THE DUBAI INTERNATIONAL FINANCE CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) NEST INVESTMENTS HOLDING LEBANON S.A.L.
(2) JORDANIAN EXPATRIATES INVESTMENT HOLDING COMPANY
(3) QATAR GENERAL INSURANCE AND REINSURANCE COMPANY P.J.S.C.
(4) GHAZI KAMEL ABDUL RAHMAN ABU NAHL
(5) JAMAL KAMEL ABDUL RAHMAN ABU NAHL
(6) TRUST COMPASS INSURANCE S.A.L.
(7) TRUST INTERNATIONAL INSURANCE COMPANY (CYPRUS) LIMITED
(8) HIS EXCELLENCY SHEIKH NASSER BIN ALI BIN SAUD AL THANI
(9) FADI GHAZI ABU NAHL
(10) HAMAD GHAZI ABU NAHL
(11) KAMEL GHAZI ABU NAHL

Claimants

and

(1) DELOITTE & TOUCHE (M.E.)
(2) JOSEPH EL FADL

Defendants

ORDER WITH REASONS OF JUSTICE SIR RICHARD FIELD

UPON considering the Claimants' application for permission to appeal, the Court's finding that the claim is statute barred in Lebanese law, filed on 4 July 2021

AND UPON considering the Claimants' Notice of Appeal and skeleton argument in support of the said application (the **"Permission Application"**)

AND UPON considering the judgment given by the Court upon determining the preliminary issues ordered to be tried (the **"Preliminary issues"**) including the evidence given by the experts on Lebanese law dated 13 June 2021

AND UPON considering the Defendants' skeleton argument in opposition to the permission application dated 14 July 2021

AND UPON considering what order for costs should be made following the determination of the preliminary issues having regard to the parties' written arguments on the issue of costs

IT IS HEREBY ORDERED THAT:

On the Permission Application

1. The Claimants shall have permission to appeal the Court's finding that the limitation period applicable to claims against the Defendant auditors is five years starting from the date when the relevant auditor reports were put before the general meeting.

2. The Claimants' application to appeal against the Court's finding that "supervisory faults" in Article 178 LCC covered the whole range of auditor defaults so that there was no separate category of non-supervisory defaults beyond the purview of Article 178 is dismissed.

3. The Defendants must pay 75 % of the Claimants' costs of the Permission Application to be assessed by the Registrar on the standard basis, if not agreed.

On the costs issue

4. There be separate costs orders in respect of the trial of the Preliminary issues and the other costs of the action (excluding the costs orders and costs settlements listed on page 15 of Schedule 2 to the Defendants' Submissions on Costs dated 27 June 2021).

5. The Claimants must pay 55% of the Defendants' costs of the trial of the Preliminary issues.

6. The Claimants must pay the costs of the action (as defined in (4) above) to be assessed by the Registrar on the standard basis, if not agreed, and must pay interest at the rate of 9% per annum on such costs from the respective dates of payment.

7. Within 28 days of the date hereof, the Claimants must make an interim payment of USD 1,690,479 to the Defendants in respect of the costs herein awarded against them.

8. There be no order as to costs in respect of the costs issues that were before the Court.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 13 September 2021
At: 10.30am

SCHEDULE OF REASONS

The Permission Application

1. Referring to the requirements of RDC 44.19 (a) and (b), the Claimants contend that their proposed appeal has a real prospect of success and there is some other compelling reason why the appeal should be heard. It has long been held in these courts, following the judgment of Lord Woolf in *Swain v Hillman* [2001] 1 All ER 91, that an appeal has "a real prospect of success" if there is a "realistic" as opposed to a "fanciful" prospect of success[1] .

2. The Claimants submit that the Court erred in deciding: (i) that the length of the limitation period was five years starting with the date when the auditors presented their challenged reports to the general meeting (the **"Start Date Issue"**); and (ii) that the expression "supervisory faults" in Article 178 LCC covers all defaults committed by auditors in the course of carrying out the role of auditor (commissaire de surveillance) including failures to report to the Central Bank of Lebanon suspicions of money laundering under Lebanese Law No. 318 of 20 April 2001 and the Regulations concerning money laundering and terrorist financing made under Basic Circular No. 83 dated 18 May 2001 (**"Scope of Article 178 Issue"**).

3. In my judgment, the submissions made in paragraphs 15 and 16 of the Claimants' Appellant's Notice and paragraphs 5.3, 5.4, 38 - 55 of their skeleton argument in support of a proposed appeal against the Court's finding on the Start Date Issue have a real prospect of success. I am also of the view that there is another compelling reason why the appeal against the Start Date Issue finding should be heard, namely, that it is appropriate that the Court of Appeal express its view on whether the test on an appeal against a finding of foreign law is whether the judge properly conducted an evaluative exercise and came to a decision that was within the appropriate margin of appreciation, or whether the judge's decision was fairly arrived at and correct.

4. Turning to the Scope of Article 178 Issue, the Claimants contend in paragraphs 56 - 70 of the Appellant's Notice and paragraphs 56 - 70 of their skeleton argument that inadequate reasons were given for the finding on this issue and that the Court ought to have construed the phrase "supervisory faults" in light of the expansion of the role of auditors, particularly bank auditors, that requires the taking of an initiative to report to the Lebanese authorities on suspected conduct contrary to the national interest such as money laundering and financial support for terrorism.

5. The Claimants' submissions in favour of an appeal against the Scope of Article 178 Issue finding are essentially the same as those that were advanced at the trial on the meaning of "supervisory faults". In my judgment, this proposed appeal has no realistic prospect of success and I therefore refuse permission for this part of the proposed appeal. I say this because: (i) I regard it as plain and obvious as a matter of construction that the phrase "supervisory defaults" in Article 178 LCC encompasses every conceivable sort of default committed by an auditor in the course of an audit and therefore includes defaults consisting of a breach of a duty to report to the Lebanese authorities on the existence of grounds for suspecting that the company has been laundering money and/or financing terrorism; (ii) there is no support for Ground 2 in any of the jurisprudence of the Lebanese and French Courts or in any scholarly writings.

6. The Claimants have lost on submission (ii) but have otherwise been largely successful. By virtue of the discretion conferred on me by RDC 38.6 and 38.8 (2), I accordingly hold that the Defendants should pay 75% of the Claimants' costs of the Permission Application.

Costs

7. Relying on RDC 38.7 (1), the Defendants submit that, having obtained an order striking out the entire proceedings on the ground that they are statute-barred under Lebanese law, they should be awarded the whole of the outstanding costs of the action, including the costs of the Preliminary issues. In support of their claim for this costs order, the Defendants advance the following additional arguments: (i) the Claimants resisted the ordering of a trial of the three preliminary issues, including the limitation issue; (ii) the Claimants should have appreciated before they even commenced the proceedings that their claims were time-barred under Lebanese law; (ii) the Claimants' case on the third issue that the notices in question would be all admitted in evidence under Lebanese law was manifestly unreasonable; and (iv) the Claimants' insistence on pursuing the claim not only against the First Defendant but also against Mr El Fadl was unreasonable.

8. In my judgment, given that the fate of the proceedings also depended on the outcome of the first Preliminary issue, (the recoverability issue) and having regard to the amount of learning and the time that was devoted thereto, this is a case where a proportionate costs order is called for. This means that: (i) there must be an order for the costs of the trial of the Preliminary issues that is separate from the costs order made in respect of the other outstanding costs of the action; and (ii) account must be taken of the parties' relative success on the third issue and the extent to which that issue figured in the trial.

9. In my opinion, the Defendants did considerably better on the third issue than did the Claimants although they were not outright winners. On the other hand, this issue took up very little time.

10. In my judgment, given: (a) the heavy nature of the first issue and that its determination could have resulted in the proceedings being struck out; (b) the small amount of learning and time that was devoted to the third issue; and (c) the continuation of the proceedings did not depend on the outcome of the third issue, the appropriate costs order in respect of the Preliminary issues trial is that the Claimants should pay 55 % of those costs.

11. Citing paragraph 3 of Practice Direction No. 4 of 2017[2] , the Defendants seek an order that the Claimants pay interest at 9% per annum. on the prejudgment costs that they are awarded from the date payment was due under the relevant invoices. Details of these dates are provided in

12. The Claimants accept that, in principle, interest on costs should be payable from the date of payment and that, as Justice Giles observed in *Adil v Frontline Development Partners Ltd [2014]* CFI-015 (24 July 2016), the purpose of an order for such interest is to ensure proper compensation. However, they go on to submit that it is for the party seeking an award of interest on costs to show that the rate proposed ensures proper compensation by reference to such matters as the need to borrow commercially or any loss of returns on capital. In the Claimants' submission, the appropriate rate is 5% per annum. I reject these submissions. In my judgment the rate of interest to be applied to the prejudgment costs is 9% per annum. I say this because: (i) Practice Direction No. 4 of 2017 is plainly intended to set a standard rate which is to apply in the absence of cogent factors indicating a lower or higher rate; and (ii) in general, there is no logic in there being a different rate of interest for prejudgment costs from the rate applicable post judgment. I also note that in Al Khorafi & Ors v Bank Sarasin-Alpen (ME) Limited & Anor CFI-026-2009 (16 January 2017), DCJ Sir John Chadwick awarded interest on the prejudgment costs at EIBOR + 1%, which preceded Practice Direction No. 4 which increased the standard rate of interest to 9% from 20 November 2019.

13. The Defendants seek an order for payment on account of costs in the sum of USD 2,197,623.59, this being 65% of their updated total costs of USD 3,380,959. They seek to justify the 15% increase on the 50% figure specified in paragraph 5 of Practice Direction No. 5 of 2014 on the grounds that they have incurred significant costs in defending this litigation, have been out of their money in some cases for up to five years and that there is no material risk of the Claimants being unable to recover any overpayment if the Claimants succeed in appealing against the dismissal of their claims.

14. The Defendants also cite the observations made by the Court of Appeal in *Vegie Bar LLC v Alkalaijleh and Emirates National Bank of Dubai Properties PJSC* [2020] CA DIFC 001 that "the discretion to order a payment on account of costs is unfettered and is to be exercised having regard to all the circumstances of the case" and that, "The 50% is clearly taken as a "safe" percentage, an assured least figure (unless something appears calling for a lesser figure) and open to increase in the particular circumstances". In the event, the Court of Appeal awarded 75% of the total costs to be paid on account in light of the length of the proceedings and that it was the least likely amount the receiving party would be likely to recover on assessment.

15. The Defendants also cite *Swift v Brake & Ors* [2020] EWHC 2416 (Ch) where the Court decided that a payment on account of 65% of the costs claimed was reasonable given there was no costs budget or detailed bill of costs to consider.

16. The Claimants submit that, once the cost agreements and costs orders that are not within the outstanding costs of the action are taken out of the account, all that is left is the pleadings and the preliminary issues trial which, they argue, strongly suggests that on taxation the recoverable costs will be substantially reduced. Indeed, they go so far as to submit that the sum on account of costs should be USD 840,000 which is half of the sum sought by the Defendants in their first round of submissions.

17. It is very difficult to estimate what the impact on the recoverable costs will be of my decision that the Claimants should be liable for 55% and not 100% of the costs of the Preliminary issues trial. I am also left with a real concern that that the costs claimed by the Defendants appear to be high given the number of matters that are excluded from the costs of the action that are in issue. In these circumstances, I have come to the view in the exercise of the discretion vested in me that the reasonable sum that should be paid on account of costs is USD 1,690,479 which is 50% of the total costs claimed.

18. In advance of knowing the partly successful outcome of their permission to appeal application, the Claimants contended in their written submissions that, whilst that application was pending, no payment on account should be ordered because it might turn out that the order striking out their claim is overturned by the Court of Appeal.

19. The position now is that the Claimants have permission to appeal the striking out of their claim on the basis that their appeal against the finding that the limitation period was five years starting with the presentation of the relevant audit reports to the general meeting has a real prospect of success.

20. In my judgment, the general rule that there should be no stay of a judgment pending an appeal should apply here. In reaching this conclusion, I have decided I am entitled to accept fully the Defendants' assurance that there is no real risk that they will be unable to repay the sum paid on account of costs if the Claimants' appeal is successful and I have also taken into account that this expensive litigation has been going on for over five years.

21. Given that the Claimants are a disparate group and the size of the payment I have ordered to be paid on account of costs, I shall give the Claimants 28 days from the date hereof to pay the sum ordered to be paid to the Defendants.

22. Finally, since the Claimants have succeeded on the question whether there should be a proportionate order in respect of the costs of the Preliminary issues and given that the sum I am ordering to be paid on account of costs is considerably smaller than the sum contended for by the Defendants, I direct that there be no order as to costs in respect of the costs issues that were before the Court.