recognition of foreign judgments, including judgments from other Emirates, has no application to the system of automatic recognition in force between the DIFC Courts and the Dubai Courts. The provisions of the JAL were said to give effect to the obvious public policy of ensuring that judgments from any Dubai Court made within jurisdiction will be recognised and enforced by all Dubai Courts in the DIFC as well as onshore Dubai without reference to conflict of law Rules applicable to foreign judgments. That policy was said to be "copper-fastened" by the existence and exclusive jurisdiction of the JJC to rule on active conflicts of jurisdiction between the Dubai Courts and the DIFC Courts.

88. So much may be accepted. That acceptance, however, leaves open the question about the effect of the judgment of the Dubai Courts in relation to Alucor's proceeding in this Court.

89. RRCM submitted that Alucor could have referred the conflict of jurisdiction which it asserted, to the JJC between 31 January 2021 when it filed these DIFC Courts proceedings and 7 April 2021 when the Court of Cassation handed down its judgment, yet it did not do so.

90. Under Article 5 of the Decree establishing the JJC, the reference of any dispute to the JJC has certain effects. First, claims or applications in respect of which there is a dispute as to jurisdiction are stayed pending a decision of the JJC in determining the competent court. Secondly, there will be a stay of execution in respect of any conflicting judgments pending a decision of the JJC as to which judgment is to be enforced in accordance with its decision.

91. RRCM also referred to the Protocol of Jurisdiction between DIFC Courts and Dubai Courts dated 7 December 2009 which, it was said, affirmed the general jurisdiction of the Dubai Courts over all disputes not falling within those in respect of which the exclusive jurisdiction of the DIFC Courts is expressly identified. These submissions have little, if any, relation to the question - what is the effect of the Dubai Courts Payment Order on the proceedings in this Court.

92. RRCM submitted that as a matter of Dubai law, no less than under DIFC law or English law, Alucor was deemed to have accepted the Payment Order and to have submitted to the jurisdiction of the Dubai CFI to have made it. That was said to follow from the finding by the Court of Cassation that Alucor had failed to file its appeal on time.

93. Article 152(4) of the UAE Civil Procedures Law was invoked for the proposition that a failure to file an appeal within time will result in the forfeiture of the right of appeal and that the Courts shall rule on such forfeiture of their own volition.

94. Against that background, RRCM submitted that the Dubai Court of Cassation's judgment of 7 April 2021 finally and definitively rejected Alucor's appeal including the jurisdiction challenge and that the matter is now res judicata. RRCM then referred to the decision of the DIFC Court of Appeal in *Lural v Listran & Lokhan*.[1] That case is discussed later in these Reasons.

Alucor's Submissions

95. Alucor began its submissions with a summary of relevant facts and procedural aspects of the dispute. It stated that on 10 August 2020 it "was surprised" to receive an Order from the Dubai Courts ordering it to pay RRCM the amount of AED 4,701,050.68 with 9% interest from 1 February 2019 in addition to fees and expenses, and the amount of AED 2,000 as lawyers' fees. It appealed from the Order on the basis that the Dubai Court of First Instance lacked jurisdiction to hear any dispute under the Subcontract Agreement by reason of clause 22.1 of that Agreement and that any dispute should be referred to the DIFC Courts.

96. The grounds upon which Alucor sought dismissal of RRCM's Part 12 application were, briefly, as follows:

(a) service of Alucor's DIFC Court claim was validly effected. It is not necessary to explore this ground further as it did not figure in debate in relation to RRCM's application.

(b) the DIFC Court of First Instance had exclusive jurisdiction over the dispute by reason of Article 5(A)(2) read with clause 22.1 of the Subcontract Agreement.

97. It was submitted that the statutory jurisdictions of the DIFC Courts under any of the gateways provided for in Article 5(A) are exclusive. That is so for the gateways under Article 5(A)(1). It does not, however, apply to jurisdiction enlivened by an agreement of the kind mentioned in Article 5(A)(2) of the JAL. Nor does the use of the term "exclusive" in clause 22 of the Subcontract Agreement change the character of the jurisdiction which it enlivens pursuant to Article 5(A)(2).

98. Counsel for Alucor argued that his client was not seeking to "reverse" a decision on the merits wrongly adjudicated by the Dubai Courts. The claim was a new one in damages for breach by RRCM of the exclusive jurisdiction clause and was based on a distinct cause of action. Alucor relied upon English law, as the substantive law governing the Subcontract Agreement as creating the legal basis for the claim for damages for breach of the EJC. The breach of a choice of court agreement is a breach of contract and a claim for damages for the breach may accordingly be framed in contract - a rule said to be firmly rooted in English law. A recognition of the remedy could also be found in case law in Australia. Reference was made to *Commonwealth Bank of Australia v White (No 2)*.[2] In that case, however, the Court's view of the proposition did not rise above its characterisation as arguable.

99. Alucor submitted that courts in the Commonwealth countries have started to embrace the remedy of damages for breach of a choice of court agreement and that DIFC Courts seem to have followed suit as appears from what was said by the Court of Appeal in *Lural*. The jurisdiction of the DIFC Courts to hear the present case cannot be excluded by a judgment of the Dubai Courts, as the present case is in damages and for a distinct cause of action. Contrary to Mr Kerens' assertion that the Dubai Courts had rejected Alucor's reliance on the EJC and had finally adjudicated on jurisdiction, Alucor's appeals were only dismissed because they were time barred. This was due to a difference in the computation of the time limit to appeal from the Order between the Federal Code of Civil Procedure and the changed time limits effected by Regulations promulgated pursuant to Decree by Law No 10 of 2017 and Cabinet Resolution No 57 of 2018. The effect of the EJC was never addressed by the Dubai Courts. Nor were the merits of the Alucor claims against RRCM discussed or raised before the Dubai Court.

100. Alucor submitted that in the circumstances RRCM could not rely upon the application of res judicata or issue estoppel arising out of the Dubai Court's Order for Payment before the Dubai Courts. It was reached as a result of a breach of the EJC in the applicable contract. It was therefore not a binding judgment for the purposes of the application of the doctrine of res judicata or issue estoppel. Nor did it constitute a judgment recognised as such by the DIFC Courts.

101. Alucor also noted that there was no conflict of jurisdiction between the Dubai Courts and the DIFC Courts raised in its application to the

DIFC CFI. Nor were there inconsistent judgments that would warrant referral of the matter to the JJC. For a conflict to exist there had to be a positive act on the Court's part - that is to say it must have, according to Decree No 19 of 2016, claimed or disclaimed jurisdiction or asserted or declined to exercise jurisdiction over a claim.

102. The Dubai Courts did not consider its own jurisdiction despite Alucor's challenge. Thus it was said the amount awarded to RRCM by way of an Order for Payment could be "clawed back" by decision of the Court that had original jurisdiction over the dispute, ie the DIFC Courts in this case.

103. It was submitted that there was no issue of forum non-conveniens. It was not open to RRCM to argue that the DIFC Courts "should not exercise any jurisdiction it may have to hear the DIFC Court claim" as the issues have "already been adjudicated by the Dubai Court" - propositions taken from Mr Kerens' Witness Statement. The only ground for such an argument could have been the doctrine of forum non-conveniens which the DIFC Court of Appeal had ruled does not apply to competing claims of jurisdiction of Courts within the UAE.

104. It was further submitted that the merits of the dispute were irrelevant to the issue of jurisdiction. Alucor referred to Mr Kerens' substantive defence of RRCM's position in its dispute with Alucor involving its own version of factual, legal and contractual matters in connection with the Subcontract Agreement and the Works. Alucor's position on the substantive aspects of the dispute was said to have been set out in detail in its Particulars of Claim, with supporting exhibits. Alucor reserved its right to expand upon those matters and to answer allegations made in Mr Kerens' Witness Statement should that become necessary. Alucor said it was well-settled in the cases that there is no provision of DIFC law requiring a claimant to satisfy any merits threshold as to the strength of its claim in order to engage the jurisdiction of the DIFC Courts if the claim comes within the relevant gateway. In this connection, Alucor relied upon *Al-Mojil v Protiviti Member Firm (Middle East) Ltd*.[3]

Lural v Listran & Lokhan

105. The DIFC Court of Appeal in Lural v Listran was concerned with the effect of a decision of the Abu Dhabi Court of Appeal, reached as a result of a breach of an exclusive jurisdiction clause in a contract favouring the DIFC Courts. The Court held that, in the DIFC Courts, the Abu Dhabi judgment was not binding for the purposes of the application of the doctrines of res judicata or issue estoppel. Nor did it constitute a judgment for the purposes of Article 5(A)(4) of the JAL, which must be construed as meaning a judgment which is recognised as such by the DIFC Courts. In those circumstances, Article 5(A)(4) of the JAL was held not 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 those courts have exclusive jurisdiction over the substantive dispute.

106. Lural was a case in which the DIFC Courts had exclusive jurisdiction under Article 5(1)(a), (b) and (c). That is not the present case where the jurisdiction of the DIFC Court of First Instance is that conferred by Article 5(A)(2) of JAL and enlivened by clause 22 of the Subcontract Agreement. That jurisdiction is not in terms exclusive. The term "exclusive" in clause 22 of the Subcontract Agreement properly construed goes to the content of the promises exchanged between the parties namely that they would treat the DIFC Court of First Instance as the exclusive forum for the determination of any dispute or difference between them.

107. At paragraph 22 of its Reasons, the Court of Appeal in Lural observed:

> "It appears to this Court that 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."

108. The Court quoted with approval an observation by Professor Adrian Briggs in *Private International Law in the English Courts* at para 6.189 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.

109. Their Honours observed that the judgment of the Abu Dhabi Court was not a judgment of a foreign court. However they said:

> "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."

RRCM, in this case, relied upon the exception made in Lural with respect to the relationship between the DIFC Courts and the onshore Dubai Courts.

110. RRCM submitted that it followed from Lural that a judgment or order of the onshore Dubai Courts that fell to be recognised by the DIFC Courts would have the effect, under Article 5(A)(4) of the JAL, of ousting any jurisdiction or cause of action in respect of the same subject matter that otherwise might be brought under any DIFC jurisdictional gateway, including under Article 5(A)(2) by virtue of any agreement to opt in to the jurisdiction of the DIFC Courts.

111. RRCM submitted that the onshore Dubai Courts claim proceeded to final judgment before the Dubai Court of Cassation without any application on the part of Alucor to the JJC. The Dubai Courts judgment was final and executory and has been satisfied and executed. It falls to be recognised by this Court under Article 7(4) of the JAL. The jurisdiction that the DIFC Courts otherwise had under Article 5(A)(2) of the JAL was ousted by the provisions of Article 5(A)(4) of the JAL.

112. As to that I make the following observations. An exclusive jurisdiction clause in a contract does not necessarily deprive a non-contractual court of jurisdiction. If a non-contractual court declines to exercise jurisdiction because the proceeding is the subject of an exclusive jurisdiction clause in favour of the contractual court, it will not necessarily do so because the effect of the clause is to deprive it of jurisdiction within its own

legal system. In the case of the Dubai CFI, its general jurisdiction is conferred by statute, including by Article 25 of the Civil Procedure Law of the UAE and the provisions of the Executive Regulations relating to Payment Orders. No common law rule of recognition or non-recognition in the DIFC can operate to amend the UAE Statute or to truncate or qualify the jurisdiction of the onshore Courts. It is a separate question whether, in courts covered by the exclusive jurisdiction clause, conflict of law rules require treatment of a judgment made by the non-contractual court of another polity as a judgment which that court had no jurisdiction to make. That is not this case. In this case, the DIFC Court of First Instance is concerned with a judgment of a court of the same polity, that is to say the Emirate of Dubai, which has, as RRCM submits, a statutory scheme allowing for the recognition and enforcement of the judgments of the onshore Dubai Courts by the DIFC Courts.

113. That said, if upon RRCM's ex parte application for a Payment Order, disclosure of the exclusive jurisdiction clause had been made by RRCM to the Dubai Court of First Instance, that Court might well have taken the view that it should not exercise its jurisdiction or, at least, not without hearing from Alucor. Such a conclusion would not have involved a determination that the onshore Court lacked jurisdiction.

114. I accept that the Dubai CFI had jurisdiction to entertain the application for a Payment Order and that it exercised its jurisdiction validly and that ultimately the exercise of that jurisdiction gave rise to a judgment capable of recognition and enforcement in the DIFC. It does not follow that Article 5(A)(4) of the JAL, as submitted by RRCM, deprives the DIFC CFI of jurisdiction in relation to all of Alucor's claims in the present proceedings. The judgment of the onshore Dubai Court was on a narrowly focussed contractual debt action based on invoices and other supporting documents. That judgment does not of itself, via Article 5(A)(4), deprive the DIFC CFI of jurisdiction in respect to other civil or commercial claims arising out of the Subcontract Agreement. If that be right, then what comes into play by reason of the onshore Dubai CFI Payment Order is not Article 5(A)(4) of the JAL but the doctrines of res judicata and issue estoppel and the extended application of res judicata according to the principles enunciated by Sir James Wigram VC in *Henderson v Henderson*.[4] The Vice-Chancellor there stated what he called the rule of the Court:

> "that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time."

Consideration and Conclusions

115. I begin by rejecting RRCM's general challenge to the jurisdiction of this Court, which depends upon its submission about the operation of Article 5(A)(4) of the JAL.

116. Alucor's application to this Court rests upon the contention that the jurisdiction of this Court is enlivened by clause 22 of the Subcontract Agreement, read with Article 5(A)(2) of the JAL.

117. Article 5(A)(4) deprives this Court of jurisdiction only in respect of "any civil or commercial claim or action in respect of which a final judgment is rendered by another court." (emphasis added) Thus the debt claim which RRCM pursued in the Dubai CFI cannot be relitigated here. It follows that the claim for breach of the EJC which seeks to recover the amount awarded in the Dubai CFI cannot be entertained in this Court. It does not follow that Article 5(A)(4) deprives the DIFC CFI of jurisdiction in any other civil or commercial claim or action arising under the contract which gave rise to the Payment Order claim. An action for damages for breach of the EJC, claiming back the costs awarded in the Dubai CFI proceedings and the appeals process, is distinct from the cause of action determined in the Dubai CFI. Alucor's claims based on non-performance by RRCM are also distinct from RRCM's debt claim in the Dubai CFI.

118. The question of real substance in this case is whether Alucor is precluded by doctrines of *res judicata* or issue estoppel and *Henderson's* case from agitating the causes of action which it seeks to have heard in this Court. That depends upon the way in which *res judicata* and issue estoppel doctrines are applied in this Court to the judgment of the Dubai CFI. It depends, in particular, upon the application of the preclusionary doctrines in relation to defences that might have been brought or claims that might have been raised by Alucor in the Dubai Courts.

119. It is not necessary for present purposes to form a concluded view on whether RRCM was in breach of the EJC in commencing proceedings for a Payment Order in the onshore Dubai CFI. That question will no doubt involve the proper construction of clause 22 and the scope of the term "disputes or differences . between the parties to this Agreement". In my opinion Alucor has an arguable case that RRCM did breach the EJC. What, if any, recoverable loss flows from that claim is not a matter to be determined in dealing with what amounts to a strike out application by RRCM of Alucor's application to this Court. It is a cause of action which has been entertained, albeit with some caution, in England. In *Union Discount Co Ltd v Zoller*[5] the Court of Appeal held that costs incurred in foreign proceedings, even if not able to be recovered under the procedural rules of the foreign court, could be recovered as damages in separate proceedings between the same parties in England where the bringing of the foreign proceedings constituted a breach of contract resulting in damages which were prima facie recoverable. Schiemann LJ, delivering the judgment of the Court, observed:

> "In circumstances such as the present we do not consider that the public interest requires that the claimant should be deprived of its reasonable expenses in litigating at the instance of the defendant in a jurisdiction which the defendant chose in breach of an exclusive jurisdiction clause."[6]

Nevertheless the Court observed that:

> "Treading cautiously in a field not much explored in recent litigation we do not propose to go further. One can envisage more doubtful cases."[7]

The Court cited, by way of example, an attempt to litigate in Australia in breach of an exclusive jurisdiction clause which nominated England. The costs rules in Australia are broadly the same as those which apply in England. If the successful defendant in the Australian proceedings recovered

only two thirds of its legal costs in those proceedings, there would be a question whether the remaining third could be claimed in England as damages for breach of the exclusive jurisdiction clause or would be defeated by public policy considerations. The Court said:

> "We prefer to leave such cases for the future. The present case concerns someone who in breach of an exclusive jurisdiction clause litigates in a jurisdiction which, save exceptionally, does not award costs in strike-out proceedings."[8]

120. It would have been open to Alucor to invoke the EJC in the Dubai Court of Appeal and to argue that the Payment Order ought not to have been made in the onshore Court. Indeed, it attempted to do so.

121. In the proceedings initiated in this Court, the EJC is invoked to support a claim for damages for its breach. So far as that claim relates to the costs of the proceedings in the Dubai Court of First Instance it is a distinct cause of action which did not go to the liability determined by the Dubai Court. To the extent that Alucor seeks to claim the amount of the judgment in the Dubai Court of First Instance as damages for breach of the EJC, it is, in my opinion, not open to it to do so. Such a claim effectively seeks to put the Payment Order of the Dubai CFI at nought.

122. It is unnecessary for present purposes to reflect upon the merits of the other claims raised by Alucor for alleged breach of the provisions of the Subcontract Agreement by RRCM. They are set out in the Particulars of Claim. While their sufficiency may be open to criticism, that criticism does not support a strike out application or dismissal of the claim for failure to disclose a cause of action. In any event, RRCM's Application to this Court is based upon the proposition that this Court lacks or should not exercise jurisdiction. Sufficient is alleged in the Particulars of Claim to identify arguable causes of action for breach of contract. That said, on its face, the Advance Payment Bond claim seems to have been thrown into the mix to little point, and in light of the evidence of security cheques provided by RRCM, may have little prospect of success. It is not clear what, if any, remedy could be claimed in relation to that matter. However, doubtful as its merits may be, they need not be determined in the context of the debate about the effect of the Dubai CFI Payment Order judgment.

123. It is necessary now to say something further about the doctrines of res judicata and issue estoppel and their application in this context as extended by the principle in *Henderson v Henderson*.

124. The doctrines of res judicata and issue estoppel are preclusionary principles, the purpose of which is to secure finality in litigation and to protect against abuse of the Court's processes. In *The Sennar (No 2)*[9] Lord Diplock considered the doctrine of issue estoppel in the context of the judgment of a foreign court recognised in an English court. He identified two necessary conditions to be satisfied by a defendant invoking the doctrine. The first was that the same set of facts as that relied upon in the English court had previously been relied upon as constituting a cause of action brought by the same plaintiff against that defendant in a foreign court of competent jurisdiction. The second was that a final judgment had been given by that foreign court and in those proceedings. His Lordship observed:

> "It is often said that the final judgment of the foreign court must be `on the merits'. The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction."[10]

125. Lord Brandon, with whose reasons Lord Diplock agreed, referred to an argument that the judgment of the foreign court in that case, the Dutch Court of Appeal, was only procedural in nature, being a decision that the Dutch Court had no jurisdiction to entertain and adjudicate upon the appellant's claim. The Court had not pronounced in any way on the question whether the claim before it, or any substantive issue in it, would succeed or fail. He said:

> "In my opinion, this argument is based on a misconception with regard to the meaning of the expression `on the merits' as used in the context of the doctrine of issue estoppel. Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned."[11]

126. Applying Lord Brandon's approach to the judgment of the onshore Dubai CFI on the application for a Payment Order, that judgment may be treated as a judgment on the merits. As appears from the Reasons of the Dubai Court of Appeal, the CFI had before it a docket of documents, including copies of purchase orders and invoices, a Debt Confirmation Letter and a Notice to Pay. The CFI may be taken to have acted upon that material in determining that, on the evidence before it, RRCM established its cause of action in debt. What the CFI must be taken to have decided is that there was a debt owed by Alucor pursuant to the terms of the Subcontract Agreement. That decision did not include a decision on any question of poor performance by RRCM or any entitlement in Alucor to damages on that account. Nor did it turn on any question whether RRCM was in breach of the EJC in bringing its action in the Dubai CFI. Accepting that, the judgment can be treated as a judgment on the merits. There is then a question as to when it became final.

127. An ex parte judgment which is subject to review, in my opinion, should not be regarded as a final and conclusive judgment. No res judicata or issue estoppel arose simply by reason of the making of the Payment Order alone until the time limited for a challenge to that Order had expired. It may be assumed, however, in favour of RRCM, that the Payment Order became final at the expiry of the time limited for challenging it by way of appeal.

128. There was much said on behalf of RRCM to the effect that, by failing to file an Appeal Notice within the requisite time, Alucor was to be taken to have made a "statutory submission to the jurisdiction". This, in my view, distracts from the real issue in this case and is a use of language which is potentially conceptually confusing. It is really just another way of saying that Alucor, having failed to file its Notice of Appeal on time, could not raise a challenge to the jurisdiction of the Dubai CFI. As I have already observed, the question is not whether the Dubai CFI had jurisdiction under the Civil Procedures Law. It may be taken to have had jurisdiction - but not on account of any deemed "submission" by Alucor.

129. Given that none of the performance claims nor the EJC claim, now advanced by Alucor, were determined in the Payment Order proceedings

in the Dubai CFI, the real question is whether Alucor is precluded from raising them in these proceedings by operation of the doctrine in *Henderson's* case?

130. Which judgment supported *res judicata*? It my opinion it was the Payment Order. The appellate process found that judgment to be beyond challenge on the basis that the appeal was out of time. The consideration by the Dubai Court of Appeal of the factual merits of the debt claim was, in a sense, irrelevant to its decision.

131. The *Henderson* principle is deployed to protect the finality of judicial decisions from abuse of process reflected in attempts to litigate matters already decided. However the principle is not hard-edged. Lord Bingham gave extended consideration to its application in *Johnson v Gore Wood & Co*.[12] He made the important observation that:

> "It is . wrong to hold that because a matter could have been raised in earlier proceedings and should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

132. By way of example, his Lordship observed that while lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised, it would not necessarily be irrelevant particularly if it appeared that lack of funds had been caused by the party against whom a claim was brought. He regarded it as preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances.

133. The preceding observations of Lord Bingham raise a question about the application of the *Henderson* principle where the judgment relied upon was secured by default. There seems little doubt that such a judgment is a judgment which will give rise to a *res judicata*. In *Kok Hoong v Leong Cheong Kweng Mines Ltd*[13] the Privy Council said:

> "Their Lordships are satisfied that, where a judgment by default comes in question, it would be wrong to apply the full rigor of any principle as widely formulated as that of Henderson v Henderson. It may well be doubted whether the Vice-Chancellor had in mind at all the peculiar circumstances of a default judgment and whether such a judgment would not naturally fall into his reservation of `special cases'. In any event it is clear from what has been said in other authorities more immediately directed to the point that a much more restricted operation must be given to any estoppel arising from a default judgment." [14]

Their Lordships also referred to the decision of the House of Lords in *New Brunswick Railway Co v British and French Trust Corporation Ltd*[15] which they took as reinterpreting *Howlett v Tarte*[16] and said:

> "This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham LC, they can estop only for what must `necessarily and with complete precision' have been thereby determined."[17]

134. The judgment awarded against Alucor is analogous to a default judgment in that it was made final by the failure of Alucor to file its Notice of Appeal within time. That was evidently because of oversight or a mistaken understanding by Alucor's advisors of the applicable time limit notwithstanding the indication given in the Notification of the Payment Order that a challenge had to be made within 15 days. Whether the failure to file a Notice of Appeal within time was due to mistake or oversight is not material for present purposes.

135. Alucor may be taken to have been the author of its own misfortune in failing to lodge its Appeal Notice within time. That said, the principles governing the application of *res judicata* and/or issue estoppel to the Payment Order in the DIFC CFI are analogous to those governing the application of those principles to a default judgment.

136. In my opinion, this Court has jurisdiction to entertain distinct claims by Alucor:

(1) For the recovery of costs incurred by reason of the alleged breach of the EJC.

(2) For damages for breaches of contractual performance obligations.

It may be that further particularisation is necessary to save the performance claims from a strike out application, but I do not think it appropriate to determine their sufficiency on this application.

137. As to costs, RRCM has not succeeded with its Application so far as it related to the jurisdiction of this Court generally and the operation of preclusionary doctrines, save for the claim for clawback of the Payment Order as an element of EJC damages. In my opinion RRCM should pay 50% of Alucor's costs of the Application.

Proposed Orders

138. In light of the above conclusions, I propose to make the following Orders:

1. On RRCM's Application dated 19 April 2021:

A. The Application is dismissed in so far as:

(i) it seeks an order that pursuant to RDC 12.1(1), the DIFC Court has no jurisdiction to try the claim;

(ii) in the alternative, an order declaring that pursuant to RDC 12.1(2), the DIFC Court shall not exercise any jurisdiction it may have;

(iii) an order dismissing the claimant's claim;

(iv) an order pursuant to RDC 12.7(1) setting aside the Claim Form;

(v) an order pursuant to RDC 12.7(2) setting aside service of the Claim Form.

2. The Court will not entertain Alucor's claim for the amount of AED 5,171,465.24, being the amount of the Payment Order made by the Dubai Court of First Instance provided that Alucor may proceed with its claim based on alleged breach of the exclusive jurisdiction clause for the costs of the proceedings in the Dubai Courts.

3. RRCM is to pay 50% of Alucor's costs of RRCM's Application dated 19 April 2021 to be assessed by the Registrar if not agreed.