THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) AL AHLI BANK OF KUWAIT K.S.C.P.
(2) MASHREQ BANK PSC
(3) ARAB BANKING CORPORATION (B.S.C.)
(4) NATIONAL BANK OF OMAN (S.A.O.G.)
(5) STATE BANK OF INDIA
(6) REGERA S.A. R.L.

Claimants

and

(1) EMIRATES HOSPITALS GROUP LLC
(2) KHALEEFA BUTTI OMAIR YOUSIF AHMED AL MUHAIRI
(3) H.E. SAEED MOHAMMED BUTTI MOHAMMED KHALFAN AL QEBAISI
(4) EMIRATES HEALTHCARE L.L.C.
(5) EMIRATES HOSPITAL L.L.C.
(6) EMIRATES SPECIALITY HOSPITAL FZ-LLC
(7) EMIRATES HOSPITALS & CLINICS L.L.C.
(8) EMIRATES HOSPITALS REHABILITATION AND HOMECARE SERVICES L.L.C.
(9) EXCEL HEALTHCARE L.L.C.
(10) EMIRATES PHARMACY L.L.C.
(11) COSMESURGE AND EMIRATES HOSPITAL PHARMACY L.L.C.
(12) VEINCUE CLINIC DMCC
(13) EMIRATES HOSPITAL DAY SURGERY & MEDICAL CENTRE L.L.C.
(14) EMIRATES HOSPITALS CLINICS BUSINESS BAY L.L.C
(15) KLINKA MAHARLIKA L.L.C.
(16) AL SABAH MEDICAL CENTRE L.L.C.
(17) COSMOPOLITAN MEDICAL CENTRE L.L.C.
(18) EMIRATES STAR MEDICAL CENTRE L.L.C.

Defendants

(1) CREDIT SUISSE AG
(2) AHLI UNITED BANK B.S.C. (DIFC BRANCH)
(3) NATIONAL BANK OF OMAN (S.A.O.G.), DUBAI BRANCH

Additional Defendants to the Counterclaim of
the First and Fourth to Eighteenth Defendants

REASONS OF JUSTICE WAYNE MARTIN FOR THE AMENDED JUDGMENT DATED 20 OCTOBER 2022

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 28 October 2022
At: 9am

SCHEDULE OF REASONS

Introduction

1. On 12 October 2022, following the completion of the trial of the claim against the Third Defendant, I ordered that judgment be entered against the Third Defendant in the amount of USD 348,751,608.59 together with costs and post judgment interest for reasons to be published. These are those reasons.

Procedural history

2. Following a hearing held on 30 November 2021, on 6 December 2021 immediate judgment was entered against all Defendants other than the Third Defendant. Reasons for that judgment were published on 20 December 2021. The general history of these proceedings up to the point of the hearing of the application for immediate judgment on 30 November 2021 was set out in paragraphs [3]-[15] of those reasons. It is unnecessary to repeat that history in these reasons, and those paragraphs of my earlier reasons should be taken to be incorporated into these reasons.

3. It is appropriate to augment that history with particular reference to steps involving the Third Defendant, and by reference to events which have occurred since the hearing on 30 November 2021.

4. As noted in the reasons published on 20 December 2021, on 28 September 2020, the Second and Third Defendants issued an application challenging the jurisdiction of this Court. A witness statement of the Third Defendant was filed in support of that application in which he asserted that he had not signed the guarantees upon which the Claimants rely for their claim against him.

5. On 21 October 2020 the Claimants filed a witness statement of Ms Yuliya Zyuzina ("Ms Zyuzina") in opposition to the challenge to the jurisdiction of the Court by the Second and Third Defendants.

6. Following the order lifting the stay of proceedings on 9 August 2021, a second witness statement of the Third Defendant was filed in support of his challenge to the jurisdiction of the Court. Further, on 7 September 2021 an expert report of Mr John Osborn ("Mr Osborn") was filed in support of the challenge to jurisdiction. A supplementary report from Mr Osborn was filed on 10 November 2021.

7. On 6 December 2021, at the time of entering immediate judgment against all Defendants other than the Third Defendant, I also dismissed the challenge to the jurisdiction of the Court made by the Second and Third Defendants, for reasons published on 20 December 2021.

8. On 21 December 2021, the Third Defendant filed a Defence (the "Defence"). The terms of that Defence will be considered in more detail below.

9. On 22 December 2021, the Claimants filed the expert report of Dr Kathryn Barr ("Dr. Barr"), an expert in the forensic examination of handwriting. Dr Barr gave evidence at the trial on 12 October 2022, and I will refer to her report and her evidence below.

10. The application made by the Trustee in Bankruptcy for recognition of the bankruptcy proceedings in Abu Dhabi and for a stay of these proceedings based upon such recognition was heard in a hearing commencing on 31 January 2022. On 11 February 2022, Justice Sir Jeremy Cooke dismissed that application for reasons published at the time.

11. On 24 February 2022, the Claimants filed a Reply to the Defence of the Third Defendant (the "Reply"), to which reference will be made below.

12. On 26 April 2022, the Registrar issued a Case Management Order. On the same day, the Claimants filed and served upon the Third Defendant a Request to Produce Documents. The time for production of those documents expired on 8 June 2022, without any documents having been produced by the Third Defendant. The lawyers for the Claimants sent an email to the lawyers representing the Third Defendant on 15 June 2022 drawing attention to the Third Defendant's failure to produce documents in response to the request.

13. On 12 July 2022, the Third Defendant's lawyers applied to come off the Court record, and an order to that effect was made by the Deputy Registrar on 15 July 2022.

14. On 21 July 2022, in accordance with the Court's directions, the former lawyers for the Third Defendant notified the Court and the Claimants of an address for service of documents upon the Third Defendant. Documents have been served upon that address, and communications have been directed to the Third Defendant without response.

15. On 10 August 2022, the Claimants filed and served the second witness statement of Ms Zyuzina.

16. I am satisfied that the Third Defendant was given notice of the trial which was held on 12 October 2022. However, neither he nor anybody acting on his behalf attended or participated in any way in that trial.

The consequences of the non-appearance of the Third Defendant

17. Rule 35.14 of the Rules of the DIFC Courts ("RDC") provides:

> "35.14 The Court may proceed with a trial in the absence of a party but:
>
> (1) .
>
> (3) If a defendant does not attend, it may strike out his defence or counterclaim (or both). The claimant may prove his claim at trial and obtain judgment on his claim and for costs."

18. The Claimants expressly requested the Court not to exercise the power to strike out the Third Defendant's Defence, and submitted that the trial should proceed and evidence in support of the claim should be called in the absence of the Third Defendant. In all the circumstances of this case, the Court accepted that submission and proceeded accordingly.

19. However, the failure of the Third Defendant to appear to give evidence at the trial, or to present Mr Osborn in order to give oral testimony relating to his reports and submit to cross-examination has significant implications in relation to the evidence before the Court.

20. RDC 29.12 provides:

> "29.12 The general rule is that any fact which needs to be provided by the evidence of witnesses is to be proved:
>
> (1) At trial, by their oral evidence given in public ."

21. Further, RDC 29.41 provides:

> "29.41 If:

(1) A party has served a witness statement; and

(2) He wishes to rely at trial on the evidence of the witness who made the statement;

he must call the witness to give oral evidence unless the court orders otherwise or he puts the statement in as hearsay evidence."

22. There was no application to tender the witness statements of the Third Defendant or the expert reports of Mr Osborn as hearsay evidence.

23. The consequence of these provisions of the Rules is that the pre-conditions to the receipt in evidence of the witness statements of the Third Defendant and the expert reports of Mr Osborn were not met, because neither man attended trial for the purpose of giving oral evidence and neither was made available for cross-examination. During the course of the trial, I indicated that I did not propose to receive any of the two witness statements of the Third Defendant or the two expert reports of Mr Osborn in evidence for the reasons set out above. This approach is consistent with that taken in *Dagher v Capital Investment International Ltd.*[1]

24. However, as I also indicated during the trial, if I had taken a different view of the effect of the Rules of Court and had received the witness statements of the Third Defendant and the expert reports of Mr Osborn in evidence, I would not have given them any weight because they bear upon a significant contested issue and neither man has been made available for cross-examination with respect to that issue.

The pleadings

The Amended Particulars of Claim

25. The Claimants filed Amended Particulars of Claim on 22 September 2021. In paragraph [6] of those Particulars it is asserted that the claim arises from documents executed in two tranches - namely:

(a) a Conventional Facility Agreement, Common Terms Agreement and Guarantee each dated 10 April 2018 under which a USD 250,000 credit facility was advanced to the First Defendant, repayment of which was guaranteed by the Fourth-Eighteenth Defendants in the Common Terms Agreement, and by the Second and Third Defendants in the Guarantee; and

(b) an additional Conventional Facility Agreement and Guarantee dated 24 May 2018 by which an additional USD 50 million facility was made available to the First Defendant, repayment of which was guaranteed by the Second - Eighteenth Defendants.

26. Particulars are given of the transfer of entitlements as between the Claimants. It is unnecessary to review those Particulars as the Claimants sued jointly and judgment was entered in their favour jointly, at their request.

27. The Particulars go on to plead the material terms of the relevant agreements, the events of default by the First Defendant and the demands for payment made and served upon the Second and Third Defendants in respect of their obligations as guarantors. It is asserted that each of those Defendants has failed to make any payment at all in satisfaction of those obligations.

The Third Defendant's Defence

28. The Third Defendant submitted his Defence without prejudice to his contention that the proceedings should be stayed pending the outcome of the application made by the Trustee in Bankruptcy for a stay of these proceedings. As noted above, that application was dismissed after the Defence was filed.

29. In the Defence it is asserted that the Third Defendant did not sign either of the two Guarantees and that his signature on those Guarantees was forged by persons unknown. It is also asserted that the Third Defendant has never met the person who is stated on each Guarantee to have witnessed his signature.[2] It is asserted that the Guarantees form part of a fraud in which the Third Defendant is a victim.[3] It is further asserted that this fraudulent scheme was perpetrated across a number of corporate groups with which the Third Defendant was involved.

30. In the Defence it is further asserted that the Third Defendant did not receive any advice with respect to the execution of either Guarantee from lawyers within the firm Latham & Watkins.[4] The Third Defendant denies the authenticity of the documents provided by that firm.

31. The Defence also takes issue with the Claimants' assertion that the Third Defendant had acknowledged the existence of the Guarantee by approving the group accounts for the period ending 31 December 2018 in which reference is made to personal guarantees.[5]

32. The Defence also asserts that the Third Defendant did not execute the Common Terms Agreement, and that he has never met the person who purportedly witnessed his signature on that agreement.[6]

33. In the Defence the events of default pleaded by the Claimants are admitted. Issue is also joined in relation to the effective service of the demands under the Guarantee.

The Reply

34. In their Reply, the Claimants take issue with the Third Defendant's assertion that his signatures on the Guarantees were forged. It is further asserted, in the alternative, that even if the Third Defendant did not sign the Guarantees he was aware that they were being provided on his behalf and either authorised the application of his signature to the documents or subsequently ratified the application of his signature to the documents such that they are binding upon him.[7]

35. In relation to service, the Claimants assert in their Reply that the demands were sent to the address specified for communications by the Third Defendant in the personal Guarantees. That assertion is proved by the evidence.

The evidence

36. The Claimants rely upon the evidence which was before the Court in relation to the immediate judgment application, augmented by the two statements of Ms Zyuzina, the expert report of Dr Barr and the oral testimony of the latter two witnesses.

37. The evidence relating to the documents comprising the financing agreements and guarantees, the events of default and the service of demands by reason of the default upon which the Court relied for the purposes of entry of judgment against the other Defendants was provided in the witness statement of Mr Simon Roderick ("Mr Roderick") of 30 September 2021. That evidence remains before the Court. In reliance upon that evidence the Court made the findings set out at [36]-[47] of the reasons for entry of immediate judgment. There is no evidence to the contrary of that provided by the documents which were produced in evidence through Mr Roderick's statement, and the findings of fact set out in those paragraphs should be taken to be incorporated into these reasons.

38. It follows that the Claimants have established the default by the First Defendant in the performance of its obligations under the financing agreement. The only questions which remain to be considered are:

(a) whether the Third Defendant is liable under the Guarantees relating to the performance of those obligations; and, if so,

(b) the amount currently due by the First Defendant to the Claimants and for which the Third Defendant is liable under the Guarantees.

The statements of Ms Zyuzina

39. Ms Zyuzina is an employee of Credit Suisse International, which is a corporate entity associated with a bank which was a party to the financing agreements with the First Defendant; although it no longer retains any interest in those agreements. In her first statement Ms Zyuzina asserts that on each of 10 April and 24 May 2018, at the request of Credit Suisse, the Second and Third Defendants arranged for signed capacity opinions to be provided by the Dubai office of Latham & Watkins LLP, together with certificates signed by Mr James Chesterman of Latham & Watkins' London office ("Mr Chesterman") confirming that each of the Second and Third Defendants had received independent legal advice in relation to potential liability and risks associated with their entry into the personal Guarantees, together with confirmation letters from each of the Second and Third Defendants confirming that they had received such advice. Those documents are exhibited to her statement.

40. Ms Zyuzina states that no representative of Credit Suisse or any of the other Claimant banks, nor their legal advisers were physically present to witness the signature of the Second and Third Defendants at the time the Guarantees were signed, and observes that execution was arranged between the lawyers representing the parties.

41. In her second statement Ms Zyuzina exhibits a number of transaction documents involving the provision of finance to corporate entities in which the Third Defendant was a shareholder and in respect of which personal Guarantees were provided in respect of the obligations of the borrower. Those transactions include:

(a) The provision of a USD 230 million Facility Agreement dated 5 September 2017, for which the Third Defendant provided a personal Guarantee, in respect of which a solicitor's confirmation letter was provided from a partner at Latham & Watkins along with written confirmation from the Third Defendant to the effect that he had received the advice from that lawyer and understood his obligations;

(b) A USD 680 million Facility Agreement dated 29 November 2017 in respect of which the Third Defendant provided a personal Guarantee dated 10 April 2018 which was accompanied by a solicitor's confirmation letter from Latham & Watkins;

(c) A USD 600 million Facility Agreement dated 2 September 2019 in respect of which the Third Defendant provided a personal Guarantee accompanied by a solicitor's confirmation letter signed by Mr Chesterman of Latham & Watkins and a confirmation certificate provided by the Third Defendant;

(d) An amendment to the Facility referred to in (c) above, taking the amount of the Facility to USD 640 million, by an agreement dated 14 November 2019 in respect of which the Third Defendant provided a personal Guarantee accompanied by a solicitor's confirmation letter signed by Mr Chesterman of Latham & Watkins and a certificate from the Third Defendant confirming that he had been advised by Mr Chesterman.

42. Ms Zyuzina asserts that as a result of enquiries she has made she believes that the Third Defendant has not alleged that he did not sign the Guarantees relating to these transactions or that he did not receive advice from Latham & Watkins.

43. In her oral testimony Ms Zyuzina confirmed the truth of her statements.

The expert report of Dr Barr

44. Dr Barr is a qualified forensic document examiner and has worked in that field since 1992. She has undertaken handwriting analysis in thousands of cases and has given expert evidence in court on many occasions.[8]

45. Dr Barr analysed the signatures apparently written by the Third Defendant on the Guarantees dated 10 April and 24 May 2018 and the confirmation letters bearing the same dates. She compared the signatures on those documents to 11 signatures apparently of the Third Defendant on documents which were notarised. As Dr Barr explained in her report and in her oral testimony, the process of notarisation provides greater confidence that the signature which is used for the purpose of comparison is in fact the signature of the relevant person. All the notarised signatures used by Dr Barr for comparison purposes were apparently executed between 2017-2019 - that is to say, around the same time as the Guarantees being the subject of these proceedings.

46. Dr Barr examined the original documents on which the questioned signatures were placed microscopically and found that they appear fluently and spontaneously written, and show a natural variation in pen pressure. She did not find any evidence, such as guidelines or unexpected pen lifts,

to suggest that the signatures were the product of attempts at simulation.[9]

47. Dr Barr also observes that the questioned signatures show a number of similarities to the specimen signatures and no significant differences, and also exhibit an expected and natural range of variation from one to the other.[10] However, the simplicity of the signature design meant that she was unable to draw a definite conclusion as to whether the questioned signatures were written by the same person as the specimen signatures - that is to say, the Third Defendant.

48. Dr Barr was provided with Mr Osborn's reports. She observed that her opinion likely differed from that expressed by Mr Osborn because they used different specimen signatures for the purposes of comparison. In particular, Mr Osborn's specimens for the purpose of comparison consisted of a larger number of documents, some notarised and some not notarised, apparently written during the period between 2001 and 2021.

49. In her oral testimony Dr Barr confirmed the material points of her written report and which are set out above.

The Annual Report of the Emirates Hospitals Group LLC and subsidiaries

50. Because of the assertions contained in the Defence filed by the Third Defendant, it is desirable to make specific reference to one of the documents exhibited to the witness statement of Mr Roderick, being the Annual Report of the Board of Directors of Emirates Hospitals Group LLC for the year ended 31 December 2018. On the first page of that document the results for the year are summarised above a place for a signature by a director or directors on behalf of the Board of Directors. There is a signature on the report which bears a striking resemblance to the signatures said to be those of the Third Defendant on the personal Guarantees and confirmation letters. It is most improbable that the signature of the Third Defendant would have been forged on the Annual Report, or, if it had been, that the Third Defendant would have failed to become aware of that forgery.

51. Item 22 of the notes to the accounts which are included within the Annual Report refer to bank borrowings and identify a number of facilities obtained from banks, including the facilities the subject of these proceedings. Within that note it is asserted that:

> "These loans were secured against personal guarantees of H E Saeed Mohamed Butti Mohamed Khalfan Al Quebasi."[11]

Analysis of the evidence

52. As a result of the non-appearance of each of the Third Defendant and Mr Osborn, the evidence which might have been adduced from those men has not been admitted. Following the trial of the claim against the Third Defendant, the evidentiary position is very similar to the evidentiary position in the claim against the Second Defendant at the time of the immediate judgment application. In each case there was a bare assertion, unsupported by testimony from the relevant Defendant to the effect that his signature on the Guarantees had been forged.

53. In the immediate judgment application, I considered that the bare assertion made by the Second Defendant fell to be assessed in the context of the following matters which had been established on the evidence:

(a) "Although the Second and Third Defendants assert that they were not aware of the existence of the Guarantees that were shown to them in the course of these proceedings prior to the commencement of the proceedings, there is clear evidence to the contrary, including:

(i) the report of the Board of Directors of the First Defendant for the period ending 31 December 2018 (a Board on which both the Second and Third Defendants served) attached the consolidated audited financial statements for the Group in which the loans and the Personal Guarantees given by the Second and Third Defendants are expressly referred to;

(ii) each of the Second and Third Defendants were given notice of the claims based upon the Guarantees prior to the commencement of the litigation;

(b) Mr James Chesterman, a partner of Latham & Watkins (Lawyers), has provided certificates dated 10 April 2018 and 24 May 2018 in which he confirmed that he had explained the nature of the Guarantees and the finance documents to each of the Second and Third Defendants;

(c) Each of the Second and Third Defendants has expressly relied upon the Guarantees which they have given of the indebtedness the subject of these proceedings in the Abu Dhabi bankruptcy proceedings for the purposes of establishing that they are relevantly "traders" in those proceedings;

(d) The assertions that the Second and Third Defendants were unaware of the provision of credit of this magnitude to the Group of companies in which they hold substantial interests is inherently implausible;

(e) The assertion that the signatures of each Defendant on the Guarantees have been forged is inherently implausible;

(f) In other proceedings before the DIFC Courts involving Guarantees given by the Second and Third Defendants in respect of different corporate groups they have also asserted that their signatures on those Guarantees were forged, and it is inherently implausible that forgery of signatures on Guarantees would occur in each of three separate corporate groups."[12]

54. I make the same findings on the basis of the evidence adduced against the Third Defendant.

55. In addition, there is evidence available as against the Third Defendant that was not available at the time of the immediate judgment application in respect of the Second and other Defendants, being in particular the evidence provided in the second witness statement of Ms Zyuzina. It is clear from the terms of that statement that the Third Defendant has repeatedly given personal guarantees in respect of very substantial facilities, in relation to which he has received advice from Latham & Watkins, including Mr Chesterman and other members of that firm. That evidence provides substantial corroboration for the evidence upon which the Claimants rely. Although Dr Barr was unable to form a definitive conclusion because of

the simplicity of the signature used by the Third Defendant, her evidence does not cast any doubt upon the Claimants' assertion that the Guarantees relevant to these proceedings were signed by the Third Defendant.

56. Taking into account the various matters to which I have referred, I was and remain satisfied on the balance of probabilities that the Third Defendant signed the Guarantees upon which the Claimants rely for their claim against him. It is therefore unnecessary to consider the claim in the alternative to the effect that if the Third Defendant did not sign the Guarantees, he nevertheless authorised them to be signed on his behalf or subsequently ratified the purported signature on the Guarantees.

57. For these reasons I was satisfied that the Claimants have established that the Third Defendant is liable in respect of the debt owed by the First Defendant to the Claimants as a result of the Guarantees which he provided at the time the financial facility was provided to the First Defendant, and later when the financial facility was extended. It remains to consider the quantum of that liability.

Quantum

58. In the application for immediate judgment the Claimants adduced in evidence a certificate issued pursuant to the provisions of the Common Terms Agreement showing the amount due under the finance facilities as at a date some months prior to the hearing of the immediate judgment application. Under the terms of that Agreement, such a certificate is conclusive evidence of the matter to which it relates in the absence of manifest error.[13]

59. As was the case in the immediate judgment application, a spreadsheet has been provided showing the calculation of interest and default interest up to the date of the hearing based upon the amount outstanding as stipulated in the certificate issued under the Common Terms Agreement. I have reviewed the calculations entered in the spreadsheet, which appear to be in order. There is no reason to doubt their accuracy. They show that the total amount outstanding as at the date of trial, namely 12 October 2022, including principal, interest and default interest was USD 348,751,608.59, and judgment was entered in that amount.

Costs

60. The immediate judgment entered against the other Defendants included an order that they pay the Claimants' costs of the claim fixed in the amount of USD 633,285.59. The Claimants accept that some but not all of those costs were incurred in relation to the claim against the Third Defendant. Through a process of assessment which has been explained and which I accept, the Claimants assess the amount of those costs which were attributable to the claim against the Third Defendant in the amount of USD 425,900. Those costs overlap with, and form part of the costs awarded against the other Defendants and so an order was made to the effect that the Third Defendant should be liable, jointly and severally with the other Defendants, in respect of those costs, up to the amount of USD 425,900.

61. Following the entry of immediate judgment against the other Defendants, the proceedings have continued against the Third Defendant only and costs have been incurred in the pursuit of those proceedings, including taking them to trial. The Court was provided with a breakdown of those costs, which total USD 359,484.05. The costs claimed appear reasonable both as to time and rate, and the claim was allowed in full. However, as the Third Defendant did not appear at trial, limited liberty to apply to seek a review of the costs awarded against him was provided in the order of the Court.

Post judgment interest

62. For the avoidance of doubt, the Court also ordered that the judgment should bear interest at the prescribed rate of 9%.