THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BEFORE H.E. JUSTICE ALI AL MADHANI

BETWEEN

VANNIN CAPITAL PCC PLC

for and on behalf of protected cell - Project Ramsey

Claimant

and

(1) MR RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) MRS AMRAH ALI ABDEL LATIF AL HAMAD

(3) MRS ALIA MOHAMED SULAIMAN AL RIFAI

(4) KBH KAANUUN LIMITED

(5) BANK SARASIN-ALPEN (ME) LIMITED

(6) BANK J. SAFRA SARASIN LTD (FORMERLY BANK SARASIN & CO LIMITED)

Defendants

REDACTED ORDER OF H.E. JUSTICE ALI AL MADHANI ISSUED ON 28 JANUARY 2016

UPON reviewing Application Notice CFI-036-2014/3 filed by the First to Third Defendants on 10 June 2015 seeking (i) a variation of the Order of H.E. Justice Omar Al Muhairi dated 10 November 2014 (the "First Application")

AND UPON hearing Counsel for the Claimant, Counsel for the Khorafis, Counsel for the Fourth Defendant and Counsel for Bank Sarasin on 29 July 2015

IT IS HEREBY ORDERED THAT the First Application is dismissed.

Issued by:

Maha Al Mehairi

Judicial Officer

Date of issue: 11 February 2016

At: 11am

REASONS FOR THE ORDER

Introduction

1. This judgment deals with the two applications brought by the First, Second and Third Defendants (the "Khorafis") made on 10 June 2015 (the "First Application") for an order varying the order of HE Justice Omar Al Muhairi of 10 November 2014 (the "Preservation Order") so that:

(i) USD 945,593.00 out of the sums paid into Court by the Fifth and Sixth Defendants ("Bank Sarasin") by way of payment on account of damages (USD 10,400,000) and an interim award of costs (USD 1,000,000) (together the "Interim Payment") in proceedings brought by the Khorafis against Bank Sarasin (the "Main Action") be paid to the Khorafi's and their present lawyers, Hamdan Al Shamsi ("HAS"); and

(ii) USD 2,000,000 to be held in Court (at the discretion of the Court) representing the First Tranche Payment to the Second Respondent KBH Kaanuun, under the CFI-035-2014 Consent Order, dated 9 February 2015; and

(iii)	Only insofar as any further damages are awarded against and paid by Bank Sarasin should such further sums be held in Court as security for the claims of the Claimant ("Vannin"), which funded the Khorafis in the Main Action, and Fourth Defendant ("KBH") which acted for them in that action.

2.	Costs shall be dealt with after inviting the parties to submit short submissions in this regard.

The First Application

3.	Vannin submitted a Claim Form on 3 November 2014 which sought interim relief to preserve the Interim Payment that Deputy Chief Justice Sir John Chadwick ordered Bank Sarasin to make to the Khorafis by his Interim Order of 28 October 2015 (the "Interim Order") in the matter CFI-026-2009 after the same judge found Bank Sarasin liable to the Khorafis for various regulatory breaches in his judgment of 21 August 2014 in the main action (the "Trial Judgment").

4.	The Interim Order consisted of USD 10,445,049 for the Khorafis' losses when their investments were `closed out', which were an agreed sum; and USD 1,000,000 as an interim payment on account of the Khorafis' costs.

5.	Vannin's ground for that claim and interim application was on the basis of its entitlement (in part with KBH) to the full amount of that payment and indeed its beneficial ownership of its entitlement under trusts declared in the RLFA.

6.	That application was supported by KBH in its own application (the "KBH Application") of 6 November 2014, also seeking an order that the Interim Payment be paid into the Court pending a further order of the Court.

7.	On 10 November 2014 H.E. Justice Omar Al Muhairi in his Judgment granted Vannin's request and ordered that the funds held by this Court should only be released if Vannin, the Khorafis and KBH agree as to the division of those funds, or there is a relevant order as to their respective entitlements based on an arbitral award to determine such matters, or pursuant to an order of any competent court.

8.	E. Justice Omar Al Muhairi in the same judgment dismissed a cross-application submitted by the Khorafis on 4 November 2014 arguing that the Court had no jurisdiction to make the Preservation Order.

9.	On 10 June 2015 the Khorafis brought this application, the First Application, to vary the Preservation Order, as stated above.

10.	In the First Application, the Khorafis sought a court order to vary the Order of Justice Omar Al Muhairi dated 10 November 2014 as follows:

(a)	The adjudged sums of **USD 10,445,049** and **USD 1,000,000** together with any interest thereon be payable from the monies awarded to the Claimants in CFI 026/2009 and paid by Bank Sarasin Alpen (ME) Limited and Bank J. Safra Sarasin Limited (formerly Bank Sarasin & Co Limited) ("the Defendants in the Main Proceedings") as partial compensation and as interim payment of costs respectively ("the Interim Judgment Sum"), by the order of the Deputy Chief Justice Sir John Chadwick dated 28 October 2014 and currently preserved by the Preservation Order of H.E. Justice Omar Ali Muhairi dated 10 November 2014 in CFI 036/2014 ("the Interim Preservation Order").

(b)	**USD 945,593.00** in support of third party disbursements under the CFI 035/2014 Consent Order dated 9 February 2015 to be paid to the Second Respondent in terms of its obligations under that Order.

(c)	**USD 2,000,000** to be held in Court (at the discretion of the Court) representing the First Tranche Payment to the Second Respondent KBH Kaanuun, under the CFI 035/2014 Consent Order, dated 9 February 2015.

(d)	The **balance**, or such sum as the Court deems appropriate, to be paid to the Applicants in accordance with their entitlement to damages and costs from the CFI 026/2009 proceeding, as determined by the order of Deputy Chief Justice Sir John Chadwick dated 28 October 2014.

(e)	Security for the claims of the First (Vannin) and Second (KBH) Respondents to be provided from any further award of damages to be paid under CFI 026/2009.

(f)	Security for the claim by the First Respondent for the sum of **USD 10,122,724.30** with that sum protected and paid into Court (the Further Preservation Order) as a first charge from any further award of damages to be paid under CFI 026/2009. That sum (or part thereof) shall be paid to the First Respondent in accordance with the final determination of any Court or Arbitral Tribunal as to the amount due to the First Respondent.

(g)	Security for the claim by the Second Respondent for the sum of **USD 2,000,000** with that protected sum paid into Court as a first charge from any further award of damages. That sum (or part thereof) shall be paid to the First Respondent in accordance with the final determination of any Court or Arbitral Tribunal as to the amount due to the First Respondent. This sum being the same monies, and not in addition, to the monies to be held under the CFI 035/2014 Consent Order dated 9 February 2015.

(h)	This order should be read together with, and in any event subject to, the order of Justice Roger Giles made in CFI 026/2015 dated 5 April 2015.

11.	The Khorafis applied for the stated relief in regards to the distribution of the Interim Fund and supported it with an Application Notice, Skeleton Argument, Draft Statement of Case and evidence including the Witness Statement of Mr Mohammed Nour and a vast number of documents, very few of which were referred to in the hearing.

12.	The draft Statement of Case deals mainly with the merit of the contractual relationship between the parties in the Litigating Funding Agreement (LFA) and the Restated Litigating Funding Agreement (RLFA). It does not address the fact that it is unsigned and not followed by a statement of truth. The reasoning behind it being submitted is not clear to anyone in the proceedings. It does not deal with the application at hand

and has no reference to it nor did it put forth any grounds or reasoning as to why the Khorafis are entitled to the remedy they are seeking in the current application. Accordingly, I find that it is not relevant to the current application.

13.&#65533;The first argument put forth by the Khorafis to support this application is that they are entitled to such relief because it is in the interest of justice to grant such relief and referred the Court to Rules 25.6(1) and RDC 25.7(2)(b) of the Rules of the DIFC Courts ("RDC") with directions as to filing the Claim under RDC 25.7(3). Rules 25.6 and 25.7 read as follows:

"25.6 An order for an interim remedy may be made at any time, including:

(1) before proceedings are started; and

(2) after judgment has been given.

25.7 However:

(1) Rule 25.6 is subject to any Rule, Practice Direction or other enactment which provides otherwise;

(2) the Court may grant an interim remedy before a claim has been made only if:

(a) the matter is urgent; or

(b) it is otherwise desirable to do so in the interests of justice; and

(c) unless the Court otherwise orders, a defendant may not apply for any of the orders listed in Rule 25.1 before he has filed either an acknowledgment of service or a defence.

(3) Where the Court grants an interim remedy before a claim has been commenced, it may give directions requiring a claim to be commenced.

(4) In particular, the Court need not direct that a claim be commenced where the application is made for production of documents or inspection of property before a claim is made."

14.&#65533;With reference to the Witness Statement of Mr Mohammed Nour, the Khorafis argue that they are entitled to liabilities of up to USD 3.5 million in addition to the liability towards KBH. It is argued that if the fund is not paid the Khorafis will not be able to pay the attorney fees for the upcoming Court of Appeal hearing which conflict with the court's overriding objective, "*ensuring that the parties are on an equal footing"* as put forth in RDC 1.6(1).

15.&#65533;The Khorafis assert that as the Respondents in the appeal brought by Bank Sarasin who have made sequential applications to the Court, they are compelled to expend money whilst their money in the preserved fund in the court is denied to them. The Khorafis further argue that without a release of funds, the Court of Appeal hearing will have to be adjourned which is against the interests of justice.

16.&#65533;The applicant's second argument is that there is a powerful reason in the List of Reasons dated 30 October 2015 by Deputy Chief Justice Sir John Chadwick at paragraph 20 to release all of the interim funds; which is the purpose for which they were given in the first place.

> "20. .It is common practice in this court, as in other courts exercising commercial jurisdiction, to recognize that a party who has obtained the benefit of an order for costs in his favour should not be kept out of his money longer than is necessary while the process of assessment grinds through."

17.&#65533;The decision of the Deputy Chief Justice Sir John Chadwick is a powerful authority for the proposition that the interests of the Khorafis, unpaid lawyers and experts, and the interests of the litigation should be favoured over the contingent interests of Vannin, provided that the interests of Vannin can be adequately safeguarded. The same reasoning must apply to the award of damages.

18.&#65533;In order to assess the interests of justice, the Khorafis suggest that it is appropriate to look at the strength of the case between the parties. A high degree of need might have to be balanced against a weak case overall. As set out below, the Khorafis possess a high degree of need, and a very strong claim against Vannin.

19.&#65533;The Khorafis contend that they are asset rich and (relatively) cash poor. They have sold assets since August 2014 and paid USD 1.1 million on account of fees and will pay a further USD 500,000 in two months. That is a very considerable effort. The conundrum is that if they sell their income producing assets, their ability to produce income will suffer.

20.&#65533;The third argument put forth by the Khorafis is that there is no need for an undertaking nor is there any risk in regards to the repayment if the court freed the preserved money to them. The Appellants presented two possible conclusions for the proceeding:

(a)&#65533;If this application for the Interim Fund is granted, but the substantive case against Vannin fails, and Vannin are owed USD 10.4 million, the answer is simple. It would be paid off by Bank Sarasin if the appeal is dismissed.

(b)&#65533;If Bank Sarasin win the appeal, Vannin will have no issues to claim. They would be barred from entitlement. No repayment issues would therefore arise according to the LFA.

21.&#65533;In the remainder of the Khorafis submissions it was argued that the Khorafis have a strong arguable case compared with Vannin and KBH's position when it comes to the standards of proof in this case.

22.&#65533;The applicant went further to deliberate the substantive claim surrounding the LFA to establish a breach on behalf of Vannin. Discussed was breach of the contract, breach of implied terms, breach of code of conduct for litigation and breach of the code of the Association of Litigation

Funders of England and Wales.

23.&#65533;Finally the Khorafis assert that Vannin and KBH have come to the Court without evidence which addresses the substantive allegations against them. They have preferred to put forward a series of largely unmeritorious procedural points. Therefore, according to the Appellants, the Court should conclude that there is a good arguable case against Vannin and KBH.

Vannin's Arguments

24. In the First Application, Vannin's primary submission is that the Preservation Order was made by H.E. Justice Omar Al Muhairi after a half day hearing of submissions from Vannin, KBH and the Khorafis, and has never been subject to any appeal by the Khorafis or any other party.

25.&#65533;Vannin asserts that the Preservation Order has been effective, and has ensured that the Interim Payment has remained preserved in Court, for over six months while the Arbitration between Vannin, the Khorafis and KBH has proceeded. The onus on any party seeking a *variation* of the Preservation Order is to show that there has been a *significant* and *material* change in circumstances from those which were, or could have been, put before the Court previously, as cited in **Chanel v Woolworth & Co [1981] 1 WLR 485 at 492H-493A:**

> "Even in interlocutory matters, a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."

26.&#65533;The argument is that the Applicant cannot simply invite a Court to reconsider an order on the same material or material which was available at the time of the earlier hearing. Vannin also supports the principle in the decision of **Lloyds Investment (Scandinavia) Ltd v. Ager- Hanssen [2003] EWHC 1740 (Ch).**

27.&#65533;Vannin invited the Court to explore the commentary to Part 23 of the CPR in the English White Book, at 23.0.15, which refers to considerations arising when there are successive applications for the same relief.

28.&#65533;In that context, Vannin argues that there is no significant or material change in circumstances save that Bank Sarasin obtained permission for the appeal against the judgment in the Main Action, which had already been intimated and filed before the Preservation Order was made by H.E. Justice Omar Al Muhairi.

29.&#65533;In reply to the point put forth by the Khorafis regarding their need to pay their counsel USD 583,077 before the end of September 2015 and their desire to pay HAS its own fees for the Appeal and of the First to Third Applications, Vannin's view is that there is no evidence of any alleged inability on the part of the Khorafis to fund those fees from other sources; and their *desire* that they should be paid from the Interim Payment gives no reason as to why this Court should now strip away the security that was given to Vannin and KBH in the Preservation Order.

30.&#65533;Vannin further argues that the faint suggestion in the Witness Statement of Mr Nour that the release of the Interim Payment from this Court is somehow required in order to allow the Khorafis to resist the Appeals is certainly not new. It was a suggestion repeatedly made during the correspondence between HAS and Vannin's lawyers, Clyde & Co, and in the period after the Trial Judgment in which Vannin and KBH were seeking to persuade the Khorafis that the Interim Payment should be paid into an agreed designated or escrow account. That correspondence was considered in some detail by H.E. Justice Omar Al Muhairi.

31.&#65533;While the DIFC Courts does have supervisory jurisdiction to deal with the Preservation Order, it does *not* have jurisdiction to deal with the merits of any of the claims intimated by the Khorafis by way of a Draft Statement of Case. Even if it did, and even if the arguments made could not have been put forth last time around, the Khorafis could show no more than an arguable case, which would *reinforce* the case for the interim preservation of the Interim Payment. For the avoidance of doubt, the Preservation Order was *not* a consent order, and does not purport to confer jurisdiction on any court.

KBH's Arguments

32. KBH's main argument in regards to the First Application is that any distribution of the Interim Preservation Sum should be in accordance with the Interim Preservation Order, which stipulates that, pursuant to the wording of the Interim Preservation Order, any variation to the Interim Preservation Order can only occur in accordance with the following:

(a)&#65533;Further order of the Court based on a consent order signed by Vannin, the Khorafis and KBH; and/or

(b)&#65533;An order by way of an arbitration award or of any competent court.

33.&#65533;KBH contends that there is currently no agreement between Vannin, the Khorafis or KBH in regards to the manner in which the Preserved Funds should be distributed. Similarly, there is currently no order by way of an arbitration award or of any competent court.

34.&#65533;None of the reasons given by the Khorafis for seeking distribution of the funds (difficulty in paying legal fees, securing the Appeal or clearing debts) constitute a legal basis justifying the variation of the Interim Preservation Order and the distribution of the Preserved Fund.

35.&#65533;During the hearing, KBH's counsel joined Vannin's counsel in his argument that the Preservation order of 6 November 2014 cannot be revisited unless significant or material circumstances from those which were, or could have been put before the Court previously have changed, as summarised in Vannin's argument above.

The Court's Power to Vary Preliminary Orders

36.&#65533;Although RDC 4.7 provides parties the right to apply to the Court in order to vary a given order that determines preliminary issues (interim orders), the question as to what extent the court can modify the order in question is not clear in the RDC as there is no such provision as to the limits.

37.RDC 2.10 (Application of the CPR and the Guide) gives this Court the power to refer to the English Civil Procedures Law in the event no provision is made in the RDC in regards to a procedures' ambiguity, as follows:

> "2.10 If no provision is made or no appropriate form is provided by the Rules or any law in force in the DIFC , the following rules of practice and procedure shall be followed and adopted:
>
> (1) Such Rules as shall have been enacted;
>
> (2) To the extent that no Rule or Practice Direction dealing with the matter shall have been enacted, with regard to the Court of First Instance, the Guide together with any prescribed forms with such changes as the Court considers appropriate to be applied in the circumstances;
>
> (3) Insofar as the Guide does not deal with the matter or makes reference to the CPR , the CPR together with any prescribed forms with such changes as the Court considers appropriate to be applied in the circumstances;
>
> ."

38.The general rule of the CPR in regards to the question at hand is what can be abstracted from CPR 3.1(9) which states,

> "In a fair and orderly case management system, pre-trial matters should remain settled so that the parties can plan for trial accordingly."
>
> The rule in Henderson v. Henderson applies so that a party cannot make repeated or successive applications where the grounds relied upon in the later applications existed and were available at the time of the first application, and still less when those grounds were relied upon, but were rejected by the Court.
>
> The Court's general jurisdiction under CPR 3.1(7) to vary its orders should not be exercised for the purpose of enabling a party to re-argue any application, relying on submissions and evidence that were available to them at the time of the earlier hearing. Lloyds Investment (Scandinavia) v. Ager-Hanssen [2003] EWHC 1740 (Ch). The Court's jurisdiction under CPR 3.1(7) should not normally be exercised unless the applicant is able to place new material before the court, whether in the form of evidence or argument, which was not placed before the court on the earlier occasion. Collier v. Williams[2006] EWCA Civ 20 [2006] 1 WLR 194.

39. The rule is summarised in **Chanel v Woolworth & Co [1981] 1 WLR 485 at 492H-493A**;

> "Even in interlocutory matters, a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."

40.One cannot imagine that parties may be allowed to continue fighting over the same issues surrounding an order without end. The judicial orders must provide stability and some sort of finality to the issues between the parties even if the issue is not on the merits of the case.

41.Deciding otherwise could lead to endless appeals on the varying of orders where the losing party would drag the application before a court for long periods that would defeat the court's objectives to deal with cases justly, fairly and in a reasonable time period.

42.Having found that a party cannot fight to vary an order which has already been fought unless there has been some significant change of circumstances, I must now turn to the Appellants submissions and evidence to verify if there was indeed a material change of circumstances since the Preservation Order was granted.

43.The evidence by the Khorafis, as put forth by Mr Mohammed Nour in his Witness Statement, suggests that:

> "8.There exists a need for urgency in this proceeding. The reason is that, whilst we have agreed with our Counsel as their fee for the Appeal, and they have substantially discounted it, on our current cash flow, we will be unable to meet the obligation.
>
> 9.Mr. Al Khorafi has expended the following sum since the 21 August 2014 judgment: USD 1,104,440.00 Paid on Account of Counsel Fees, Court Fees, Advisory Fees, Legal Fees and Disbursements.
>
> 10.Mr. Al Khorafi's cash flow determines that he next make a payment of USD 500,000.00 in September 2015.
>
> 11.I confirm that I have personally examined and informed myself as to the outstanding liabilities of Mr. Al Khorafi. I set out below;
>
> a.There is an outstanding liability to our lawyers HAS in the amount of USD 461,359.00. We are not under immediate pressure to make payment of this amount. However, at the same time, we want to pay our lawyers.
>
> b.There are outstanding Trial Costs from CFI-026-2009 of USD 948,593.00. These are detailed in the KBH Consent Order dated 9 February 2015 and are scheduled to be paid from the Preserved Funds held by the Court. These accounts have been outstanding for a long time and need to be sorted out as soon as possible.
>
> c.We have a contingent liability to a Dubai Law firm of USD 134,130.00 and a barrister instructed by them, USD 22,850.00. Our lawyers do not accept that the whole of this fee is payable due to a dispute between those firms as to the extent of instructions given. Nevertheless, we list the full amount of that payment claim.
>
> d.We have an outstanding amount to Griffins, the Forensic Accountants for work done on the Quantum hearing, of USD 48,500.00.
>
> e.In addition there is a significant sum claimed by Eversheds LLP in the amount of USD 900,000.00. They have indicated that they

are quite prepared to wait until the judgment sum becomes available. We have not yet analysed that invoice and considered its recoverability.

f.&#65533;Finally there is an Invoice for recent work done by the firm of Irwin Mitchell LLP in the amount of USD 91,000.00. Again, without casting aspersions on the invoice, we are not yet in a position to accept it as being payable and we are unlikely to do so.

13.&#65533;The problem which gives rise to this application is our difficulty in paying Counsels' Fees immediately.

14.&#65533;We have a debt of considerable gratitude to our Counsel who have worked very hard on very little and achieved considerable success."

44.&#65533;Both Vannin and KBH contend that none of the grounds in Mr Mohammad Nour's Witness Statement, which were relied on and argued by the Khorafis representatives, are new grounds or circumstances, as they were all available or could reasonably have been known by the Khorafis at the time when the Preservation Order was heard and granted or at least at the time when the Khorafis could have submitted their appeal against it.

45.&#65533;The Khorafis have not established that any of the grounds referred to in their submissions are new or could not have been available to them to put forth before the Court at the Preservation Hearing. Instead the focus was on the issues of a financial hardship and inability to pay the debts surrounding the proceeding.

46.&#65533;Consequently, the submissions suggest that there is no significant or material change in circumstances to justify varying the security provided by HE Justice Al Muhairi ordering that the Interim Payment be paid into Court. The only change is that permission to appeal has been granted for an appeal which was already anticipated at the time of the Preservation Order, and the costs of which were already being discussed by the Khorafis representative in order to seek further funding.

47.&#65533;Ms Hanlon of HAS, the representative for the Khorafis at the Preservation Hearing of 6 June 2014, mentioned on page 73 of the hearing transcript that the possibility of an appeal was an issue for the Court to consider. "There could be appeals filed by the Defendants, Defendant 1 and 2. This is in CFI-026-2009 and I cannot predict this. I have attempted to get the information from the Registrar."

48.&#65533;Having established that the Khorafis offered no material change of circumstances or events since the Preservation Order was granted, this Court sees no ground on which it can revisit the Order.

Bank Sarasin's position

49. In the First Application's submissions and while hearing the First Application above, the Appellants asked this Court to consider the presence of Bank Sarasin. This Court came to the conclusion that Sarasin Bank is not an applicant in this first application nor are they actual respondents as the Appellants never intended to serve them with his application.

50.&#65533;The Appellants never agreed that Bank Sarasin should be parties in this application; it was Vannin's suggestion that they be served with the application which they were then served with in redacted bundles and therefore submitted written replies to the application before attending the hearing with counsel to represent them.

51.&#65533;The Court agreed with the Khorafis and ordered that Bank Sarasin are not to be parties to this application since they are not required to take action or refrain from action on anything in this application. During the hearing therefore, the Court asked their representative to leave the courtroom.

52.&#65533;I see that Vannin now requests to involve Bank Sarasin. I therefore request the parties and Bank Sarasin to make submissions in regards to the costs related to Bank Sarasin's involvement up to the hearing date of no more than four pages from each party.

Issued by:

Maha Al Mehairi

Judicial Officer

Date of issue: 11 February 2016

At: 11am