THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) EMIRATES NBD BANK PJSC
(2) HSBC BANK MIDDLE EAST LIMITED
(3) ICICI BANK LIMITED, BAHRAIN LIMITED
(4) ICICI BANK UK PLC
(5) UNION BANK OF INDIA
(6) BANK OF JORDAN COMPANY
(7) NATIONAL BANK OF BAHRAIN BSC
(8) AHLI UNITED BANK BSC (DIFC BRANCH)
(9) COMMERCIAL BANK OF DUBAI PSC
(10) WARBA BANK KSCP

Claimants

and

(1) KBBO CPG INVESTMENT LLC
(2) MR KHALEEFA BUTTI BIN OMAIR YOUSIF ALMUHARI
(3) HIS EXCELLENCY SAEED MOHAMED BUTTI MOHAMED ALQEBAISI
(4) INFINITE INVESTMENT LLC
(5) GROUP OF FATHIMA CO LLC
(6) FATHIMA SUPERMARKET LLC (SHARJAH)
(7) FATHIMA SUPERMARKET WLL (ABU DHABI)
(8) FATHIMA TRADING & SUPERMARKET COMPANY WLL
(9) FAIRWAY GENERAL TRADING
(10) FAIRWAY CATERING SERVICES LLC (DUBAI)
(11) FAIRWAY CATERING SERVICES LLC (ABU DHABI)
(12) FATIMA GENERAL MARKET LLC
(13) TELE LINK COMMUNICATION LLC
(14) ONE PREPAY COMPANY LLC
(15) TECHLINK SYSTEMS LLC
(16) FRESHLY FROZEN FOODS FACTORY LLC
(17) SENORA FOODS LLC
(18) SPECTRAMI DMCC
(19) ONE PREPAY COMPANY LLC (KSA BRANCH)

Defendants

ORDER WITH REASONS OF JUSTICE SIR JEREMY COOKE

UPON reviewing the Eighteenth Defendant Application No. CFI-045-2020/13 dated 14 June 2020 to discharge the Freezing Order and to declare that the Court has no jurisdiction (the **"Application"**)

AND UPON reviewing all documents recorded in the court file

AND UPON hearing Counsel for the Claimants and Counsels for the Defendants and Counsel for the Eighteenth Defendant at a hearing on 30 June 2020

IT IS HEREBY ORDERED THAT:

1. The Application is granted.

2. The Freezing Injunction against the Eighteenth Defendant must therefore be discharged and it must follow that the Claimants must pay the Eighteenth Defendant's costs, to be the subject of assessment if not agreed.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 18 August 2021
At: 2pm

SCHEDULE OF REASONS

Introduction

1. On 14 June 2020 the Eighteenth Defendant applied for an order discharging the freezing injunction made against it, for a ruling that the court did not have jurisdiction in relation to the claim against it and for various ancillary orders.

2. There is one essential point which has to be determined which is whether or not the Claimants have a good arguable case against the Eighteenth Defendant that its sole director and 49% shareholder signed a Shareholders' Resolution and Board Resolution authorising the Second Defendant to execute a Corporate Guarantee binding upon it.

3. Jurisdiction against the Eighteenth Defendant potentially rests on 2 grounds, only one of which can properly be challenged. The Eighteenth Defendant maintains that the Guarantee signed by the Second Defendant was not authorised and that the jurisdiction clause within it is therefore not binding upon it. Since however three of the Claimants are DIFC Companies, jurisdiction is established on the basis alone under the Judicial Authority Law Article 5.(A) (1) (a) regardless of whether or not Article 5(A)(1)(b) applies by virtue of the Eighteenth Defendant's conclusion of the contract of Guarantee with its jurisdiction clause. There is no merits threshold for a claim where such jurisdiction exists. Whether or not there is jurisdiction, however, the issue for the purpose of determining whether or not the freezing injunction should be continued is whether or not there is a "good arguable case" against the Eighteenth Defendant in respect of the Guarantee executed by the Second Defendant.

4. There was no disagreement between the parties as to the appropriate test to be applied to determine whether or not there is a good arguable case. The position is now established by reason of the decisions of the Court of Appeal in Lakatamia v Su and in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] 1 WLR 3514 and, in particular, the leading judgment of Green LJ in the latter, with which the other two Lords Justices agreed. Reference was made to two decisions of the Supreme Court and the test laid down there, "eschewing losses, re-formulations and explications". The question arose as to whether or not the test was a "absolute" test or a "relative" test- does the claimant merely have to establish that its own case is objectively arguable or that it has *the better of the argument or even much the better of the argument?*

5. At paragraphs 70 - 77 Green LJ referred to the second decision in the Supreme Court and applied it to a situation where the disputed fact upon which jurisdiction depends is likely to be decisive of the action itself it proceeds. That is the case here in relation to the jurisdiction claim which rests on Article 5(A)(1)(b). The traditional test as referred to by Lord Sumption JSC was whether the claimant had "the better of the argument" on the facts required to establish jurisdiction. The reformulation of the effect of that test was as follows:

> (i) "that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;
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> (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but
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> (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it".

6. Where limb (i) was concerned, the Lord Justice expressed the view that it was clear that the Supreme Court had, at least in part, confirmed the relative test. The reference to *"a plausible evidential basis"* in limb (i) is a reference to an evidential basis showing that the claimant has the better argument. The court, including Davis LJ consigned the word "much" in the expression *"much the better argument"* to outer darkness but approved the yardstick of *"having the better of the argument"* for the purpose of deciding whether the ultimate test of *good arguable case* had been met.

7. With that in mind I turn to the disputed evidence, where I have come to the clear view that the Claimants do not have a plausible evidential basis for their case that authority was given by the Eighteenth Defendant to the Second Defendant to execute the Guarantee and that they do not have the better of the argument on the point. It is only necessary for me to give my reasons in summary form, despite the length of the argument addressed to me.

8. The authorisation upon which the Claimants rely is contained in a Shareholders' Resolution and a Board Resolution, both of which are said to have been signed by Mr Choudha, who was the sole director of the Eighteenth Defendant.

9. At an earlier stage in this action, the Claimants relied upon what had been referred to as the "Initial Resolutions" which were in a different form but to much the same effect as those subsequently relied on.

> 9.1. The Initial Shareholders' Resolution referred to the CTA and approved the "Transaction Documents" in the Schedule and the entry by the Eighteenth Defendant into the Transaction, which included the Guarantee. It stated that the giving of the guarantee was in the best interests of the company's business and that the Second Defendant was authorised to take such action in connection with the negotiation, execution and delivery of the Documents for and on behalf of the Company, agreeing the form and terms of the documents and authorising him to sign any such document. The type written date of this resolution was 18 November 2019 and the signature of the Second Defendant (the 51% shareholder) appear on page 3 with the purported signature of Mr Choudha on page 4.
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> 9.2. The Initial Director's resolution referred to Mr Choudha as the director of the company, referred to the CTA and the Transaction Documents and followed much the same form as the Initial Shareholders' Resolution in conferring authority upon the Second Defendant. At page 4 appeared the purported signature of Mr Choudha with, once again a type written date of 18 November 2019. On a page which was actually the sixth page of this document but was numbered variously as page 4 in the middle and page 5 at the side, appeared a specimen signature of the Second Defendant.

10. Mr Choudha, in an affidavit of 27 May 2020, responding to the freezing order and giving disclosure in accordance with its terms, expressly stated that the Eighteenth Defendant had never signed any corporate guarantee, nor the CTA and that nobody had the right to sign the guarantee on behalf of it other than himself. When soft copies of the Initial Resolutions were shown to him, in a further witness statement, he stated that he had not signed either document and sought an Order from the Court that the soft copies with meta data and original hardcopies be sent for forensic

examination.

11. What then transpired, as discovered by the Claimants, was that the bound volume of completion documents for the CTA and related Transaction Documents contained different resolutions (the **"New Resolutions"**) again purportedly signed by Mr Choudha. Despite enquiring of the lawyers involved in putting together the Transaction, no explanation has been forthcoming for the difference between the Initial Resolutions and the New Resolutions and the existence of signatures on both as if both were final effective documents.

12. The New Shareholders Resolution is dated, in manuscript, 18 November 2019 with the Second Defendant's signature on page 3 and Mr Choudha's purported signature at page 4. The New Directors' Resolution likewise has a manuscript date of 18 November 2019 and Mr Choudha's purported signature at page 3 and the Second Defendant's specimen signature at page 4. A detailed comparison of the Initial Resolutions with the New Resolutions gives rise to no obvious reason for the considerable number of changes and the New Directors Resolution refers to "directors" in the plural when Mr Choudha knew himself to be the sole director. He stated in his third witness statement that he was the Manager and sole director and the only person authorised to sign documents on behalf of the Eighteenth Defendant. By a resolution of 5 February 2019, he had been authorised to sign guarantees on behalf of the Eighteenth Defendant.

13. A series of anomalies were pointed out by those representing the Eighteenth Defendant and a handwriting expert engaged by it. So far as concerns the Initial Resolutions:

13.1. The first two pages and the last page of the Shareholders' Resolution bear a document reference in the bottom left corner whereas the third and fourth pages have the same reference number, but in a different position and in a bold type. Although there is sufficient space on the second page for signatures, both the 2nd Defendant's signature and that purporting to be that of Mr Choudha appear separately on the third and fourth pages which are pages which differ in style from the others.

13.2. A forensic examination undertaken in-house by the Eighteenth Defendant showed that the Initial Shareholders' resolution was created at Denton's on 19 November 2019, whereas the document was purportedly signed on 18 November 2019.

13.3. The Directors' Resolution contains different numeration of the document on the first five pages from the last two. On the bottom right, the last two pages are numbered 5 and 6 although they are in fact the sixth and seventh pages and have the page numbers 4 and 3 respectively in the middle of the page. The first 5 pages bear no page numbers at all. Once again there is space on the third page for the signature but the signature appears on the next page alone as the sole entry.

14. So far as concerns the New Resolutions, Mr Choudha again denied signing them and an inspection was arranged by a forensic expert at the offices of AG who opined that the signatures attributed to Mr Choudha were both forged. Whilst the report is not in the sophisticated form that the Court ordinarily encounters when dealing with handwriting experts who express the strength of their views across a range, the fact is that a certified expert with the UAE Ministry of Justice and the Dubai Court since 2000 has expressed a clear conclusion by comparing the signatures which are relied on with specimen signatures from Mr Choudha from the past as well as the present. He used a digital microscope with enlargement of 300 X, noted that the signatures had a lack of natural variation, appeared to be written in slow motion, showed great similarities in their reproduced images and involved additional pressure beyond the norm. Whereas the acknowledged signatures of Mr Choudha maintained stability over the years and the same natural variation with variable line thickness as a result of signing at speed, the thickness of the signatures on the New Resolutions was equal throughout, showing, in his view, a slow writing motion. The signatures, in his view lost symmetry and uniformity at the start had certain variations but gave indications of tracing.

15. Counsel for the Claimants pointed out, the findings of handwriting experts consist in part of what might be termed "scientific" expertise where particular instrumentation which is only available to the expert is used by him to reach conclusions, whilst other findings consist of observations which any individual with good eyesight and powers of observation can see, the fact remains that the Claimants had the same opportunity to carry out a forensic examination of these documents as the Eighteenth Defendant's expert did. There is no evidence to contradict that of the expert engaged by the latter, tallying as it does with Mr Choudha's evidence and the range of anomalies which surround both the Initial Resolutions and the New Resolutions with their unexplained differences. Whilst each of the individual anomalies may be capable of explanation it is the cumulation of points which suggests that something has gone amiss.

16. The reality is that the Claimants do little more than express suspicion and doubt about the denials of Mr Choudha as to the signatures and can rely on nothing more than the documents themselves which purport to show that he signed them.

17. The Claimants also seek to raise a number of points in relation to the bank accounts disclosed by the Eighteenth Defendant as a result of the injunction granted and various payments therein included the sum of AED 2.5 million which appears to have emanated from the Funds loaned by the Claimant to the First Defendant, at least according to a spreadsheet supplied by the previous management of that entity, the accuracy of which is now disputed by those running that company.

18. It is true that the Second Defendant, through other companies, owns 51% of the Eighteenth Defendant. It is also true that Mr Choudha on his own admission had dealings with the Fourteenth Defendant to which he personally lent AED 4 million by a cheque dated 16 September 2019, which on his account, was repaid in 4 instalments including AED 2.5 million which was received into his personal account on 5 December 2019 (c.f. the sum paid on 28 November according to the First Defendant's then management). He also had dealings with a Saudi entity which is directly or indirectly owned by the Second Defendant, with monies passing between them.

19. Nonetheless having examined with some care all the witness evidence from Mr Choudha and from his solicitor Doctor Brawn, on his instructions, together with the contemporary documents exhibited ,there is consistency in what he says in relation to his refusal of the request from those representing the First and/or Second Defendants for the supply of a guarantee to be given by the Eighteenth Defendant in respect of the CTA and the Transaction. At paragraph 22 onwards of his third witness statement, he describes how he was approached by the Chief Financial Officer of the First Defendant, by phone, asking for a corporate guarantee to secure a bank loan. Mr Choudha said that he reminded him that his policy was not to allow the Eighteenth Defendant to give guarantees and then spoke to the Group Chief Financial Officer of the Group to which the First Defendant and other Defendants belonged, to explain that he would not do so. He said that the only way that the Eighteenth Defendant could give

such a guarantee would be if his own 49% shareholding was bought out by the First Defendant's' group, whereupon the Eighteenth Defendant would belong to them and they could make whatever commitment they wished on its behalf. Despite further efforts from those representing the First and/or Second Defendants and attempts to procure the giving of the guarantee in exchange for non-binding offers to purchase the shareholding or to give an indemnity, Mr Choudha said that he put the matter to the test by insisting that a deal be done before any such guarantee could be given.

20. He referred to a meeting on 13 November 2019 in Abu Dhabi with senior personnel of the Group who would not agree to the terms of his offer which required an immediate commitment to buy out his 49% shareholding. In consequence, on his evidence, they said they would not include the Eighteenth Defendant as a guarantor on the loan facilities. The contemporary documents in November 2019 which have been produced support Mr Choudha's story, including his correspondence with his lawyers about drafting agreements to sell and the whatsapp messages in which draft indemnity letters and an offer letter were sent. On 12 November 2019,Mr Choudha sent a draft offer letter which was to be signed by the Second Defendant or one of his companies confirming the offer to purchase his 49% shareholding for US $ 30 million with $15 million paid upfront on the date of his own counter signature of that offer letter, once executed by the Second Defendant or one of his companies.

20.1. The draft offer letter required a comprehensive sale and purchase agreement to be signed no later than 15 January 2020.

20.2. At paragraph 8 was a provision by which the purchaser was to agree *"that until all the shares are transferred to it after payment to the seller of the full purchase price, the seller will not be asked to sign or execute any document or resolution for the Company whether as a shareholder, director or otherwise bind the company in any manner except in the normal course of the Company's business operations, unless the Seller shall have received from the Purchaser's Bank a Bank Guarantee (the "Guarantee") in form and content as Annex A attached to this Offer Letter, initialled by the Seller and made an integral and inseparable part of this Offer Letter. Subject to signing the SPA and the full Purchase Price being received by the Seller, the Guarantee shall be returned by the Seller on the Signing Date."*

21. It is clear from Mr Choudha's evidence and the contemporary documentation that he was not prepared to commit the Eighteenth Defendant to any guarantee nor to pass any resolutions allowing for a guarantee to be given without a firm and binding commitment to purchase his shareholding and a binding guarantee. He suspected that the offers were bogus in an attempt to procure a guarantee and would have none of it. As he rightly points out, had there been effective resolutions along the lines of the Initial Resolutions or New Resolutions, correspondence with him on the subject would be expected and none has been produced. Although it is true that the Claimants would not have access to this correspondence, the reality is that the Claimants are left with a series of questions they would like to ask but no positive evidence to show that anything that Mr Choudha has said is wrong and no evidence to show that the New Resolutions are genuine authentic document signed by him in the face of evidence to the contrary.

22. In these circumstances, I cannot see that the Claimants have a good arguable case in the sense required for the retention of the ex parte freezing order made against the Eighteenth Defendant or for jurisdictional purposes, should it have been necessary to establish the DIFC Court's jurisdiction by reference to an agreement authorised by the Eighteenth Defendant which submitted to it.

23. The Freezing Injunction against the Eighteenth Defendant must therefore be discharged and it must follow that the Claimants must pay the Eighteenth Defendant's costs, to be the subject of assessment if not agreed.