Claim No: CFI-026-2009

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BEFORE THE DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK

BETWEEN

(1) RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) AMRAH ALI ABDEL LATIF AL HAMAD

(3) ALIA MOHAMED SULAIMAN AL RIFAI

Claimants

and

(1) BANK SARASIN-ALPEN (ME) LIMITED

(2) BANK SARASIN & CO. LTD

Defendants

ORDER OF JUSTICE ROGER GILES

UPON reviewing the Defendants' Application Notice CFI-026-2009/20 dated 9 November 2014, seeking a stay of the Order of the Deputy Chief Justice Sir John Chadwick made on 28 October 2014 (the "Stay Application");

AND UPON reviewing the Claimant's response to the Stay Application dated 12 November 2014;

AND UPON reading the relevant material in the case file;

AND UPON hearing Counsel for the Claimants and Counsel for the Defendants on 13 November 2014;

IT IS HEREBY ORDERED THAT:

1. The Stay Application is dismissed.

2. The Defendants shall pay the Claimants' costs of the application.

4. The operation of the order in paragraph 2 above shall be stayed for seven days or, if an application for some other order as to costs is filed within that period, until the determination of that application.

REASONS FOR THE ORDER:

1. This is a stay application by unsuccessful defendants. For the reasons which follow, it should be dismissed.

The proceedings

2. The three Claimants are members of a Kuwaiti family. The two Defendants are a Swiss bank ("the Bank") and a DIFC licensed firm ("the Firm") partly owned by the Bank.

3. In 2007 and early 2008 the Claimants purchased structured financial products ("the Notes") from the Bank on the introduction of the Firm. Their total outlay was USD 200 million, in part funded by Al Ahli Bank Kuwait ("ABK").

4. In November 2008 the Bank made margin calls. The Claimants did not meet them, and the Bank closed out the Notes. The Claimants suffered substantial losses.

5. In late 2009 the Claimants brought proceedings against the Defendants, claiming to recover their losses. They alleged that the Firm was in breach of contract, negligent and guilty of misrepresentation in advising them that the Notes were suitable for their investment objectives, and in breach of the DFSA Regulations under which it was authorised to offer financial services; and that the Bank acted in breach of the DIFC Regulatory Law (DIFC Law No 1 of 2004) in carrying on an unauthorised financial services business within the DIFC, and was itself in breach of contract by operation of Swiss law and vicariously liable for the Firm's negligence and misrepresentation under DIFC law.

6. The proceedings were hard fought. A number of interlocutory applications, were brought by the Defendants, and were taken by them to the Court of Appeal.

7. The trial took place before Deputy Chief Justice Sir John Chadwick in the period May - July 2013. Judgment was given on 21 August 2014.

8. The Judge held that the Firm had been in breach of its regulatory obligations and was liable to pay compensation to the Claimants, and that the Bank had acted in breach of the Regulatory Law and was also liable to pay compensation to them. These became the bases for the orders next described, and I pass over the Judge's dealing with the contractual, tortious and misrepresentation claims.

9. The parties could not agree on the consequential orders, and a further hearing took place on 28 October 2014. During the hearing the Judge made orders which so far as presently relevant maybe summarised as -

> (a) declarations of the Defendants' breaches and liability to pay compensation;
>
> (b) statements of the amounts of the liabilities, as to both Defendants, at USD 1,263,549.00 to the First Claimant, USD   8,540,000.00 to the Second Claimant and USD 641,500.00 to the Third Claimant, in each case together with interest to be assessed, plus further amounts to be assessed in respect of other fees and interest charged by the Bank and "losses arising out of the Claimants' relationship with [ABK]";
>
> (c) the three stated amounts to be paid within 14 days;
>
> (d) all other claims for interest and damages adjourned for a one day hearing on the first available day after 29 January 2015;
>
> (e) costs and interest on costs to be paid by the Defendants and an interim amount of USD 1 million to be paid on account of costs.

10. The formal record of the orders was issued on 30 October 2014.

The stay application

11. On 6 November 2014 each of the Defendants filed an application for permission to appeal, accompanied by grounds of appeal. The Firm's grounds of appeal were lengthy, occupying 28 pages. The Bank's grounds of appeal were a more modest four pages.

12. On 9 November 2014 the Defendants filed a joint application for -

> ".a stay.of the order of Deputy Chief Justice Sir John Chadwick issued on 30 October 2014.pending the granting of permission to appeal and, if permission is granted, until the determination of the appeal or until the further order of the Appeal Court."

13. In view of the order that the three stated amounts be paid within 14 days, the Defendants requested an urgent hearing of the stay application. A hearing took place by telephone on 13 November 2014, with supplementary material provided by the Claimants on 17 November 2014 and (albeit without leave) by the Defendants on 19 November 2014. Counsel for the Claimants was able to state that they would not take action to enforce the orders prior to judgment on the application.

14. The generous terms of the stay application were clarified at the hearing. The stay was limited to (i) the orders for payment of the three stated amounts and the interim costs amount ("the money orders") and (ii) the order for a further hearing of the claims for interest and other damages ("the further hearing order").

Other claims

15. The Claimants had litigation funding for the proceedings. They were represented by KBH Kaanuun Ltd ("KBH"), until that representation ceased in late August 2014.

16. On 3 November 2014 the litigation funder ("the funder") commenced proceedings against the Claimants, KBH and the Defendants claiming an order that USD 11,445,049.00 (being the total of the three stated amounts and the interim costs amount) be paid into court. In the claim form the funder alleged that it was a term of the litigation funding agreement that any damages and costs be paid into an account controlled by KBH, on which it was to have first call, and that it was concerned that the money would not be dealt with in that way. At an urgent hearing on 6 November 2014 HE Justice Omar Al Muhairi ordered that the money be paid into court by the Defendants by 4pm on 11 November 2014 and held until further order -

> "2. .such an order to be in the form of an order made by consent of the Claimant and the First, Second, Third and Fourth Defendants (as parties to an Amended Restated Litigation Funding Agreement dated 21 April 2013) and/or (insofar as it relates to the respective entitlements of the Claimant and the First, Second, Third and Fourth Defendants) pursuant to an order of any competent court and/or an arbitration award."

17. Neither the evidence before his Honour nor a record of his Honour's reasons, if one exists, were before me.

18. The Defendants did not attend the hearing. They take the view that they are not bound by the order because they were not served with the evidence in support. They have not paid the money into court.

19. Shortly prior to the hearing on 6 November 2014, KBH wrote to the Defendants putting them on notice that it also had a claim against the money ordered to be paid to the Claimants. They provided a draft application for an order for payment into court or various alternative relief, alleging an entitlement to legal fees and disbursements under a letter of engagement, conditional fee agreements and the funding agreement. So far as appears the application has either not been made, presumably because the order in the funder's proceedings was thought to provide protection to KBH's claim, or not been determined.

Stay pending an appeal

20. Unless there is an order otherwise, an appeal does not operate as a stay of any order or decision (RDC 44.4); *a fortiori*, when permission to appeal has been sought and has not yet been granted. By Article 33 of the DIFC Courts Law 2004 (DIFC Law No 10 of 2004), the Court may stay any decision, order or proceeding "if it considers it appropriate". There is a general discretion, exercisable in making an order otherwise or while an application for permission to appeal is considered.

21. The approach adopted in relation to CPR 52.7, which is in similar terms to RDC 44.4, was common ground at the hearing of the application. The parties referred to Leicester Circuits Limited v Coates Bros PLC [2002] EWCA Civ 474; Department for Environment, Food and Rural Affairs v Downs [2009] EWCA Civ 257; HTC Corporation v Nokia Corporation [2013] EWCA Civ 1759; and Sunico A/S v The Commissioners for Her Majesty's Revenue and Customs [2014] EWCA Civ 1108.

22. These cases have differences in expression and emphasis, but the following may be taken from them. Grounds for a stay must be established by the applicant. The successful party at trial has a decision in its favour, and is entitled to the fruits of that decision unless the applicant does so. The outcome on appeal being uncertain, the rival contentions as to the merits are unlikely to be persuasive, and it is a question of justice between the parties until the outcome is known with a view to minimising the loss to the ultimately successful party. An important consideration is the relative risk of injustice in granting or not granting a stay, but it depends on the particular facts.

Stay of the money orders

23. It was not suggested that having to pay the money now would be a financial hardship to the Defendants. Nor was it suggested that there was a risk that the Defendants would be unable to pay the money at a later time if it was not paid now and any appeal was unsuccessful. These considerations may be put aside.

24. The applications for permission to appeal have not yet been determined, and the Defendants are not able to say that a grant of permission to appeal recognises a real prospect of success. They contended that they had appeals of substance; the Claimants contended that the appeals were largely against factual findings and were flimsy. These contentions were variously expanded.

25. The skeleton arguments in support of permission to appeal have not yet been filed. I do not think that, for the purposes of this application, I can meaningfully assess the strength of the rival contentions, and as it is common in such applications it is not appropriate that I attempt to do so. I am prepared to assume that there are some grounds of appeal worthy of consideration; but the Claimants have a decision in their favour, and that alone does not make out a case for a stay.

26. In their skeleton argument the Defendants pointed to the claims of the funder and KBH, and to the Claimants' response to the funder's claim in part by challenging the Court's jurisdiction. They described the Claimants' allegations as allegations of failure to comply with contractual duties, and said that it appeared that the Claimants would not be willing or able voluntarily to comply with an order for repayment; further, that they (the Defendants) would not be protected by payment into court pursuant to the order of 6 November 2014 because it permitted payment out following agreement between the Claimants, the funder and KBH, and that they would be caught up in disputes which were of no concern to them.

27. In my view, there is little in this. On the evidence of Ms Gayle Hanlon, the disputes are over substantiation of fees claimed by the funder and KBH, and not over liability. The submission that the Claimants declined to recognise a contractual obligation even to pay into the controlled account lacks substance when the Claimants did not have the money from the Defendants.

28. The existence of the disputes does not warrant a conclusion that the Claimants would be unwilling or unable to repay the money if it were now paid and there were successful appeals. Nor, so far as the Defendants suggested that upon payment the money would go to the funder and / or KBH and be irrecoverable, would there be risk of injustice to the Defendants if the Claimants' total wealth be sufficient for repayment.

29. In the skeleton argument the Defendants also suggested that there would be difficulty in enforcing recovery of the money from the Claimants in Kuwait if the appeals were successful. They retreated from that suggestion when available treaties were identified. I do not think that is a material risk.

30. Oral submissions of the Defendants were directed to the Claimants' total wealth. They said that the Claimants' stance at trial was that they were not wealthy and could not pay the margin calls of USD 8,500,000 made by the Bank. By reference to paragraphs in the Judge's reasons, they said that the Claimants had a substantial indebtedness of USD 80 million to ABK. And they said that there was reason to believe that the Claimants were presently under financial pressure. For this they pointed first, to a statement in the claim form in the funder's proceedings that the Claimants were "believed recently to have disposed of substantial property in Kuwait", and secondly to a passage in the transcript of the 27 October 2014 hearing before the Deputy Chief Justice in which counsel for the Claimants said, in connection with losses for the further damages hearing, that "since the trial there had been some foreclosures on property as a result of the ABK lending, leading to at least one instance of property sold". Thus it was submitted that, if the money were now paid to the Claimants, it would be likely to go to ABK and could not be repaid if the appeals were successful.

31. These submissions had not been foreshadowed in the Defendants' skeleton argument, and were a particular subject of the Claimants' supplementary material filed on 17 November 2014.

32The Claimants responded that their stance at trial was that they could not pay the margin calls in the 24 hours stipulated by the Bank, not that they did not have wealth to pay them, and they pointed to a ground in the Firm's grounds of appeal asserting that the relevant period was not 24 hours but eight or nine days and that the Claimants "could plainly have met the margin calls" within that period.

33. I do not find the assertions concerning the trial in this respect of great assistance; I was not taken to underlying evidence, and it is better to look to such more direct evidence as is before me.

34. The Judge described the Claimants at [5] -

"The first Claimant.is a member of a wealthy Kuwaiti family. On the death of his father.he inherited control of the family assets. The second Claimant.is the mother of [the First Claimant]. She, too, inherited significant wealth from her own family and from her late husband. The third Claimant.is [the First Claimant's] wife. Again, she inherited significant wealth from her own family."

35. As a general proposition, the Claimants are wealthy. What more does the evidence show?

36. The statement in the claim form in the funder's proceedings is of little if any weight and the position concerning ABK was explained in evidence from Ms Hanlon. The First and Second Claimants had reached a settlement with ABK, had paid it USD 37.5 million, and had no indebtedness to it other than as guarantors of the indebtedness of the Third Claimant. They had undertaken an (unspecified) indebtedness to Commercial Bank of Kuwait in order to pay the settlement sum. The Third Claimant owed ABK a little over USD 33 million, in respect of which there had been foreclosures of properties by ABK.

37. Ms Hanlon stated, based on her review of financial information provided by financial advisors of the First Claimant and information provided by the legal advisor of the Second Claimant, that -

"(c) Notwithstanding the matters set out above (including the foreclosures and personal guarantees),

(i) the First Claimant is a businessman with substantial assets and his net asset position is substantially above the amount of USD $1,263,549 which he is due under the Order of 28 October 2014, if that sum ever had to be repaid.

(ii) the Second Claimant has very substantial assets, including unencumbered personal and real property assets. Her net assets are in excess of US $70 million. Her net asset position is substantially above the amount of USD $8,540,000 which she is due under the Order of 28 October 2014, if that sum ever had to be repaid.

(iii) Whilst the Third Claimant does not have a net asset position of the size of the First and Second Claimant, as the spouse of the First Claimant, she still has available to her more than sufficient net assets available to cover the amount of USD $641,500 which she is due under the Order of 28 October 2014, if that sum ever had to be repaid."

38. The Defendants submitted that, when the Claimants suffered foreclosures by ABK rather than pay ABK out from their asserted wealth, either they could not pay or they were not willing to pay; and that whichever be the case, it should be found that they will be unlikely to make repayment in the event of successful appeals. If there were no other evidence of the Claimants' wealth, there could be some force in the submission. However, the particular position as between Claimants and ABK is not the measure of or a sound guide to their ability otherwise to pay the amounts the subject of the money orders. That the First and Second Claimants reached a settlement with ABK suggests disputes, which may explain that position.

39. I am not satisfied that there is a risk of any significance that, if the money the subject of the money orders is paid to the Claimants, they will be unable to repay it in the event of successful appeals. In this respect I take account of the interim costs amount and interest in addition to the amounts to which Ms Hanlon refers, and note that the largest amount is payable to the Second Claimant whose total wealth greatly exceeds it. The other amounts are relatively not large. To the extent that there is a risk, I bear in mind that the Claimants have been out of their money for many years. However, as the Defendants submitted, the Claimants will have interest on the judgment sums upon any eventual payment, interest is not a universal panacea and an element in the justice between the parties is that they should not be delayed in having the fruits of the decision in their favour pending determination of the applications for permission to appeal and any appeal(s).

40. In all the circumstances, in my view it is not appropriate to stay the money orders.

Stay of the further hearing order

41. The grounds of appeal of the Firm, but not those of the Bank, included that there was error of law in making the further hearing order, because there had not been a split of liability and quantum and failure in proof at the trial meant that the claim to further damages must be dismissed. The Defendants submitted that the costs of the further hearing would be wasted if the appeal in this respect succeeded, and might not be recoverable from the Claimants.

42. The Judge gave directions concerning evidence at the further hearing, and said in reasons accompanying the orders of 28 October 2014 -

"9. The second matter which requires explanation is the restriction on further evidence that I have included under paragraph 8 of my order. There is force in the Defendants' submission that this is not a case in which the Court was asked to order, or did order, a split trial. The evidence on which the Claimants are entitled to rely for the purpose of assessing the quantum of their claims is the evidence that was before the Court at the trial; subject to the possibility that the quantification of those claims may be affected by reason of post-trial events. It is for that reason that I think it right to restrict the evidence which the Claimants may adduce in support of their contentions on the Quantum Determination to post-trial matters, but I leave open the possibility that there may be some further matters which justice requires the Court to consider; and, if there is, the Claimants may apply in writing to rely on evidence of those matters. But such application is to be made in advance of the Quantum Determination; and, in order to determine such application (if any), the Court will require to see, in draft at least, the further evidence which the Claimants seeks to rely."

43. In the light of this, in my view there is limited scope for the ground of appeal, and the risk of the incurring of wasted costs is not high.

44. In any event, even if there were a real prospect of obtaining an appellate ruling that there should not be a further hearing, case management considerations are strongly against a stay. The further hearing is not purely consequential on other challenged orders. It is an additional area of substance, likely to generate its own appeal(s) by one or more of the parties (including if further evidence is allowed; but that is for the future). It is far better that it take place and any appeal(s) be heard (if permission to appeal be granted) together with the appeal(s) already on foot (again, if permission to appeal be granted).

45. Wasted costs are preferably to be avoided, but the costs of a one day hearing will be additional to what must already be a very great costs burden and in the present case not of major independent significance. Nor, for reasons already given, do I accept a real risk that the Claimants will not be able to pay the additional costs if necessary. I am not satisfied that it is appropriate to stay the further hearing order.

Costs

46. As at present advised I see no reason why the costs of the application should not follow the event. I will so order, but in case the Defendants wished to seek some other order I will stay the operation of the order for seven days or, if an application for some other order is filed within that period, until the determination of that application.

Issued by:

Mark Beer

Registrar

Date of issue: 20 November 2014

At: 2pm