Claim No. CFI 079/2020

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

PUNJAB NATIONAL BANK, DIFC BRANCH

Claimant

and

(1) NMC HEALTHCARE LLC
(2) NEW MEDICAL CENTRE TRADING LLC
(3) NMC SPECIALITY HOSPITAL LLC, DUBAI
(4) NMC SPECIALITY HOSPITAL LLC, ABU DHABI
(5) NEW MEDICAL CENTRE SPECIALITY HOSPITAL LLC, AL AIN
(6) MR. B.R. SHETTY
(7) NMC HEALTH PLC (IN ADMINISTRATION)

Defendants

and

Claim No. CFI 043/2021

BETWEEN

PUNJAB NATIONAL BANK, DIFC BRANCH

Claimant

and

(1) UAE EXCHANGE CENTRE LLC
(2) MR BAVAGUTHU RAGHURAM SHETTY
(3) MR BINAY RAGHARAM SHETTY

Defendants

ORDER WITH REASONS OF JUSTICE RENE LE MIERE

UPON the Part 7 Claim Form dated 28 September 2020 filed under Claim No. CFI-079-2020 and the Part 7 Claim Form dated 4 April 2021 filed under Claim No. CFI-043-2021 (together the "Claims")

AND UPON the Claimant's Application No. CFI-079-2020/6 dated 13 July 2023 seeking Immediate Judgment

AND UPON the Sixth Defendant's Application No. CFI-079-2020/7 dated 9 August 2023 seeking dismissal of the claim and stay of the proceedings

AND UPON the Sixth Defendant's Application No. CFI-079-2020/8 dated 12 September 2023 seeking an extension of time to file its submissions

AND UPON the Second and Third Defendants' Application No. CFI-043-2021/7 dated 13 September 2023 seeking dismissal or stay of the claim

AND UPON the Claimant's Application No. CFI-043-2021/8 dated 28 September 2023 seeking Immediate Judgment

AND UPON hearing Counsel for the Claimant and Counsel for the Defendants at a consolidated hearing for the Claims held on 20 November 2023

AND UPON reviewing all relevant submissions added on to the Court file

AND UPON reviewing the parties' post-hearing supplementary submissions provided via email correspondence to the Registry

AND UPON reviewing the Rules of the DIFC Courts (the "RDC")

IT IS HEREBY ORDERED THAT:

1. In the NMC Healthcare case:

a) The Claimant's application for immediate judgment is granted.

b) The Sixth Defendant's application to dismiss the Claimant's immediate judgment application or stay the proceeding against him is dismissed.

c) Judgment will be granted that the Sixth Defendant pay to the Claimant the sum of USD 37,740,811.20.

d) Unless within 14 days either party files a minute proposing different orders in relation to costs together with written submissions (and if appropriate any witness statement or exhibit), the Sixth Defendant shall pay the Claimant's costs of:

i. the immediate judgment application;

ii. the Sixth Defendant's application to dismiss the immediate judgment application and stay the proceedings; and iii. the case;

iii. the case;

on the standard basis to be assessed by the Registrar by a detailed assessment if not agreed.

e) if any party files a minute of proposed orders in relation to costs (the "Minute") within 14 days:

i. the other party may respond by filing written submissions (and if appropriate witness statements and exhibits) within 14 days of receipt of the Minute and supporting submissions and exhibits (if any); and

f) subject to any further order of the Court, the issues raised by the Minute and submissions as may be filed and served in accordance with these orders shall be determined by the Court without an oral hearing.

2. In the UAE Exchange case:

a) The Claimant's application for immediate judgment is granted.

b) The Second and Third Defendants' application to dismiss the claim against them or stay the proceeding against them is dismissed.

c) Judgment will be granted that the Second and Third Defendants jointly and severally pay to the Claimant the sum of USD 44,511,990.40.

d) Unless within 14 days any party files a minute proposing different orders in relation to costs together with written submissions (and if appropriate any witness statement or exhibit), the Second and Third Defendants shall pay the Claimant's costs of:

i. the immediate judgment application;

ii. the Second and Third Defendants' applications to dismiss or stay the claim against them; and

iii. the case;

on the standard basis to be assessed by the Registrar by a detailed assessment if not agreed.

e) If any party files a minute of proposed orders in relation to costs (the "Minute") within 14 days:

i. the other party or parties may respond by filing written submissions (and if appropriate witness statements and exhibits) within 14 days of receipt of the Minute and supporting submissions and exhibits (if any); and

ii. subject to any further order of the Court, the issues raised by the Minute and submissions (if any) as may be filed and served in accordance with these orders shall be determined by the Court without an oral hearing.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 19 January 2024
At: 12pm

SCHEDULE OF REASONS

1. In these two cases, - Claim No. FI-079-2020 (the "NMC Healthcare case") and Claim No. CFI-043-2021 (the "UAE Exchange case), the Claimant has applied for immediate judgment and the sixth defendant in the NMC Healthcare case and the Second and Third Defendants in the UAE Exchange case have applied for the immediate judgment application in the NMC Healthcare case to be dismissed, the claim against them in the UAE Exchange case to be dismissed or alternatively the proceedings against them in both cases be stayed.

2. The applications were heard together because they involve the same parties and give rise to similar issues.

3. In each case, the claimant is the Punjab National Bank DIFC Branch (the "Claimant").

4. Mr Bavaguthu Raghuram Shetty (referred to as Mr BR Shetty) is the Sixth Defendant in the NMC Healthcare case and the Second Defendant in the UAE Exchange case. His son, Mr Binay Shetty, is the Third Defendant in the UAE Exchange case. For convenience, I will refer to Mr Bavaguthu Raghuram Shetty as Mr Shetty and Mr Binay Shetty as Mr Binay.

5. The NMC Healthcare case concerns loans advanced by the Claimant to the First Defendant, NMC Healthcare LLC ("NMC Healthcare")

pursuant to a facility agreement made on 7 August 2017 (the "NMC Facility Agreement") by which the Claimant agreed to extend an overdraft facility to NMC Healthcare for an amount up to USD 50 million. The Claimant says that Mr Shetty executed a guarantee (the "NMC Guarantee") by which he guaranteed the performance by NMC Healthcare of its obligations under the NMC Facility Agreement.

6. The Second to Fifth Defendants and the Seventh Defendant executed corporate guarantees.

7. The proceedings against the Defendants in the NMC Healthcare case, except for Mr Shetty, are stayed as a result of those companies being in administration.

8. The Claimant claims from Mr Shetty the outstanding amount due from NMC Healthcare to the Claimant under the NMC Facility Agreement.

9. On 13 July 2023, the Claimant applied for immediate judgment against Mr Shetty (Application No. CFI-079-2020/6).

10. On 9 August 2023, Mr Shetty filed an application to dismiss the Claimant's application for immediate judgment or for the proceedings against Mr Shetty to be stayed until the liability of NMC Healthcare has been determined (Application No. CFI-079-2020/7).

11. The UAE Exchange case concerns credit facilities granted by the Claimant to the First Defendant, UAE Exchange Centre LLC (UAE Exchange"), pursuant to a facility agreement originally made on 15 June 2010 (the "First Facility Agreement") and amended by the First Supplemental Agreement and the Second Supplemental Agreement

12. The Claimant says that Mr Shetty and Mr Binay executed guarantees by which they guaranteed the performance by UAE Exchange of its obligations under the First Facility Agreement as amended.

13. The Claim against UAE Exchange is subject to a standstill agreement

14. The Claimant claims from Mr Shetty and Mr Binay the outstanding amount due from UAE Exchange to the Claimant under the First Facility Agreement as amended (which I will sometimes refer to as the UAE Exchange Facility Agreement).

15. On 13 September 2023, Mr Shetty and Mr Binay filed an application to dismiss or stay the claim against them (Application No. CFI-043-2021/7).

16. On 28 September 2023, the Claimant applied for immediate judgment against Mr Shetty and Mr Binay (Application No. CFI-043-2021/8).

17. For convenience, I will sometimes refer to Mr Shetty and Mr Binay together as the Defendants.

18. In the NMC Healthcare case for the reasons which follow:

f) The Claimant's application for immediate judgment will be granted.

g) The Sixth Defendant's application to dismiss the Claimant's immediate judgment application or stay the proceeding against him will be dismissed.

h) Judgment will be granted that the Sixth Defendant pay to the Claimant the sum of USD 37,740,811.20.

i) Unless within 14 days either party files a minute proposing different orders in relation to costs together with written submissions (and if appropriate any witness statement or exhibit), the Sixth Defendant shall pay the Claimant's costs of:

i. the immediate judgment application;

ii. the Sixth Defendant's application to dismiss the immediate judgment application and stay the proceedings; and

iii. the case;

on the standard basis to be assessed by the Registrar by a detailed assessment if not agreed.

j) if any party files a minute of proposed orders in relation to costs (the"Minute") within 14 days:

i. the other party may respond by filing written submissions (and if appropriate witness statements and exhibits) within 14 days of receipt of the Minute and supporting submissions and exhibits (if any); and

k) subject to any further order of the Court, the issues raised by the Minute and submissions as may be filed and served in accordance with these orders shall be determined by the Court without an oral hearing.

19. In the UAE Exchange case for the reasons which follow:

a) The Claimant's application for immediate judgment will be granted.

b) The Second and Third Defendants' application to dismiss the claim against them or stay the proceeding against them will be dismissed.

c) Judgment will be granted that the Second and Third Defendants jointly and severally pay to the Claimant the sum of USD 44,511,990.40.

d) Unless within 14 days any party files a minute proposing different orders in relation to costs together with written submissions (and if appropriate any witness statement or exhibit), the Second and Third Defendants shall pay the Claimant's costs of:

i. the immediate judgment application;

ii. the Second and Third Defendants' applications to dismiss or stay the claim against them; and

iii. the case;

on the standard basis to be assessed by the Registrar by a detailed assessment if not agreed.

e) If any party files a minute of proposed orders in relation to costs (the "Minute") within 14 days:

i. the other party or parties may respond by filing written submissions (and if appropriate witness statements and exhibits) within 14 days of receipt of the Minute and supporting submissions and exhibits (if any); and

ii. subject to any further order of the Court, the issues raised by the Minute and submissions (if any) as may be filed and served in accordance with these orders shall be determined by the Court without an oral hearing.

Immediate judgment principles

20. The Court may give immediate judgement against a defendant on the whole of a claim if it considers that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at a trial.[1]

21. The principles on which the Court may give immediate judgement are well established. For the purposes of the present application, it is sufficient to refer to these points:[2]

(1) The court must consider whether the defendant has a realistic as opposed to a fanciful prospect of success. A claim is fanciful if it is entirely without substance.

(2) A realistic prospect of success is one that carries some degree of conviction and not one that is merely arguable.

(3) The court must avoid conducting a minitrial without disclosure and oral evidence. The object of the rule is to deal with cases that are not fit for trial at all.

(4) This does not mean that the court must take everything that a party says in his witness statement at face value and without analysis. In some cases, it may be clear that there is no real substance in factual assertions that are made.

(5) The court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process.

(6) In reaching its conclusion, the court must consider not only the evidence actually placed before it on the application for immediate judgement, but the evidence that can reasonably be expected to be available at trial.

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(8) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better. However, it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed arguments and mature consideration.

(9) The overall burden of proof remains on the claimant to establish, if it can, the negative proposition that the defendant has no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial.

(10) There will be a compelling reason for trial where there are circumstances that ought to be investigated.

22. In each case the principal issue is whether Mr Shetty and Mr Binay signed the guarantees.

23. The Claimant has adduced first-hand evidence in witness statements from senior bank officers and documentary evidence to support its case.

24. The Defendants rely on their statements of defence, witness statements of their lawyer, Mr P.V. Sheheen, and a report of a forensic document examiner.

25. In so far as Mr Sheheen's witness statements consist of arguments, I will treat them as submissions.

26. In so far as Mr Sheheen's witness statements purport to repeat or summarise the Defendants' statements of defence and the forensic document examiner's report, I will disregard them and have regard to the statements of defence and the forensic document examiner's report themselves.

27. In so far as Mr Sheheen states facts which are controversial and beyond his own personal knowledge, I will give no weight to those assertions. Practice Direction No. 1 of 2016 - Practitioners' Duties to the Court - Filing of Witness Statements by Lawyers employed by Part I Law Firms - makes it clear that, except in appropriate circumstances, lawyers should not give evidence of controversial facts or facts beyond their own personal knowledge. There are no circumstances in this case which make it appropriate for Mr Sheheen to do so.

28. In so far as Mr Sheheen gives hearsay evidence that Mr Shetty and Mr Binay did not sign the guarantees or other documents, I will give no weight to that evidence. There is no evidence that Mr Shetty and Mr Binay are not available to give witness statements.

The NMC Healthcare Case

Liability of Mr Shetty pursuant to the NMC Guarantee

29. The Claimant's claim against Mr Shetty is:

a) NMC Healthcare is obligated to pay the amount due to the Claimant under the NMC Facility Agreement;

b) NMC Healthcare has failed to pay the amount due to the Claimant in accordance with the terms of the NMC Facility Agreement;

c) Mr Shetty signed the NMC Guarantee;

d) by the NMC Guarantee, Mr Shetty, promised to pay on demand to the Claimant the amount NMC Healthcare is obligated to pay to the Claimant under the NMC Facility Agreement that NMC Healthcare has failed to pay when due in accordance with the terms of the NMC Facility Agreement; and

e) Mr Shetty has failed to pay the amount due to the Claimant under the NMC Facility Agreement.

30. Mr Shetty advances several contentions in opposition to the Claimant's application for immediate judgement:

a) Mr Shetty did not sign the NMC Guarantee, his signature on the guarantee has been forged or misplaced;

b) the NMC Guarantee is unenforceable pursuant to Article 121 bis of UAE Federal Law No.14 of 2018 regarding the Central Bank & Organization of Financial Institutions and Activities as amended ("the Banking Law") ("Article 121 bis" and "the Banking Law");

c) the NMC Guarantee is unenforceable pursuant to Article 1061 of the UAE Federal Law No 5 of 1985 on the Civil Transactions Law of the United Arab Emirates State ("Article 1061" and "the UAE Civil Code");

d) the NMC Guarantee is unenforceable because it does not comply with section 4 of the Statute of Frauds 1677 (UK);

e) the proceedings against Mr. Shetty should be stayed until NMC Healthcare's liability is determined;

f) the proceedings against Mr Shetty should be stayed until the administration proceedings against the other defendants come to an end; and

g) the Claimant has not cooperated with the Sixth Defendant by making documents available to Mr Shetty as ordered by H.E. Justice Nassir Al Nasser on 22 June 2023.

NMC Healthcare is obligated to pay the Claimant the amount due under the NMC Facility Agreement

31. By the NMC Facility Agreement, the Claimant granted an overdraft facility up to USD 50 million on an annual renewal reducing basis to NMC Healthcare pursuant to the terms of the agreement.

32. The first drawdown by NMC Healthcare of the loan made available to it under the NMC Facility Agreement was on 15 August 2017, for USD 25 million. The second drawdown was on 22 August 2017 for USD 25 million.

33. By clause 7.1 of the NMC Facility Agreement, NMC Healthcare must pay accrued interest at the rate which is an aggregate of LIBOR and Margin (which is defined as 3.5%) on the Outstanding Amount (defined as the amount of the principal sum, interest and other charges outstanding at any relevant time).

34. The interest pursuant to clause 7.1 is charged to NMC Healthcare's account on the last day of each month and is payable by NMC Healthcare as and when levied in the account. On 1 March 2020, the monthly Interest payment became due for the month of February 2020. NMC Healthcare failed to make that payment and has failed to pay the monthly interest payments from February 2020 onwards.

35. By clause 7.3, NMC Healthcare was liable to pay default interest at a rate 2% higher than that payable under clause 7.1 on unpaid sums if (amongst other things) it failed to make payment of any sums due under, amongst other things, the NMC Facility Agreement on the relevant due date. Default interest of 2% began to run from February 2020.

36. The failure to make the monthly interest payment from February 2020 onwards constituted an Event of Default pursuant to clause 20.1 of the NMC Facility Agreement.

37. In April 2020, the Seventh Defendant, NMC Health plc, went into administration in England following well-publicised allegations of a massive fraud within the NMC Health Group. The Claimant decided that the administration of NMC Health plc put the repayment of the facility at risk.

38. By clause 5.1 of the NMC Facility Agreement, all advances to NMC Healthcare were repayable on demand together with all accrued interest and other charges.

39. By clause 2.7, the Claimant had the right at any time to cancel the facility or demand the repayment of the facility without prior notice to NMC Healthcare and without assigning any reason.

40. On 22 April 2020, the Claimant exercised its right to demand immediate repayment from NMC Healthcare. NMC Healthcare did not repay the outstanding sum or any sum, which is an Event of Default within the meaning of clause 20.1 of the NMC Facility Agreement.

41. The Claimant says that there have been other Events of Default within the meaning of clauses 20.3 (Misrepresentation), 20.4 (Cross Default), 20.6 (Insolvency Proceedings), and 20.11 (Change in Circumstances), but it is unnecessary to consider those alleged defaults.

42. Clause 20.15 of the NMC Facility Agreement provides for acceleration of the due amount by providing that at any time after the occurrence of an Event of Default, the Claimant may by serving notice on NMC Healthcare declare that all or any of the advances be payable on demand whereupon they shall immediately become payable on demand by NMC Healthcare.

43. Clause 26.1 of the NMC Facility provides that the entries made in the accounts maintained by the Claimant are prima facie evidence of the matters to which they relate. Mr Srinivasan has produced statements of NMC Healthcare's account. There is no evidence to contradict the account.

44. The statement of account for NMC Healthcare shows that as of 1 June 2020 the sum outstanding under the NMC Facility Agreement was USD 29,327,079.94. At that date, the Claimant characterised the loan as a non-performing loan.

45. The facility limit was for a period of twelve (12) months from the date of the NMC Facility Agreement and thereafter USD 50 million is to be reduced by 20% each year till the Final Maturity Date and such reduced limit shall be the facility limit (Clauses 1.1 and 5). Thus, the principal was payable every year on 7 August 2018 to 7 August 2023 ("Final Maturity Date") - the "Repayment". On 07 August 2020, the First Defendant failed to repay the principal amount due on 7 August 2020. The failure to make the Repayment constituted an event of default pursuant to clause 20.1 of the NMC Facility Agreement.

46. On 22 September 2020, the Claimant sent a Recall and Invocation Demand Notice ("the RIDN") to NMC Healthcare (and Mr Shetty) stating that as of 15 September 2020, the outstanding amount owed to it under the NMC Facility Agreement, including interest, was USD 30,104,225.06.

47. The RIDN called upon NMC Healthcare (and the Guarantors, including Mr Shetty), jointly and severally to pay this outstanding amount within three days of the date of receipt of the RIDN. Neither NMC Healthcare nor Mr Shetty, nor any other defendant, has paid any sum in response to this demand.

48. The Claimant commenced the present claim on 28 September 2020.

49. As of 17 November 2023, the outstanding some due from NMC Healthcare to the Claimant under the NMC Facility Agreement is USD 37,370,455 and continues to accrue at a daily rate of USD 5,878.67.

NMC has failed to pay the amount due to the Claimant

50. The evidence establishes that NMC Healthcare has failed to pay the amount due to the Claimant in accordance with the terms of the NMC Facility Agreement, and Mr Shetty has adduced no evidence to the contrary.

Mr Shetty signed the NMC Guarantee

51. Mr Shetty's primary defence is that he did not sign the NMC Guarantee.

52. There is overwhelming evidence that he did.

53. The witness statement of the Claimant's Deputy CEO at the time, Mr Srinivasan, states the following.

54. Mr Srinivasan and other officers and employees of the Claimant had extensive communications with representatives of NMC Healthcare, after NMC Healthcare approached the Claimant in June 2015 to request credit facilities in the sum of USD 60 million. Mr Srinivasan's communications were primarily with NMC Healthcare's Head of Treasury and Banking Operations, Mr Udayakumar.

55. On 1 July 2017, Mr Udayakumar sent the legal documents of NMC Healthcare to Mr Srinivasan by email, followed by copies of Mr Shetty's passport and Emirates ID.

56. A draft of the NMC Facility Agreement was prepared by the Claimant's lawyers and shared by email with Mr Udayakumar on 12 July 2017. On 27 July 2017, Mr Udayakumar sent an email to the Claimant attaching an extract of NMC Healthcare's Memorandum of Association, including Article 13 which lists Mr Shetty as a member of the Board of Directors with the term of his office unlimited.

57. On 29 July 2017, Mr Udayakumar sent an email to the Claimant confirming that Mr Shetty was the sole signatory for NMC Healthcare based on a power of attorney executed by its three shareholders.

58. The provision of the NMC Guarantee was an express condition precedent of the NMC Facility Agreement.

59. It was the practice of the Claimant for members of its senior management to attend and witness clients signing significant banking documentation, such as the NMC Facility Agreement and the NMC Guarantee. An internal written record of the Claimant dated 7 Aug 2017 notes in relation to documents including the NMC Facility Agreement and NMC Guarantee:

> "The execution of the documents from Sl. no 1 to 8 above have been organized for today at the borrower's corporate office in Abu Dhabi".

60. On 7 August 2017, having received confirmation of Mr Shetty's availability from Mr. Udayakumar, the Claimant's CEO, Mr Binod Kumar, and Mr Srinivasan travelled together to NMC Healthcare's offices in Abu Dhabi to attend a signing meeting with Mr Shetty. They were driven there by the Claimant's driver, Mr Chinniah. The Claimant maintained a handwritten "Movement Register", which recorded when employees left the office during working hours, and for what purpose. The Movement Register for 7 August 2017 shows that when leaving the office for the signing meeting with Mr Shetty, Mr Kumar and Mr Srinivasan signed out at 14:20hrs to attend the "NMC Healthcare Docs execution", and signed back in at 19:00hrs.

61. Mr Kumar and Mr Srinivasan arrived at NMC Healthcare's offices at around 3.50 pm, shortly before the scheduled 4pm meeting. Mr Shetty personally opened his office door to greet them at 4pm. His office had a meeting table with around eight seats, where they sat down. Mr Srinivasan placed the loan facility documents on the table. He had taken paper versions of these documents with him to the meeting for signing. Mr Srinivasan signed the NMC Facility Agreement and the NMC Guarantee for and on behalf of the Claimant. Mr Shetty signed the NMC Facility Agreement, the NMC Guarantee, the Confirmation Letter and Undertaking Letter all dated 7 August 2017, at the meeting in the presence of Mr Srinivasan

and Mr Kumar.

62. Mr Srinivasan has a clear recollection of several other members of NMC Healthcare's management being present at this signing meeting, including Mr Udayakumar and Mr Prasanth Manghat, the Deputy CEO.

63. Mr Srinivasan recalls the signing meeting with Mr Shetty very well. He had not previously met Mr Shetty, and as Mr Shetty was such a high-profile businessman, the meeting was memorable for Mr Srinivasan. He clearly recalls engaging in some small talk with Mr Shetty at this meeting, including a discussion of an Indian movie, Baahubali 2: The Conclusion, an acclaimed blockbuster that was showing in cinemas at the time. Mr Shetty hinted that he was producing an epic movie even bigger than Baahubali 2. They had a cup of tea. Mr Shetty gave Mr Srinivasan his calling card, which Mr Srinivasan produced and remembers because of its unusual size.

64. The first drawdown of the loan made available to NMC Healthcare under the NMC Facility Agreement was 8 days later, on 15 August 2017, for USD 25 million. The second drawdown was on 22 August 2017 for USD 25 million.

65. What then is the evidence to contradict the evidence of Mr Srinivasan supported by the documents I have referred to and the circumstances surrounding the negotiations for and draw down of the facility?

66. Mr Shetty has not denied that he signed the NMC Guarantee. In his defence, Mr Shetty says that he has no recollection of agreeing to and signing a personal guarantee on 7 August 2017[3] and cannot exclude the possibility that his signature was forged without his authority by one or more of the NMC defendants' management[4].

67. In his defence, Mr Shetty also says that he does not recollect agreeing to and executing a credit facility for NMC Healthcare.[5]

68. Mr Shetty has made no witness statement in opposition to the Claimant's application for immediate judgement.

69. Mr Shetty's lawyer, Mr PV Sheheen, made a witness statement dated 9 August 2023 on the instructions and information provided by Mr Shetty. In that statement, Mr Sheheen says that in his statement of defence, Mr Shetty says that he has neither signed nor authorised any person on his behalf to sign any of the documents referred to by the Claimant. That is misleading. As I have said, in his defence Mr Shetty says that he does not recollect agreeing and executing a personal guarantee or the credit facility, but he does not say that he did not sign it.

70. In his second witness statement of 25 September 2023, Mr Sheheen relies on an expert report of Mr Ahmed O Albah, whose report states that his areas of expertise are signatures and handwriting and forged documents. His profile says he is an international standard expert in documents forgery.

71. Mr Sheheen states that the expert report of Mr Albah "revealed substantially alarming discrepancies with respect to the authenticity of Mr Shetty's signature on the disputed personal guarantee." That is misleading. Mr Albah did not opine that the signature on the NMC Guarantee is not authentic, that is not Mr Shetty's genuine signature. Rather, Mr Albah speculates that "the signature of Dr Shetty could have been attached" (emphasis added)"

72. Mr Albah's speculation appears to be that the page of the guarantee document containing Mr Shetty's signature could have been added to the other pages of the guarantee document rather than Mr Shetty having signed the last page of the entire document.

73. Mr Albah stops short of opining that the page containing Mr Shetty's signature was added to the document; he says it "could" have been. There is no proper basis for Mr Albah's speculation. Mr Albah's speculation is based upon his following observations:

(1) the facility agreement and the personal guarantee do not contain the Claimant's letterhead;

(2) the documents are not numbered;

(3) the signatures of the signatories are missing on each page;

(4) the signature of Mr Shetty is found separately on the last page "which raises the question of whether the signature was attached to the documents."

(5) the facility agreement and the personal guarantee were re-stapled multiple times which reinforces the fact that the signature of Mr Shetty could have been attached.

74. The speculation that the signature page was added to the guarantee document is speculation of dishonesty by Mr Srinivasan and unnamed and unknown officers or employees of the Claimant who perpetrated the fraud by attaching the page containing Mr Shetty's signature to the guarantee document.

75. That is a different speculation than the speculation offered by Mr Shetty in his defence. There Mr Shetty said he could not exclude the possibility that documents which purportedly contain his signature were forged without his authority by one or more of the NMC defendants' management. There is not a skerrick of evidence to support that possibility and it can be readily dismissed. Mr Srinivasan has given detailed evidence that he witnessed Mr Shetty sign the documents. Therefore, if the signatures are forgeries, the statement of Mr Srinivasan is false and the signatures must have been forged by Mr Srinivasan or representatives of the Claimant, not by representatives of NMC management.

76. Point 1 of Mr Albah's "discrepancies" is irrelevant. There is no evidence that the Claimant's usual practise at the time was to execute guarantees on a letterhead. The absence of a letterhead offers no support to the "misplaced page" speculation.

77. In the absence of evidence that the Claimant's usual practice at the time was to number documents, point 2 similarly offers no support to Mr Albah's speculation.

78. Again, in the absence of evidence that the Claimant's usual practice at the time was to have each signatory sign each page, point 3 offers no support to Mr Albah's speculation.

79. Point 4, that the signature of Mr Shetty is found `separately on the last page", appears to be the foundation for Mr Albah's speculation. He comments that that observation "raises the question of whether the signature was attached to the documents."

80. Mr Albah's statement that Mr Shetty's signature is found "separately" on the last page is misleading. Mr Shetty's signature appears under the words:

> "This Guarantee has been duly executed and delivered by the Guarantor as a deed on the day and year first before written."

81. If the signature is Mr Shetty's, and Mr Albah, a signature expert, does not suggest it is not, then Mr Shetty signed a page which he knew at the time to be part of a guarantee.

82. Furthermore, Mr Shetty's signature is followed by the signature of Mr Srinivasan, it is not "found separately" on the last page.

83. As to point 5, the most logical explanation is that the pages of the document have been taken apart to be copied and then restapled, but in any event that the pages of the document have been unstapled and restapled "multiple times" adds no support to the speculation that the last page was added to the document.

84. What is important about Mr Albah's report is that he made no comparison of the signature with known authentic copies of Mr Shetty's signature which he obviously had access to with Mr Shetty's approval. It is implicit in Mr Albah's report that the signature is genuine, and Mr Albah speculates that the page which Mr Shetty signed was added to the guarantee document later. There is no foundation for that speculation. In summary, Mr Albah's report should be put to one side as unfounded speculation.

85. Mr Srinivasan states that he signed the NMC Facility Agreement on behalf of the Claimant and Mr Shetty signed the NMC Facility Agreement on behalf of NMC Healthcare at the same signing ceremony as when each of them signed the NMC Guarantee. The execution page of the NMC Facility Agreement bears under the words "The Borrower NMC Healthcare LLC" a signature that appears to be the same as the signature above Mr Shetty's name on the execution page of the NMC Guarantee, and the company seal of NMC Healthcare, and under the words "The Lender Punjab National Bank, DIFC Branch the signature of Mr Srinivasan and the company seal of the Claimant.

86. If the signature on the NMC Facility Agreement is Mr Shetty's and the seal is the company seal of NMC Healthcare, and Mr Albah does not suggest they are not, then Mr Shetty signed a page and attached the company seal to a document which he knew at the time to be part of a credit or loan agreement between NMC Healthcare and the Claimant.

87. A summary judgment application should not be a minitrial. However, the Court may and should dispose of issues that depend on factual assertions that are of no substance. This is such a case. The issue whether Mr Shetty signed the NMC Guarantee is not a question of weighing competing evidence. There is no evidence of substance that Mr Shetty did not sign the NMC Guarantee. In his defence, Mr Shetty says only that he does not recollect executing a personal guarantee for NMC Healthcare. He has made no witness statement challenging the detailed evidence of Mr Srinivasan that he (Mr Shetty) signed the NMC Guarantee. His lawyer, Mr Sheheen, purports to do no more than repeat Mr Shetty's defence and refer to Mr Albah's report, which for the reasons I have stated is not evidence that Mr Shetty did not sign the NMC Guarantee.

88. Mr Shetty has no real prospect of successfully defending the claim on the ground that he did not sign the NMC Guarantee. Mr Shetty's lack of recollection and Mr Albah's speculation are not compelling reasons for the claim to be disposed of at trial.

Mr Shetty, promised to pay amount NMC Healthcare is obligated to pay

89. Clause 1.1 of the NMC Guarantee provides that the Guarantor (Mr Shetty) promises to pay on demand to the Claimant the amount NMC Healthcare is obligated to pay to the Claimant under the NMC Facility Agreement that NMC Healthcare has failed to pay when due in accordance with the terms of the NMC Facility Agreement.

90. Subject to Mr Shetty's contentions that the NMC Guarantee is not valid and enforceable, which I will consider later in these reasons, Mr Shetty is liable for the payment of the amount outstanding which is due and payable to the Claimant pursuant to the terms of the NMC Facility Agreement.

91. As of 17 November 2023, the outstanding sum due from NMC Healthcare to the Claimant under the NMC Facility Agreement, and hence from Mr Shetty to the Claimant under the NMC Guarantee is USD 37,370,455 and continues to accrue at a daily rate of USD 5,878.67

Mr Shetty has failed to pay the amount due to the Claimant

92. Acting on NMC Healthcare's default, on 28 May 2020, the Claimant served on Mr Shetty a formal demand for payment under the NMC Guarantee of the sum then due from NMC Healthcare including penal interest and declared the acceleration of the due amount which was then immediately due and payable to the Claimant.

93. On 22 September 2020, the Claimant sent the RIDN to Mr Shetty (and NMC Healthcare) stating the outstanding amount due to it under the NMC Facility Agreement as of 15 September 2020, including interest.

94. The RIDN called upon the Guarantors, including Mr Shetty, jointly and severally to pay this outstanding amount within three days of the date of receipt of the RIDN. Neither Mr Shetty, nor any other defendant, has paid any sum in response to this demand.

95. Mr Shetty has not made any payment in response to the Claimant's demands.

Article 121 bis does not make claim not maintainable

96. Mr Shetty argues that the NMC Guarantee is unenforceable under UAE law, which governs the NMC Guarantee.

97. Clause 31 of the NMC Facility Agreement provides that the agreement and all matters arising from or connected with it are governed by the laws of UAE. Clause 18.1 of the NMC Guarantee provides that the guarantee will be governed by and construed in accordance with the laws of the UAE.

98. On 2 January 2023, Federal Law No. 23 of 2022 amended Federal Law No.14 of 2018 (the "Banking Law") by inserting Article 121 bis in Part III - Organization of Licensed Financial Institutions & Activities, Chapter 6 Consumer Protection.

99. Article 121 bis provides[6]:

> "Credit Facility Guarantees
>
> 1. "The licensed financial institutions shall obtain the sufficient guarantees for all types of facilities provided to the natural clients and private sole proprietorships, in accordance with the client's income or the guarantee, if any, and the size of the required facilities, as determined by the Central Bank.
>
> 2. No application, action or plea filed to the competent judicial authorities or the arbitral tribunals by any licensed financial institution in respect of a credit facility provided for a natural person or a private sole proprietorship shall be accepted if such financial institution fails to obtain the guarantees referred to in Clause (1) of this Article.
>
> 3. The Central Bank may impose administrative and financial penalties which it deems appropriate on the licensed financial institutions which violate the provision of Clause (1) of this Article, in accordance with Article (137) of the present Decree-Law."

100. Mr Sheheen submits that Article 121 (bis) requires banks and financial institutions to have obtained sufficient securities before extending credit facilities to borrowers and prohibits banks and financial institutions from taking legal action against individuals who act as guarantors if such sufficient securities are not obtained when granting credit facilities.

101. The Claimant submits that Article 121 (bis) does not apply to the NMC Guarantee for four reasons. First, Article 121 bis does not apply to the Claimant because it is a financial institution established in the DIFC and regulated by the Dubai Financial Services Authority (DFSA). Secondly, Article 121 bis does not apply to the NMC Guarantee because the Claimant is not a "licensed financial institution". Thirdly, Article 121 bis does not apply to facilities provided to a corporation. Fourthly, Article 121 bis does not apply retrospectively.

102. I find that Article 121 bis does not apply to the Claimant, the financial services provided by the Claimant to NMC Healthcare, the NMC Facility, or the NMC Guarantee.

103. Article 121 bis does not apply to credit facilities provided by the Claimant or guarantees obtained by the Claimant from clients. Article 3 (2) of Federal law No 8 of 2004 Regarding the Financial Free Zones provides that the Financial Free Zones and Financial Activities are not subject to Federal civil and commercial laws. Financial Activities is defined by Article 1 to mean, amongst other things, Financial and Banking Activities to be carried out in the Financial Free Zone. Financial Banking Activities is defined to mean financial banking business and the business of Banks[7].

104. The DIFC is a Financial Free Zone, and the Claimant is established, registered, and carries out financial and banking activities in the DIFC.

105. Further, Article 151 (Scope of Application of the Decretal Law) of the Banking Law provides that its provisions apply to the Central Bank, financial institutions, financial activities, and Persons subject to it; and does not apply to the Financial Free Zones and the financial institutions regulated by the authorities of these zones.

106. The Claimant therefore falls outside the scope of the Banking Law.

107. The question remains whether Article 121 bis applies to the NMC Facility and the NMC Guarantee because the parties have chosen UAE law to govern the NMC Facility and the NMC Guarantee.

108. DIFC law affords parties a degree of autonomy in the choice of the law which governs their contracts. Article 6 of DIFC Law No. 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre as amended (the "Judicial Authority Law") provides:

> "Governing Law
>
> The Courts shall apply the Centre's Laws and Regulations, except where parties to the dispute have explicitly agreed that another law shall govern such dispute, provided that such law does not conflict with the public policy and public morals."

109. Article 8 of DIFC Law No. 3 of 2004, the Law on the Application of Civil and Commercial Laws in the DIFC, often referred to as "the waterfall provisions", further provides:

> "Application
>
> (1) Since by virtue of Article 3 of Federal Law No.8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).
>
> (2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:
>
> (a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC, failing which,

(b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,

(c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,

(d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,

(e) the laws of England and Wales."

110. Thus, while Article 8(2)(c) permits parties to choose the law of another jurisdiction to govern their dispute, this choice is subject to Article 8(2)(a), which provides that DIFC Law is to apply "so far as there is a regulatory content" to the matter.

111. Financial services provided in and from the DIFC are regulated by the DFSA established under DIFC Law No. 1 of 2004 (the "Regulatory Law").

112. The DFSA is the regulator responsible for the regulation and supervision of financial services within the DIFC. The DFSA is empowered by the Regulatory Law to license and regulate financial institutions, including banks, The DFSA also sets out the rules and regulations that financial institutions must comply with.

113. The Claimant submits that permitting DFSA regulated parties which provide financial services in or from the DIFC to "opt in" to regulation by the Central Bank under the Banking Law instead of regulation by the DFSA would be contrary to public policy within the meaning of Article 6 of the Judicial Authority Law because it would permit DIFC institutions like the Claimant to opt out of the DFSA's regulatory regime (and into the Central Bank's regulatory regime) by choosing a different governing law.

114. The effect of Article 8 of the Law on the Application of Civil and Commercial Laws in the DIFC (DIFC Law No. 3 of 2004) is that in so far as the rights and liabilities of the Claimant, NMC Healthcare, and Mr Shetty are affected by regulation of the financial services provided by the Claimant, they are to be determined according to the laws in force in the DIFC and not the laws of the UAE regulating financial institutions and services.

115. Further the Banking Law does conflict with the public policy of the DIFC. Basically, a contract or an act is contrary to public policy if it results in a breach of law or causes injury to the body politic. To apply the Banking Law to the regulation of the provision of financial services in the DIFC by a financial institution registered in the DIFC would evade or replace the DIFC regulatory laws.

116. Secondly, Article 121 biz does not apply to the NMC Guarantee because the Claimant is not a "licenced financial institution". Licensed Financial Institutions are defined in Article 1 of the Banking Law as follows:

"Banks and Other Financial Institutions licensed in accordance with the provisions of this decretal law, to carry on a Licensed Financial Activity or more, including those which carry on the whole or a part of their business in compliance with the provisions of Islamic Shari`ah, and are either incorporated inside the State or in other jurisdictions, or have branches, subsidiaries or Representative Offices inside the State."

117. The Claimant is an Indian bank. It does not have any branches in the UAE outside the DIFC. Its DIFC Branch is licensed and regulated by the DFSA under the Regulatory Law. It is not a Licensed Financial Institution to which the Banking Law applies.

118. Thirdly, Article 121 bis does not apply to make the NMC Guarantee unenforceable because it does not apply to lending to a corporation.

119. Article 121 bis applies to "facilities provided to the natural clients and private sole proprietorships", A corporation is not a natural client or private sole proprietorship.

120. In *Invest Bank PSC v Ahmad Mohammed El Husseini*[8] Stephen Houseman KC sitting as a judge of the High Court of England and Wales considered a translation of Article 121 bis which translated the relevant words as "provided to customers among physical persons as well as the private individual enterprises". His honour said:

". the phrase "private individual enterprise(s)" (also translated as "institution(s)" in some instances) in subsections (1) and (2) also translates as "sole enterprise". It refers to private joint stock companies under UAE law, corresponding to sole trader entities, as might be expected in the context of consumer protection. Neither or none of the borrowers under each credit facility was a "private individual enterprise" or "sole enterprise" (or "institution"). They are both limited liability companies. They are or were commercial corporate entities."

121. The facility was provided to NMC Healthcare. NMC Healthcare is a limited liability company, a commercial corporate entity; it is not a natural client or physical person or a private sole proprietorship, private individual enterprise, or sole enterprise.

122. Mr Sheheen relies upon an explanatory circular issued by the General Secretariat of the Judicial Council Office on 28 February 2023 (the "Circular")[9].

123. Mr Sheheen says that the Circular makes at least the following points. First, the directives, which appears to include Article 121 bis, will apply to guarantees executed before the directives came into force. Secondly, Article 121 bis applies to all credit facilities granted by banks including credit facilities to business corporations. Thirdly, the Central Bank deemed a personal guarantee shall not be sufficient to obtain the credit facility but must be accompanied by in-kind guarantees subject to the bank's assessment and evaluation.

124. If and in so far as Mr Shaheen submits that "all types of facilities provided to the natural clients and private sole proprietorships" includes a personal guarantee given by a natural person to a licensed financial institution, that is wrong. First, facilities and guarantees are not the same thing. A facility is essentially another name for a loan taken out by a borrower, while a guarantee is a promise to meet the liabilities of the borrower if they don't fulfil their obligations under the facility agreement. Secondly, the article refers to facilities provided to the natural clients, not facilities given by

natural clients.

125. The question is the meaning and effect of the article. The meaning of Article 121 bis, even allowing for ambiguity or uncertainty that may arise in translating laws in Arabic into English, cannot extend to lending to corporations. That conclusion has judicial support.

126. The Dubai Court of Cassation in Appeal No. 995/2023 delivered on 29 August 2023 held that Article 121 bis does not apply to lending to corporations. The Court of Cassation held that the circulars of the Judicial Department/Council of another Emirate, such as Abu Dhabi, have no legal force in Dubai. The Court concluded that Article 121 bis was not intended to apply to credit facilities granted to a limited liability company, and therefore upheld enforcement against a corporate borrower and its personal guarantor.

127. In Invest Bank P.S.C v Ahmad Mohammed El Husseini, the High Court of England and Wales opined that it was not clear from the translation of the Circular that it advises that article 121 bis applies to borrowing by companies other than sole enterprises, but if the Circular suggests that article 121 bis applies to corporate as opposed to consumer borrowing[10]:

> "I see no basis for such an interpretation in the language of or rationale behind the statutory provision."

128. Fourthly, Article 121 bis does not apply to credit facilities created before Article 121 bis came into effect on 2 January 2023.

129. The Circular advises that Article 121 bis applies to facilities entered into before it came into effect on 2 January 2023, and Abu Dhabi courts have on occasions followed the Circular and given retrospective effect to the article.

130. However, two recent decisions of the Abu Dhabi Court of Cassation[11] concluded that Article 121 bis does not apply retrospectively. In one of those decisions[12] the Court held that Article 112 of the UAE Constitution precluded the retrospective application of Article 121 bis.

131. Mr Sheheen made further submissions to the effect that a judgement of this Court in favour of the Claimant would not be enforced in the UAE outside of the DIFC because of article 121 bis. It is not necessary to consider that issue. Whether a claimant which obtains a judgement from this Court is able to enforce it elsewhere is not relevant to whether the defendant has a real prospect of successfully defending the claim and is not a compelling reason for the claim to be disposed of at trial. The Claimant may seek to enforce its judgement in the DIFC or in some other jurisdiction where article 121 bis will not be considered.

132. In supplementary submissions filed on 2 January 2024 purportedly addressing the application of Article 121 bis, Mr Sheheen submitted that the NMC Guarantee does not give the DIFC Courts jurisdiction to settle disputes in compliance with Article 5 (A)(2) of the Judicial Authority Law, which provides that 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.

133. That submission is misconceived. First, the Court has jurisdiction pursuant to s5(A)(1)(a) of the Judicial Authority Law because the Claimant is a DIFC Establishment and a Licenced DIFC Establishment.

134. Furthermore, clause 18.2 of the NMC Guarantee provides that each of the Claimant and Mr Shetty submit their disputes in connection to the guarantee to the nonexclusive jurisdiction of the courts of Dubai, UAE. Whilst it is always a matter of construction of the agreement in its context, a reference to "the courts of Dubai" should normally be construed to include the DIFC Courts[13]. The relevant context of the NMC Guarantee includes that the party in whose favour the guarantee is issued is a recognised company in the DIFC and carries on banking activities in the DIFC and not elsewhere in the UAE. On the proper construction of the NMC Guarantee the parties' submission to the jurisdiction of the courts of Dubai includes submission to the courts of the DIFC.

135. In his supplementary submissions filed on 2 January 2024, Mr Sheheen further submitted that the claim against Mr Shetty should be dismissed because the NMC Guarantee contravenes Article 409(2) of Federal Decree Law N0 50 of 2022 ("UAE Commercial Transactions Law").

136. Article 409 is in Book 3 (Banking operations), Section 3 (Bank credits). Chapter 1 (Bank loan) of the UAE Commercial Transactions Law. Article 409(1) provides:

> "Bank loan is a contract whereby the bank delivers the borrower an amount of money as a loan or crediting the amount to his account with the bank, on the agreed conditions and terms."

137. Article 409(2) provides:

> "The banks shall have sufficient securities or guarantees against the provided loans".

138. I consider Article 409(2) of the UAE Commercial Transactions Law does not give rise to a real prospect of Mr Shetty successfully defending the claim and is not a compelling reason for the claim to be disposed of at trial.

139. First, Article 409(2) does not apply to the Claimant, the NMC Facility Agreement or the NMC Guarantee for substantially the same reasons Article 121 bis does not apply. The law has "regulatory content". Financial services, such as bank loans and credits provided in and from the DIFC are regulated by the Dubai Financial Services Authority ("DFSA") established under DIFC Law No. 1 of 2004 (the "Regulatory Law").

140. Secondly, Article 4 of Federal Decree Law N0 50 of 2022 provides that Decree Law shall come into force as of 2 January 2023. There is nothing to suggest that the Law is to have retrospective effect. To the contrary, Article 2 (2) is more consistent with the Law not having retrospective force.

141. Thirdly, it does not appear that the NMC Guarantee, or any personal guarantee, is made unenforceable by Article 409(2). The terms and context of Article 409(2) are different from Article 121 bis. The requirement of Article 409(2) is that the bank have "sufficient securities or

guarantees". Unlike Article 121 bis, Article 409(2) does not provide that no claim by a licensed financial institution in respect of a credit facility shall be accepted if such financial institution fails to obtain sufficient securities or guarantees. Mr Sheheen did not point to any other provision in the Law to the effect that a guarantee is unenforceable if there is not "sufficient securities or guarantees" for the facility in respect of which it is given.

142. I consider that Mr Shetty has no real prospect of defending the claim against him on the ground that it is unenforceable because of Article 121 bis of the Banking Law or Article 409(2) of the UAE Commercial Transactions Law. Nor are Mr Shetty's submissions in relation to those statutory provisions a compelling reason why the case should be disposed of at a trial.

Article 1061 does not make the NMC Guarantee unenforceable

143. Article 1061 of the UAE Federal Law No. 5 of 1985 On the Civil Transactions Law of the United Arab Emirates State as amended ("Article 1061" and the "Civil Code") provides:

> "The validity of a suretyship is conditioned upon its object being warranted by the principal as a known debt, kind or person and being deliverable by the surety".

144. Mr Sheheen submitted that Article 1061 provides that a guarantee is valid only when it is for a certain, fixed, and known debt, and consequently, suretyship cannot be provided in respect of debts unknown or not determined. Any such guarantee which is for an uncertain amount is unenforceable and void.

145. The NMC Guarantee provides:

> ". the Guarantor hereby irrevocably and unconditionally guarantees and promises to pay on demand to the Bank any and all sums of money that the Borrowers are obligated to pay to the Bank under the Facility Agreement that the Borrowers have/shall have failed/omitted to pay when due in accordance with the terms of the Facility Agreement including but not limited to all costs, charges, expenses and losses that the Bank may sustain on account of any failure/omission by the Borrowers to perform all or part of their obligations under the Facility Agreement.".

146. Mr Shetty's case is that the obligation to pay "any and all sums of money that [NMC Healthcare] is obligated to pay to [the Claimant] under the [NMC Facility Agreement]" includes potential future or unforeseen financial obligations, and the amount outlined in the NMC Facility Agreement is uncertain and subject to fluctuations, and therefore the NMC Guarantee contravenes the mandatory provisions of Article 1061 and is invalid.

147. Mr Sheheen referred to the judgment of Justice Lord Glennie in *Union Bank of India (DIFC Branch) Vs Velocity Industries*[14], where His Honour held that the effect of Article 1061 of the Civil Code, as applied to that case, is that the personal guarantees, which are governed by UAE law, cannot extend beyond the four corners of the facility agreement granted to the principal debtor. His Honour held that the terms of the personal guarantees in that case went further - they purported to cover not only future and contingent liabilities but also liabilities arising under any agreement, not just the facility agreement granted to the principal debtor. His Honour held that if the personal guarantees by their terms extend beyond the four corners of the facility agreement, the entire guarantee is void and unenforceable.

148. Justice Lord Glennie held that "all monies guarantees" are unenforceable in the UAE pursuant to Article 1061 of the Civil Code:

> "To establish whether a guarantee is valid and legally enforceable, it is important to establish the nature of the guarantee. In an "all monies" guarantee, a guarantor guarantees any and all obligations of the principal debtor to the creditor, whether existing at the time of the guarantee or arising in the future. However, such guarantees may not be enforceable in the UAE.
>
> Article 1061 of the Civil Code requires the issuance of guarantees subject to specified "debt" or a thing that is certain in amount, and must, therefore, refer to the amount or facility guaranteed by the Guarantor. Further, the Dubai Court of Cassation has held that the guarantee contract shall be void unless it determines the guaranteed amount; or includes the basis on which the amount guaranteed should be calculated; or refers to the credit facility granted to the principal debtor."

149. Mr Sheheen submits that the guaranteed amount under the NMC Guarantee is subject to fluctuations and is uncertain making it an all-monies guarantee provided by Mr. Shetty to cover any and all liabilities of NMC Healthcare, and pursuant to Article 1061 of the Civil Code, the NMC Guarantee, being an all-monies guarantee, should be held to be null and void.

150. Senior counsel for the Claimant, Ms O'Sullivan KC, submitted that the NMC Guarantee complies with the requirements of Article 1061. Its wording is very different from that considered in the *Velocity Industries case,* which is thus distinguishable. In the *Velocity Industries case,* the wording of the guarantee was extremely wide - it made the guarantor liable for future and contingent advances to the borrower and also for sums not even advanced to the borrower under the relevant facility agreement but under some other agreement. In those circumstances, Justice Lord Glennie found that the guarantee was void under Article 1061: His Honour held that under Article 1061, the guarantee must not go beyond the "four corners" of the facility agreement granted to the principal debtor. Since the guarantee did, as a matter of construction, go beyond the four corners of the facility agreement, it was void.

151. In this case, by clause 1.1, Mr Shetty agreed to guarantee "any and all sums of money that the Borrowers are obligated to pay under the Facility Agreement when due in accordance with the terms of the Facility Agreement.". The facility itself is limited to USD 50 million. Mr Shetty was thus only agreeing to guarantee:

> a) sums due from the Borrower under the Facility Agreement but unpaid by it, not future or contingent liabilities;
>
> b) sums advanced to the Borrower under the Facility Agreement but not under any other agreement, and
>
> c) sums limited to a maximum of USD 50 million.

152. Ms O'Sullivan referred to judgments of the Dubai Court of Cassation which reject the argument that a personal guarantee is invalid unless it states a specific figure. In Appeal 261 of 2001 (rights) the Court of Cassation said:

> ". it is established by legal precedents of this court that the guarantee of future debt is invalid except where the value of the guaranteed debt is defined in advance in the deed of guarantee. It is established also that the guarantee of liabilities arising from a current account opening contract is a future debt guarantee, the amount of which shall be capable of calculation only when the account is closed and finally liquidated and the balance in respect therefore is settled and drawn up. It is also determined that the guarantor's liability shall be limited to the amount of the guarantee."

153. The wording of the guarantees in that case provided that the guarantee was a continuous guarantee until the full final payment of the liabilities resulting from the account opening contracts. The Court of Cassation upheld the validity of the guarantee.

154. In Appeal 1008 of 2019 (commercial), the Court of Cassation held:

> ". the trial court has the authority to establish the guaranteed debt, to identify the guarantee and to determine whether the guarantor has agreed for its guarantee to be continuing, so long the trial court's decision is reasoned, has a basis in the evidence and in interpreting the guarantee does not go beyond the possible meanings contained in it wording and intended by the partes keeping in mind the context and the circumstances surrounding its execution. It is also decided that a guarantee is not dependent on the manner or form by which the guaranteed obligations are expressed, whether that be in respect of a loan, or promissory note, or facility in the form of a current account. Further, a guarantee is valid even if it does not contain or identify a value for the guaranteed debt, so long as the basis for calculating the guaranteed debt (in the future) is contained within it" [emphasis added].

155. In Appeal 79 of 2008 (commercial), the Court of Cassation said:

> "a guarantee is not valid except if its partes identify precisely the value of the guaranteed debt in the guarantee agreement, or if the guarantee agreement contains the basis upon which the guaranteed debt may be calculated at a later date or identifies the nature of the facilities being granted. It is also decided that the guarantee of obligations arising from a current account is the guarantee of a future debt, which cannot be ascertained precisely until such time as the account is closed and accounts in respect thereof drawn up. Whereas the facility agreement dated 28 February 2000 establishes that the Respondent bank accepted the Appellant's and the Fi?th Respondent's request for facilities of AED 5,000,000 to be granted to the Second Respondent, and the guarantee agreement dated 29 February 2000 (signed by the Appellant) contains a guarantee in respect of the Second Respondent's debts as a result of the facilities granted to it based on the Appellant's request, the value of which is precisely identified in the facility agreement. This is considered an identification of the value of the debt guaranteed by the Appellant in its capacity as a guarantor. As such, the argument that the guaranteed debt is not identified is without basis." [emphasis added].

156. Ms O'Sullivan submitted that the effect of these authorities is that a guarantee of banking facilities will be valid under UAE Law either if it expressly states the value of the debt which is being guaranteed, or the guarantee sets out the basis on which the amount of the debt may be calculated at a later date.

157. Ms O'Sullivan referred to an article entitled "Legal Framework of Guarantees under UAE law" which was referred to and relied upon by Justice Lord Glennie in the *Velocity Industries case.* The article states:

> "Specific Guarantee
>
> To establish whether the guarantee is valid and legally enforceable, it is important to establish the nature of the guarantee. In an "all monies" guarantee, a guarantor guarantees any and all obligations of the principal creditor to the debtor, whether existing at the time of the guarantee or arising in the future. However, such guarantees may not be enforceable in the UAE.
>
> Article 1061 of the Civil Code requires the issuance of guarantees subject to specified "debt" or thing that is certain in amount and must, therefore, refer to the amount or facility guaranteed by the Guarantee. Further, the Dubai Court of Cassation has held that the guarantee contract shall be void unless it determines the guaranteed amount or includes the basis on which the amount guaranteed should be calculated; or refers to the credit facility granted to the principal debtor."

158. This was the passage relied upon by Justice Lord Glennie in concluding that, to comply with Article 1061:

> "personal guarantees must be for a fixed amount or an amount capable of being ascertained from the terms of the facility and cannot extend beyond the four corners of the facility being granted".

159. The NMC Guarantee meets the requirements of Article 1061 as explained by the Dubai Court of Cassation. It refers specifically to the Claimant's agreement to grant a facility of up to USD 50 million under the NMC Facility Agreement and provides that Mr Shetty agrees to guarantee payment of all the sums which NMC Healthcare is obligated to pay under the NMC Facility Agreement but has failed to pay. The NMC Guarantee therefore identifies how the sum guaranteed is to be calculated - the Claimant must establish the sum due from NMC Healthcare under the Facility Agreement and show that it has not been paid; that is the sum which is then due from the guarantor. The NMC Guarantee is within the "four corners" of the NMC Facility Agreement.

160. I consider that there is no real prospect of Mr Shetty successfully defending the claim on the ground that the NMC Guarantee is unenforceable pursuant to Article 1061. I consider that the effect of Article 1061 is not a compelling reason for the claim to be disposed of at trial.

The NMC Guarantee contains an indemnity

161. The Claimant advanced a further argument why Mr Shetty's contentions based on Article 121 bis of the Banking Law, Article 409(2) of the Commercial Transactions Law and Article 1061 of the Civil Code do not give rise to a real prospect of Mr Shetty successfully defending the claim and are not compelling reasons for the claim to be disposed of at trial.

162. The NMC Guarantee does not only contain a guarantee imposing secondary liability, but also contains an indemnity imposing primary lability on Mr Shetty. Clause 10 provides:

> "Without prejudice to the Bank's rights against the Borrowers as the principal obligors, the Guarantor shall, as between the Bank on the one hand and the Guarantor in the other, be deemed principal obligor in respect of its obligations hereunder and not merely as a surety.
>
> Accordingly, the Guarantor shall not be discharged, nor shall its liability be discharged or impaired by any act, thing, omission or means whatsoever whereby its liability would have been discharged if it had been merely a secondary obligor. This guarantee shall remain binding on the Guarantor notwithstanding that all or any of the Borrower's obligations under the Facility Agreement may not for any reason be valid and binding or capable of enforcement."

163. The indemnity given by Mr Shetty is a separate obligation from the guarantee he gives in the NMC Guarantee, notwithstanding that they are contained in the same instrument. A contract of indemnity is a primary liability. Whilst a guarantor is discharged from liability if the principal contract is void or unenforceable, an indemnifier generally remains liable if another associated transaction is unenforceable or void.

164. Whilst it appears that the guarantee instrument considered by Lord Justice Glennie in the *Velocity Industries* case contained an indemnity, there is no discussion whether the indemnity may be enforced notwithstanding the guarantee is unenforceable.

165. Where the guarantee or the facility in relation to which the guarantor gives a guarantee is made unenforceable by statute, whether an indemnity in relation to the facility will be enforceable will depend on the terms of the indemnity and the construction of the statute.

166. Those matters were not argued before me. In view of my conclusions in relation to Mr Shetty's arguments based on Article 121 bis of the Banking Law, Article 409(2) of the UAE Commercial Transactions Law, and Article 1061 of the UAE Civil Code, it is not necessary to consider the issue further. "

Section 4 of the Statute of Frauds Act 1677 (UK)

167. Finally, Mr Sheheen submitted that the NMC Guarantee is unenforceable because it does not comply with section 4 of the Statute of Frauds 1677 (UK).

168. Mr Sheheen submitted that the guaranteed obligations of Mr. Shetty under the NMC Guarantee are invalid and unenforceable because his signature was misused and therefore contravenes the provisions of Section 4 of the Statute of Frauds 1677 (UK).

169. This submission has no merit. First, the Statute of Frauds 1677 (UK) has no application to this case. Secondly, there is no evidence of substance that Mr Shetty's signature was misused.

Claim maintainable notwithstanding liability of NMC Healthcare has not been determined

170. In Application No. CFI-079-2020/7 at [3.3] Mr. Shetty asserts that the Claimant cannot enforce the NMC Guarantee until the Court has determined NMC Healthcare's liability to the Claimant,

171. In his statement affirmed on 9 August 2023 in support of Application No. CFI-079- 2023/7 Mr Sheheen says:

> " [3.1] In general, a guarantee is a commitment from a third party to ensure that another party fulfils its obligations as per the guarantee terms. The Disputed Personal Guarantee provides that if the Borrower fails to meet the primary obligation, the guarantor will take the place of the breaching party and carry out the primary obligation. Thus, the guarantor's liability under the Disputed Personal Guarantee is secondary, meaning that it is contingent upon and corresponds to the Borrower's failure to meet the primary obligation.
>
> [3.2] In the present Case, the Borrower has:
>
> a. Not admitted its liability;
>
> b. Not submitted any defence; and
>
> c. A stay order has been issued in its favour
>
> [3.3] Therefore, the Borrower's liability in this Case has neither been admitted nor proven/determined by this Court, and the Claimant cannot invoke the guarantee until the court establishes/assesses the Borrower's liability toward the lender, and also the Borrower's failure to discharge such proven liability."

172. That argument has no substance. Clause 7.2 of the NMC Guarantee provides that the Claimant may enforce the guarantee without first making demand on or taking any proceeding against the Borrower.

173. Further, the NMC Guarantee is an indemnity as well as a guarantee. Clause 10 provides:

> "Without prejudice to the Bank's rights against the Borrowers as the principal obligors, the Guarantor shall, as between the Bank on the one hand and the Guarantor on the other, be deemed principal obligor in respect of its obligations hereunder and not merely as a surety."

174. This means that the Claimant does not have to prove that the Borrower is in fact liable to it under the Facility Agreement. In any event, the evidence of the Borrower's indebtedness set out in Mr Srinivasan's witness statement has not been contradicted by evidence adduced by Mr Shetty.

175. Mr Shetty has no real prospect of successfully defending the claim on the ground that the NMC Healthcare's liability has not been determined

and that assertion provides no compelling reason why the case should be disposed of at a trial.

Claim should not be stayed pending resolution of administration of NMC Healthcare

176. In Application No. CFI-079-2020/7 Mr Shetty submits:

> "[4.2] . the possibility of the administration proceedings being decided in favour of the Borrower cannot be overlooked and also the possibility of the Borrower being discharged of its liability against the Claimant also cannot be neglected. That being the case, it is only appropriate that proceedings against Mr. Shetty in the current Case remain stayed until then."

177. The borrower, NMC Healthcare, and the corporate guarantors who are the Defendants other than Mr Shetty, are under administration and the proceedings against them, with the consent of the Claimant, have been stayed until the administration proceedings come to an end.

178. In his statement affirmed on 9 August 2023 in support of Application No. CFI-079- 2023/7, Mr Sheheen says that the administration proceedings might be "decided in favour of the Borrower" and the Borrower might be "discharged of its liability against the Claimant". Therefore, Mr Sheheen says, it is appropriate in the interest of justice that the proceedings against Mr. Shetty be stayed until then.

179. This argument is a variation of the argument that the proceedings against Mr Shetty should be stayed until the liability of the primary debtor, NMC Healthcare, has been determined. This argument has no merit for the same reasons.

The Claimant has not failed to co-operate as ordered by the Court

180. Mr Shetty alleges that the Claimant has not co-operated with him as ordered by the Court.

181. On 22 June 2023, His Excellency Justice Nassir Al Nasser ordered the Claimant to cooperate with Mr Shetty by making available to his expert witness the originals of the NMC Guarantee, NMC Facility Agreement, Corporate Guarantees, and any other documents that allegedly bear Mr Shetty's signature.

182. The Claimant provided Mr Shetty's expert with the originals of the NMC Guarantee, the NMC Facility Agreement, and the Corporate Guarantees as required by the order.

183. Mr Shetty's complaint appears to be that the only other document "that allegedly bears the Sixth Defendant's signature" which the Claimant provided to the expert was the undertaking letter. In his statement affirmed on 9 August 2023, Mr Sheehan complains that only once the expert is provided with all the documents, which are in possession of the Claimant and which bear Mr. Shetty's signature, would he be able to prove and substantiate Mr Shetty's defence.

184. There is no evidence that the Claimant has other documents from around 2017 "that allegedly bear Mr Shetty's signature" or otherwise failed to cooperate in accordance with the terms of the order

185. In any event, it is hard to discern the point of Mr Shetty's complaint. The usual methodology is for an expert to compare the disputed signature against the usual or "specimen" signatures of the alleged signatory which the signatory confirms are authentic. Obviously, it was for Mr Shetty, not the Claimant, to provide authentic specimen signatures of Mr Shetty to be compared against the signature on the NMC Guarantee.

186. If Mr Shetty's point is that his expert has not compared his "alleged signature" on the NMC Guarantee with authentic specimens of his signature and evidence may be available in the future after his expert carries out such a comparison, there is no merit to that suggestion.

187. Mr Sheheen submitted in effect that a compelling reason the case should be disposed of at trial is that further evidence that Mr Shetty did not sign the NMC Guarantee or other evidence rendering the NMC Guarantee unenforceable may turn up.

188. Arguments that evidence may turn up in the future which casts a different light on the matter should be approached with caution. It is not sufficient to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on a factual issue.

189. In some cases, a defendant may need time to investigate the claim, not having had the opportunity to do so, and such investigation might provide the defendant with real prospects of success. This is not such a case. Mr Shetty has had every opportunity to investigate the authenticity of his signature on the NMC Guarantee, including his forensic expert comparing the signature with authentic specimens of Mr Shetty's signature.

190. Mr Shetty has not identified the nature of the evidence which may be available at trial to enable him to successfully defend the claim.

191. Mr Shetty's forensic expert, Mr Ahmed O Albah, conducted a forensic examination of the NMC guarantee on 19 September 2023. If, as appears to be the case, Mr Shetty, or his lawyer, did not provide Mr Albah with authentic specimens of Mr Shetty's signature to compare against his "alleged signature" on the NMC Guarantee, it was their election not to do so.

192. The Claimant's alleged non-co-operation provides no compelling reason why the case should be disposed of at a trial.

Conclusion on NMC Healthcare case

193. For the reasons stated:

a) Mr Shetty has no real prospect of successfully defending the claim against him and there is no other compelling reason why the case should be disposed of at a trial;

b) the Claimants application for immediate judgement against Mr Shetty should be granted;

c) Judgement should be entered for the Claimant against Mr Shetty in the sum of USD 37,370,455 plus USD 5,878.67 per day since 17

November 2023, that is USD 37,740,811.20.

d) Mr Shetty's application to dismiss the Claimant's application for immediate judgment or to dismiss the claim against him must be dismissed.

The UAE Exchange Case

Liability of Mr Shetty and Binay pursuant to the UAE Exchange Guarantee and Binay Guarantee

194. The Claimant says that Mr Shetty executed guarantees on 15 June 2010 (the "First Guarantee"), 8 September 2010 (the "Second Guarantee") and 5 April 2012 (the "Third Guarantee") and Mr Binay executed a guarantee on 5 April 2012 (the "Binay Guarantee") by which each of them guaranteed the performance by UAE Exchange of its obligations under the First Facility Agreement as amended.

195. Each of the First, Second, Third and Binay Guarantees, which I will sometimes refer to as the Personal Guarantes, provides that the Guarantor, Mr Shetty and Mr Binay respectively:

a) guarantees to the Claimant punctual performance by UAE Exchange of its obligations under the First Facility Agreement as amended by the First Supplemental Agreement and Second Supplemental Agreement (the "UAE Exchange Facility Agreement");

b) undertakes with the Claimant that whenever UA Exchange does not pay any amount when due under or in connection with the UAE Exchange Facility Agreement that he shall immediately on demand pay that amount including all accrued interest and charges; and

c) indemnifies the Claimant immediately on demand against any cost, loss or liability suffered by the Claimant if any obligation guaranteed by it is or becomes unenforceable, invalid, or illegal. The amount of the cost, loss or liability shall be equal to the amount which the Claimant would otherwise have been entitled to recover.

196. Each of the Personal Guarantees further provides that the obligations under the guarantee are continuing obligations and will extend to the ultimate balance of sums payable by UAE Exchange under the UAE Exchange Facility Agreement regardless of any intermediate payment or discharge in whole or in part.

197. The Claimant's claim against each of Mr Shetty and Mr Binay is:

a) UAE Exchange is obligated to pay an amount due to the Claimant under the UAE Exchange Facility Agreement;

b) UAE Exchange has failed to pay the amount due to the Claimant in accordance with the terms of the UAE Exchange Facility Agreement;

c) Mr Shetty and Binay signed the Personal Guarantees respectively;

d) By the Personal Guarantees, Mr Shetty and Binay respectively promised to pay on demand to the Claimant the amount UAE Exchange is obligated to pay to the Claimant under the UAE Exchange Facility Agreement that UAE Exchange has failed to pay when due in accordance with the terms of the UAE Exchange Facility Agreement; and

e) Mr Shetty and Mr Binay have failed to pay the amount due to the Claimant under the UAE Exchange Facility Agreement.

198. As in the NMC Healthcare case, Mr. Mr Shetty and Mr Binay advance several contentions or arguments in opposition to the Claimant's application for immediate judgement:

a) Mr Shetty did not sign the First, Second or Third Guarantees and Mr Binay did not sign the Binay Guarantee; their signatures on the guarantees have been forged;

b) the Personal Guarantees are unenforceable pursuant to provisions of the DFSA Prudential - Investment, Insurance Intermediation, and Banking Module ("Prudential Rules");

c) the Personal Guarantees are unenforceable pursuant to Article 121 bis of the Banking Law;

d) the Personal Guarantees are unenforceable pursuant to Article 1061 of the Civil Transactions Law;

e) the Personal Guarantees are unenforceable because they do not comply with section 4 of the Statute of Frauds 1677 (UK); and

f) the proceedings against Mr. Shetty should be stayed until UAE Exchange's liability is determined.

UAE Exchange is obligated to pay amount due to the Claimant

199. The Claimant says that on 15 June 2010 Mr Shetty, as managing director and CEO and His Excellency Abdulla Humaid Ali Mazroei as chairman, signed the First Facility Agreement on behalf of UAE Exchange. Pursuant to the First Facility Agreement, the Claimant granted short term revolving credit facilities of up to USD 10 million to the Borrower, UAE Exchange. It was a condition precedent to the First Facility Agreement that Mr Shetty would give a personal guarantee to secure the indebtedness of the Borrower.

200. The Claimant says that also on 15 June 2010 Mr Shetty executed the First Guarantee. Under the First Guarantee, Mr Shetty both guaranteed punctual repayment by the Borrower and, in the event that the Borrower did not pay any amount due under the First Facility Agreement, undertook to immediately pay that amount on demand to the Claimant himself.

201. At a board meeting of UAE Exchange held on 5 September 2010, the board resolved to seek an increase in the short-term credit facilities extended to UAE Exchange by the Claimant from USD 10 million to USD 25 million. It was further resolved that the signature mandate communicated to the Claimant by means of the board resolutions dated 10 June 2010 and 5 July 2010 for operating the existing credit limit and

signing related documents should hold good for the enhanced limit. An extract of the board minutes signed by Mr Shetty in his capacity as the Managing Director and CEO of UAE Exchange, was sent to Mr Raj Kumar, the CEO of the Claimant, under cover of a letter dated 6 September 2010.

202. The amount of the credit facility was accordingly increased to USD 25 million by a first supplemental agreement dated 8 September 2010 (the "First Supplemental Agreement") which amended the First Facility Agreement. Mr Shetty also signed the First Supplemental Agreement on behalf of UAE Exchange in his capacity as its Managing Director and CEO.

203. The Claimant says that Mr Shetty gave a second personal guarantee for the increased credit facility of USD 25 million, also on 8 September 2010.

204. The amount of the credit facility was again increased, this time to USD 35 million, by a second supplemental agreement dated 5 April 2012 (the "Second Supplemental Agreement"). The Second Supplemental Agreement was signed by Mr Shetty, as Managing Director and CEO, and H.E. Abdulla Humaid Ali Al Mazroei, as Chairman, on behalf of UAE Exchange.

205. By clause 3.1 of the First Supplemental Agreement and clause 3 of the Second Supplemental Agreement, the parties agreed that the terms of the First Facility Agreement remained in force, save to the extent amended by the First Supplemental Agreement and Second Supplemental Agreement respectively. The parties further agreed that the First Facility Agreement, the First Supplemental Agreement, and the Second Supplemental Agreement (and security documents) should be read and construed as one instrument.

206. The Claimant says that at the time of execution of the Second Supplemental Agreement on 5 April 2012, Mr Shetty provided the Third Guarantee,

207. The Claimant says that also on 5 April 2012 Mr Binay provided the Binay Guarantee.

208. The Claimant says that the Personal Guarantees were provided by Mr Shetty and Mr Binay to secure all or any part of any unpaid sums due under the First Facility Agreement, as amended, including all interest, charges, fees, and costs. In addition, UAE Exchange, pursuant to the terms of the First Facility Agreement and finance documents, provided the Claimant with a security cheque drawn on a deposit account in its name for the entire loan facility amount of USD 35,000,000. This cheque was signed by Mr Shetty.

209. On or around 27 February 2020, UAE Exchange sent the Claimant a Utilisation Notice seeking to draw the amount of USD million.

210. On 27 February 2020, the Claimant transferred USD 35 million to UAE Exchange's account.

211. The Claimant produced, through Mr Anjaneyj Kumar, the statement of UAE Exchange's account with the Claimant. The Defendants adduced no evidence to contradict the account statement.

212. UAE Exchange failed to make any repayment of the credit facility. Under the First Facility Agreement as amended that was an Event of Default which gave the Claimant the right to declare each advance to be immediately due and repayable together with accrued interest or declare each advance to be due and payable on demand of the Claimant.[15]

213. The Claimant served notices on UAE Exchange on 16 April 2020, on Mr Shetty on 28 May 2020 and on Mr Binay on 16 April 2020 of an Event of Default and that the Claimant was exercising its right to accelerate repayment and to demand immediate payment of all amounts outstanding under the credit facility.

214. The amount due at this date was USD 35,150,000 plus penal interest.

215. Under the First Facility Agreement as amended the Claimant was entitled to charge default interest and penal interest.[16]

216. The notices stated that unless the amount due was repaid in full by 23 April 2020, the Claimant would commence proceedings against both the Borrower, UAE Exchange, and the guarantors, Mr Shetty and Mr Binay, for the recovery of the sum. The notices were formally served on UAE Exchange, Mr Shetty, and Mr Binay through the Dubai Courts.

217. On 4 May 2020, UAE Exchange paid USD 8,767.64 to the Claimant. Aside from this one payment, none of UAE Exchange, Mr Shetty or Mr Binay has made any repayment of the sums due under the First Facility Agreement as amended.

218. Further notices were served on all the Defendants on 19 January 2021 and 26 January 2021. No responses were received.

219. On 1 June 2020, the Claimant classified the loan facility account of UAE Exchange as a nonperforming account.

220. On 19 January 2021, a final recall and demand notice was sent to UAE Exchange and (in copy) to Mr Shetty and Binay at the addresses stipulated in the First Facility Agreement and the Personal Guarantees. As at this date, the sum due (inclusive of contractual interest) was USD 36,808,430.18 plus penal interest.

221. On 26 January 2021, an invocation of guarantee notice was sent to the two personal guarantors, Mr Shetty and Mr Binay, as well as to UAE Exchange.

222. As of 31 March 2023, the sum due from UAE Exchange under the First Facility Agreement as amended was USD 42,580,571.00 inclusive of contractual interest pursuant to clause 6.1 of the First Facility Agreement. In addition, penal interest is payable pursuant to clause 7.3.

223. On 4 April 2021, the Claimant commenced this action against UAE Exchange, Mr Shetty, and Mr Binay to recover the amount due by UAE Exchange to the Claimant pursuant to the First Facility Agreement as amended and from Mr Shetty and Mr Binay pursuant to the Personal Guarantees given by each of them.

224. The Claimant is not currently pursuing its claim against UAE Exchange because, pursuant to a Deed of Standstill dated 24 May 2021 (and subsequently amended) made between, amongst others, Global Fintech Investment Holdings AG and Finablr Limited, the Claimant has agreed not to take enforcement steps against UAE Exchange for the period set out in the deed.

225. As of 17 November 2023, the outstanding some due from UAE Exchange to the Claimant under the First Facility Agreement as amended, is USD 44,102,956 and continues to accrue at a daily rate of USD 6,492.61.[17]

UAE Exchange has failed to pay the amount due to the Claimant

226. The Claimant has adduced evidence that UAE Exchange has failed to pay the amount to the Claimant in accordance with the terms of the UAE Exchange Facility Agreement. The Defendants have not adduced evidence to the contrary, nor alleged that UAE Exchange has paid the amount to the Claimant in accordance with the terms of the First Facility Agreement as amended.

Mr Shetty signed the Guarantees

227. Mr Shetty's principal defence is that he did not sign the First, Second or Third Guarantee.

228. There is overwhelming evidence that he did.

229. Mr Raj Kumar states that he witnessed Mr Shetty sign the First Facility Agreement and the First Guarantee on 15 June 2010. Mr Raj Kumar gives the following evidence.

230. It was the practice of the Claimant to have a member of its senior management attend and witness the signing by clients of significant banking documentation, such as the First Facility Agreement and personal guarantees.

231. In his capacity as the Claimant's then CEO, Mr Kumar travelled from Dubai to UAE Exchange's offices in Abu Dhabi, carrying the First Facility Agreement and personal guarantee to personally witness Mr Shetty sign both documents, as well as other documents.

232. Mr Kumar arrived at UAE Exchange's offices at around 10 am on 15 June 2010. He was driven there by Mr Chinnaih, the Claimant's driver, in the Claimant's car.

233. Mr Kumar remembers several other members of UAE Exchange's management being present at this signing meeting, including Mr Y Sudhir Kumar Shetty, the CEO of Global Operations, and Mr TP Pradeep Kumar, UAE Exchange's CFO. In addition to those individuals, there were two other gentlemen present on behalf of UAE Exchange. All the meeting participants are visible in photographs produced by Mr Kumar which he says were taken at the signing meeting. One of the photographs shows Mr Kumar shaking hands with Mr Shetty and the other photograph shows Mr Shetty handing over the First Facility Agreement and personal guarantee to Mr Kumar after he signed them in Mr Kumar's presence.

234. The Second Guarantee bears the same signature on the execution page and on each page as the First Guarantee.

235. Mr Sumitra Baskaran, the Deputy CEO of the Claimant has given evidence that he witnessed Mr Shetty sign the Third Guarantee and Mr Binay sign the Binay Guarantee.

236. Mr Baskaran confirms the evidence of Mr Raj Kumar and Mr Srinivasan that it was the practice of the Claimant to have members of its senior management attend and witness the signing by clients of significant banking documentation, such as the First Facility Agreement, the First Supplemental Agreement, the Second Supplemental Agreement, and the Personal Guarantees provided by Mr Shetty and Mr Binay.

237. Mr Baskaran states that as the Claimant's Deputy CEO, he travelled with Mr Manas Ranjan Biswal, then the Claimant's CEO to UAE Exchange's offices in Abu Dhabi to witness Mr Shetty sign the Second Supplemental Agreement and his third personal guarantee, as well as other documents, and to witness Mr Binay sign his personal guarantee. They were driven there by the Claimant's driver and arrived at UAE Exchange's offices in Abu Dhabi at around 11:00 am on 5 April 2012.

238. Mr Baskaran remembers several other members of UAE Exchange's management being present at this signing meeting, including Mr Y Sudhir Kumar Shetty, the COO of Global Operations, and Mr P Pradeep Kumar, UAE Exchange's CFO. They witnessed the signings by Mr Shetty and Mr Binay. In addition to those two individuals, there were two other gentlemen present on behalf of UAE Exchange whose names Mr Baskaran does not recall.

239. What then is the evidence to contradict the evidence of Mr Raj Kumar and Mr Baskaran supported by the documents I have referred to and the circumstances surrounding the negotiations for and draw down of the facility?

240. The crucial part of the defence filed on behalf of Mr Shetty is [18] which pleads to [14] of the Claimant's particulars of claim in which the Claimant pleads that Mr Shetty executed the First, Second, and Third Guarantees.

241. Paragraph 18 of Mr Shetty's defence pleads:

> "All the allegations raised in paragraph 14 are false per se and are denied in toto. Mr Shetty neither signed nor authorised any person on his behalf to sign/accept the personal guarantees as claimed by the Claimant and shall not be made liable for the acts of the First Defendant. However, Mr Shetty does not exclude the possibility that his signatures in the personal guarantees are forged by the First Defendant's representatives. Mr Shetty shall only rely on the opinion of an experienced and qualified forensic document examiner on the issue of whether someone other than Mr Shetty had signed the aforementioned documents."

242. The forgery defence must be rejected.

243. The defence pleads that Mr Shetty's signatures may have been forged by the First Defendants' representatives. That conjecture can be readily

dismissed. Two senior representatives of the Claimant have given detailed evidence that they witnessed Mr Shetty sign the documents - Mr Kumar on 15 June 2010 and Mr Baskaran on 5 April 2012. Mr Kumar has produced photographs of the 15 June 2010 signing. Mr Shetty accepts he is the person in the photographs. Therefore, if the signatures are forgeries, the statements of Mr Kumar and Mr Baskaran are false and the signatures must have been forged by representatives of the Claimant, not by representatives of the First Defendant.

244. It is inherently improbable that the signatures on the Personal Guarantees (and the relevant facility agreements) were forged by senior representatives of the Claimant.

245. The Claimant advanced USD 10 million to UAE Exchange on 17 June 2010 and subsequently increased the advances to UAE Exchange to USD 35 million. If Mr Shetty's forgery defence is correct, the Claimant's senior representatives caused the Claimant to do so without having any guarantee signed by Mr Shetty or even obtaining a written facility or loan agreement. That is implausible.

246. It is not plausible that two senior executives of the Claimant, who are no longer employed by the Claimant, have each, either independently or as part of a dishonest combination, engaged in acts of forgery and given false statements to support the Claimant's claim.

247. Further, the evidence of Mr Shetty is insubstantial. The evidential value of the pleaded denial in [18] of the defence that Mr Shetty signed any of the Personal Guarantees is undermined by a number of factors.

248. First, unlike his defence in the NMC Healthcare Case, Mr Shetty has not signed the statement of truth verifying the facts stated in the defence. It is signed by "Bakertilly Law Corporation" as Mr Shetty's legal representative.

249. Secondly, Mr Shetty has not made a witness statement responding to the detailed evidence of Mr Raj Kumar that he witnessed Mr Shetty sign the First Facility Agreement and First Guarantee. The only response to the photographs produced and verified by Mr Raj Kumar is a statement by Mr Shetty's lawyer, Mr Sheheen, in his Second Witness Statement that Mr Shetty states that the photo was taken during a courtesy meeting when he had discussions with the Claimant relating to the Xpress money remittance scheme which aims to increase remittances from UAE to India. Mr Sheheen does not explain what documents are being held by Mr Shetty in the photographs or how or why photographs were taken at a "courtesy meeting" of Mr Shetty shaking hands with Mr Kumar and holding documents which appear to include tabs frequently used to indicate the place in documents for signatures to be appended.

250. Thirdly, Mr Shetty has not made a witness statement responding to the detailed evidence of Mr Baskaran that he witnessed Mr Shetty sign the Second Supplemental Agreement and Third Guarantee.

251. Fourthly, the statement that Mr Shetty shall only rely on the opinion of an experienced and qualified forensic document examiner on the issue of whether someone other than Mr Shetty had signed the documents implies Mr Shetty will accept he signed the documents if an experienced and qualified forensic document examiner opines that he did. That undermines the weight of the denial in the defence that Mr Shetty signed the documents.

252. Fifthly, Mr Shetty has had a proper opportunity to have the documents examined by a forensic document examiner but has not done so. The defence filed on behalf of Mr Shetty was filed on 15 May 2023. Mr Shetty has given no, or no adequate explanation, of why he has not arranged for a forensic document examiner to examine the documents, including applying for a relevant order if that was necessary.

253. A summary judgment application should not be a "minitrial", but that does not mean that the Court should accept the defendant's evidence without question. In this case, the compelling evidence of Mr Raj Kumar and Mr Baskaran, the surrounding circumstances, the inherent probabilities, and the insubstantial nature of Mr Shetty's evidence in response are sufficient to allow the Court to find that Mr Shetty's forgery defence has no real prospect of success.

Mr Binay signed the Binay Guarantee

254. I have already referred to the detailed evidence of Mr Baskaran, the Deputy CEO of the Claimant, that he witnessed Mr Binay sign the Binay Guarantee at the time Mr Shetty signed the Second Supplemental Agreement and the Third Guarantee.

255. Mr Binay's denial that he signed the Binay Guarantee, at paragraph 17 of the defence filed on his behalf, repeats almost verbatim Mr Shetty's denial that he signed the First, Second and Third Guarantees:

> "Mr Binay neither signed nor authorised any person on his behalf to sign the Personal Guarantee as claimed by the Claimant. Mr Binay does not exclude the possibility that his signature on the Personal Guarantees was forged by the First Defendant's managers who have now absconded from legal scrutiny as explained in paragraphs No 4 and 5 of this Defence. Mr Binay shall be relying on the opinion of an experienced and qualified forensic document examiner on the issue of whether someone other than Mr Binay had signed the aforementioned documents."

256. Mr Binay's denial has no substance.

257. His speculation that his signature may have been forged by the First Defendant's managers must be rejected for the same reasons as Mr Shetty's speculation to the same effect must be rejected.

258. Mr Binay's assertion that "he shall be relying on the opinion of an experienced and qualified forensic document examiner on the issue of whether someone other than Mr Binay had signed the aforementioned documents" should be disregarded. Like Mr Shetty, Mr Binay has had had an adequate opportunity to have the documents examined by a forensic document examiner but has not done so and has offered no explanation why he has not done so.

259. The possibility that Mr Binay's signature was forged by representatives of the Claimant is implausible for substantially the same reasons that the possibility that representatives of the Claimant forged Mr Shetty's signatures is implausible.

260. Like Mr Shetty, Mr Binay has elected not to sign his defence and not to make any witness statement denying that he signed the Binay Guarantee.

261. The compelling evidence of Mr Baskaran, the inherent probabilities, and the insubstantial nature of Mr Binay's evidence in response are sufficient to allow the Court to find that Mr Binay's forgery defence has no real prospect of success.

Examination of guarantees by expert not compelling reason for trial

262. Mr Shetty and Mr Binay appear to argue that the immediate judgement application should not be determined at this time because the opinion of a forensic expert is critical for their defence against forgery and that is a compelling reason why the case should be disposed of at a trial.

263. The argument in their skeleton argument is as follows;

a) the expert's inspection of Mr Shetty's signature on the disputed NMC Guarantee and NMC Facility Agreement has uncovered instances of misuse of Mr Shetty's signature;

b) the Defendants' concern about their signatures being misused/forged on the UAE Exchange documents cannot be dismissed without examination of the original documents by a forensic expert as it involves the same parties save for Mr Binay's involvement in the NMC case;

c) the opinion of a forensic expert is critical for the Defendants' defence against forgery; and

d) it would be detrimental and unfair to their right to prepare a proper defence if the Court considers the immediate judgement application at this stage.

264. That argument has no merit. First, Mr Albah's inspection of Mr Shetty's signature on the NMC Guarantee and NMC Facility Agreement has not uncovered instances of misuse of Mr Shetty's signature.

265. Secondly, and critically, Mr Shetty and Mr Binay have had a reasonable and proper opportunity to have a forensic expert examine the First, Second, Third and Binay Guarantees and the First Facility Agreement and Supplemental Agreements.

266. The lawyer for Mr Shetty and Mr Binay filed defences on their behalf on 25 April 2023. The defences asserted that Mr Shetty and Mr Binay did not sign the First, Second, Third and Binay Guarantees and pleaded that they shall be relying on the opinion of an experienced and qualified forensic document examiner on the issue of whether someone other than Mr Shetty or Mr Binay respectively had signed the guarantee documents.

267. On 19 September 2023, a forensic expert instructed on behalf of Mr Shetty attended the offices of the Claimant's lawyers and inspected documents including the original off the NMC Facility Agreement and the NMC Guarantee.

268. Mr Shetty and Mr Binay elected not to provide a witness statement denying or responding to the detailed evidence of Mr Kumar and Mr Baskaran that they witnessed Mr Shetty and Mr Binay sign the Third and Binay Guarantees respectively.

269. Mr Shetty and Mr. Binay have not caused a forensic expert to examine the First, Second, Third and Binay Guarantees. There is no evidence that they have attempted but been prevented from doing so or, if they had been, that they have applied to the Court for an order to facilitate a forensic expert examining the documents.

270. Mr Shetty and Mr. Binay have had a reasonable and proper opportunity to cause a forensic expert to examine the First, Second, Third and Binay Guarantees but have not taken the opportunity.

271. In those circumstances the need for the First, Second, Third and Binay Guarantees to be examined by a forensic expert is not a compelling reason for the case to be disposed of at a trial.

Prudential Rules do not make the guarantees unenforceable

272. The Defendants submit that Personal Guarantees are unenforceable pursuant to provisions of the DFSA Prudential - Investment, insurance Intermediation, and Banking Module ("Prudential Rules").

273. Chapter 4 of the Prudential Rules deals with the prudential requirements relating to the management of Credit Risk by an Authorised Firm. The chapter aims to ensure that an Authorised Firm holds sufficient regulatory capital of acceptable quality so that it can absorb unexpected losses arising out of its Credit Risk Exposures.

274. In Mr Sheheen's second witness statement, he refers to rules 4.4.2, 4.4.3, 4.4.7, 4.4.8 and 4.5.9 of the Prudential Rules, which require an Authorised Firm to implement and maintain a credit risk policy, which must include certain things, to implement and maintain a documented credit procedures manual which sets out certain criteria and procedures and establish certain criteria for granting credit, to maintain and implement processes for credit assessment, and, on a specified minimum periodic basis, to review its problem credits.

275. In their skeleton argument and in Mr Sheheen's second witness statement the Defendants contend that the Claimant did not adequately evaluate the credit risk posed by UAE Exchange and did not adhere to the guidelines outlined in chapter 4 of the Prudential Rules before granting additional facilities and approving draw-down requests made by UAE Exchange's management. They further contend that the Personal Guarantees do not meet the requirements of the Prudential Rules relating to recognising the effects of Credit Risk mitigation of a guarantee.

276. The Defendants did not submit that the Prudential Rules themselves make the Personal Guarantees unenforceable or confer on the Defendants a cause of action against the Claimant which might give rise to a set-off or make the Claimant's action not maintainable.

277. The Defendants have not explained how a contravention of the specified provisions of chapter 4 of the Prudential Rules by the Claimant, if the

Claimant has failed to comply with the Prudential Rules, provides a defence to the Claimant's claim against them.

278. It is the obligation of the Defendants and their legal representatives to identify the defence being advanced and the facts giving rise to it. That does not mean referring to facts and regulatory rules in an oblique way. It means squarely putting the defence, if there is one, by coherently expressing the facts and legal propositions in a way that the Court can understand the defence that is being put forward. It is not for the Court to search out, organise and bring together facts and legal propositions that might give rise to a defence that has a real prospect of success.

279. The Defendants have not sufficiently or at all identified a legal basis for their contentions in relation to the Prudential Rules and the defence being advanced based on those contentions.

280. In any event, there is no evidence that the Claimant did not maintain the specified policies, credit procedural manual, processes for assessment, or carry out the specified periodic reviews or fail to comply with the prudential requirements relating to the management of Credit Risk alluded to in the Defendants' skeleton argument.

281. I consider that the Defendants have no real prospect of successfully defending the claim on the basis that the Claimant has failed to comply with the specified rules in chapter 4 of the Prudential Rules.

282. In his defence, Mr Shetty pleaded that the Claimant was required to secure facilities through sufficient and adequate securities but did not secure the loan with any additional security other than the Personal Guarantees from Mr Shetty and Mr Binay and therefore the Claimant did not take sufficient measures to secure the facility. Mr Binay raises a similar contention.

283. Mr Shetty and Mr Binay appear to elaborate on this contention in their skeleton argument and in Mr Sheheen's second witness statement. The Defendants contend that the Claimant did not adequately evaluate the credit risk posed by UAE Exchange and did not adhere to the guidelines outlined in the Prudential Rules before granting additional facilities and approving draw-down requests made by UAE Exchange's management.

284. The Defendants have not adduced any evidence that the Claimant did not adequately evaluate the credit risk posed by UAE Exchange or did not adhere to the guidelines outlined in the Prudential Rules before granting the loans or credit pursuant to the First Facility Agreement as amended by the First and Second Supplemental Agreements.

285. The Defendants appear to rely upon the Claimant approving a drawdown request of USD 35 million on 27 February 2020. They submit that there were serious doubts raised with respect to UAE Exchange's financial statements in the report published by Muddy Water Capital LLC on December 17, 2019 ("Muddy Water Report") and nearly three months later, on 27 February 2020, the Claimant approved a draw-down request of UAE Exchange for USD 35 million.

286. The Defendants' contention appears to be that the Claimant did not carry out a thorough examination of UAE Exchange's capacity and willingness to repay the debt, or identify the source of repayment or, at a minimum, on a monthly basis, review its problem credits and re-classify its assets as required by the Prudential Rules. The loan was classified as non-performing 6 months after the release of the Muddy Water Report, and 4 months after the approval of the draw-down request on 27 February 2020.

287. Neither the defences, nor the skeleton argument elaborate on how those matters provide a defence to the Claimant's claim. Mr Sheheen did not elaborate on the matter in his oral submissions. In Mr Sheheen's second witness statement he said the Claimant was negligent to approve the drawdown requests without taking any steps to verify the credit risk presented by the Borrower. He said the Claimant was either negligent in failing to properly assess the Borrower's ability and willingness to repay the debt; or the Claimant conducted an internal verification and complied with the Prudential Rules and chose to approve the draw-down request notwithstanding the credit risk the Borrower posed.

288. Actions in negligence are governed by the Law of Obligations, DIFC Law No.5 of 2005. A claimant must establish that the defendant owes a duty of care to the claimant, the defendant breached that duty of care and the defendant's acts or omissions in breach of his duty of care caused loss to the claimant and, as here, the facts which satisfy s.20 of the Law of Obligations concerning pure economic loss.

289. The Defendants have not pleaded, or otherwise identified, that the Claimant owed them a duty of care, the content or scope of any such duty, that the Claimant breached such a duty or the Claimant's acts or omissions in breach of that duty of care to the Defendants which caused loss to the Defendants, or the facts which satisfy s.20 of the Law of Obligations.

290. I am not able to discern the legal defence being advanced.

291. The Defendants appear to rely upon the Claimant approving a drawdown request of USD 35 million on 27 February 202 without carrying out a credit assessment in accordance with the Prudential Rules, as the negligent act or omission giving rise to their claim against the Claimant in negligence.

292. The Defendants have not explained the content or scope of a duty of care owed by the Claimant to the Defendants.

293. There is no evidence from which it may be inferred that the that the Claimant was negligent by approving the drawdown request without taking any steps to properly assess the credit risk presented by UAE Exchange. There is no evidence that the Claimant was or should have been aware of the Muddy Water report before it approved the draw down on 27 February 2020 or that the Claimant did not carry out an adequate review before approving the draw down. It was not until April 2020 that UAE Exchange went into administration.

294. The Defendants have not explained how their claim stands with clause 2.4(c) of each of the Personal Guarantees which provides that the obligations of the guarantor will not be affected by any act, omission, matter or thing which, but for this clause would reduce, release or prejudice any of its obligations under the guarantee including neglect to take up any security over assets of the Borrower or any unenforceability, illegality or invalidity of any obligation of any person under the Facility Agreements or any other document or security.

295. The Defendants have not established the necessary reliance or causation.

296. In summary, there is no real prospect of the Defendants successfully defending the claim on the basis that the Claimant was negligent in approving the 27 February 2020 draw down by UAE Exchange.

UAE Federal Laws do not apply

297. The Defendants assert that the Personal Guarantees are unenforceable because of the provisions of Article 1061 of the UAE Civil Code and Article 121 bis of the Banking Law.

298. The Defendants argue that UAE Federal Laws apply to the Personal Guarantees notwithstanding that each of the guarantees provides that they "shall be governed by the laws of the Dubai International Financial Centre".

299. The Defendants first argument relies on the "waterfall provisions" of Article 8(2) of DIFC Law on the Application of Civil and Commercial Laws in the DIFC (DIFC Law No.3 of 2004) to argue that UAE Federal Laws govern the treatment of personal guarantees and the requirement of determining the debt of a borrower where DIFC law is silent on those issues.

300. It is unnecessary to consider whether the Defendants have accurately characterised the relevant legal questions or whether DIFC law is silent on those questions because the argument on which the Defendants contention is based is wrong. The laws of the UAE do not apply merely because DIFC law does not expressly contain the cause of action or remedy relied upon by the Defendants.

301. In *The Industrial Group Limited v Abdelazim El Sheikh El Fadi Hamid*[18] the Court of Appeal rejected the basis for the Defendants' argument. The Court of Appeal held that the waterfall provisions are concerned with choice of law rules to determine the applicable system of law rather than the content of that system of law. The Court of Appeal explained:

> "The wording of Art. 8(1) is plainly expressed. The rights and liabilities are to be determined "according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2)". The content of the law in the jurisdiction chosen in accordance with Art. 8(2) is neither here nor there; it is whatever laws are for the time being in force in the jurisdiction chosen." (emphasis in original)

302. The Court of Appeal held:

> "The fact that there is a "gap" in the law in the jurisdiction chosen in accordance with Article 8(2) does not give parties a right to select the next jurisdiction in the waterfall or "trigger a default selection of the next jurisdiction in line".

303. The Defendants' second argument is that Article 7(2) of DIFC Law No.12 of 2004 as amended provides that any judgement issued by the DIFC Courts to be executed outside the DIFC shall be executed only in accordance with the procedure and rules adopted by the specific courts and in this case the courts of Abu Dhabi because Mr Shetty and Mr Binay are resident in Abu Dhabi and accordingly any execution proceedings contrary to the procedures and rules set out in the UAE laws would fail.

304. That argument may be dealt with summarily. On an application for immediate judgement, the Court is not concerned with where the judgement might be executed and whether it could be executed in any particular jurisdiction.

Article 1061 does not make the guarantees unenforceable

305. The Defendants argue that the Personal Guarantees are unenforceable pursuant to Article 1061 of the UAE Civil Code, which governs the Personal Guarantees.

306. That argument may also be dealt with summarily. For the reasons already stated UAE Federal Laws do not apply to the Personal Guarantees or the dispute arising from them.

Article 121 bis does not make claim not maintainable

307. The Defendants argue that the Personal Guarantees are unenforceable pursuant to Article 121 bis of the Banking Law of the UAE, which governs the Personal Guarantees.

308. That argument may also be dealt with summarily. For the reasons already stated UAE Federal Laws do not apply to the Personal Guarantees or the dispute arising from them.

Section 4 of the Statute of Frauds 1677 (UK) does not apply

309. The Defendants argue that Article 8(2)(e) of DIFC Law No.3 of 2004 provides for the laws of England and Wales to be the governing law if the UAE Federal Laws are not applicable under Article 8(2)(d). The Defendants then argue that the Personal Guarantees are unenforceable because they contravene Section 4 of the Statute of Frauds 1677 (UK).

310. That contention must be rejected for the same reasons that the Defendants' contention that the UAE Federal laws govern this claim must be rejected. The Personal Guarantees and disputes arising from them are governed by the law of the DIFC. The UK Statute of Frauds does not apply to the Personal Guarantees or the Claimant's claim based on them.

Claim should not be stayed pending determination of liability of UAE Exchange

311. The Defendants submit that the proceedings against the Defendants should be stayed until UAE Exchange's liability is determined.

312. That contention has no merit for substantially the same reasons that Mr Shetty has no real prospect of defending the claim against him in the NMC case on the ground that the liability of NMC Healthcare has not been determined.

313. It is not in the interests of justice that the proceedings be stayed until the liability of UAE Exchange has been determined. The Claimant's rights under the Personal Guarantees are not dependent on the Claimant first obtaining a determination of the liability of UAE Exchange.

Mr Binay's Insolvency Case

314. On 22 November 2023, that is after the hearing of these applications, the lawyers for Mr Binay, Bakertilly, informed the Court that Mr. Binay had initiated Insolvency Proceeding before the Court of First Instance, Dubai ("Dubai Court") under Case No. 86 of 2023 ("Insolvency Case") in accordance with the provisions of the Federal Law Decree No. (19) of 2019 Concerning Insolvency ("UAE Insolvency Law") and that the Dubai Court has approved the Insolvency Case and appointed Mr. Ahmed Ali Ahmed Al-Hosni as the trustee to commence the insolvency proceedings.

315. Bakertilly submitted that pursuant to Article 7 read along with Article 51 of the UAE Insolvency Law, the commencement of the insolvency proceedings shall result in the suspension of all ongoing lawsuits and judicial execution procedures against Mr Binay's assets. They further submitted that the Claimant shall be entitled to enforce the disputed guarantee only after obtaining permission from the Dubai Court and, in accordance with Article 8 of the UAE Insolvency Law, the Claimant is required to present its claims against the Mr Binay and supporting documents to the trustee.

316. Bakertilly requested that in light of those matters and bearing in mind the overriding objective of the DIFC Courts, the Court should exclude Mr Binay from the Immediate Judgement Application or grant a stay in favour of Mr Binay under the Stay Application No. CFI-043-2021/7 in the UAE Exchange case until the completion of the Insolvency proceedings before the Dubai Court (the "Stay Request").

317. On 29 November 2023. the Claimant filed submissions in opposition to the Stay Request and on 7 December 2023, Mr Binay filed submissions in response.

318. Amongst other things, the Claimant submitted that the Court should decline to consider the Stay Request unless and until Mr Binay makes a proper application, supported by evidence, and the application fee is paid.

319. In response, Bakertilly said that Mr Binay has already applied for the stay of the present proceedings albeit on different grounds. Notice of the Insolvency Case was sent by email to the Court and the Claimant with the intention to inform the parties and the Court of the Insolvency Case as soon as they had knowledge and confirmation of it. However, Bakertilly said, if a separate application is to be submitted even though the hearing of these applications has concluded, Mr Binay is willing to submit such an application as per the directions of the Court.

320. The Stay Request is an entirely different application than the application filed by Mr Shetty and Mr Binay on 13 September 2023 to stay the proceedings against Mr Shetty and Mr Binay until the liability of UAE Exchange has been determined and proved. The Stay Request should have been brought by a separate application filed with the Court. The way in which Bakertilly have raised the issue has resulted in the Court not having the benefit of evidence establishing the relevant facts and the legal basis for a stay being articulated and the subject of argument. The Court has been forced to search out, organise and bring together facts and legal propositions that might support staying the case against Mr Binay. Mr Binay choose not to file an application supported by evidence and coherent legal argument. The Court will not now delay the resolution of these applications by giving directions for Mr Binay to bring an application.

321. There is a dispute between the parties as to the stage the Insolvency Case has reached, and the effect of the Dubai Court having approved the Insolvency Case and appointed Mr. Ahmed Ali Ahmed Al-Hosni as the trustee to commence the insolvency proceedings. The scarce materials before the Court make it inappropriate to resolve that dispute. In any event, I find it unnecessary to do so because there are fundamental issues with the Stay Request which are fatal to acceding to the request.

322. The first question is: what is the source of the Court's power to stay the case against Mr Binay or the basis on which it can and should do so? The Bakertilly submissions allude to four possible bases for the Court to stay the case against Mr Binay.

323. The first possible basis is the UAE Insolvency Law.

324. The UAE Insolvency Law does not apply in the DIFC, pursuant to Article 3(2) of the Financial Free Zones Law. The law which applies in the DIFC is DIFC Law No. 1 of 2019 (the "DIFC Insolvency Law").

325. The order of the Dubai Court does not have (and does not purport to have) extraterritorial effect. This is not an execution proceeding and, in any event, the order of the Dubai Court is not entitled to recognition in the DIFC Court under Article 7(4) of the Judicial Authority Law because there is currently no subject matter of execution situated in the DIFC, nor is it final and executory, and it thus does not meet the requirements of Article 7(4).

326. The second possible source of power is the DIFC Insolvency Law. Insolvency proceedings in the Dubai Courts are "foreign" proceedings" in the DIFC Court. Article 117(3) of the DIFC Insolvency Law provides that the UNCITRAL Model Law (with certain modifications for application in the DIFC) as set out in Schedule 4 of the DIFC Insolvency Law has force in the DIFC in respect of Foreign Companies. Mr Binay is not a Foreign Company. The DIFC Insolvency Law and Schedule 4 do not apply to Mr Binay.

327. Further, the relevant provisions of Schedule 4 do not apply to Mr Binay. Under Chapter III "a foreign representative" may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed. Upon recognition of a foreign proceeding the Court may grant relief including staying proceedings. The "foreign representative" is defined as the person authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding; it is not the debtor. Mr Binay is not "a foreign representative". Mr. Ahmed Ali Ahmed Al-Hosni may be a foreign representative, but he has not made any application for recognition of the foreign proceeding or a stay of the case against Mr Binay.

328. In short, the DIFC Insolvency Law does not confer power on the Court to stay the case against Mr Binay.

329. The third basis on which Bakertilly submit the Court should stay the case against Mr Binay is that enforcement of the DIFC Court's judgement would be dependent on the trustees of the insolvency proceeding taking place in the Courts of Abu Dhabi in line with the applicable laws i.e., UAE Insolvency Law, because Mr Binay is resident in Abu Dhabi. Bakertilly refer to the statement of Justice Sir Jeremy Cooke in Altamimi v Emirates NBD Bank and others[19]:

> "To the extent that any enforcement is sought against the individual guarantors who may have assets elsewhere in the world, any enforcement there would be subject to the ability of the Trustees to take objection on the same or a similar basis as in the application before this Court, by reference to the insolvency laws and conventions applicable in that jurisdiction."

330. Justice Sir Jeremy Cooke did not think the argument in that case had any merit, stating[20]:

> "The trustees are anxious that the DIFC Court should not decide any case against the Joined Litigants or the borrowers and even more specifically HEAQ. They wish to decide the existence and amount of indebtedness themselves, subject to a limited right of an aggrieved party to present his grievance to the Abu Dhabi Court. They profess to wish to avoid unnecessary expense for the benefit of the creditors as a whole, but appear not to be interested in a judicial determination of an issue of forgery which can only be appropriately decided, if genuinely in dispute by the court process, which could result in an increase of the assets available to the whole body of creditors,"

331. This case has even less merit because it is the debtor, not the trustee, who seeks the stay of the proceeding in the DIFC Court and must be presumed to do so for his benefit, not the benefit of his creditors.

332. Further, any issue that might arise on the Claimant seeking to execute a judgment is not a reason for staying the case against Mr. Binay. The applications before the Court are not applications for execution. The Court does not know where the Claimant may seek to execute a judgement against Mr Binay. The Court is not concerned with execution.

333. Fourthly, insofar as the Court has a broad discretion to stay the proceedings, the Insolvency Case is not a good reason for staying the proceeding. It is appropriate that Mr Binay's liability, depending on questions of fact and law, should be determined in this Court rather than in the insolvency process in the Insolvency Case.

334. There is no good reason to stay the case against Mr Binay arising from the Insolvency Case.

Conclusions on UAE Exchange case

335. For the reasons stated:

a) The Defendants have no real prospect of successfully defending the claim against them and there is no other compelling reason why the case should be disposed of at a trial;

b) the Claimants application for immediate judgement against the Defendants should be granted; and

c) Judgement should be entered for the Claimant against the Defendants in the sum of USD 44,102,956 plus USD 6,492.61 per day since 17 November 2023, that is USD 44,511,990.40.

336. The Defendants' application to dismiss or stay the claim against them will be dismissed.

Costs

337. The Court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they ought to be paid. In deciding what order to make about costs, the Court must have regard to all the circumstances. Accordingly, the parties should have an opportunity to make submissions, and if necessary to put on evidence, before the cost orders are resolved.

338. However, to save the parties the time and costs of unnecessarily making further submissions, I will make a provisional order as to costs.

339. My provisional views in relation to costs are as follows.

340. First, the Claimant has been completely successful on all of the applications and in accordance with the general rule the Defendants should pay the costs of the Claimant of each application.

341. Secondly, the costs should be assessed by a detailed assessment by the Registrar because the costs relate to two applications in each of the two cases and the costs of each case and having regard to the complexity of the assessment and the lack of material available to me it is not appropriate to make an immediate assessment of the costs.

342. Thirdly, the costs should be assessed on the standard basis because the facts of the case and conduct of the Defendants do not take the case away from the norm.

343. In each case I will order that unless within 14 days any party files a minute proposing different orders in relation to costs together with written submissions (and if appropriate any witness statement or exhibit), the relevant Defendants shall pay the Claimant's costs of:

a) the immediate judgment application;

b) the Defendants' applications to dismiss the immediate judgment application and dismiss or stay the proceedings; and

c) the case;

on the standard basis to be assessed by the Registrar by a detailed assessment if not agreed.

344. I will order that if any party files a minute of proposed orders (the "Minute") within 14 days:

a) the other party or parties may respond by filing written submissions and if appropriate witness statements and exhibits within 14 days of receipt of the Minute and supporting submissions and exhibits (if any); and

b) subject to any further order of the Court, the issues raised by the Minute and submissions (if any) as may be filed and served in accordance with these directions shall be determined by the Court without an oral hearing.