THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) AJIAL NATIONAL EDUCATION COMPANY K.S.C.C
(2) TALAL KHALIFA TALAL AL JERI

Claimants

and

(1) AL AMAN INVESTMENT COMPANY K.S.C.P
(2) AL-AMMARY EDUCATIONAL COMPANY W.L.L
(3) FIRST KUWAITI FOR EDUCATION HOLDING COMPANY W.L.L

Defendants

ORDER WITH REASONS OF JUSTICE MICHAEL BLACK

UPON the Defendants' Application No. CFI-105-2021/2 dated 30 November 2022 seeking an order for Security for Costs (the "Application")

AND UPON the Claimants' evidence in answer to the Application dated 13 December 2022 (the "Answer")

AND UPON the Defendants' evidence in reply to the Answer dated 20 December 2022

AND UPON hearing the parties at the hearing listed before me on 26 January 2023

AND UPON reviewing the submission in the Case File

AND PURSUANT TO the Rules of the DIFC Courts ("RDC")

IT IS HEREBY ORDERED THAT:

1. The Application is dismissed.

2. The Defendants shall pay the Claimants' costs assessed at USD 45,000.

Issued by:
Delvin Sumo
Assistant Registrar
Date of Issue: 30 January 2023
At: 10:45am

SCHEDULE OF REASONS

1. This is an Application made on behalf of all the Defendants against all of the Claimants for security of their costs of the proceedings under RDC 25.97.

2. RDC 25.99 provides:

> "25.99
>
> An application for security for costs must be supported by written evidence, setting out:
>
> (1) the grounds on which security is sought;
>
> (2) any factors relevant to the exercise of the Court's discretion, such as the location of the claimant's assets and any practical difficulties which may arise in enforcing any order for costs;
>
> (3) a statement of costs already incurred, including the information required by RDC 38.35 and signed by the party or his legal representative; and
>
> (4) An estimate of anticipated future costs calculated by reference to the elements set out at RDC 38.35 and signed by the party or his legal representative."

3. RDC rules 25.101 and 102 provide:

> "25.101

The Court may make an order for security for costs under Rule 25.100 if it is satisfied, having regard to all the circumstances of the case that it is just to make such an order; and

(1) one or more of the conditions in Rule 25.102 applies; or

(2) an enactment permits the Court to require security for costs.

25.102

The conditions are:

(1) the claimant is resident out of the UAE;

(2) the claimant is a company or other body (whether incorporated inside or outside the DIFC) and there is reason to believe that it will be unable to pay the defendant's costs if ordered instead of."

4. The sum sought by way of security is USD 453,446.71 of which USD 210,908.16 had already been incurred as of 25 November 2022. The Defendants' estimated costs thereafter until the conclusion of the disclosure stage of the proceedings are USD 223,000. The overall costs of the proceedings are estimated to be excess of USD 1 million.

5. The Defendants submit that the following matters are material to exercise of the Court's discretion to order security under RDC rule 25.101(1):

(1) The Claimants are resident outside the UAE; and

(2) The Claimants' assets are located outside the DIFC and there will be practical difficulties win enforcing any order for costs.

6. It is no longer suggested that the First Claimant is a company and there is reason to believe that it will be unable to pay the Defendants' costs if ordered to do so.

7. There is no dispute that none of the parties is resident either in the DIFC or wider United Arab Emirates. Each of the Defendants is a company established and registered in Kuwait with a registered office in Kuwait. The First Claimant is also a company established and registered in Kuwait with a registered office in Kuwait. The Second Claimant is a Kuwaiti national resident in Kuwait.

8. Very properly neither party has asked me to investigate the merits of the Claim. It is only necessary that to note that that the documents on the court file indicate serious issues between the parties to be tried and that no party has an overwhelming case on the merits such that it should influence the decision whether or not or to order security for costs.

9. In summary, on 15 May 2019, the Claimants agreed to sell 100% of the ownership of Dar Al Salaam Education Company (the "Company") to the Defendants on the terms of a Sale & Purchase Agreement ("SPA") subject to the laws of Kuwait and the exclusive jurisdiction of the DIFC Courts. The business of the Company was to run schools in Kuwait. The Adjusted Purchase Price was KWD 18 million.

10. On the same date, 15 May 2019, the Parties executed a Disclosure Letter which set out certain General Disclosures and Specific Disclosures. The Disclosure Letter qualified the Warranties under the SPA.

11. The Completion Date of the Transaction occurred on 26 June 2019, and on this date, the Shares of the Company were duly transferred to the Defendants.

12. There was a Hold Back Amount of KWD 4.5 million payable one year after completion. The Claimants claim that they are entitled to payment of that sum. They also claim reimbursement of costs related to pre-contract guarantee obligations in the sum of KWD 22,923.55, salaries paid on the Defendants' behalf of KWD 447,872 plus interest.

13. The Defendants claim that there were breaches of warranties in the SPA and that they were justified in retaining the Hold Back Amount. The Defendants admit that the Claimants are entitled to costs they have properly incurred in connection with guaranteed obligations but deny the amount. The Defendants plead that in accordance with the terms of the SPA the obligation to pay the salary costs was on the Claimants as Sellers and not the Defendants as Buyers.

14. The claim form was issued on 5 December 2021. Service was effected on 25 May 2022 and an acknowledgement of service was filed on 21 June 2022. Particulars of Claim were filed on 16 August 2022. The Defence was filed on 13 September 2022. The Reply was filed on 11 October 2022. On 11 October 2022 the Claimants served a Request for Further Information. The Defendants filed their response to that request on 25 November 2022. The Defendants issued the present Application on 30 November 2022. A Case Management Conference was scheduled for 7 December 2022 but was vacated, the parties having agreed directions. The parties are currently working towards a 30 January 2023 deadline for standard disclosure.

15. The Defendants submit that prior to making the Security Application, the Defendants have repeatedly requested that the Claimants either clarify their asset position or agree in principle (subject to further agreement as to quantum) to pay security into the DIFC Courts for the Defendants' anticipated costs of the proceedings. They say that the evidence submitted by the Claimants pursuant to RDC 23.41 on 12 December 2022 - some 6 weeks after the Defendants' first request to the Claimants on 1 November 2022 - constitutes, to date, the only attempt by the Claimants to engage substantively with the Defendants' concerns.

16. The Defendants point out that there is no evidence that Claimants have any assets in the DIFC or wider UAE. They then focus upon the evidence of their expert on Kuwaiti law, Mr Hussein Al Ghareeb, Managing Partner of Meshari Alosaimi Law Firm. It is his evidence that foreign judgments are in principle enforceable in Kuwait under the GCC Convention but the procedure can be time-consuming and costly. He cites examples where the procedure as taken in excess of 2 years having regard to rights of appeal and enforcement procedures. He also notes that the

real costs of enforcement will not be recoverable. Mr Al Ghareeb suggests that the unique status of the DIFC Court may also lead to confusion and delay.

17. The Defendants contrast Mr Al Ghareeb's evidence with that of the Claimants' expert Mr Salim Ali, a partner in Al Hamad Legal Group. Mr Ali states that he has first-hand experience of enforcing foreign judgments in Kuwait and he knows of colleagues who have enforced DIFC judgments in Kuwait. It was on that basis that counsel to the parties advised the incorporation of a DIFC jurisdiction clause in the SPA, the first draft of which was prepared by counsel to the Defendants.

18. Mr Ali refers to the GCC and Riyadh Conventions and points out that the principle of reciprocity of enforcement of judgments is enshrined in the Kuwait Civil Commercial Procedure Law Number 38 of 1980. In his view it might take 6-7 months and cost up to USD 5,000 to have any judgment legalised before submission to the Execution Department. He does not address rights of appeal thereafter but does note that the Execution Department would be able to issue an immediate freezing order.

19. I am willing to accept that enforcement of a DIFC costs judgment in Kuwait will involve irrecoverable costs and that it will take more than 7 months given the rights of challenge (see *PJSC Tatneft v Bogolyubov* [2019] Costs LR 977 at [19] per Butcher J). Those matters may be mitigated if an attachment is granted and remains in place throughout the process. The attachment would of course only benefit the judgment creditor if the judgment debtor has assets to attach.

20. The uncontradicted evidence seems to be that the Claimants do not have assets in the UAE but do have substantial assets in Kuwait. Mr Mahmoud Rashad, the CFO of Aljeri Group the indirect holding company of the First Claimant and of which the Second Claimant is chairman, CFO and 66% shareholder, deposes that:

(1) The First Claimant was founded in 2002;

(2) It is one of 4 subsidiaries in Kuwait and the group owns 18 schools;

(3) The First Claimant has good financials, with an annual income of KWD 3,554,207 (approx. USD 11,575,000). Furthermore, the First Claimant has assets in excess of KWD 19,732,015 (approx. USD 64,269,000) according to the audited financial statements for 2021;

(4) The Defendants have paid some KWD 13,500,00, approximately USD 44,000,000, to the First Claimant in respect of the purchase of DEC. The majority of those funds have been reinvested in the First Claimant and therefore the purchase price still forms part of the asset pool of the First Claimant; and

(5) The Group is worth around USD 246 million with an annual income of around USD 27 million. Mr Aljeri is, as noted, two-thirds owner of the Group.

21. In the present case legally-advised and apparently sophisticated parties of equal bargaining power entered into what was essentially a domestic Kuwaiti agreement - all the parties were Kuwaiti, the subject matter was located in Kuwait, the consideration was in Kuwaiti dinars and the governing law was that of Kuwait - but nevertheless decided to opt into the exclusive judication of the DIFC Courts. It is hard to imagine that they would have done so without considering the ramifications of that decision.

22. Mr Lovett for the Defendants points out that one ramification is the availability of adverse costs orders that may be underwritten by orders for security.

23. The Defendants alight on the words of RDC rule 25.99(2) *"any practical difficulties which may arise in enforcing any order for costs"* and refer me to the English authority *Danilina v Chernukhin* [2018] EWCA Civ 1802 at [51/52] where Hamblen J set out a number of criteria under the equivalent English rules (insofar as relevant):

(1) The court has a discretion to make an order for security for costs if *"it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order";*

(2) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of Articles 6 and 14 ECHR - while these provisions do not apply in the DIFC, I think it is necessary to have regard to the UAE's treaty obligations binding within the DIFC, in particular those concerning judicial cooperation and the rights before the UAE's courts of nationals of contracting states;

(3) This requires objectively justified grounds relating to obstacles to, or the burden of, enforcement in the context of the particular foreign claimant or country concerned;

(4) Such grounds exist where there is a real risk of *"substantial obstacles to enforcement"* or of an additional burden in terms of cost or delay;

(5) The relevant risks are of (i) non-enforcement and/or (ii) additional burdens of enforcement. A real risk of either will suffice to meet the "threshold" test;

(6) Mere difficulty of enforcement in itself is not enough (save in so far as it results in additional costs and therefore an extra burden of enforcement). The relevant risk is non-enforcement, not difficulty in enforcement and this is the risk to which the test of *"substantial obstacles"* is directed. The obstacles need to be sufficiently substantial to amount to a real risk of non-enforcement. Difficulties may, however, be evidence of the *"substantial obstacles"* required for there to be a real risk of non-enforcement; and

(7) Delay is mentioned as a relevant additional burden of enforcement, but it is difficult to see how this can be quantified in terms of security unless it is likely to result in some additional cost or interest burden.

24. My attention was also drawn to the decision of the English Court of Appeal in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556 at [64]:

> "64. The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases - particularly other common law countries which introduced in relation to English judgments legislation equivalent to Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Part II of the Administration of Justice Act 1920) - it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden, meriting the protection of an order for security for costs. Even then, it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrecoverable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden."

25. And at [67]:

> "67. The risk against which the present defendants are entitled to protection is, thus, not that the claimant will not have the assets to pay the costs, and not that the law of her state of residence will not recognise and enforce any judgment against her for costs. It is that the steps taken to enforce any such judgment in the United States will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here or in any other Brussels/Lugano state. Any order for security for costs in this case should be tailored in amount to reflect the nature and size of the risk against which it is designed to protect."

26. It was this passage that prompted me during argument to ask counsel what in present case is the extra burden faced by the Defendants, in other words, what are we comparing with what. Mr Lyon for the Claimants replied rhetorically that it might be comparing the costs of enforcement in Kuwait with those in the DIFC or those in the wider UAE. The latter comparison is in my view telling as the procedure for enforcement in emirates other than Dubai is likely to be similar to that in Kuwait and of course if the Claimants had assets anywhere in the UAE there would be no grounds for making security.

27. Mr Lovett with his extensive experience in the region no doubt realised this and tried to argue that the relevant difference would be between contested and uncontested proceedings. I am afraid I cannot agree. The passage at [67] of Nasser does not say that - what it compares is institutional difficulty - in that case the additional burden of enforcing in the USA over that under the Brussels Regulation or Lugano Convention.

28. There is no evidence in the present case that there is any risk of non-enforcement. Mr Lovett tried to suggest that there might be, but the evidence is just not there.

29. The only evidence is that the normal procedure for enforcement in Kuwait may take some time and may involve irrecoverable but unquantified costs, but these were matters that were or should have been well known the parties when making their agreement and were therefore commercial risks the parties expressly or implicitly agreed to bear.

30. Additionally, it seems to me that for this court to hold that the normal procedure for the enforcement of UAE judgments in the Kuwait courts justifies an order for security for costs would be unfairly to discriminate against Kuwaiti parties litigating before these courts in reliance on their rights under the Riyadh and GCC Conventions. I find the situation analogous to that of parties from Brussels Regulation or Lugano Convention states litigating before the English courts.

31. In this connection I would like to mention the reference to *"the offshore nature of the nature of the DIFC Court"* at paragraph 17 of Mr Al Ghareeb's witness statement. I do understand that lawyers in other jurisdictions may find the status of the DIFC Courts complex but I should like to emphasize that while "onshore/offshore" is a convenient shorthand for the distinction between the Dubai courts respectively outside and inside the DIFC, there is nothing *"offshore"* in the generally-accepted sense of the word about the DIFC Courts. The DIFC is an open and cooperative jurisdiction. The DIFC Courts are courts of Dubai and the UAE. The judges of the courts are appointed by the Ruler like any other judge and give their judgments in his name. Business in the DIFC is transparently regulated with independent regulators and courts acting in accordance with published laws, regulations and procedures. The DIFC is bound by, and enforces, all international treaties and conventions to which the UAE is a party.

32. I was referred to paragraphs [47] and [48] of the decision of the Court of Appeal Bader *Al Khorafi & Ors v Bank Sarasin-Alpen (ME) Limited & Ors* [2010] DIFC CA 001

> "47. In this connection, it is important not to lose sight of the underlying purpose of such Orders. This was expressed by Lord Donaldson M.R. in De Bry v Fitzgerald [1990] 1 WLR 352 at pages 558 to 559: "a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded the costs of the action, he will have real difficulty in enforcing that order." He further observed: "If this difficulty [in enforcing the order] would arise from the impecuniosity of the plaintiff, the court will of course have to take an account of the likelihood of his succeeding in his claim, for it would be a total denial of justice that poverty should bar him from putting forward what is prima facie a good claim." and continued: "If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by significant expenditure of time and money, the defendant should be entitled to security."

and [48]

> "Such Orders, therefore, have the purpose of protecting a defendant from the injustice that would be caused where, having successfully defeated the claim against him and having recovered an Order for costs against the claimant, he was then left in the position of being unable to enforce that Order. For this reason such Orders may be made against a claimant who is resident abroad and who has no assets within the

jurisdiction against which a Costs Order can be executed. In those circumstances the Order for security is intended to remove the risk of irrecoverability of costs under a future order because of the difficulty of enforcing such an order in the foreign jurisdiction. Such difficulty may arise because of the unwillingness or inability of the foreign court to enforce a Costs Order; or because the claimant's assets are or have been made unavailable for execution or for some other reason. [my emphasis]."

33. There is no evidence in the present case that there is any unwillingness or inability of the Kuwaiti courts to enforce a Costs Order in the form (as it would be) of a DIFC Court judgment. Equally there is no evidence that the Claimants' assets are or have been made unavailable for execution or for some other reason - on the contrary, the Claimants appear to be parties of considerable substance.

34. As the Court of Appeal emphasized in Khorafi at [49] *"The burden of establishing facts sufficient to justify an order of security for costs rests on the applicant. If on the whole of the evidence the Court is not persuaded that the burden has been discharged, no Order can be made."*

35. On the whole evidence I am not persuaded that the Defendants have discharged the burden to justify an order for security for costs and the Application is dismissed.

36. While it has been unnecessary for me to consider factors that may weigh in the exercise of the discretion whether or not to make an order, I do note the stage of these at which this Application has been made. It does seem to be somewhat late in the day given that pleadings had closed and the Defendants had already incurred over USD 200,000 in costs. The later an application is made the more inclined a court may be to find that the real motivation is not to protect the applicant against irrecoverable costs but to place tactical pressure on the opposing party.

37. The Defendants are to pay the Claimants costs assessed at USD 45,000.