Claim No. ENF 022/2023
ENF 023/2023
CFI 046/2023

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

GTC TRADING SA

Claimant

and

(1) HAZEM ABDOLSHAHID MAHMOUDI RASHED
(2) H.M.R. INVESTMENT HOLDING LIMITED

Defendants

ORDER WITH REASONS OF JUSTICE SIR JEREMY COOKE

UPON reviewing the Enforcement Order of Justice Sir Jeremy Cooke dated 3 February 2023 (the "Enforcement Order") and the Worldwide Freezing Order dated 3 February 2023 (the "Worldwide Freezing Order") both made in related Claim No. ENF-022-2023, and the Interim Charging Order dated 3 February 2023 (which was made final on 20 March 2023) (the "Charging Order") in related Claim No. ENF-023-2023

AND UPON the First Defendant's Application ENF-022-2023/3 dated 25 September 2023 seeking to set aside the Enforcement Order

AND UPON the First Defendant's Application ENF-022-2023/4 dated 25 September 2023 seeking to discharge the Worldwide Freezing Order

AND UPON reviewing the Committal Order of Justice Sir Jeremy Cooke dated 28 November 2023

AND UPON the First Defendant's Application ENF-022-2023/9 dated 5 December 2023 seeking an extension of time for the First Defendant to swear and serve his affidavit in order to comply with his disclosure obligations, pursuant to paragraph 9 of the Worldwide Freezing Order

AND UPON a hearing having been held before me on 15 December 2023 with Counsel appearing for the Claimant, and Counsel for the First Defendant

IT IS HEREBY ORDERED THAT:

1. The First Defendant's Applications to set aside the Enforcement Order, the Worldwide Freezing Order and the Charging Order are refused.

2. The Claimant shall by no later than **4pm on Thursday, 21 December 2023** submit the proposed form of order for the sale of the shares.

3. The First Defendant shall pay the Claimant's costs of the Applications, to be the subject of immediate assessment by the Court.

4. The First Defendant shall by no later than **4pm on Thursday, 21 December 2023** file any submissions in writing that he wishes to make in relation to the schedule of costs filed with the court by the Claimant, and the Claimant shall reply thereto by no later than **4pm on Monday, 25 December 2023.**

Issued By:
Hayley Norton
Assistant Registrar
Date of issue: 19 December 2023
At: 8am

SCHEDULE OF REASONS

The Contempt

1. The First Defendant applies to set aside the Enforcement Order, Worldwide Freezing Order and Charging Order. The First Defendant is in contempt of court which remains un-purged. He has expressed an intention to purge his contempt by complying with court orders for disclosure of his assets but it is said that he is currently in hospital or laid aside for medical reasons and is currently unable to comply with the orders made against him, which were first made on 3 February 2023. On that date the Court made ex parte orders for the recognition and enforcement of the onshore Dubai judgment, a worldwide freezing order, with the usual ancillary disclosure orders, and an interim charging order over the First Defendant's shares in the Second Defendant. On 16 March 2023, the return date, the freezing order was continued and a final charging order was made against the shares of the First Defendant in the Second Defendant, a DIFC registered company.

2. Despite the absence of any participation in the proceedings for over six months until 20 September 2023 when the First Defendant made his applications and the deliberate and flagrant breach of the Court's order in failing to provide the disclosure ordered which led to the contempt ruling made by this court on 22 November 2023, in which it was said that the First Defendant should purge his contempt before being able to address

the court on all matters other than the question of the Court's "prima facie" jurisdiction to make the orders it did in February and March 2023, the Court permitted counsel for the First Defendant to address it on all matters. The Second Defendant has played no part in these proceedings and is not represented, although a witness statement was filed on its behalf in relation to the disclosure order made against it.

Jurisdiction

3. The primary argument put forward by Counsel for the First Defendant was that the court had no jurisdiction to make any of the orders it did because of the terms of the Execution Letter of 31 January 2023 from the onshore Dubai Court seeking attachment and execution of a judgment of the onshore court. Whilst the Execution Letter referred in its subject heading to *"Execution No. 4565/2018/207 Commercial Execution"* which was the reference number for the execution proceedings which had been taking place in onshore Dubai, there is no doubt that the monetary judgment entered in onshore Dubai for which enforcement was sought in those execution proceedings and to which they referred was that made on 31 October 2018 by the Court of Appeal and which became finally enforceable when the Court of Cassation dismissed an appeal from it on 24 February 2019. The execution amount referred to in the Letter of Execution was AED 67,502,449.45.

4. The jurisdiction of the DIFC court is, as has always been recognised, statutory in nature. Under Article 5 of the JAL, jurisdiction is given in respect of *"any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations"* per Article 5 (A) (1)(e). Article 5 (D) provides that the Chief Justice is to assign one or more of the Courts' judges as execution judge(s) and Article 7, which is headed *"Execution" provides as follows: "the execution judge assigned pursuant to paragraph (D) of Article (5) of this Law shall have jurisdiction over execution of the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts if the subject matter of execution is situated within DIFC, and such execution shall be in accordance with the Rules of the Courts."* The basis upon which the application was made for the Enforcement Order, the Freezing Order and the Charging Order was the existence of the First Defendant's shares in the Second Defendant in the jurisdiction without evidence as to any other assets that he might own within it.

5. Under Article 7 (4), *"where the subject matter of execution is situated in DIFC, the judgments, decisions and orders rendered by Dubai Courts or Arbitral Awards ratified by Dubai Courts shall be executed by the execution judge of the Courts,* "subject to the three conditions which follow in subparagraphs (a) (b) and (c), none of which were in issue between the parties. Article 7 (5) provided: *"in addition to Paragraphs (a) (b) and (c) of Clause (4) of this Article, when executing, through the Courts, the judgments, decisions or orders issued by Dubai Courts and Arbitral Awards ratified by Dubai Courts, the following must be observed:*

> *(a) The Dubai Courts shall issue an execution letter to the Chief Justice of the Courts stating the procedure to be carried out;*
>
> *(b) the person requesting execution shall submit to the execution judge of the Courts an application accompanied by a copy of the judgement, decision or order, legal translation of the same, and the execution letter;*
>
> *(c) the execution judge of the Court shall apply the execution procedure and rules stipulated in the Rules of the Court, including any objections to execution. The execution judge may not reconsider the merits of the judgement, decision or order;*
>
> *(d) .."*

6. Article 24 of the Court Law also gives the Court jurisdiction to ratify any judgment, order or award of the Courts of Dubai for the purpose of the enforcement thereof in the DIFC. Although it is expressly *"pursuant to Article 7"* of the JAL (which has been held to refer to Article 7 (4) - (6)), it is concerned with a different but related subject matter, namely ratification of judgments for the purpose of enforcement in the DIFC, rather than the execution of the judgment as a means of enforcement, which is the subject of Article 7 (1) of the JAL.

7. On 3 February 2023, this Court ratified and recognized the judgment of the onshore Dubai Court for the money sum and declared it enforceable as a judgment of the DIFC Court. Although paragraph 2 of that order referred to Article 5 (1) (e) and 7 (4) - (5) of the JAL, no execution of any judgment, whether that of the onshore Dubai Court or that of the DIFC thereby granted, was ordered or effected. Execution can only follow after ratification and recognition of the onshore judgment as a judgment of the DIFC Court, which is to be seen as an independent domestic judgment with a validity of its own See *DNB Bank ASA v Gulf Eyadh Corporation* [2015] DIFC CA 007 at paragraphs 105 - 106 and 116 - 117. The Interim Charging Order was made following the Enforcement Order as the first step in the enforcement process with the freezing order made to prevent removal or dissipation of assets in the meantime.

8. There is no need for the presence of any asset within the jurisdiction for the exercise of the jurisdiction to ratify an onshore Dubai judgment for the purpose of enforcement in the DIFC and there can therefore be no basis for any challenge to the order made on 3 February 2023 on any such ground (See *DNB Bank ASA v Gulf Eyadh Corporation* [ibid] at paragraphs 125 - 127, in the context of the Court's exercise of a conduit jurisdiction.)

9. Whilst the terms of Article 7 (1) of the JAL do refer to the need for the subject matter of execution to be situated within the DIFC, this is no more than stating the obvious since judgment can only be executed by a court on assets that are within its jurisdiction. The provision does no more than vest the jurisdiction to execute judgments in the execution judge and to say that he should exercise that jurisdiction in accordance with the RDC in relation to assets that are within the DIFC.

10. The essence of the position taken by the First Defendant is that the jurisdiction of the DIFC Court to recognise and enforce a judgment of the onshore Dubai Court is limited to the scope of that judgment and the terms of the Execution Letter. It goes without saying that the whole purpose of the enforcement jurisdiction is to enforce a judgment of the foreign court and that the enforcement must be of what is ordered in that judgment. It is also self-evident that the jurisdiction enshrined in Article 7 (1) is specifically conditioned by the need for the subject matter of execution to be situated within the DIFC and that Article 7 (4) sets out conditions for the exercise of the jurisdiction by reference to the nature of the decision to be enforced, the requirement for a translation and the affixing of the executory formula on the judgment or order in question.

11. Article 7 (5) makes no reference to "jurisdiction" as such but sets out mandatory requirements for the execution of onshore Dubai Judgments

requiring the production to the Court of the Execution Letter and the provision of a copy of the onshore Dubai Court judgment with a translation, whereupon the execution judge of the DIFC Court is to apply the procedures and rules set out in the RDC, not those of the onshore Dubai Court. There is nothing in Article 7 (5) (a), where reference is made to the Execution Letter "stating the procedure to be carried out" which restricts the way in which the DIFC Court should carry out its function of execution. The wording of that subparagraph is designed to ensure that the Execution Letter makes it plain what it is that the DIFC Court is expected to enforce, namely payment of a monetary judgment, specific performance or compliance with an injunction or order.

12. In these circumstances, the requirements of jurisdiction for execution are met by the existence of the onshore Dubai judgment for payment of a monetary sum which is final and enforceable in Dubai as well as the DIFC. The mandatory requirements of Article 7 (5) are not matters which impinge upon the jurisdiction of this Court which has "prima facie" jurisdiction within the meaning of the Court of Appeal decision in Sandra Holdings at paragraph 76 (where of course there was no existing foreign judgment). Issues arising under Article 7 (4) and (5) are matters which do not go to the existence of the jurisdiction but to the manner in which that jurisdiction should be exercised. In practice, as appears below, none of these requirements represent a barrier to enforcement.

The On Shore Courts' decisions

13. As already mentioned, the First Defendant does not and cannot take issue with the monetary judgment entered against him in onshore Dubai. What is said however is that there was another judgment of the onshore Execution Court in which it was found that no execution in Dubai should be levied against the shares of the First Defendant in the Second Defendant. It is by no means clear whether or not this was the decision that was taken by the Court of Appeal in the context of execution (and if it is what the basis of it was) but it is of no relevance because any such decision would be a procedural decision and not a substantive decision. This is the result that it could not create res judicata or issue estoppel for the purposes of enforcement of the substantive judgment of the onshore Dubai Court, or this Court, in the DIFC. The matter is concluded, in my judgment, by the decision of the Court of Cassation No. 440/2013 of 12 November 2014 and the decision of the English Court in *Invest Bank PSC v El Husseini* [2023] EWHC 2302 (Comm) where the English Court enforced a UAE judgment notwithstanding that it was not then enforceable in the UAE itself. Reference should be made to paragraphs 15 and 37 - 62.

14. When attention is focused on the First instance and Court of Appeal decisions in the context of execution in the onshore Dubai Court, it can be seen that the judgment of the lower court appears to have, in the eyes of the Court of Appeal, erred by ordering an appraisal by an expert of the assets of the Second Defendant in which the First Defendant's shares were held and the sale of that portion of the company's assets, as opposed to the sale of the First Defendant's shares in the company: *"We authorize the sale of the share of the Execution Debtor in the company as stated in the application for the market value as per the expert's report"*.

15. Whilst that is not clear, the application made to the First instance execution court was for the *"sale of movable property/real estate property/shares/share/others"* and specifically sought the sale of the First Defendant's shares in the second Defendant at a public auction, but the decision of the court was that: *"Upon review, we authorise that an accounting expert shall be appointed according to the roll to appraise the Execution Debtor's share in the company outlined in the application according to the book value stated in the Company's record and the market value and further appraise the Company's tangible assets or securities."* It thus appears that the court ordered a valuation, not of the First Defendant's shares in the second Defendant but his "share" of the capital assets of the company which required an appraisal of the company's assets.

16. This is the only basis upon which the decision of the Court of Appeal makes sense. The Court of Appeal states, in its ruling, that because the Second Defendant is to be considered a "private company" not a "limited liability company" for the purposes of Federal Decree Law No. 32 of 2021 on Commercial Companies Law, Article 81 is inapplicable and Article 20 applies instead. In referring to Article 20 the Court of Appeal stated that creditors of a "partner" (shareholder) may not recover its rights out of the share of the debtor partner in the company's capital but may claim its rights from his shares in the Company's profits (dividends). The court went on to say that:

> *"if the partner's contribution to the Company consists of shares, then the creditors thereof may, in addition to the rights set out in clause (1) of this Article, file a lawsuit before the competent court to sell the shares and subsequently recover his debt out of the sale proceed."*

The court went on to say that:

> *"in light of the above,... the provisions of said Article 81 are not applicable, rather the provisions of Article 20 of the same law. As such, the share of the Appellant therein may not be sold. Whereas, the appeal decision violated this perspective, it should be cancelled and a new judgement issued to reject the request to sell the shares, as will be stated in the working of the judgement. Now therefore, the court ruled to accept the appeal.. to revoke the appealed decision, to issue a new order all rejecting the request to sell the Appellant's shares in [the Second Defendant]..."*

The use of the singular and plural in different places is confusing but the rationale of a decision based on Article 20 speaks for itself.

17. Article 20, in translation or is headed "Enforcement upon anything in lieu of capital contribution". It provides:

> *"1. The creditor of any partner may not satisfy his right from the contribution of his debtor to the capital of the Company, but rather, he may satisfy the same from his debtor's profit share. If the Company is dissolved, the creditor's right shall attach to his debtor's share upon liquidation of the Company.*
>
> *2. If the partner's contribution to the Company's shares, then his creditor may, in addition to the rights of as set out in Clause 1 of this Article, file a case with the competent court for the shares to be sold and the proceeds thereof be used to satisfy the creditor's right."*

18. The terms of the statute are perhaps clearer, in translation, at least. Under Article 81, it appears that there would be no need to apply to the

court and the creditor could auction the shares of the debtor, with a right of pre-emption in the other shareholders. Under Article 20 however, a distinction is drawn between, on the one hand, shares held by a creditor in a company (which may, if a court order is obtained, be sold and the proceeds used to satisfy the debt, as would be the case in the DIFC) and on the other hand the contribution of the debtor to the capital of the company, which as a matter of contradistinction, can only mean his proportionate share of the assets of the company.

19. The confusion between ownership of shares in the company and a proportionate share of the company's assets continues to feature in the correspondence exchanged between the First Defendant and the authorities and courts of both onshore Dubai and the DIFC. That may or may not be understandable when it is considered that the First Defendant is apparently the one hundred percent shareholder in the second Defendant. The courts themselves in onshore Dubai appear to have been confused unless the translations that appear in the bundle of documents are inaccurate, which appears likely to be the case. Regardless of this, there has never been any request from the onshore Dubai Court to the DIFC Court to refrain from ordering the sale of the First Defendant's shares in the Second Defendant, although there has been a request in August of this year to unfreeze the shares which are caught by this Court's Worldwide Freezing Order, following that Court's own orders. It is noteworthy that the Execution Court in on shore Dubai did accept and recognize the Freezing Order in freezing the disposition of the properties owned by the Second Defendant, which had been gratuitously transferred to it by the First Defendant shortly before the Court of Cassation decision upholding the Court of Appeal monetary judgment.

20. Be that as it may, since the decisions of the onshore Dubai Court with regard to execution are procedural and not substantive, there is no res judicata or issue estoppel effect in the DIFC and this Court must proceed to execute the judgement which was for a monetary sum unless there is some other good reason for not doing so.

The Execution Letter

21. The First Defendant contends that the Execution Letter is restricted to enforcement against "funds" which is the translation from the Arabic that he puts forward. The translation which was presented to the DIFC Court contained the following wording: *"the Dubai Court of first Instance decided to write to you in order to attach and execute against the assets of the above-mentioned execution Defendant up to the execution amount of AED 67,502,449.45"*. The difference between the parties turns on the meaning of the word which is transliterated from the Arabic as *"amwal"*.

22. In the third affidavit of Kareem Bessisso at paragraph 65, the deponent, who is an associate at Al Tamimi and who speaks Arabic and English, referred to the allegation of mistranslation of the word as "assets" rather than as "funds". The translation that was produced to the court was that of a translator accredited by the UAE Ministry of Justice and the deponent went on to exhibit a well-known and highly regarded Arabic dictionary where the word was said to include *"all property"* including *"national currency, foreign currencies, securities, commercial notes, every object with a financial value such as real estate or movable physical properties and all rights attached thereto as well as the deeds and instruments evidencing all the foregoing in any electronic or digital form"*. The First Defendant had asserted the contrary in his witness statement, but he does not speak English, and has every reason to put forward any version which will assist him in avoiding payment of the judgment debt. Selective reference was made in the First Defendant's skeleton argument to the website from which the definition had been taken by Mr Bessisso, taking only the parts of the definition which referred to *"cash; money, a stock of money, funds, fund, Finance and day-to-day money"*. This was a distortion of the position in the dictionary leading to the assertion that what this word therefore described was something akin to "cash".

23. I have no hesitation in preferring the evidence of Mr Bessisso and the dictionary definition produced by him as well as the translation in the Execution Letter which, it is to be assumed, was made with some care by a translator accredited with the UAE Ministry of Justice who might be expected to have some knowledge of the appropriate terminology. In reality, the First Defendant's case proves too much since it could not possibly be the intention of the Execution Letter to restrict enforcement against cash or its equivalent, if there was real property or other movable property owned by the First Defendant. It is to my mind inconceivable that there would be any restriction on enforcement against those assets. It is only because of the issue which occurred in onshore Dubai in relation to enforcement against shares there that there is any occasion for the First Defendant to raise an argument about the terms of the Execution Letter, which, on the First Defendant's argument does not merely prevent enforcement against shares but all other property that does not qualify as cash or its equivalent. I consider such an argument contrived in the light of the clear dictionary definition which includes all assets.

Conclusion

24. In the circumstances there is no ground for any of the orders made in February and March of this year to be set aside and all the First Defendant's applications are rejected. The First Defendant has sought by various means, in onshore Dubai and in the DIFC, to avoid payment of the monies due under the 31st of October 2018 judgment of the Court of Appeal in onshore Dubai. The time has come for execution of the judgment and for the shares of the First Defendant in the Second Defendant to be sold and the proceeds used to pay what is due.

25. It follows also that the First Defendant must bear the costs of the applications upon which he has failed, about which I have thus far received no submissions.

26. The Claimant should, within two business days submit the proposed form of order for the sale of the shares and the First Defendant, within the same time, should make any submissions in writing that he wishes to make in relation to the schedule of costs filed with the court by the Claimant and the Claimant should reply thereto within two business days thereafter. Issue of sanctions for contempt remain to be determined.