Claim No. CFI 060/2020

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

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

Claimants

and

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

Defendants

and

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

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

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ORDER WITH REASONS OF JUSTICE WAYNE MARTIN

UPON considering the letter received from the Abu Dhabi Judicial Department dated 13 September 2021 (the **"Letter"**)

AND UPON the Court inviting the parties to provide their views on the Letter

AND UPON reviewing the Claimants' submissions dated 10 October 2021 with respect to the Letter

AND UPON reviewing the Defendants' submissions dated 10 October 2021 with respect to the Letter

IT IS HEREBY ORDERED THAT:

1. The Court should take no action in response to the letters which have been received from the Abu Dhabi and Dubai Courts.

2. The Defendants should pay the Claimants' costs of this issue to be assessed by the Registrar unless the parties agree the quantum of those costs within 28 days of the date of this Order.

Issued by:
Nour Hineidi
Registrar
Date of issue: 20 October 2021
Time: 8am

SCHEDULE OF REASONS

Summary

1. All Defendants (not including the Defendants to counterclaim) submit that there should be an immediate stay of these proceedings, without the need for any further application, as a consequence of the letter dated 13 September 2021 sent from the Abu Dhabi Judicial Department to this Court. That submission must be rejected, for the reasons which follow.

The Abu Dhabi proceedings

2. The Second Defendant in these proceedings, Khaleefa Butti Omair Yousif Al Muhairi, commenced bankruptcy proceedings in the Abu Dhabi Court of First Instance (case 7/2021). He is the Applicant Debtor in those proceedings, to which he has joined 29 additional parties as "Joined Litigants". The Third Defendant in these proceedings, H.E. Saeed Mohamed Butti Mohamed Al Qebaisi, is one of the Joined Litigants. The other 28 Joined Litigants are corporate entities. The 28 corporate Joined Litigants include some, but not all, of the Defendants to these proceedings. Only one of the Defendants to these proceedings who is a Joined Litigant in the Abu Dhabi proceedings is incorporated in Abu Dhabi. The remainder of the corporate Defendants to these proceedings who are also Joined Litigants are not registered in Abu Dhabi.

3. On 27 July 2021, the Abu Dhabi Court of First Instance issued a ruling (the **"Abu Dhabi Bankruptcy Decision"**) in which it ordered, among other things, that:

(a) a Trustee in bankruptcy be appointed;

(b) the Trustee is to make an inventory of the assets of the Applicant Debtor and the Joined Litigants;

(c) the Trustee is to provide a report to the Court with respect to both the Applicant Debtor and the Joined Litigants;

(d) the Trustee was to call for submissions from creditors of the Applicant Debtor and the Joined Litigants; and

(e) the Trustee was to prepare and develop a restructuring plan for the Applicant Debtor and the Joined Litigants.

4. Of direct relevance to the present question, the Abu Dhabi Court also ordered that:

> Judicial proceedings against the Debtor and the Joined Litigants and the execution proceedings against their assets thereof are stayed. Permission is given to address letters to the competent authorities and to issue a "To Whom It May Concern" certificate to advise of the content of this decision.

5. On 9 August 2021, the Abu Dhabi Court of First Instance issued a document described as a "To Whom It May Concern" certificate referring to the ruling of the Court to which I have just referred. The certificate included the following:

> Based on the above we would like to inform whoever it concerns that the Court decided as follows:
>
> 1. .
>
> 5. Stay court proceedings against the Applicant Debtor and the Joined Litigants and the execution proceedings on their assets.

6. On 17 August 2021, the Abu Dhabi Court of First Instance sent a letter to the President of the Dubai Court of First Instance referring to the decision in the bankruptcy proceedings to which I have referred above, and stating:

> It is decided to delegate to Your Excellency to address the Dubai International Financial Centre to stay the proceedings in the cases tried before it against the Debtor and the Joined Litigants and to stay the execution procedures on their assets .

7. On 9 September 2021, the Dubai Civil Court of First Instance sent a letter to the Chief Justice of the DIFC Courts (the **"Delegation Letter"**) which included the following:

> It is ordered by the Dubai Court of First Instance on 8 September 2021 in the said delegation above to address this Honourable Court to execute the content of the order of the Abu Dhabi Court of First Instance in Case no. 7/2021 bankruptcy, Abu Dhabi, as per its request.

8. On 13 September 2021, the Abu Dhabi Court of First Instance wrote to this Court (the **"Abu Dhabi Court Letter"**), referring to the bankruptcy proceedings in Abu Dhabi and asserting:

> Pursuant to the order rendered by the Bankruptcy Circuit in the Abu Dhabi Commercial Court, it has been decided to address you (the Dubai International Financial Centre Courts) to stay the proceedings in the cases listed before you, against the Debtor and the Joined Litigants and to stay execution proceedings on their assets further to the decision rendered by the Bankruptcy Circuit in Case no. 7 of 2021 *Abu Dhabi Bankruptcy* on 27/07/21.

9. This is the letter upon which the Defendants in these proceedings primarily rely for the purposes of their submissions that these proceedings should be stayed, although reliance is also placed upon the "Delegation Letter" sent to the DIFC Courts by the Dubai Courts.

10. Following the appointment of the Trustee by the Abu Dhabi Court, a number of creditors, including the Claimants in these proceedings, filed a grievance petition in the Abu Dhabi Court in which they sought the reversal of the decision to appoint a single Trustee and the replacement of that Trustee with a suitably qualified Trustee from a reputable firm with experience in complex restructuring and liquidation proceedings.

11. On 23 August 2021, the Abu Dhabi Court rejected the request to dismiss the Trustee but directed the appointment of two additional Trustees from international accounting firms.

12. On 26 September 2021, the Abu Dhabi Court of First Instance ordered:

(a) the appointment of two partners from DeLoitte as additional Trustees; and

(b) that the Applicant Debtor and the Joined Parties pay into Court the sum of AED 2.9 million on account of the fees of the additional Trustees.

13. On 28 September 2021, the Applicant Debtor and the Joined Litigants filed a grievance petition with the Abu Dhabi Court against that decision. Those parties have not paid into Court the amount ordered by the Abu Dhabi Court pending the resolution of their grievance petition.

The Defendants' Submissions

14. The Defendants rely upon the DIFC Insolvency Law[1] which incorporates, as Schedule 4 to that Law, a modified form of the UNCITRAL Model Law.

15. The Defendants submit that for the purposes of the application of the UNCITRAL Model Law in DIFC, the Abu Dhabi Court is a foreign court and the Abu Dhabi bankruptcy proceedings are foreign proceedings, and this appears to be common ground.

16. The Defendants place particular reliance upon Article 25 of Schedule 4 which provides:

In matters referred to Article 1, the Court may co-operate with foreign courts or foreign representatives, either directly or through a DIFC insolvency office holder.

17. The Defendants submit that the implementation of a stay of proceedings plainly falls within the co-operation which should be extended in response to the requests issued by the Abu Dhabi Court.

18. The Defendants also place reliance upon the inherent power of this Court to order a stay of proceedings, expressly preserved by RDC 4.2(6).

19. In their submissions, the Defendants do not specifically address the position of the Defendants to these proceedings who are not Joined Litigants in the Abu Dhabi bankruptcy proceedings (the Fourth, Seventeenth and Eighteenth Defendants to these proceedings). It might perhaps be inferred that the Defendants contend that the stay of proceedings directed by the Abu Dhabi Court should apply to any proceedings to which the Applicant Debtor and/or any of the Joined Litigants is a party, irrespective of whether there are other Defendants to those proceedings.

20. The Defendants have not applied for recognition and/or enforcement of the orders of the Abu Dhabi Court in this Court. Indeed, the Defendants make no application at all but submit that these proceedings must be stayed without need for any application. It follows that it is neither necessary nor appropriate to express any view with respect to the likely outcome of an application for recognition and/or enforcement of the Abu Dhabi Bankruptcy Decision unless and until such time as an application of that kind is made.

21. Similarly, although the Defendants place reliance upon the Delegation Letter sent from the Dubai Court of First Instance to the Chief Justice of this Court, no reliance is placed upon Article 7(5) of the Judicial Authority Law.[2] That clause refers to the execution of the judgments, decisions or orders issued by the Dubai Courts and requires the issue of an execution letter to the Chief Justice of the DIFC Courts, together with an application by the person requesting execution accompanied by a copy of the judgment decision or order of the Dubai Courts. The Defendants have made no application of that kind, presumably because the judgment upon which they rely is not a judgment of the Dubai Courts.

The Claimants' Submissions

22. The Claimants' submissions rely heavily (understandably) upon the decision of Justice Cooke in *Mashreqbank PSC v Infinite Partners Investment LLC & Ors*[3]. The Claimant in that case is one of the Claimants in this case. The Second and Third Defendants in that case are the Second and Third Defendants in this case. The other Defendants in that case are corporate entities who are not parties to these proceedings. The issues determined by Justice Cooke arose from the same judgment of the Abu Dhabi Court at First Instance in bankruptcy and from the same communications from that Court to the Dubai Courts and to this Court as in this case.

23. In that case, the Defendants sought orders for recognition and/or enforcement of the judgment of the Abu Dhabi Court in the bankruptcy proceedings and/or of the Delegation Letters to the DIFC Courts issued by the Abu Dhabi Court and the Dubai Courts. A significant part of the reasons of Justice Cooke relate to his rejection of those applications. As noted, no applications of that kind have been made in this case, and it is therefore unnecessary to refer to that portion of Justice Cooke's reasons.

24. In that case, the Defendants also placed reliance upon the provisions of the DIFC Insolvency Law[4] and in particular, Schedule 4 of that Law, which incorporates the modified UNCITRAL Model Law. In that respect, the submission appears to be identical to the submission made by the Defendants in this case.

25. Justice Cooke rejected that submission for reasons given in the following terms:

32. Article 117 of the Insolvency Law provides as follows:

"(1) where a Foreign Company is the subject of insolvency proceedings in its jurisdiction of incorporation, the Court shall, upon request from the court of that jurisdiction, assist that court in the gathering and remitting of assets maintained within the DIFC.

.

(3) the UNCITRAL Model Law (with certain modifications for application in the DIFC) as set out in Schedule 4 of this Law has

force in the DIFC in respect of Foreign Companies."

33. The request here can come from the foreign corporation, unlike the request in Article 15 of the Schedule for recognition where it must come from the foreign representative. However, the request can only relate to a foreign company which is incorporated in the jurisdiction of that foreign Court. The evidence before the Court is that, of all the Defendants, only one, namely the First Defendant is a company incorporated in Abu Dhabi, from which the requests for execution or assistance, in the shape of the Delegation Letters, issued by the Court, have come. There is no basis upon which, under Article 117, this Court can assist the Abu Dhabi Court in respect of insolvency proceedings relating to the Second and Third Defendants who are individuals and the Fourth to Seventh Defendants which are companies incorporated in Dubai, not Abu Dhabi. It would be open to the Court to assist the Abu Dhabi Court in relation to insolvency proceedings in relation to the First Defendant alone, if other requirements were satisfied, but what is sought by way of assistance is not "the gathering and remitting of assets maintained within the DIFC" which belong to the First Defendant, but the stay of all proceedings against all the Defendants.

34. Under Articles 25 - 27 of Schedule 4, provision is made for co-operation and direct communication between a Court of the DIFC and foreign Courts or foreign representatives, either directly or through a DIFC insolvency office-holder. Article 27 provides that cooperation may be implemented by any appropriate means including coordination of the administration and supervision of the debtor's assets and affairs and approval or implementation by Courts of agreements concerning the coordination of proceedings. Whilst this gives flexibility to this Court in relation to the means by which any assistance could be given, the only relevant assistance which is being sought is the stay of proceedings which could only be granted against the First Defendant, which is not a form of assistance envisaged in Article 117.

26. Regrettably, the Defendants' submissions make no reference to this decision. I am therefore left to analyse the applicability of this reasoning without the benefit of contrary argument.

27. It is clear from the passages which I have set out above that the reasoning adopted by Justice Cooke depends fundamentally upon the implicit proposition that paragraph (3) of Article 117 should be construed as only applying Schedule 4 in respect of foreign companies to the extent of enabling this Court to discharge the obligation imposed by paragraph (1) of Article 117. Put another way, Justice Cooke has concluded that the provisions in Schedule 4 can only be applied by the Court if and to the extent that they facilitate "the gathering and remitting of assets maintained within the DIFC", as specified in Article 117 (1). In Justice Cooke's view, because the request for a stay of proceedings did not fall within the scope of Article 117(1), the Defendants were unable to place any reliance upon the provisions of Schedule 4.

28. With the greatest of respect to Justice Cooke, I do not construe Article 117 of the insolvency law in this way. There are 2 reasons for this view. First, there is nothing in the language of Article 117(3) which would suggest that the incorporation of Schedule 4 to the Insolvency Law in relation to foreign companies is limited in the way Justice Cooke has found. To the contrary, the incorporation of Schedule 4 in relation to such companies is entirely unqualified. It seems that the only basis for the limitation upon the operation of Schedule 4 found by Justice Cooke is that Article 117 (3) is found in the same Article as 117(1), and with respect, I do not regard that as sufficient basis to read down the unqualified terms of Article 117(3).

29. The second reason is because there are many provisions within Schedule 4 which are not concerned with "the gathering and remitting of assets maintained within the DIFC". If the provisions of Schedule 4 could only be invoked for the purposes of discharging the obligation imposed by Article 117(1), those provisions would serve no purpose and their inclusion in Schedule 4 would be pointless. It is of course an accepted principle of statutory construction that a statute should not be construed in such a way as to make any of its provisions otiose. There are many provisions within Schedule 4 which would be rendered otiose if the operation of the Schedule is limited in the way proposed by Justice Cooke. It is unnecessary to recite them all in these reasons - the point is sufficiently made by reference to some.

30. Prominent amongst them are the provisions of Chapter III of Schedule 4, which relate to the recognition of foreign proceedings, and the grant of relief following recognition, including stays of execution against assets, and stays upon the commencement or continuation of proceedings concerning the debtor's assets, rights, obligations or liabilities.[5] In the case of recognition of a "foreign main proceeding" a stay of proceedings against the debtor, and a stay of execution against the debtor's assets is automatic.[6] A "foreign main proceeding" is defined to mean "a foreign proceeding taking place in the state where the debtor has the centre of its main interests.[7] A "foreign proceeding" is defined to mean "a . proceeding in a foreign state . pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are subject to control or supervision by a foreign court for the purpose or re-organisation or liquidation".[8]

31. Upon recognition of a foreign proceeding, whether main or non-main, the Court is empowered to grant a wide range of relief where necessary to protect the assets of a debtor or the interests of the creditors, including stays upon proceedings or stays upon execution of the debtor's assets, but in the case of non-main proceedings those powers are discretionary rather than automatic.

32. Other significant provisions within Schedule 4 which confer powers upon the Court which go well beyond the powers necessary to discharge the obligation imposed by Article 117(1) include the provisions of Chapter IV, relating to cooperation with foreign courts and foreign representatives. These are the provisions upon which the Defendants relied in the case before Justice Cooke, and upon which the Defendants rely in this case. Justice Cooke concluded that those provisions had no application to the case before him because they were not concerned with the discharge of the obligation imposed by Article 117(1). My short point is that if those provisions could only be utilised for that purpose, there would be no point in their inclusion within Schedule 4, because Article 117(1) imposes an unequivocal obligation upon this Court to undertake that task.

33. However, the question remains as to whether those provisions, and in particular Article 25 of Schedule 4 should be applied to the particular circumstances of this case. That Article provides, relevantly:

25

(1) In matters referred to in Article 1, the Court may co-operate with foreign courts or foreign representatives either directly or through a DIFC insolvency office holder.

(2) The Court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign

representatives.

34. Article 1 of Schedule 4 provides that the Model Law applies where:

(a) Assistance is sought in the DIFC by a foreign court or a foreign representative in connection with a foreign proceeding.

Accordingly, as it is common ground that the bankruptcy proceedings in Abu Dhabi are a "foreign proceeding" and that the Abu Dhabi Court is a "foreign court" for this purpose, there is no doubt that Article 25 of Schedule 4 is potentially applicable to the circumstances of this case.

35. Article 27 of Schedule 4 is also potentially applicable. It provides that:

27. Cooperation referred to in Articles 25 and 26 may be implemented by any appropriate means, including:

(a) .

(e) coordination of concurrent proceedings regarding the same debtor.

36. Returning to Article 25, it is significant that the Article is expressed in terms whereby "the Court may cooperate with foreign courts". This terminology provides a clear and unequivocal indication that the Court has a discretion as to whether it will cooperate with foreign courts, and as to the extent of that cooperation.

37. In my view, that discretion is properly exercised taking into account the other provisions of Schedule 4 and the particular circumstances of the case.

38. As I have noted, those provisions include an explicit and detailed regime for the recognition of foreign proceedings and the consequences of recognition. That regime expressly provides for stays of proceedings in certain circumstances, and in that respect distinguishes between stays of proceedings upon the recognition of foreign main proceedings, which are automatic, and stays of proceedings upon the recognition of other foreign proceedings, which are discretionary. That distinction no doubt reflects the policy that primary responsibility for the supervision of the insolvency administration of a debtor should be undertaken by the courts in the State where the debtor has the centre of his, her or its main interests.

39. Put another way, Chapter III of Schedule 4 creates a regime for the recognition of foreign proceedings and the consequential imposition of stays of proceedings in the DIFC Courts which requires the Court to take account of the place in which the relevant debtor has "the centre of its main interests". This Court presently has no information on that topic in relation to any of the Defendants in these proceedings, although it is known that only one of those Defendants is incorporated in Abu Dhabi. If the provisions of Chapter III of Schedule 4 are invoked, and application is made for recognition of a foreign proceeding by an appropriately qualified "foreign representative" that information would no doubt be placed before the Court, and all relevant matters properly considered in accordance with the regime created by Chapter III.

40. However, in this case the Defendants, in effect, seek to circumvent the regime created by Chapter III of Schedule 4, by relying upon the general discretion with respect to cooperation conferred upon this Court by Article 25 in order to achieve a stay of execution of proceedings against all Defendants, irrespective of their circumstances, and without any attempt whatsoever to comply with the requirements of Chapter III. In my view, the use of the discretionary power conferred by Article 25 in this way would significantly undermine the scheme evident in Schedule 4 as a whole. For that reason, in my view, this is not an appropriate case in which to exercise the discretion conferred by Article 25.

41. I digress to observe that, having refused the application for recognition and/or enforcement of the Abu Dhabi order in the case before Justice Cooke, the reasoning which I have applied in this case would have led inexorably to the rejection of the reliance upon the provisions of Chapter IV of Schedule 4 in that case as well. Accordingly, in that respect I would have arrived at the same conclusion as Justice Cooke in the circumstances of that case, albeit for different reasons.

42. For the sake of completeness, it is necessary to refer to the Defendants' reliance upon the inherent jurisdiction of the Court to grant a stay of proceedings, preserved by the express provisions of the Rules of Court. As that jurisdiction is discretionary, the same considerations apply to the exercise of that discretion as with respect to the exercise of the discretion conferred by Article 25 of Schedule 4. To reiterate, it would not be appropriate to exercise the discretion of the Court in such a way as to undermine the regime created by Schedule 4 with respect to the recognition and enforcement of foreign proceedings, and the grant of stays of proceedings in this Court following such recognition.

43. For these reasons, at least in the circumstances as they presently exist, the Court should take no action in response to the letters which have been received from the Abu Dhabi and Dubai Courts.

Costs

44. The Defendants should pay the Claimants' costs of this issue to be assessed by the Registrar unless the parties agree the quantum of those costs within 28 days of the date of this order.