Claim No. CFI-015-2018

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) ED&F MAN CAPITAL MARKETS MENA LIMITED

(2) ED&F MAN CAPITAL MARKETS LIMITED

Claimants

and

(1) SAYYED HUSSAIN

(2) RJ O'BRIEN MENA CAPITAL LIMITED

(3) STEPHEN GHALLAMI

Defendants

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

UPON reviewing the First Defendant's application for permission to appeal dated 21 November 2018 and supporting documents (the "First Defendant's Application") seeking permission to appeal the Order of H.E. Justice Omar Al Muhairi dated 31 October 2018 (the "Order)

AND UPON reviewing the Second and Third Defendants' application for permission to appeal dated 21 November 2018 and supporting documents (the "Second and Third Defendants' Application") seeking permission to appeal the Order

AND UPON reviewing the Claimants' letter dated 21 November 2018 containing their submissions in response

IT IS HEREBY ORDERED THAT:

1. The First Defendant's Application seeking permission to appeal is denied.

2. The Second and Third Defendants' Application seeking permission to appeal is denied.

3. The First Defendant shall bear the costs of the First Defendant's Application.

4. The Second and Third Defendants shall bear the costs of the Second and Third Defendants' Application.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of issue: 10 December 2018

Time: 12 pm

SCHEDULE OF REASONS

BACKGROUND

1. These are Applications seeking permission to appeal the Order with Reasons of H.E. Justice Omar Al Muhairi dated 31 October 2018.

PARTIES' GROUNDS OF APPEAL

2. The Defendants submit that the Judge erred at law or was wrong in procedure as he failed to provide reasons for why he accepted items 1 to 4 and items 7 to 15 of the Claimants' request to produce schedule for the First and Second Defendants and items 2 to 5 and items 9 to 11 of the Claimants' request to produce schedule for the First Defendant.

3. The First Defendant submits that the Judge erred at law or at principle in his decision to deny the First Defendant's application to exclude evidence of his telephone recordings and transcripts.

4. The Second and Third Defendants submit that the Judge erred at law/ failed to provide adequate reasons/ failed to take into account relevant considerations in his decision to deny the Second and Third Defendants' application seeking an order for the Claimants to stay the proceedings

ongoing in the United States of America.

DISCUSSION

5. Permission to appeal is dismissed for the reasons set out below.

6. The nature of the hearing held on 9 October 2018 was a Case Management Conference (the "CMC"). The Orders I made in relation to the document production requests and application to exclude telephone recordings were as a result of the CMC and were in effect, case management directions. The Judge is entitled to make any such case management directions or Orders as is his discretionary right to do so under the Rules of the DIFC Courts (the "RDC")

7. RDC 44.27 sets out the relevant considerations for the lower court or court of appeal to take into account when deciding whether to grant permission to appeal from a case management decision:

" 1) The issue is of sufficient significance to justify the costs of an appeal

2) The procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision; and

3) It would be more convenient to determine the issue at or after trial."

8. Accordingly, I find the procedural consequence of the appeal in potentially losing the trial date set for 17 December 2018 outweighs the significance of the Case Management Decision.

9. Furthermore, the case of *Fidel v Felicia* [2015] DIFC CA 002 at paragraph 24 sets out the test the appellate court will apply when deciding to grant an appeal from case management decisions. The appellate court will only grant appeal if the Judge:

"a) Erred in principle

b) Took into account irrelevant maters

(c) Failed to take into account relevant matters; and/or

d) Came to a decision so plainly wrong it must be regarded as outside the generous ambit of the discretion entrusted to the Judge″

10. I find that there was no error in principle and my Order dated 31 October 2018 took into account all relevant matters. The Defendants submitted that I failed to take into account relevant submissions they made during the hearing. However, the Order clearly states in the preamble that all written and oral submissions made by both the Claimants and Defendants were reviewed and considered for the purposes of the Order and its reasons. Furthermore, a Judge when issuing an Order or judgment is not required to repeat all the parties' submissions. I also find that the decisions contained in the Order were not *`so plainly wrong*' so as to be outside the wide ambit of the Judge's discretion.

11. Furthermore, in *Dagher v Capital Investment International* [2011] CFI 013 2014 the court confirmed that permission to appeal should not be granted if the Judge's reasons sustain the same result notwithstanding that in some respects those reasons may be open to question. Accordingly, I find that the reasons of my Order would sustain the same result at appeal.

Application to request to produce documents

12. I find that I did not err at law and neither was there any procedural irregularity with the reasoning provided in the Order. I clearly state at paragraphs 17 to 20 of my Order, the relevant provisions of the RDC which apply when considering requests to produce documents.

13. I identified in detail which of the Claimant's requests did not comply with the requirements of Part 28 of the RDC and thereby accepted the remaining requests to produce documents on the basis that they did comply with the requirements of Part 28. I was satisfied by the explanations given by the Claimants in their schedules of document production in relation to all the requests that I accepted.

14. Upon reviewing the Claimants' schedules containing requests to reproduce documents, it is clear that the majority of the requests complied with Part 28 of the RDC, in particular RDC 28.17 which requires a request to produce to contain:

"1) A description of a requested document sufficient to identify it; or

2) A description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;

3) A description of how the documents requested are relevant and material to the outcome of the case; and

4) A statement of the reason why that party believes the documents requested to be in the possession, custody or control of the other party and either;

(a) A statement that the documents requested are not in the possession, custody or control of the requesting party, or

(b) A statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents."

15. I accordingly found that the items 1 to 4 and items 7 to 15 of the Claimants' document production schedule for the First and Second Defendants and items 2 to 5 and items 9 to 11 of the Claimants' document production schedule for the First Defendant clearly complied with the requirements of RDC 28.17.

16. It is enough for the Judge to find that the requests to produce comply with RDC 28.17 and I am not required to provide any further additional reasoning as to why these requests were accepted. Within the Order, I provided more detail in relation to the items of request which were rejected as an explanation was required as to why a right (to request to produce) was being denied.

17. I find that I was not wrong in my decision to accept all other documents requested by the Claimant as it is also clear from the Claimant's schedules that these documents will be relevant to the substantive issues to be heard at trial.

18. Furthermore, I clearly stated in the Order that having heard and reviewed all submissions, that I was not convinced by the Defendants' respective arguments in relation to the document production requests.

Application to Exclude Telephone Recordings and Transcripts

19. I find I made no error at law in my decision. The Judge has a discretionary right to make case management decisions in relation to the exclusion or inclusion of evidence at trial.

20. I carefully considered the submissions made by the Claimants and the First Defendant and also reviewed the relevant legislature and the relevant employment contract before arriving at my decision.

21. I did not accept the First Defendant's submissions requesting exclusion of his telephone records and found them to be weak in contest of the applicability of the Dubai Financial Services Authority's legal requirements.

22. After reviewing the employment contract, I found that the First Defendant had consented to having his telephone calls recorded.

23. I find that I made no error in my decision. I also did not accept the Defendants' arguments in relation to the UAE Penal Code and my judgment of the Defendants' arguments was reasonable.

24. Furthermore, I exercised my discretionary right to refuse the application to exclude the telephone records. These were case management directions which the Judge has a discretion to direct.

25. The telephone records will be of material relevance and value when considering the substantive issues at trial and therefore, I find I was correct in my decision.

Anti-Suit Application

26. I find that I made no error at law and I did not fail to provide adequate reasons for my decision. Neither did I fail to take into account relevant considerations in my decision to dismiss the application to make an Order for the Claimants to stay the USA proceedings.

27. I find I provided adequate reasons for dismissing the application, particularly, I reasoned that the Defendants are not barred from making an application to stay the USA proceedings themselves, and that granting such an order against the Claimants would put the parties on unequal footing, which would be contrary to the overriding objectives of this Court.

CONCLUSION

28. I did not make any error at law within my Order with Reasons dated 31 October 2018. I exercised my discretionary right when making the case management decisions contained within the Order.

29. I did not commit any procedural irregularity and provided adequate reasoning for my decision. I find there is no other compelling reason to grant these appeal applications. Therefore, the appeal applications do not have a prospect of success at appeal and should be denied accordingly.

30. The First Defendant shall bear the costs of the First Defendant's Application.

31. The Second and Third Defendants shall bear the costs of the Second and Third Defendants' Application.