THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

BETWEEN

(1) OLSEN
(2) OBED

Judgment Creditors/Appellants

and

OTHMAR

Second Judgment Debtor/Respondent

ORDER WITH REASONS OF H.E. CHIEF JUSTICE WAYNE MARTIN

UPON the Second Judgment Debtor's Application No. ENF-106-2023/3 dated 18 November 2024 seeking document (the "Production Application")

AND UPON the Order of H.E. Justice Maha Al Mheiri dated 27 November 2024, issued under Case No. ENF-024-2023, listing an Examination Hearing for 8 January 2025 (the "Part 50 Examination Hearing") (the "Part 50 Order")

AND UPON the Judgment Creditor's Application No. ENF-106-2023/4 dated 10 December 2024, seeking (i) security for their costs of the Production Application (the "Security for Costs Application") (ii) a stay of the Production Application pending determination of the Security for Costs Application

AND UPON the Second Judgment Debtor's Application No. ENF-106-2023/5 dated 27 December 2024, seeking an extension of time to comply with the Part 50 Order and adjourn the Part 50 Hearing Examination Hearing (the "Part 50 Extension Application")

AND UPON the Order of H.E. Justice Maha Al Mehiri dated 31 December 2024, dismissing the Part 50 Extension Application

AND UPON the Judgment Creditor's Application No. ENF-106-2023/6 dated 1 January 2025, seeking to stay the proceedings in ENF-106-2023 (the "Stay Application") and to set aside the Part 50 Order (the "Set Aside Application")

AND UPON the Order of H.E. Justice Maha Al Mheiri dated 6 January 2025 by which the Judge partially granted the Second Judgment Debtor's application dated 1 January 2025 for a stay of Case No. ENF-106-2023 ("ENF-106-2023") and for the Order of the Judge dated 27 November 2024 (the "Part 50 Order") to be set aside or alternatively stayed (the "Stay and Set Aside Application") (the "6 January Order")

AND UPON the Order of H.E. Justice Maha Al Mheiri dated 30 January 2025 dismissing the Security for Costs Application (the "30 January Order)

AND UPON the Judgment Creditors' Application No. ENF-106-2023/7 dated 20 February 2025 and Appeal Notice dated 25 February 2025 seeking an extension of time to appeal the 6 January Order (the "Extension Application") and permission to appeal (i) the 30 January Order; and (ii) the 6 January Order (the "Permission Application")

AND UPON the Order of H.E. Justice Maha Al Mheiri dated 14 March 2025 dismissing the Production Application and awarding costs to the Judgment Creditor

AND UPON the Order of H.E. Justice Maha Al Mheiri dated 11 April 2025 lifting the stay imposed by the 6 January Order and the 30 January Order

AND UPON the Order with Reasons of H.E. Justice Maha Al Mheiri dated 16 April 2025, granting the Extension Application and the Permission Application

AND UPON the Part 50 Examination Hearing that took place before H.E. Justice Maha Al Mehiri on 5 May 2025

AND UPON the case being transferred to the Court of Appeal and allocated Case No. CA-002-2025 (the "Appeal")

IT IS HEREBY ORDERED THAT:

1. The Appeal is dismissed on the ground that the issues the subject of the Appeal have become moot.

2. The Second Judgment Debtor/Respondent shall pay the Judgment Creditors/Appellants' costs of the Appeal.

3. In default of agreement as to the quantum of the costs to be paid pursuant to the preceding order, such costs shall be assessed in accordance with the following procedure.

4. The Judgment Creditors/Appellants shall file a Statement of Costs together with short submissions in support of the costs claimed by no later than **4pm on Wednesday, 9 July 2025.**

5. The Second Judgment Debtor/Respondent shall file short submissions relating to the quantum of the costs claimed in response to the documents served pursuant to the preceding order by no later than **4pm on Wednesday, 23 July 2025.**

6. Thereafter, the Judgment Creditors/Appellants shall serve submissions in reply by no later than **4pm on Wednesday, 30 July 2025.**

7. The quantum of the costs to be paid pursuant to these Orders will thereafter be assessed by H.E. Chief Justice Wayne Martin on the papers.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 25 June 2025
Time: 3pm

SCHEDULE OF REASONS

Summary

1. The Judgment Creditors/Appellants (the "Olsen and Obed") apply for an order dismissing the Appeal on the ground that supervening circumstances subsequent to the commencement of the appeal have rendered the issues the subject of the appeal academic, and for the further order that the Second Judgment Debtor/Respondent ("Mr Othmar ") pay their costs of the appeal on the ground that it is "tolerably clear" that the appeal would have succeeded.

Procedural context

2. It is necessary to consider the issues raised by the application in their procedural context.

3. On 27 October 2021, by a judgment of the Dubai Court of Appeal, Mr Othmar and two others were ordered to pay Olsen and Obed an amount of AED 35,211,885.68 plus interest, court fees and legal fees.

4. On 2 February 2023, Olsen and Obed commenced proceedings in the DIFC Court[1] for the recognition and enforcement of the judgment of the Dubai Court of Appeal. On 20 February 2023, the DIFC Court issued an order recognizing and enforcing that judgment.

5. On 5 May 2023, Olsen and Obed commenced further enforcement proceedings in the DIFC Court[2] for the enforcement of the recognized judgment of the Dubai Court through the attachment of and execution against assets.

6. On 9 May 2023, the DIFC Court issued orders for the attachment of and execution against a number of assets, including companies understood to be owned by Mr Othmar and the other Judgment Debtors.

7. On 14 November 2024, Olsen and Obed applied for an order pursuant to Part 50 of the Rules of the DIFC Courts ("RDC") requiring Mr Othmar to produce documents and attend Court to be examined in relation to his assets and means of satisfying the judgment debt.

8. On 18 November 2024, Mr Othmar filed an application for production of an agreement said to have been entered into between Olsen and Obed and various other companies which Mr Othmar asserted had a bearing upon the merits of the claim underpinning the judgment of the Dubai Court of Appeal (the "Production Application").

9. On 21 November 2024, Mr Othmar commenced proceedings in the Dubai Courts seeking production of the agreement the subject of the Production Application and release from execution on the basis that the underlying debt had been settled pursuant to the agreement which he sought produced.

10. On 27 November 2024, the Part 50 Application was granted and Mr Othmar was ordered to produce certain documents relating to his means within fourteen (14) days of being served with the order and to attend a hearing for examination on 8 January 2025.

11. After the Production Application was made, lawyers representing Olsen and Obed requested confirmation from lawyers representing Mr Othmar that he would pay Olsen and Obed costs if the Production Application failed. Mr Othmar's lawyers declined to give that undertaking on his behalf.

12. On 10 December 2024, Olsen and Obed applied for security for costs in respect of the Production Application.

13. On 11 December 2024, the Dubai Court ordered an interim stay of execution proceedings in that Court in response to the application made by Mr Othmar on 21 November 2024.

14. On 27 December 2024, Mr Othmar applied to the DIFC Court on an urgent basis for an extension of time within which to comply with the requirement to produce documents under the Part 50 Order, and for an adjournment of the hearing of his examination. That Application was dismissed on 31 December 2024.

15. The following day, on 1 January 2025, Mr Othmar applied for a stay of the enforcement proceedings in the DIFC Court and for an order that the Part 50 Order be set aside on the grounds that the Dubai Court had stayed enforcement proceedings in that Court.

16. On 6 January 2025, the Enforcement Judge granted the application and ordered that Mr Othmar's obligation to produce documents and attend an examination hearing be stayed until further order on the basis of the interim stay which had been granted in the Dubai Court. The Judge

expressed the view that the interim stay was "an order which must be recognized by the DIFC Courts" and that "the Dubai order being stayed has the same effect to the DIFC enforcement proceedings, to avoid any jurisdictional inconsistency and duplicative litigation".

17. On 30 January 2025, the Enforcement Judge dismissed Olsen and Obed's Application for Security for Costs. However, in the reasons given for dismissing the Application, the Judge applied the principles applicable to an application for an order for interim payment pursuant to RDC 25.81, rather than the principles applicable to an application for security for costs pursuant to RDC 25.97.

18. On 25 February 2025, Olsen and Obed applied for permission to appeal against the order made on 6 January 2025 staying the Part 50 Orders and the Order made on 30 January 2025 dismissing the Application for Security for Costs in respect of the Production Application. The grounds of appeal will be referred to below.

19. On 14 March 2025, the Enforcement Judge dismissed the Production Application, as a result of which the Application for Security for Costs in respect of that application, and the appeal insofar as it related to the Order made on 30 January 2025 became academic.

20. On 25 March 2025, the Dubai Court dismissed the proceedings brought by Mr Othmar and lifted the stay of execution in that Court. Olsen and Obed subsequently applied to the DIFC Court to lift the stay in this court, and on 11 April 2025 the DIFC Enforcement Judge lifted the stay and relisted the Part 50 hearing. By reason of those Orders, the appeal against the Stay Order made on 6 January 2025 has also become academic.

21. On 16 April 2025, the Judge granted Olsen and Obed permission to appeal the Orders of 6 January 2025 and 30 January 2025 on the grounds that the appeal had real prospects of success, even though the appeal had become academic by then.

22. On 6 May 2025, Olsen and Obed's lawyers sent an email to the Registry of the Court requesting orders that the appeal be dismissed on the grounds that the issues the subject of the appeal had become academic and for a further order that Mr Othmar pay their costs of the appeal. Olsen and Obed were directed to serve written submissions in support of that Application and such submissions were filed on 20 May 2025.

23. Mr Othmar filed a response to those submissions on 7 June 2025 and Olsen and Obed filed submissions in reply on 12 June 2025.

The relevant issues

24. The submissions which have been filed by the parties cover many issues which go beyond the issues which it is necessary to determine in order to dispose of this appeal. In particular, each of the parties is stridently critical of the conduct of the other in relation to issues which do not bear directly upon the issues that are relevant to the disposition of the appeal or the costs of the appeal. It is unnecessary to deal with the extraneous issues raised in the submissions, and these reasons will focus only upon the relevant issues, which are:

(a) Have the substantive issues raised by the appeal become academic, so that the remaining live issues in the appeal relate only to costs? and

(b) Is it "tolerably clear" that the appeal would have succeeded, so that it is appropriate to order Mr Othmar to pay Olsen and Obed's costs of the appeal without dissipating the resources of the parties and the Court by requiring an appeal to be prosecuted solely for the purposes of vindicating a claim to costs? and

(c) Is there some other reason why the Court should order Mr Othmar to pay Olsen and Obed's costs of the appeal.

Has the appeal become academic?

25. All parties agree that the appeal has become academic, and there could be no credible suggestion to the contrary. The stay order made on 6 January 2025 has been lifted, and the Production Application which was the subject of the Application for Security for Costs has been dismissed.

26. It follows that the only live issue in the appeal relates to costs.

Would the appeal have succeeded?

27. In common law courts the exercise of the discretion with respect to costs is generally guided by the outcome of the proceedings, so that, generally speaking, costs will follow the event. Of course, difficulties can arise where the is no "event" by reference to which costs can be assessed.

28. There are a wide variety of circumstances which can result in there being no curial determination against which an entitlement to costs can be measured. Those circumstances include:

(a) Settlement of the proceedings by agreement;

(b) One party having effectively conceded the other party's position; and

(c) The proceedings having become academic by reason of supervening events or circumstances.

29. In the first of these circumstances, the parties will generally deal with costs as part of their settlement agreement. In the second circumstance above, namely the withdrawal of a claim or position, or the acceptance of the other party's claim or position, the concession will generally be treated as "the event" and costs will be awarded in favour of the party whose claim or position has been established by reason of the other party's concession.

30. In the third circumstance identified above, that is where the proceedings have become academic by reason of supervening events, in *MH (Eritrea) v Secretary of State for the Home Department*[3] the English Court of Appeal held that if it was "tolerably clear" that the appellant would have won the appeal had it not become academic, the Court should exercise its discretion in favour of the appellant and require the respondent to pay the appellant's costs of the appeal.

31. The parties have not cited any decision of this Court in which that approach has been taken, although it is well established that the Court has a "wide discretion as to costs to be exercised in accordance with the Overriding Objective to deal with cases justly".[4]

32. In my view, the principle adopted by the English Court of Appeal should be followed in this Court. When an appeal has become academic by reason of supervening circumstances it is in nobody's interest for the appeal to be pursued in order to vindicate a claim for costs. However, if it is tolerably clear the appellant would have been successful in the appeal, dismissal of the appeal with no order as to costs would be unjust and would deprive the appellant of an inchoate entitlement to an order in respect of the costs incurred up to the point at which the appeal became academic.

33. Of course, when proceeding on this basis, the Court must bear in mind that there has been no determination of the appeal on the merits and that the outcome of litigation, including appeals, can be beset with varying degrees of uncertainty. Accordingly, a Court should only exercise the power to award costs in the absence of a curial determination of the outcome of the proceedings if sufficiently certain as to what that outcome would have been in order to justify the exercise of the power. This is the concept which I take to be embodied in the phrase used by the English Court of Appeal to describe the predicted outcome as being "tolerably clear".

The Order of 6 January 2025

34. The primary ground of appeal from the Order of 6 January 2025, and the ground upon which permission was granted, related to the Judge's misapprehension of the effect of the interim stay granted by the Dubai Courts. The judgment of the Dubai Court of Appeal has been recognized and enforced by an order of the DIFC Court. Finality is a precondition to recognition and enforcement of a judgment. Following recognition of a final foreign judgment such as that of the Dubai Court of Appeal, enforcement proceedings in this Court are a matter to be determined by this Court, and not by the foreign Court, unless and until the foreign judgment is set aside. Accordingly, the fact that an interim stay of execution proceedings had been granted in the Dubai Courts did not have the consequence that there should be a stay of enforcement proceedings in this Court, contrary to the view expressed by the Judge.

35. Further, to the extent that the grant of a stay involved the exercise of discretion, the importance of proceedings under Part 50 for the provision of information with respect to the means available to satisfy a judgment and the lack of any apparent prejudice to Mr Othmar by the continuation of the Part 50 proceedings, were significant factors weighing heavily against the grant of a stay.

36. For these reasons, it is tolerably clear that the appeal against the Order of 6 January 2025 would have succeeded.

The Order of 30 January 2025

37. As the Judge recognized in the course of the Application for Permission, the criteria relating to interim payments were erroneously applied to the Application for Security for Costs. It follows that the exercise of discretion miscarried and the appeal against the order of 30 January 2025 would have succeeded and the matter would have been remitted to an enforcement judge for reconsideration unless Mr Othmar could persuade the appellate court that there was no prospect that the discretion relating to the grant of security for costs could have been exercised against his interests.

38. In order to succeed in the Application for Security for Costs, Olsen and Obed would have had to demonstrate that one or other of the conditions specified in RDC 25.102 were satisfied, or that an enactment permitted the Court to require security for costs. In support of the Application for Security Olsen and Obed asserted that various conditions specified in RDC 25.102 were satisfied including:

(a) Mr Othmar had given an incorrect address in his witness statement dated 18 November 2024; and

(b) Mr Othmar had taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

39. Olsen and Obed further contended that Article 46(1) of the Court Law (2010) conferred a general discretion upon the Court to require a party to provide security for costs on terms and conditions it considers appropriate.

40. As far as I can see, Mr Othmar has never responded directly to these propositions. In particular, he has not responded to the allegation that he provided an incorrect address in a court document or that he has taken steps to arrange his assets so as to make it difficult to enforce an order for costs against him. In the absence of some convincing response to those assertions, and none has been advanced to date, the appeal would have succeeded and the matter would most likely have been remitted to an Enforcement Judge for consideration of the application on its merits by reference to proper principles, rather than those erroneously applied by the Judge at first instance.

41. For these reasons, it is tolerably clear that the appeal against the Order of 30 January 2025 would also have succeeded.

General

42. There are other considerations which support the exercise of the discretion with respect to costs. The appeals were the consequence of Mr Othmar making the Production Application and applying to the Dubai Courts for a release from the execution proceedings in those courts. Both applications failed. In a real sense, the Judgment Creditors' costs of the appeal can be said to be the consequence of those unmeritorious applications.

Conclusion

43. For these reasons:

(a) The appeal has become academic by reason of supervening circumstances, and should be dismissed, rather than pursued only to vindicate a claim for costs; and

(b) It is tolerably clear that but for those supervening circumstances Olsen and Obed would have been successful in their appeal and therefore

should be awarded their costs: and

(c) In this case there are other considerations which support the award of the costs of the appeal to the judgment creditors, being the failure of the applications made by Mr Othmar which gave rise to the appeal.

44. Orders will be made to enable the quantum of the costs to be assessed by a process analogous to immediate assessment, rather than detailed assessment.