Claim No. ARB 017-2020

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) CESFIN VENTURES LLC
(2) CESSNA FINANCE CORPORATION
(acting via its Attorney, Cesfin Ventures LLC)

Claimants

and

(1) AL GHAITH HOLDING COMPANY PJSC

First Defendant

(2) ABU DHABI COMMERCIAL BANK PJSC

Proposed Second Defendant

Claim No. ARB 021-2021

AND BEWEEN:

(1) CESFIN VENTURES LLC
(2) CESSNA FINANCE CORPORATION
(acting via its Attorney, Cesfin Ventures LLC)

Claimants

and

(1) ALI HAMEL KHADEM AL GHAITH AL QUBAISI
(2) KHALIFA KHADEM AL GHAITH AL QUBAISI
(3) SIX STAR REPRESENTATION OF COMPANIES LLC

Defendants

ORDER WITH REASONS OF JUSTICE WAYNE MARTIN

Hearing :	11 January 2022 and 12 January 2022
Counsel :	Rupert Reed QC assisted by Gregor Hogan instructed by DWF Middle East LLP on behalf of the Claimant David Russell QC instructed by Diana Hamade Attorneys At Law on behalf of the Defendants Tom Stewart Coats instructed by Holman Fenwick Willan Middle East LLP on behalf of the Proposed Second Defendant ("**ADCB**")
Judgment :	24 March 2022

UPON the Claimants' application that the Court find AGH in contempt of court for breaching the terms of the First Freezing Order pursuant to RDC 52.1, filed on 24 August 2021 (the **"AGH Contempt Application"**)

AND UPON the Claimants' application that Abu Dhabi Commercial Bank PJSC (**"ADCB"**) be joined as party to Claim No. ARB-017-2020 pursuant to RDC Part 20, filed on 24 August 2021 (the **"ADCB Joinder Application"**)

AND UPON the Claimants' application that the Court find ADCB in contempt of court pursuant to RDC 52.1 for having helped or permitted AGH to breach the terms of the First Freezing Order, filed on 24 August 2021 (the **"ADCB Contempt Application"**)

AND UPON the Claimants' application for an order that ADCB do produce certain classes of document pursuant to RDC 25.1(7) and/or (9) alternatively RDC 25.10 and/or RDC Rules 28.51 and 28.52 and/or 28.16-28.19, filed on 25 August 2021 (the **"ADCB Document Production Application"**)

AND UPON the Claimants' application for an order that the Court find Ali Khadem Al Ghaith Al Qubaisi, Khalifa Hamel Khadem Al Ghaith Al Qubaisi and Six Star Representation of Companies LLC in contempt of court pursuant to RDC 51.2 for breaching the terms of the Second Freezing Order issued on 26 August 2021 (the **"Al Ghaith/Six Star Contempt Application"**)

AND UPON reviewing the Claimant's application to discontinue the Contempt Application insofar as itrelates to Abu Dhabi Commercial Bank PJSC by way of application notice dated 10 January 2022 (the **"Discontinuance Application"**)

AND UPON reviewing ADCB's request for further and better particulars of the ADCB Contempt Application dated 17 October 2021

AND UPON reviewing the Claimants response to ADCB's request for further and better particulars of the ADCB Contempt Application dated 3 November 2021

AND UPON reviewing the Claimant's skeleton argument dated 5 December 2021 and supplemental skeleton argument dated 10 January 2022

AND UPON reviewing the Defendants' skeleton argument dated 6 January 2022 and supplemental skeleton argument dated 10 January 2022

AND UPON reviewing ADCB's skeleton argument dated 6 January 2022

AND UPON hearing Counsel for the Claimant, Counsel for the Defendants and Counsel for the Proposed Second Defendant at a hearing on 11 January 2022 and 12 January 2022

IT IS HEREBY ORDERED THAT:

1. The ADCB Joinder Application and the ADCB Contempt Application are adjourned indefinitely by consent.

2. The AGH Contempt Application and the Al Ghaith/Six Star Contempt Application are each allowed.

3. Each contempt and contemnor the subject of the AGH Contempt Application and the Al Ghaith/Six Star Contempt Application will be referred to the Attorney General of Dubai for consideration.

4. Each Defendant to the AGH Contempt Application and the Al Ghaith/Six Star Contempt Application is to pay the Claimants' costs of the application for committal brought against that Defendant to be agreed, or in default of agreement assessed by the Registrar.

Issued by:
Nour Hineidi
Registrar
Date of issue: 24 March 2022
Time: 10am

SCHEDULE OF REASONS

Summary

1. The Claimants have made applications for orders of committal against each of the Defendants in each of these related proceedings on the grounds that they have committed contempts of court. In ARB-017-2020 the Claimants allege that on 26 July 2020, the First Defendant, Al Ghaith Holding Company PJSC (**"AGH"**), transferred AED 7 million from its account with the Abu Dhabi Commercial Bank (**"the Bank"**) to Six Star Representation of Companies LLC (**"Six Star"**) in contravention of a Worldwide Freezing Order made against AGH in this Court on 23 July 2020 (**"the First WFO"**). An application for an order of committal against the Bank has been adjourned by consent in order to enable that application to be resolved by agreement. In ARB-021-2021 the Claimants allege that the First and Second Defendants, Ali Hamel Khadem Al Ghaith Al Qubaisi (**"Ali Al Ghaith"**) and Khalifa Khadem Al Ghaith Al Qubaisi (**"Khalifa Al Ghaith"**), contravened a Worldwide Freezing Order made in those proceedings on 29 July 2021 (**"the Second WFO"**) by failing to make disclosure of their assets in accordance with the terms of that order by virtue ofthe disclosure they provided being much later than the time specified in the Second WFO and being inadequate as a result of their continuing failure to provide full disclosure of all their assets, as directed by the Court. The Claimants allege that Six Star also contravened the Second WFO by failing to provide disclosure of its assets within the time specified by the Court. The Claimants do not allege that the disclosure provided by Six Star was inadequate.

2. For the reasons which follow I am satisfied beyond reasonable doubt that the Claimants have established that each Defendant committed the contempts of court alleged. The orders appropriately made in respect of those contempts are to refer each Defendant, namely AGH, Ali Al Ghaith, Khalifa Al Ghaith and Six Star to the Attorney General of Dubai.

Background to the applications

3. On 13 December 2021, I dismissed an application by the Defendants in ARB-021-2021 to set aside the Second WFO. In my reasons for that decision, I set out the background to the two sets of proceedings in the following terms:

> "9. The procedural history starts with the commencement of a New York seated arbitration by the Second Claimant against AGH claiming that AGH was liable as guarantor under three aircraft leasing arrangements made between the Second Claimant and the UAE company, Prestige Jet Rental LLC. In an award issued on 26 October 2015 the claim was upheld in the amount of USD43,201,971.10, with ongoing interest. The benefit of that award was assigned to the First Claimant by an assignment dated 25 October 2019.
>
> 10. AGH is a company incorporated in Abu Dhabi owned by interests associated with the Al Ghaith family. The two individual Defendants in ARB-021-2021 are, together with their brother, Ghaith Al Ghaith, the only directors of AGH. The three brothers and their two sisters are shareholders of AGH.
>
> 11. Six Star is a company which was owned by AGH until about December 2019, at which time the shares held by AGH were transferred to individual members of the Al Ghaith family. The Claimants assert that Six Star has been used as a vehicle by AGH and members of the Al Ghaith family to dissipate their assets in breach of orders made by this Court. Ghaith Al Ghaith is the Chairman of Six Star.
>
> 12. AGH launched a number of appeals and challenges to the arbitral award in New York, all of which were unsuccessful. The deadline for any appeal to the US Supreme Court has expired. AGH also unsuccessfully challenged the award in the Courts of Abu Dhabi, and

proceedings which AGH brought in the Dubai Courts for declarations that the underlying guarantees were invalid have also been dismissed.

13. The Claimants assert that as soon as it became apparent to the members of the Al Ghaith family that the various challenges to the award in New York were going to be unsuccessful, the members of the family embarked upon a campaign of stripping out the assets of AGH and transferring them to themselves. The Claimants assert that the asset stripping mainly took place between January and July 2020, but has continued, in part using Six Star as a vehicle. The Defendants vigorously deny these assertions. Although it appears to be clear that real estate in onshore Dubai that is said to be worth approximately USD187 million has been transferred to the Al Ghaith siblings, they assert that the transfers took place in accordance with the Sharia Law notion of *"Heba"*, under which family assets held by a corporate entity can be returned to the members of the family.

14. During July 2020 the Claimants sought recognition and enforcement of the New York arbitral award in the DIFC Courts. The application, which was made without notice, was successful and on 23 July 2020 an order recognising the award and entering judgement on the award was made. By that time, the sum due under the award had risen, with interest, to USD88,596,077. At the same time, in reliance upon the evidence of disposition of assets to which I have referred, a Worldwide Freezing Order was made against AGH (the **"First WFO"**).

15. After those orders were made, AGH commenced the proceedings in the onshore Courts of Dubai and the JJC,[1] to which I have referred.

16. The Claimants issued proceedings in New York in February 2021 seeking to enforce the award against the three Al Ghaith brothers on the basis that each of them is an alter ego of AGH and seeking to set aside various transfers of assets as fraudulent conveyances (the **"Alter Ego Proceedings"**). Those proceedings are ongoing and an application to amend the proceedings in order to join Six Star as a Defendant has been made but not yet determined.

17. The Claimants have made further allegations in relation to dissipation of assets based on information received since the First WFO was made. Based on that information, in July 2021 the Claimants commenced ARB-021-2021 against Ali and Khalifa Al Ghaith and Six Star and sought the Second WFO, which was issued on 29 July 2021. The Second WFO was made in support of the Alter Ego Proceedings in New York in reliance upon the jurisdiction sometimes described as the "Wintercap" jurisdiction, referring to the decision of Justice Shamlan Al Sawelehi in *SEC v Wintercap,*[2] in which a freezing order was granted in support of foreign proceedings. The existence of that jurisdiction is put in issue by the Defendants in these proceedings, who submit that the case was wrongly decided and should not be followed.

18. The Second WFO required the Defendants to disclose their assets worldwide with an excess in value of AED50,000 within 72 hours of service of the order, and to confirm that information by affidavit within five working days. The Claimants assert that those obligations were not complied with, and have commenced contempt proceedings against the Defendants in ARB-021-2021. The Claimants have also commenced contempt proceedings against AGH in respect of its alleged dissipation of assets, and against a bank which is said to have been knowingly involved in the dissipation of assets by AGH. The contempt applications have been listed for hearing in January 2022.

19. On 21 October 2020, the English High Court made a Worldwide Freezing Order against Ghaith Al Ghaith in support of the Alter Ego Proceedings in New York.

9. I have granted the Defendants in ARB-201-2021 permission to appeal from that decision, and that appeal remains to be heard. It will be a matter for the Attorney General of Dubai to determine what, if any effect the pendency of that appeal should have upon any action he might take in consequence of my conclusion that the Defendants in those proceedings have committed contempts of court of sufficient gravity to be referred to him.

Contempt - general principles

10. Article 43 of the DIFC Court Law[3] confers jurisdiction upon the Court to deal with contempt of court. It provides:

"43(1) The DIFC Court has jurisdiction, on application or on its own motion, to deal with matters relating to contempt.

(2) The DIFC Court may in exercise of such jurisdiction:

(a) make any order it considers necessary in the interests of justice;

(b) impose fines;

(c) refer the matter to the Attorney General of Dubai."

11. In *VIH Dubai Palm Jumeirah Ltd v Assas Opco Ltd*[4] ("VIH") Justice Sir Richard Field observed that:

"Although Article 43 of the Court Law provides that the Court in the exercise of its contempt of court jurisdiction may make any order it considers necessary in the interests of justice, in my judgment this would not include the imposition by the Court of a sentence of imprisonment."[5]

12. I respectfully agree with that view. The DIFC Court does not have criminal jurisdiction, although it does have power to impose fines.[6] That power is generally regarded as regulatory in nature, or, at the highest, quasi - criminal in nature.

13. In VIH[7] Justice Sir Richard Field observed that in that case it was common ground that the allegations of contempt of court must be proved to what is the criminal standard of proof in criminal jurisdictions, namely, beyond reasonable doubt. I respectfully agree with that view and would add that in my view it follows that the normal procedures adopted by common law courts with respect to the determination of allegations of criminal conduct should be applied by this Court when considering an application for committal for contempt of court.

14. Those principles include the principle that the onus of proof of criminal conduct rests at all times upon the party alleging that criminal conduct

has occurred. That onus does not change at any point in the process, and the party against whom an application for an order of committal is made carries no obligation to prove anything by way of defence. At various points in the course of his oral submissions, Senior Counsel for the Claimants submitted that notwithstanding the criminal nature of the allegations made against the alleged contemnors in this case, in light of the evidence adduced on behalf of the Claimants, there was a practical onus upon the Defendants to adduce evidence to dispel the inferences properly drawn from the evidence before the Court. I do not accept that submission, which is inconsistent with established procedure in common law criminal courts. In those courts juries are routinely directed that a person accused of a crime has no obligation to prove anything by way of defence,[8] and no adverse inference can be drawn against a person accused of crime by reason of his or her failure to adduce evidence by way of defence. In my view those principles should be applied in this Court in the determination of applications for committal by reason of contempt of court.

15. Similarly, common law principles of mens rea should be adopted when this Court considers an application for an order of committal by reason of contempt. Those principles generally require that the conduct giving rise to the alleged contempt must have been the knowing and wilful act or omission of the alleged contemnor. It is important to emphasise that the mental element required to establish breach applies only to the act or omission said to constitute breach, not its consequences. Put more directly, an applicant for a committal order does not have to establish that the alleged contemnor knew or ought to have known that the act or omission said to constitute the contempt would involve a breach of the orders of the Court. Notice of the orders of the Court must be proven, but thereafter any act or omission which constitutes a breach of those orders will constitute a contempt of court irrespective of whether or not the contemnor knew or intended that the relevant act or omission would constitute a breach.[9]

16. The authors of Arlidge, Eady and Smith on Contempt express the relevant principles applicable to the mental element of contempt in the following terms:

> What was traditionally required was to demonstrate that the alleged contemnor's conduct was intentional (in the sense that what he actually did, or omitted to do, was not accidental); and secondly that he knew the facts which rendered it a breach of the relevant order or undertaking. He must normally be shown at least in the case of a mandatory order to have been notified of its existence..
>
> Yet there is no need to go so far as to show that the respondent realised that his conduct would constitute a breach, or even that he had read the order. This means that liability for contempt has been treated as though it were strict; that is to say, not depending on establishing any specific intention either to breach the terms of the order or subvert the administration of justice in general. Nor will it avail a respondent that he believed for some reason that he had a right to do the relevant act.[10]

17. Accordingly, in the case of the applications brought against the corporate defendants, AGH and Six Star, contempt of court will be sufficiently proven if it is established that the companies had notice of the orders made by the Court and thereafter, by the acts or omissions of the relevant company, failed to comply with those orders. There is no requirement to establish that any natural person or persons within each company was aware of the orders made by the Court, and was also aware of the conduct which constitutes the alleged contempt. Once the relevant company is on notice of the orders made by the Court, it is legally obliged to comply with those orders and cannot rely upon the alleged ignorance of one or more of its officers as an excuse for non-compliance.

18. Common law courts with a general criminal jurisdiction and a range of penal sanctions available to them, including imprisonment, will generally only refer an alleged contempt to the Attorney General if the Court considers that a fuller investigation by the prosecuting authorities is necessary before any sanction is appropriately imposed on the relevant parties and/or accessories to the contempt.[11] However, as the DIFC Courts lack a general criminal jurisdiction and the power to order imprisonment, a reference to the Attorney General of Dubai may also be appropriate in cases in which the Court considers that the sanctions available to the Court, which are essentially limited to the imposition of a fine, are inadequate to appropriately reflect the significance of the contempt committed and impose appropriate punishment upon the contemnor.

RDC Part 52

19. Part 52 of the Rules of Court (**"RDC"**) contains various procedural requirements relating to applications for an order of committal as the consequence of alleged contempt of court. I am satisfied that the procedural requirements of Part 52 have been satisfied in respect of each application, and the Defendants do not submit otherwise. In particular, notice has been given of the grounds upon which each contempt is alleged, and of the possible consequences of a finding of contempt.

20. During the hearing a question arose as to the admissibility and/or weight of affidavit evidence adduced in opposition to a committal application if the party relying upon that evidence, having been given notice that the deponent is required for cross-examination, fails to produce the deponent for cross-examination without justification or excuse. The issue arose as a consequence of AGH's reliance upon an affidavit sworn by Ghaith Al Ghaith to which I will refer below. The Claimants gave notice that all deponents of affidavits adduced in opposition to the committal application were required for cross-examination. The Defendants advised that no deponents would be produced for cross-examination at the hearing. When Senior Counsel for AGH maintained that position at the hearing, and advised that Ghaith Al Ghaith was not in Dubai, I indicated that the Court would be willing to make any arrangements necessary for Ghaith Al Ghaith to be cross-examined by video link from wherever he was. However, AGH declined to take up that opportunity, and Ghaith Al Ghaith was not produced for cross-examination.

21. RDC Part 52 relevantly provides:

> "52.12 Written evidence in support of or in opposition to a committal application must be given by affidavit.
>
> 52.13 Written evidence served in support of or in opposition to a committal application must, unless the Court otherwise directs, be filed.
>
> 52.14 A respondent may give oral evidence at the hearing, whether or not he has filed or served any written evidence. If he does so, he may be cross-examined.
>
> 52.15 A respondent may, with the permission of the Court, call a witness to give oral evidence at the hearing, whether or not the witness has sworn an affidavit."

22. Senior Counsel for AGH submitted that the affidavit sworn by Ghaith Al Ghaith was admissible irrespective of whether or not he was produced for cross-examination. He submitted that there is no general requirement in the RDC to the effect that a deponent to an affidavit must be produced for cross-examination as a condition of the admissibility of the evidence, nor is any such requirement embodied within RDC Part 52. Senior Counsel relied upon the fact that the only reference to cross-examination within RDC Part 52 is in RDC 52.14, which only applies where a respondent has given oral evidence at the hearing of the committal application, from which it is said be inferred that this is the only circumstance in which production of a witness for cross-examination is required.

23. Senior Counsel for AGH submitted that the RDC should be taken to exclude the principles established in the decisions of the Court of Appeal of England and Wales in *Comet Products (UK) Ltd v Hawkex Plastics Ltd*[12] and the decision of the House of Lords in *Crest Homes PLC v Marks*[13] to the effect that an alleged contemnor cannot have his cake and eat it too by electing to file sworn evidence, and then endeavour to hide behind it without being cross-examined upon it. Alternatively, Senior Counsel submits that this Court should follow a more recent decision at first instance in England, namely, *Discovery Land Co LLC v Jirehouse*[14] where doubts were expressed in relation to the proposition that a defendant filing evidence in response to a contempt application can be compelled to be cross-examined upon it.

24. This submission must be rejected. While I accept that there is no general provision in the RDC or in Part 52 of the RDC which provides that production of a deponent to an affidavit for cross-examination is a condition of the admissibility of that affidavit, in my view the Rules should be construed as permitting the Court to exclude from evidence an affidavit in a case in which a deponent appropriately required for cross-examination is not produced for cross-examination without justification or excuse. It is implicit in the RDC generally, and in Part 52 that the Court may require the deponent of an affidavit to attend for cross-examination.[15] It is equally implicit in the existence of that power that in the event that it is exercised, and a deponent required for cross-examination is not produced for cross-examination without justification or excuse, the Court has the power to exclude the evidence in the exercise of its discretion. That conclusion follows from the adversarial nature of proceedings conducted in the DIFC Courts, and from the obligations of procedural fairness which are implicit in the RDC, and which require the Court to provide all parties with an adequate opportunity to test the case put against them, including, where appropriate, testing that evidence by cross-examination.

25. RDC 52.14 should not be construed as restricting the Court's general power to determine the conditions upon which evidence should be adduced. That provision is directed at a specific circumstance - namely, the circumstance in which a respondent wishes to give oral evidence at the hearing, presumably to ensure that a respondent has every opportunity to meet the charges brought against him, irrespective of whether or not he or she has previously adduced evidence on affidavit. However, the provision makes clear that if a respondent elects to exercise the right provided by the provision, he or she can be cross-examined, consistently with the principles implicit in both the RDC generally, and Part 52 in particular in relation to the cross-examination of deponents of affidavit evidence.

26. Support for this conclusion is provided by the observation that if the submissions of Senior Counsel for AGH were accepted, it would follow that an applicant for an order of committal could rely upon affidavit evidence in support of that application without necessarily producing the deponent or deponents for cross-examination at the request of the alleged contemnor. Given the criminal nature of the proceedings under Part 52, and the requirement for proof beyond reasonable doubt, that is a startling proposition which cannot have been intended by the Court at the time the RDC were promulgated.

27. The principles established in *Comet Products* and *Crest Homes* should be followed in this Court. The doubts expressed in relation to those principles in *Jirehouse* were based upon changes made to the relevant English rules since the earlier cases were decided. However, equivalent changes have not been made to the RDC, and there is no reason why *Comet Products* and *Crest Homes* should not be regarded as reliable guides to common law practice by this Court, given the absence of any provision in the RDC precluding reliance upon that practice.

28. For these reasons I conclude that it is open to the Court to exclude the evidence of Ghaith Al Ghaith from consideration on the ground that he has not been produced for cross-examination when required, and as no reasonable justification or excuse has been proffered for the failure to produce Ghaith Al Ghaith for cross-examination, I would exercise that power.

29. However, in case a contrary view is taken elsewhere, I will also consider the case on the basis that the evidence of Ghaith Al Ghaith is admissible, and that his failure to attend for cross-examination is a matter which goes to the weight of the evidence. For reasons which I will explain below when I consider Ghaith Al Ghaith's evidence, that approach to the evidence does not alter the findings of fact which I make on the basis of the evidence before the Court as a whole.

The specific defences

30. Before turning to consider whether the evidence adduced establishes the contempts alleged beyond reasonable doubt, it is appropriate to deal with a number of specific defences advanced by the Defendants which are unrelated to that evidence.

31. In the application brought in ARB-017-2020 against AGH it is asserted that the application is an abuse of process because of:

> "(a) The multiplicity of proceedings to recognise and enforce the award in the UAE; and
>
> (b) Limitations on the proper use of enforcement procedures in respect of awards recognised in the DIFC where the enforcement action is concerned with conduct outside the DIFC."[16]

32. In the application brought in ARB-021-2021 against Mr Ali Al Ghaith, Mr Khalifa Al Ghaith and Six Star the Defendants assert that the application is an abuse of process because of:

> "(a) Limitations on the proper use of enforcement procedures in respect of foreign judgments recognized in the DIFC where the enforcement action is concerned with conduct outside the DIFC; and
>
> (b) The Second WFO is void and of no effect because the court had no jurisdiction to make it."[17]

33. The last proposition can be dealt with quickly. The submission is made as a matter of form in order to protect the Defendants in the event that their appeal from my earlier decision dismissing their application to set aside the Second WFO succeeds. They do not advance any argument in support of that contention other than to refer to the arguments which they have advanced in the appeal, and accept that the outcome of that submission must depend upon the determination of the appeal.

34. This leaves for determination essentially two propositions which are said to underpin the allegation of abuse of process, namely, the assertions that:

> (a) The proceedings relating to the recognition and enforcement of the arbitral award are an abuse of process because of the "multiplicity" of such proceedings (the **"Multiplicity Contention"**); and
>
> (b) There are limitations upon the proper use of enforcement procedures within the DIFC Courts in relation to both arbitral awards and foreign judgments where the enforcement action is concerned with conduct occurring outside the DIFC (the **"Extraterritorial Contention"**).

The multiplicity contention

35. AGH submits that it is manifestly unfair to AGH to make it subject to enforcement procedures which are not available in the civil law courts of Abu Dhabi and Dubai, where the relevant assets are located. That unfairness is said to be assessed in the circumstance in which none of the Defendants have any assets within the DIFC.

36. In fact only two proceedings have been brought in order to enforce the arbitral award against AGH - action ARB-017-2020 brought in this Court, and enforcement proceedings commenced in Abu Dhabi. There is no doubt that it is open to a party seeking to enforce an arbitral award to proceed in one or more jurisdictions at the same time.[18]

37. The Claimants cannot be criticised for commencing enforcement proceedings in Abu Dhabi, where AGH was incorporated and has assets.

38. Nor can the Claimants be criticised for utilizing the so-called "conduit jurisdiction" of the DIFC Courts in order to enforce the arbitral award against assets of AGH within the Emirate of Dubai. This Court has consistently held that there is nothing wrong or improper in a party using the parallel jurisdictions created by the legislation of the Emirate of Dubai in order to enforce an arbitral award or foreign judgment within that Emirate.[19] As the Claimants were perfectly entitled to commence enforcement proceedings in this Court and in the courts of Abu Dhabi, there can be no basis for any assertion that either action or both actions were an abuse of process because they were maintained simultaneously against a party with assets in both Abu Dhabi and Dubai.

39. Nor can it be credibly asserted that there is any inconsistency as between the two sets of proceedings. Both proceedings are concerned with the same objective - namely the enforcement of the arbitral award against the assets of AGH. The fact that different procedures apply to the enforcement proceedings brought in different courts is the inevitable consequence of the exercise of the undoubted right to commence enforcement proceedings in courts in different jurisdictions.

40. The multiplicity contention is baseless and must be rejected.

41. However, it is also necessary to address a rather different argument that has been advanced by the Defendants under the same heading. This argument relies upon Article III of the New York Convention adopted in the UAE by Decree no. 43 of 2006. That Article provides:

> "Each contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the Territory where the award is relied upon ."

42. The Defendants submit that for the purposes of the Article, the "Territory" is the UAE, with the result that the rules of procedure must be the Federal rules of procedure which apply to the UAE as a whole, rather than the rules applicable in the various separate courts of the Emirates which together comprise the UAE. The Defendants submit that as there are no Federal rules of procedure which authorise the making of Worldwide Freezing Orders, the First WFO, made in support of the enforcement of the arbitral award, is beyond the jurisdiction of the Court and void and unenforceable.

43. With respect, the ingenuity of this submission significantly exceeds its substance. The Emirate of Dubai has exercised the power to legislate with respect to the Financial Free Zone which is the DIFC by promulgating the DIFC Arbitration Law. That law implements the principles of the New York Convention, which are made part of the domestic law of the DIFC. There can be no credible suggestion that by enacting this legislation the Emirate of Dubai has acted in a manner which is inconsistent with the obligations undertaken by the UAE as a party to the New York Convention.

44. In *Lahela v Lameez*[20] the Court of Appeal observed that the DIFC Arbitration Law was an example of "DIFC laws which implement obligations under treaties to which the UAE is a party".[21] The DIFC Court has consistently held that an award creditor may make use of the recognition and enforcement regime provided by the DIFC Arbitration Law and RDC Part 43 irrespective of whether or not the award debtor has assets in the DIFC and whether not or the arbitration or award has any other connection to the DIFC.[22]

45. It follows that the proceedings brought in this Court to enforce the arbitral award involved the conventional exercise of the enforcement powers of the Court created by valid legislation enacted by the Emirate of Dubai. There can be no credible suggestion that the Court is exercising power conferred by UAE Decree no. 43 of 2006 adopting the New York Convention.[23]

46. For these reasons this aspect of the "Multiplicity Contention" must also be rejected.

The Extraterritorial Contention

47. The Extraterritorial Contention is, with respect, difficult to follow. It appears to rely upon Article 7(2) of the Judicial Authority Law, which provides:

> "Where the subject matter of execution is situated outside the DIFC, the judgments decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside DIFC in accordance with the procedure and rules adopted by such entities in this regard ."

48. The argument appears to be to the effect that because the assets against which enforcement of each of the arbitral award and prospective foreign judgment might be made are situated in either Dubai (outside the DIFC) or Abu Dhabi, and the civil courts of those Emirates do not have rules and procedures which permit the making of Worldwide Freezing Orders, the Worldwide Freezing Orders made by this Court cannot apply to conduct in those jurisdictions.

49. If I have captured this proposition correctly (and it is somewhat elusive in the skeletons and oral argument) it is difficult to see how it amounts to anything more than a restatement of the assertion that the DIFC Court lacks jurisdiction to make a Worldwide Freezing Order in support of a prospective foreign judgment - an argument which I rejected and which is under appeal. Further, the argument expressed in this way appears inconsistent with the Defendants' express concession that the Court had jurisdiction to make a Worldwide Freezing Order (the First WFO) in support of the recognition and enforcement of the arbitral award.

50. In any event there is no substance in the argument. This Court has repeatedly held that the power to issue freezing orders is not confined to assets located within the jurisdiction of the DIFC, and may extend to assets held in Dubai, other Emirates of the UAE and other countries. If the Court has power to make such orders, it must also have the power to enforce such orders by way of proceedings for contempt, irrespective of where the conduct alleged to constitute the contempt takes place.

51. For these reasons none of the specific defences advanced on the behalf of the Defendants has any substance and they must all be rejected.

The application in ARB-017-2020

52. The First WFO was made at 2.00pm on 23 July 2020. The order contains notice to the Respondent (AGH) in the usual terms, and provides that AGH must not:

> "4.1 Remove from the DIFC any of its assets which are in the DIFC up to the value of USD88,596,077.00; or
>
> 4.2 In any way dispose of, deal with or diminish the value of any of its assets whether they are in or outside the DIFC up to the same value."

53. Paragraph 6 of the order provides that the prohibition includes the assets particularised in that paragraph, including:

> "6.9 Any money standing to the credit of the account number 209510020001 . held with Abu Dhabi Commercial Bank . including the amount of any cheque drawn on such account which has not been cleared;
>
> .
>
> 6.11 Any money standing to the credit of any other bank account including the amount of any cheque drawn on such account which has not been cleared ."

54. Paragraph 13 of the order provides:

> "This order does not prohibit the Respondent from dealing with or disposing of any of its assets in the ordinary and proper course of business."

55. The order, and a translation of the order in Arabic were sent to various senior officers of AGH by email at 7.01pm on 23 July 2020. Notice was not sent any earlier because it took several hours to obtain the Arabic translation of the order.

56. 23 July 2020 was a Thursday, which was the last day of the working week in Abu Dhabi (and then in Dubai). It is clear that the emails came to the attention of AGH, as a letter was sent to the lawyers representing the Claimants by Wasel and Wasel Ltd, lawyers representing AGH at 8.36am on Sunday 26 July 2020, the first day of the next working week.

57. Although the letter is dated 26 July 2020, and was sent by email on that date, it can be inferred from the following passage of the letter that it was written the previous day:

> "5. Service in person on our Client was only effected this morning (25 July 2020), when a copy of the Order was posted on the door of our Client's offices."

58. The letter acknowledged that early notice of the order had been provided by email to certain individuals within AGH at 7.01pm on 23 July 2020.

59. Various complaints with respect to the adequacy of service of notice of the order and of the order itself were contained within the letter. It is unnecessary to recount those complaints as they are not pursued in answer to this application.

60. The letter contains the following observation:

> "Lest you have forgotten, your client obtained serious and wide-ranging interlocutory relief against our Client in a hearing about which our Client had no notice and no knowledge."

61. As I have noted, the letter was apparently written on Saturday 25 July 2020, and was sent by email at 8.36am on 26 July 2020. It can be inferred, and I do infer, that between the time at which notice of the order was sent by email to various individuals within AGH at 7.01pm on 23 July 2020, and 25 July 2020, AGH instructed lawyers to provide advice with respect to the First WFO and received such advice. Further, AGH gave instructions to its lawyers to prepare and send the letter which was sent early on 26 July 2020.

62. As I have noted, the First WFO specifically prohibited all transactions on a specific account held by AGH at the Bank.[24]

63. An internal record maintained by the Bank establishes that Mr Mohammed John Muthaid, an officer of AGH, attended the Abu Dhabi branch of the Bank by 8.32am on 26 July 2020. This must have been very soon after the Bank opened for business that day. It was 4 minutes before lawyers acting on behalf AGH sent their letter to the lawyers acting on behalf of the Claimants by email.

64. The representative of AGH presented a document to the Bank on the letterhead of AGH apparently signed by two officers of AGH and bearing the seal of AGH. The document is undated apart from a stamp apparently affixed by the Bank showing its receipt on 26 July 2020.

65. The document refers to the account of AGH with the Bank, using the account number specified in the First WFO. The document was addressed to the Manager of the Bank, and requested the Bank to transfer the sum of AED7 million from the specified account of AGH to a specified account of Six Star also held at the Bank. The document stated that the code for the transaction was "Inter Group Transfer (IGT)".

66. At 8.37am on 26 July 2020, Mr Mohammed Hassan Shalaby, an officer of the Bank, sent an email to various other officers of the Bank attaching the document from AGH which had been presented to the Bank. It seems that the primary recipient of the email was Mr Murtuza Hussain, an officer of the Bank. The text of the email was as follows:

> "Dear Murtuza,
>
> Kindly note that the attached Fund Transfer has presented in our branch by Mr Mohammed John. We seek your kind confirmation of the same with the account holder in order to proceed with the client request."

67. At 9.03am on 26 July 2020, Mr Murtuza Hussain sent an email to Mr Shalaby and other officers of the Bank in the following terms:

> "Dear Mohammed,
> Please process the transfer.
> Thank you."

68. It can be inferred from these emails, and I do infer, that after receiving the email from Mr Shalaby, Mr Hussain made contact with an officer of AGH, and confirmed the authenticity of the request to transfer AED7 million from the account of AGH to the account of Six Star. The evidence does not establish the identity of the officer of AGH who confirmed to Mr Hussain that the transfer was authorized and should proceed.

69. There are a number of copies of the document presented to the Bank by AGH in evidence. The most legible of those copies bears a stamp apparently affixed by the Bank at 8.49am on 26 July 2020.

70. The statement of AGH's account with the Bank which is in evidence shows that AED7 million was transferred from its account with the Bank, being the account specifically identified in the First WFO, to the account of Six Star on 26 July 2020.

71. As already noted, Six Star is a company which was owned by AGH until about December 2019, when the shares held by AGH were transferred to individual members of the Al Ghaith family. The Claimants allege that the evident purpose of the transaction was to take funds standing to the credit of AGH with the Bank beyond the reach of the First WFO by transferring those funds to Six Star, the beneficial interest in which was held by the members of the Al Ghaith family personally.

72. The transfer established by the evidence to which I have referred was a clear breach of the First WFO unless it was undertaken "in the ordinary and proper course of business". Although transactions undertaken in the ordinary and proper course of business are an exception to the general prohibition contained within the First WFO, given the criminal nature of these proceedings, the Claimants carry the onus of proving beyond reasonable doubt that the transfer was not undertaken in the ordinary and proper course of business. In order to assess that issue, it is necessary to consider the evidence relating to what has been described by the Defendants as a corporate restructure, and what has been characterised by the Claimants as a deliberate and sustained program of stripping assets from AGH in order to put them beyond the reach of the Claimants.

73. An email dated 25 December 2019 from Mr Ali Ahmed, an officer of the Bank responsible for the management of the relationship with the Al Ghaith Group, to Mr Gerhard Nel, then the CFO of the Al Ghaith Group, provides some evidence of the restructure. The term sheet attached to that email lists a proposal to split the Bank's loan of AED102.4 million to AGH between Two Seasons Hotel and Furnished Apartments FZE LLC (**"Two Seasons"**) as to AED70 million, and Six Star as to AED32.4 million. The guarantors of the split loans were to be AGH, Ali Al Ghaith, Khalifa Al Ghaith and Ghaith Al Ghaith.

74. The term sheet attached to the email sets out the instalments which were to be paid in respect of the loans by each of Two Seasons and Six Star. The term sheet provided that Six Star was to repay the loan by quarterly instalments of a little over AED1 million. I digress to observe that AED7 million equates to approximately seven quarterly instalments due under the restructured loan to Six Star, or put another way, the total payments due over a period of 21 months.

75. It seems from an email dated 15 October 2019 from Mr Ahmed to Mr Nel that the December proposal was a refined and developed version of a proposal first put to the Bank in October 2019.

76. However, it seems that the loan restructure was not completed until well after the First WFO was made and the alleged contempt committed. This appears from an internal AGH document summarising various loan arrangements. Relevantly that document provides:

"During January 2020, AGH requested ADCB to restructure and shift the existing two loans to [Two Seasons and Six Star] with new values. The Bank after their internal approvals and reviews sent the facility documents on 10 June 2020 for us to fill in and get the required signatures. The required documents were filled in, signed and submitted to the Bank on 18 June 2020. The new facility agreements remained under bank review and approval process and our old loans (AED102.4 million) were restructured and shifted to Six Star (AED32.4 million) and Two Seasons Hotel (AED70 million) respectively on 27 December 2020."

77. I digress to observe that until the loan restructure occurred in December 2020, AGH remained liable on the loans, and Six Star had no liability in respect of what became its portion of the loans.

78. Given that:

(a) The loan restructure was not completed until 27 December 2020; and

(b) Quarterly instalments due from Six Star after the restructure had been completed were approximately AED1 million,

there is no credible basis for AGH's assertion that the transfer of AED7 million to Six Star on 26 July 2020 was justified by the need to place that company in funds in order that it could discharge its liabilities to the Bank.

79. It appears from other internal bank documents that the loan restructure was associated with the transfer of property ownership from AGH to other companies, including Six Star and Two Seasons, under the control of members of the Al Ghaith family. That evidence is consistent with the Claimants' assertion that the members of the Al Ghaith family devised and implemented a deliberate strategy of transferring assets from AGH to other entities under their control in order to put those assets beyond the reach of the Claimants.

80. The statements relating to AGH's account with the Bank covering the period 1 May 2019 - 15 December 2020 are in evidence. They are most instructive on the question of whether the transfer of AED7 million on 26 July 2020 was in the ordinary and proper course of business.

81. Analysis of those statements shows that the transfer of AED7 million was by far the biggest transaction undertaken in relation to that account over the period of almost 20 months covered by the statements. Apart from payments of instalments to the Bank, which were reversed in many cases, the next largest payment over that period was AED2.6 million.

82. The account statements also enable the transaction of 26 July 2020 to be viewed in context. On 25 June, 30 June and 4 July 2020 amounts of AED206,000, AED1.3 million and AED3.8 million (approx.) respectively were deducted from the account in favour of the Bank as "instalment recovery". The latter payment was enabled by the deposit of AED7.3 million into the account on 4 July 2020, said to be from Jindal Steel and Power Mauritius.

83. The payments deducted in favour of the Bank were reversed on 13 July 2020, resulting in a credit of approximately AED5.3 million, which took the balance of the account to AED9.59 million (approx.).

84. On 14 July 2020, AED2.4 million was transferred from the account to Six Star.

85. On the same day, 14 July 2020, Mr Shafqat of AGH sent an email to Mr Nel, the CFO of AGH in the following terms:

"ADCB has reversed the loan instalments deducted from ADCB-AGH account. Further, we also received AED1.7 million rent from ADCB for airport road tower.

Please advise can we transfer the entire balance to Six Star- ADCB (just leaving the minimum balance required)?"

86. The email was accompanied by an internal cheque payment voucher proposing the transfer of AED7 million from AGH to Six Star.

87. This evidence establishes that the proposal to transfer all funds standing to the credit of AGH's account with the Bank to Six Star, apart from the minimum balance required to be maintained in the account, was initiated more than a week before the First WFO was made. However, the transaction was not implemented until 26 July 2020, by which time AGH had notice of the First WFO.

88. The fact that the transaction was initiated before the First WFO was made does not, of itself, establish that the transaction was in the ordinary and proper course of business. To the contrary, when the transaction is viewed in the context of the loan restructure associated with the transfer of assets from AGH to other entities under the control of the Al Ghaith family, including Six Star, and compared to other transactions undertaken on the account over the period of 20 months to which I have referred, and in particular the transactions in June and July 2020 which I have set out above, there is an overwhelming inference to the effect that the proposal to transfer AED7 million from AGH to Six Star was a component of the general strategy of transferring assets from AGH to other entities under the control of the Al Ghaith family in order to put them beyond the reach of the Claimants.

89. That inference is, in my view inescapable, and is established beyond a reasonable doubt. It follows that the transaction undertaken on 26 July 2020 was the antithesis of a transaction undertaken in the ordinary and proper course of business.

90. As noted, it is not disputed that AGH had notice of the First WFO before the transaction was undertaken on 26 July 2020. Clearly the transaction was undertaken knowingly and intentionally by AGH, so that the requisite mental element required to establish the committal of the contempt is satisfied.

91. Apart from the evidence relating to the role of the officer of AGH who presented the document to the Bank shortly after the Bank opened on 26 July 2020, there is no direct evidence to establish the identity of the officers of AGH involved in the undertaking of the transaction. It follows that there is no direct evidence that those persons had knowledge of the making of the First WFO. However, for the legal reasons to which I have already referred, because AGH was on notice of the making of the First WFO, the contempt is sufficiently established without proof that the persons involved in the transaction were themselves aware of the First WFO and its terms, and AGH does not submit otherwise. Once AGH was

on notice of the terms of the First WFO, it was obliged to ensure compliance with the order of the Court, and it conspicuously failed to perform that obligation.

92. Notwithstanding the paucity of the evidence relating to the individuals involved in the transaction which took place on 26 July 2020, there is an inescapable inference to the effect that the purpose of that transaction was to remove funds from AGH's account in order to defeat the First WFO. I draw that inference from the fact that the evident purpose of the transaction was to transfer funds from AGH to other entities under the control of the Al Ghaith family, and on the evening of 23 July 2020, AGH received notice that such a purpose would be frustrated by the terms of the First WFO.

93. That notice was received after the close of business on the last business day of the week. Within minutes of the Bank opening on the first business day of the following week, an officer of AGH attended the Bank in order to strip AGH's account of almost all the funds standing to the credit of that account and place them in Six Star's account. The transaction occurred simultaneously with the transmission of a letter from AGH's lawyers to the Claimants' lawyers asserting that service of the First WFO had been inadequate.

94. In these circumstances I am satisfied beyond reasonable doubt that it must be inferred that the transfer of funds from AGH's account was undertaken with knowledge of the First WFO and for the purpose of attempting to defeat its operation. I reiterate the observation that such a finding is not an essential element of the commission of the contempt, but it is very relevant to the significance of the contempt and the manner in which the Court should deal with it.

95. It follows from the views I have expressed that I reject the submission of Senior Counsel for AGH to the effect that the timing of the transfer of the funds from AGH to Six Star, occurring, as it did, less than an hour after the Bank opened for the first time after AGH received notice of the First WFO may be entirely coincidental. In all the circumstances, that possibility is entirely fanciful and I reject it.

96. The only affidavit tendered on behalf of the Respondents to the application was the affidavit of Ghaith Al Ghaith sworn on 5 December 2021. For the reasons I have given, I would exclude this affidavit from the evidence before the Court, on the ground that Ghaith Al Ghaith has not been produced for cross-examination on his affidavit when required, without sufficient justification or cause. However, in case a different view is taken in relation to the admissibility of the affidavit on appeal, I will now refer to its relevant terms, and assess the weight which I would give to it if it were admissible.

97. Ghaith Al Ghaith is not a party to these proceedings, although he is the Chairman of Six Star, which is a party to ARB-021-2021. His personal interests are clearly allied to the interests of the Defendants who are the Respondents to these applications.

98. The only portions of Ghaith Al Ghaith's affidavit to which Senior Counsel for AGH specifically referred are paragraphs 15-19. In those paragraphs Mr Al Ghaith asserts that the amount of AED7 million was transferred to Six Star:

> "For the payment of forthcoming loans transferred from AGH to Six Star and Two Seasons Hotel, operating expenses of Six Star managed properties and salaries of all AGH employees."

99. Ghaith Al Ghaith asserts, as is the fact, that the transfer had been initiated within AGH as early as 14 July 2020.

100. Ghaith Al Ghaith asserts that the transfer notice required "wet ink" signatures from him and his brother Ali. He asserts that they were both out of the UAE at the time, which meant that the transfer notice was not signed until late in the week ending 23 July 2020 and thereafter couriered to Abu Dhabi, with the result that the documents were not available to be provided to the Bank until the morning of 26 July 2020.

101. Although not specifically referred to in oral argument by Senior Counsel for AGH, Ghaith Al Ghaith also deposes that because he and his brother Ali travelled abroad often and were the authorised signatories of the AGH account, it was decided that it would be desirable to have cash available in the Six Star account to settle liabilities relating to the properties which were to be transferred to Six Star.

102. This evidence is inherently implausible, and inconsistent with the objective evidence to which I have referred.

103. As I have noted, the transfer of AED7 million to Six Star was the only transaction of that magnitude, and the only transaction of that kind, other than another transfer of AED2.4 million to Six Star a week or so earlier, over the period of almost 20 months covered by the bank statements in evidence. The pending transfer of the loan from AGH to Six Star provides no credible explanation for the transfer, as the amount transferred was approximately seven times greater than the quarterly instalments due under the loan, and in any event, the loan was not transferred to Six Star until almost six months after the transfer of funds on 26 July 2020.

104. Similarly, the properties themselves had not been transferred at the time the funds were transferred from AGH to Six Star, with the consequence that potential liabilities accruing following transfer provide no justification for the transfer at that time.

105. Nor do the practical difficulties arising from the overseas travel of the authorised signatories to the AGH account provide any plausible explanation for the transfer. Those difficulties could have been overcome quite simply by amending the mandate given to the Bank in relation to the AGH account and authorising other signatories.

106. Nor is the explanation for the presentation of the transfer minutes after the Bank opened on 26 July 2020 plausible. If Ghaith Al Ghaith had submitted to cross-examination, that inherently implausible evidence could have been tested by requiring production of records relating to the travel of Ghait Al Ghaith and his brother Ali.

107. In summary, if, contrary to my view, the evidence of Mr Al Ghaith is admissible, it is inherently implausible, and given Mr Al Ghaith's refusal to submit himself to cross-examination, I give it no weight, as a result of which it does not alter the conclusions I have already expressed.

108. Senior Counsel for the Claimants referred to a number of the cases dealing with the meaning to be given to the "ordinary and proper course of business" exception. Those authorities establish that the requirements of the exception are conjunctive, in the sense that the transaction must be

ordinary in the sense of common or routine, and proper in the sense of being lawful and carried out in good faith. Those propositions do not appear to be contentious, and in the stark circumstances of this case, it is unnecessary to dwell upon the authorities which establish them.

109. The facts established by the evidence to which I have referred compel the conclusion that the transfer of AED7 million from AGH to Six Star was neither ordinary nor proper. It was not ordinary in the sense of common or routine - for the reasons I have given it was exceptional and extraordinary. The transaction was improper, for a number of reasons. As Senior Counsel for AGH was obliged to concede, there is no evidence capable of sustaining the conclusion that the transfer of the funds was in the interests of AGH. Put another way, it is impossible to see any basis upon which AGH could have derived any benefit from the transfer. Further, for the reasons I have given, the evidence establishes, beyond a reasonable doubt, that:

(a) The transfer of funds was initiated on 14 July as part of a general strategy to transfer assets from AGH to other entities under the control of the members of the Al Ghaith family for the purpose of putting those assets beyond the reach of the Claimants; and

(b) The transfer was undertaken at the earliest possible opportunity after AGH received notice of the First WFO in an attempt to defeat the terms and effect of the First WFO.

Conclusion - ARB-017-2020

110. For these reasons I conclude that the evidence establishes beyond a reasonable doubt that AGH committed a contempt of court as alleged by the Claimants. I will deal with the significance of the contempt and the appropriate relief to be granted by the Court later in these reasons.

The application in ARB-021-2021

111. The Claimants allege that Ali Al Ghaith and Khalifa Al Gaith committed a contempt of the orders made by the Court in the Second WFO with respect to the provision of information relating to their assets by:

(a) Failing to comply with the orders of the Court with respect to the time by which that information had to be provided; and

(b) Failing to provide the information ordered to be provided by the Court by omitting reference to significant assets which they held from the information provided.

112. The Claimants allege that Six Star committed a contempt of the Second WFO by failing to provide the information ordered to be provided by the Court within the time specified in the orders of the Court.

113. The relevant provisions of the Second WFO are:

"12. Unless paragraph 13 applies, each Respondent must within 72 hours of service of this Order and to the best of its ability inform the Applicants' solicitors of all its assets worldwide exceeding AED50,000 in value whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

13. If the provision of any of this information is likely to incriminate a respondent, that respondent may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is a contempt of court and may render the Respondents liable to be fined or referred to the Attorney General of Dubai.

14. Within 5 working days after being served with this order, each Respondent must swear and serve on the Applicants' solicitors affidavits setting out the above information."

114. The Second WFO was made on 1 August 2021. It was served on each of the Respondents on 3 August 2021. It follows that the obligation imposed by paragraph 12 of the Order had to be performed by 8 August, and confirmed by affidavits served no later than 12 August 2021. Both of those dates passed without any information being provided to the Claimants' lawyers by the Respondents.

115. On 11 August 2021 lawyers acting on behalf of the Respondents sent an email to the lawyers acting for the Claimants advising that they had been appointed to represent the Defendants in place of Eversheds Sutherland (International) LLP. Although the email made reference to the requirements of the Second WFO relating to the provision of information, there was no suggestion in the email as to the time by which such information would be provided.

116. Lawyers acting on behalf of the Claimants responded by email of the same date advising that the Respondents were in breach of their obligations with respect to the provision of information.

117. On 14 August 2021, the lawyer representing the Defendants replied to that email without referring to the provision of any information by her clients.

118. On 15 August 2021, lawyers representing the Claimants sent another email to the lawyer representing the Defendants reiterating their failure to comply with the provisions of the Second WFO relating to the provision of information. The lawyer representing the Defendants responded to that email on the same day, advising that an application had been made to the Court for an extension of time.

119. That application was made by an email dated 10 August 2021, in which an extension of 15 working days (three calendar weeks) was sought in relation to the time for the provision of the information specified in the Second WFO. On 5 September 2021 that application was dismissed and the Defendants were ordered to pay the Claimants' costs of the application.

120. On 9 September 2021, Ali Al Ghaith swore an affidavit in purported response to the Second WFO. After referring to the Second WFO Mr Al Ghaith deposed:

"6. I do not have any assets in the DIFC.

7. I have not, in any way, disposed of, dealt with or diminished the value of any of my assets up to the same value (USD95 million). I will not, in any way, dispose of, deal with or diminish the value of my asset base up to the same value (USD$95 million), until this Order is set aside, varied or otherwise is dealt with.

8. I hereby swear that I do not own any assets worldwide exceeding AED50,000 in value whether in my name or not and whether solely or jointly owned."

121. It is apparent from the terms of the affidavit that it manifestly fails to comply with the requirements of the Second WFO. Further, evidence establishes that the assertion that Mr Al Ghaith does not own any assets worldwide exceeding AED50,000 in value is patently false.

122. Mr Khalifa Al Ghaith swore an affidavit in identical terms on 9 September 2021. That affidavit is also manifestly deficient and the assertion that Mr Khalifa Al Ghaith did not own any assets worldwide exceeding AED50,000 in value is patently false.

123. On 8 November 2021, Ali Al Ghaith swore another affidavit in which he expressed an apology to the Court for the fact that his first affidavit was "inadvertently erroneous" because it was his understanding that the Second WFO referred only to assets held by him outside the UAE. A list of assets in the UAE exceeding AED50,000 in value was annexed to Ali Al Ghaith's affidavit. However, he did not assert that the list was complete - rather, he stated, more than three months after the Second WFO had been made:

"I am yet to collate further information pertaining to other assets I may have under my ownership or control and which are not listed herein however, . I am submitting the partial list of my assets in as far as I can ascertain to date, and I will aim to complete and submit a list containing the remainder of my asset base, before the hearing date of 14 November 2021."

124. Also on 8 November 2021, Mr Khalifa Al Ghaith swore an affidavit in identical terms.

125. I digress to observe that, more than three months after the Second WFO had been made, each of Mr Ali Al Ghaith and Mr Khalifa Al Ghaith swore affidavits admitting to their failure to comply with its terms.

126. Further, it is apparent that each Defendant was well aware of their failure to comply much earlier than the provision of their "amending" affidavits on 8 November 2021. At a directions hearing on 5 October 2021 Counsel on behalf of the Defendants sought an extension of time for compliance with the orders relating to the provision of information of 2-3 months, on the ground that the Defendants had misunderstood the requirements of the order of the Court.

127. On 5 December 2021, each of Ali and Khalifa Al Ghaith filed updated lists of assets. This was more than four months after the Second WFO had been made.

128. Senior Counsel for the Claimants referred the Court to documentary evidence which establishes that the lists of assets provided on 5 December 2021 are manifestly incomplete. The evidence establishes that the lists failed to refer to parcels of land in which Ali and Khalifa Al Ghaith had an interest, including parcels of land in Dubai. Further, Ali Al Ghaith has failed to disclose an interest which he holds in a company incorporated in Turkey, and another company incorporated in Bahrain. As neither Ali Al Ghaith or Khalifa Al Ghaith contend that they have provided adequate disclosure of their assets in accordance with the Second WFO, it is unnecessary to dwell upon that evidence in these reasons, and sufficient to note that I am satisfied that the evidence establishes that the disclosure given by each of those Defendants was, and remains, inadequate.

129. Turning now to the application against Six Star, on 9 September 2021 Ghaith Al Ghaith swore an affidavit deposing to the assets held by Six Star. Attached to that affidavit was a list of properties held by Six Star in Abu Dhabi and Dubai. The Claimants do not contend that this disclosure was inadequate. However, they rely upon the fact that the affidavit was provided approximately one month later than the date specified in the Second WFO. No explanation or purported justification has been provided for the delay in the provision of the information.

Conclusion - ARB-021-2021

130. The evidence to which I have referred establishes beyond reasonable doubt that each of the Defendants in ARB-021-2021 have committed the contempts alleged. Indeed, the Defendants did not seriously contend otherwise.

131. In particular, the evidence establishes beyond reasonable doubt that each of Ali and Khalifa Al Ghaith failed to provide the information required by the terms of the Second WFO within the times specified in that order and have repeatedly failed to provide complete and adequate information in relation to their assets, as required by the order. Although Six Star has ultimately complied with the requirements of the order, it did not do so until 9 September 2021, which is approximately one month later than the time required by the terms of the order.

The significance of the contempts and the orders appropriately made.

132. A number of submissions were made by Senior Counsel representing the Defendants in mitigation of the alleged contempts.

133. In relation to the contempt alleged against AGH, it was submitted that the transfer of AED7 million from AGH to Six Star cannot have caused any loss or disadvantage to creditors, including the Claimants. That superficially surprising submission was said to be justified by the following reasoning.

134. First, the transfer created a debt from Six Star to AGH, which was an asset of AGH. That asset would be available to creditors, including the Claimants, unless Six Star was insolvent. However, if Six Star was insolvent, as AGH was liable to the Bank as guarantor of the restructured debt, and the Bank held security to support that guarantee, any funds remaining in the credit of AGH's accounts at the Bank would be applied in satisfaction of the guaranteed debt and would not have been available to creditors in any case.

135. So, it is submitted that irrespective of whether or not Six Star is insolvent, creditors have suffered no loss or disadvantage by reason of the transfer.

136. This submission must be rejected. The transfer of AED7 million from AGH to Six Star has deprived AGH of an asset which would have been readily and easily available to the Claimants in proceedings to enforce the arbitral award against AGH. The course proposed in the submission would require the Claimants to liquidate AGH, and then instruct and fund the liquidator to pursue recovery of the debt due from Six Star to AGH, a course fraught with risk, given the apparent enthusiasm with which members of the Al Ghaith family move assets between companies under their control in order to defeat the claims of creditors against those companies.

137. The submission posited on an assumption of the insolvency of Six Star is, with respect, entirely speculative, and there is quite insufficient information before the Court to enable any projection of the consequences of insolvency to be made with any confidence, nor any evidence to suggest that Six Star is in fact insolvent.

138. Senior Counsel for the Defendants also submitted that the continuing failure of Ali and Khalifa Al Ghaith to provide adequate information with respect to their assets should not be regarded as a significant contempt, because the assets which they had ultimately disclosed would be more than sufficient to satisfy any judgment entered against them in the New York alter ego proceedings.

139. With respect, that submission misses the point of the provisions in WFOs relating to the disclosure of information with respect to assets. That purpose was succinctly identified by Justice Ali Al Madhani in *SBM Bank (Mauritius) Ltd v Renish Petrochem FZE & Others.*[25] His Honour observed:

> "Freezing injunctions generally serve two purposes. The first is to prevent the dissipation of assets in the hope that any liability determined by the Court may be satisfied and the second is to provide information as to the assets of a defendant. I accept . [the] submission that freezing injunctions would be rather toothless if the information orders were not complied with, as not only would a claimant be left in the dark as to what assets they may be able to recover, but also the claimant would be unaware as to whether the substantive orders, those prohibiting dissipation, were being complied with. The information element of freezing injunctions is of particular importance in cases . where a party is accusing another of fraud or wrongdoing and is seeking to trace back its assets before they were dissipated by the wrongdoer. Moreover in cases of fraud it is most often the case that the wrongdoer has left very little in the way of evidence. And so, the claimant seeks relief from the Court in the form of provision of information under the terms of a freezing injunction to piece together events and trace their assets."[26]

140. These helpful observations also explain the common practice of requiring that the information which is to be provided with respect to assets must be provided a very short time, measured in days, not weeks, after a freezing order is made. That practice recognizes the very real dangers to the efficacy of a freezing order if the Court and the beneficiary of that order are not provided with the information necessary to scrutinize compliance with the order very soon after it is made.

General Legal Principles Relating to Penalty

141. A number of English cases provide useful guidance in relation to the approach which the Court should take when dealing with an established contempt. Those cases establish the following principles:

(a) The serious and deliberate breach of a court order may well merit imprisonment, depending upon the Court's assessment of the culpability of the conduct and the harm which it caused - see *Oliver v Shaikh;*[27]

(b) Breach of a court order is always serious because it undermines the administration of justice, and imprisonment is likely to be required to punish serious contempt and manifest the Court's disapproval of the breach of its orders - see *McKendrick v FCA;*[28]

(c) A deliberate and substantial breach of a freezing order is a serious matter which normally attracts an immediate custodial sentence - see JSC BTA Bank v Solodchenko (no. 2);[29]

(d) Where there is a continuing failure to disclose relevant information, the Court should consider imposing a long sentence - see *JSC BTA Bank;*[30]

(e) Mitigatory factors include:

(i) an immediate admission of breach;

(ii) an admission of the seriousness of the breach;

(iii) co-operation in order to mitigate the consequences of the breach; and

(iv) a sincere apology to the Court - see Oliver.[31]

The contempt committed by AGH

142. It is difficult to overstate the significance and gravity of the contempt committed by AGH.

143. I have found that the contempt was committed in the course of a deliberate and continuing strategy to transfer assets from AGH to other entities under the control of the Al Ghaith family in order to put those assets beyond the reach of the Claimants, and was committed at the first available opportunity after AGH received notice of the First WFO and for the purpose of attempting to defeat the operation of that order. Adjectival rhetoric, utilising terms such as "contumelious" and "contumacious" is not especially illuminating, although thoroughly justified by the circumstances of this case. The evidence establishes that the contempt was deliberate and undertaken for the purpose of defeating the orders of the Court. It follows that the contempt must be considered to be at the upper end of the range of significance in relation to contempts of court

generally.

144. There is nothing to be said by way of mitigation. The allegations of contempt have been contested, no admissions have been made and no attempt made to mitigate the damage caused by the contempt, nor has any apology been proffered to the Court.

145. If the contempt committed by AGH had been committed by a natural person, and if I was sitting in a Court with criminal jurisdiction, I would have had no hesitation in sentencing the contemnor to a significant term of imprisonment, consistently with the principles enunciated in the English cases to which I have referred.

146. However, AGH is not a natural person and this Court does not have a criminal jurisdiction. This Court could impose a fine upon AGH, but that course would be futile. Judgment has been entered against AGH in this Court in a very substantial amount which remains unsatisfied. In those circumstances it is highly unlikely that any fine imposed by the Court would be paid, and if it was, the effect would be to reduce the assets available to the Claimants in the enforcement of their judgment.

147. As I have noted, the evidence does not establish which officers of AGH were involved in the transfer of funds which constituted the contempt, other than Mr Mohammed John Muthaid, although on the evidence he may have been little more than a courier of the document to the Bank. In my view this is one of those cases in which further investigation would be highly desirable for the purpose of identifying the individuals who were involved in the commission of the contempt, in order that any appropriate criminal proceedings could be brought against those individuals and appropriate levels of punishment imposed.

148. Obviously the most appropriate person to cause such an investigation to be undertaken is the Attorney General of Dubai and the matter should be referred to him. If those investigations reveal the identity of the individuals within AGH who were involved in the commission of the contempt, appropriate criminal proceedings could be brought against AGH and the individuals concerned in the Courts of Dubai. As there has been no challenge to the validity of the First WFO, there is no reason why that investigation, and any subsequent proceedings could not be commenced immediately.

Ali Al Ghaith and Khalifa Al Ghaith

149. It is also difficult to overstate the significance and gravity of the contempts committed by Ali Al Ghaith and Khalifa Al Ghaith in relation to the requirements of the Second WFO relating to the provision of information with respect to their assets. They have treated the orders of the Court with wanton disregard over a long period and remained in breach of those orders at the time the contempt application was heard - some five months after the time for compliance with those orders had expired. They have acted in a way which compels the conclusion that they do not consider that they have any obligation to comply with orders made by the Court.

150. The information initially provided was farcical in its scope, and very late, and the information provided two months later was acknowledged to be incomplete at the time it was provided. The further information provided one month after that remains incomplete and at the time of the hearing each Defendant remained in breach of the order with respect to the adequacy of the information provided.

151. There are no mitigatory factors - the Defendants have not admitted their contempt, they have asserted through counsel that their contempts are not serious, they have not taken any steps to mitigate the consequences of their contempts and have proffered no apology to the Court other than the insincere apology proffered at the time their second affidavits were served, in which they expressly acknowledged their continuing non-compliance with the orders of the Court.

152. Again if I was sitting in a Court with a criminal jurisdiction, I would give very serious consideration to imposing terms of imprisonment upon each of Ali Al Ghaith and Khalifa Al Ghaith. However, that option is not available. I consider that the imposition of a fine would not adequately reflect the seriousness of their deliberate and continuing breach of the orders of the Court. Accordingly, the appropriate order is to refer each contemnor to the Attorney General of Dubai in order that the Attorney General may consider the instigation of appropriate criminal proceedings. As I have noted, it will be for the Attorney General to determine whether the instigation of any such proceedings should await the outcome of the appeal in which the Defendants challenge the validity of the Second WFO.

Six Star

153. Obviously the contempt committed by Six Star is significantly less serious than the contempts committed by the other contemnors. The information ultimately provided by Six Star is not said to be inadequate, but it was provided approximately one month later than it should have been. The observations made by the Courts in *JSC BTA Bank* and *SBM Bank (Mauritius) Ltd* reinforce the importance of compliance with the orders of the Court requiring prompt disclosure of information with respect to assets when a freezing order is made.

154. No mitigatory factors are present. No attempt has been made to justify, excuse or explain the delay, no admission of breach has been made, nor any apology proffered to the Court.

155. If the only case before the Court had been that relating to Six Star, I might have considered the imposition of a fine. However, Six Star is the corporate manifestation of the individuals involved in the commission of the other contempts found by the Court, and Six Star's conduct is appropriately viewed in that context. As those contempts are to be referred to the Attorney General, it is appropriate for the contempt committed by Six Star to be referred to the Attorney General as well.

Conclusion

156. For the reasons I have given I find that each contempt alleged has been proven beyond reasonable doubt. The Court will order that:

(a) each contempt and contemnor will be referred to the Attorney General of Dubai for consideration; and

(b) each Defendant is to pay the Claimants' costs of the application for committal brought against that Defendant to be agreed, or in default of

agreement assessed by the Registrar.