Claim No. CFI-033-2015

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) ORION HOLDINGS OVERSEAS LIMITED (IN LIQUIDATION)

(2) ORION GLOBAL FINANCIAL SERVICES LLC (IN LIQUIDATION)

(3) ORION CAPITAL LIMITED (IN LIQUIDATION)

Claimants

and

(1) MOHAMMED ABU AL HAJ

(2) NIDAL ABDEL KHALEQ ABU AL HAJ

(3) PRIVATBANK IHAG ZURICH AG

Defendants

ORDER WITH REASONS OF H.E. JUSTICE SHAMLAN AL SAWALEHI

UPON the Third Defendant's ("**D3**") Application to challenge the jurisdiction of the DIFC Courts, dated 23 August 2017 (the "**Jurisdiction Application**");

UPON the Claimants' application for permission to amend the Particulars of Claim, dated 16 November 2017 (the "**Amendment Application**");

AND UPON reading the documents submitted in the Court file and hearing the arguments of the Claimants' and D3 at the Hearing on 23 January 2018;

IT IS HEREBY ORDERED THAT:

1.The Jurisdiction Application is dismissed.

2. The Amendment Application is granted.

3. Costs in the case.



Issued by: Natasha Bakirci

Senior Assistant Registrar

Date of Issue: 8 February 2018

At: 9am



SCHEDULE OF REASONS

Background

1.The Claimants are companies in liquidation since 2009, with their Claim Form being issued on 9 November 2015. To date, only D3 has been successfully served with the Claim and is presently seeking for the Court to find that it has no jurisdiction over the claim brought by the Second Claimant ("**C2**"), a company incorporated in Delaware, USA. D3 also seeks for the Court to decline to exercise its jurisdiction over the claims by the First and Third Claimants ("**C1**" and "**C3**" respectively) as the parties contractually agreed to litigate only in Switzerland. Particularly as the Claimants have accepted that the claims against D3 are different in fact and legal construction from the Co-Defendants.

2. D3 is a bank solely based in Switzerland, with no place of business or any relationship with any bank in the DIFC. C1 is a company incorporated in Panama on 11 November 2004, which opened an account with D3 on 2 January 2005 and was re-domiciled in the DIFC on 1 April 2008; C2 is a company incorporated in Delaware, USA on 24 March 2004 which opened an account with D3 on 1 May 2004; and C3 is a company incorporated in the DIFC on 13 April 2008, which opened its account with D3 on 30 December 2008. Although D3 accepts that the Court has jurisdiction over the claims brought by C1 and C3 as they are DIFC establishments, it submits that the Court should not exercise that jurisdiction but instead give effect to the jurisdiction clauses contained in their account opening documents (the "**Jurisdiction Clause**"), which states:

"All legal relationships between the client and the Bank are subject to Swiss law. The place of performance, place of enforcement for clients domiciled abroad and the exclusive place of jurisdiction for all proceedings is Zurich."

3. On 28 December 2005 C1 had signed a Pledge Agreement in favour of D3 which secured borrowings of D1; it was signed in London and contained the Jurisdiction Clause. On 3 July 2006 C2 had signed a Pledge Agreement which secured any borrowings of D1; it was signed in Zurich and contained the Jurisdiction Clause. On 27 October 2009, C3 had entered into a Pledge Agreement with D3 which secured any borrowings of C1; it also contained the Jurisdiction Clause. The First and Second Defendants ("**D1**" and "**D2**" respectively) were directors of C1 and C2. C2 and C3 were subsidiaries of C1, and all were wound up and put into liquidation by the DIFC Courts in 2009.

4. The underlying claim relates to an allegation that D1 and D2 acted in breach of their fiduciary duties (including their duty to disclose their interest in the transactions) fraudulently and without authority by concluding the Pledge Agreements and that these matters must have been known by D3 at the time. D3 has made an Application to contest the jurisdiction of the DIFC Courts and the Claimants' have made an Application for permission to amend the Particulars of Claim, both shall be considered in turn.

The Jurisdiction Application

Third Defendant's submissions

5. There are multiple arguments set out by D3 in the Jurisdiction Application which can be summarised briefly as follows:

(i) With respect to C2, D3 submits that there is no jurisdiction as it is not a DIFC establishment, and it is irrelevant that it is a wholly-owned subsidiary of C1 and has a DIFC liquidator. The claim is brought by C2, not its parent company, which is a separate legal entity and Article 5(A)(1)(a) of the judicial authority law ("**JAL**"), provides that the DIFC Courts is to have jurisdiction in cases where a DIFC establishment is an actual party to a claim.

(ii) Article 5(A)(1)(c) is not engaged as C2's Pledge Agreement was signed in Zurich, not the DIFC and no factual evidence has been forwarded to support the allegation that any act of authorisation is likely to have occurred in the DIFC. The parties had agreed that the place of performance of the accounts and the Pledge Agreement is Switzerland.

(iii) The Court should give effect to the foreign Jurisdiction Clause by staying the proceedings unless the Claimants establish strong cause for not doing so. The crucial consideration is that parties should be kept to their contractual bargain unless to do so would be to cause serious injustice to one party or the other, which would not be the case in this instance. The Jurisdiction Clause was accepted by the Claimants upon the opening of their accounts and there is no basis upon which the Liquidator can seek to put himself in any better position.

(iv) The claim against D3 cannot proceed with the claims against D1 and D2 in any event given the time that has already passed and that they have yet to be served. There will be a splitting of the claims and there is no argument that procedural dislocation will be avoided by not enforcing the Jurisdiction Clauses.

(v) If the Court does not uphold the Jurisdiction Clauses, this will greatly prejudice D3. Unless and until the DIFC Insolvency Orders are recognized by the Zurich court, D3 cannot recognize the Liquidator as an officer of the Claimants and cannot release information to him pursuant to the secrecy obligations imposed under Swiss law.

(vi) Even if this Court decides it should exercise its jurisdiction, a judgment against D3 will not be enforceable under Swiss law as the DIFC Courts will not be regarded as having jurisdiction in light of D3's challenge to jurisdiction. The Liquidator will need to have the liquidation recognized in Switzerland in order to establish his right to pursue the claim and recover any assets, if successful.

Claimants' submissions

6. The Claimants suggest that the Jurisdiction Application is limited in scope as it is pursued exclusively under RDC 12.1(1) and does not invite the Court to decline its jurisdiction on the grounds of *forum non conveniens* if the Court would otherwise have been satisfied that it did have jurisdiction, pursuant to RDC 12.1(2).

7. Although the Claimants maintain that D3 is a necessary and proper party to the proceedings and relief is properly sought against it, the principal claim is against D1 and D2 and there is no doubt that the DIFC has exclusive jurisdiction in relation to them pursuant to the JAL. As the claim is one in relation to which a DIFC establishment is a party (C1 and C3); the claim arises out of and relates to a contract performed within the DIFC (namely the contracts between D1 and D2 and the Claimants as well as the Pledge Agreements); and the claim arises out of, and/or relates to, incidents and transactions wholly or partly performed within the DIFC (including the breach of the fiduciary duties and acts of authorisation conferred by the Claimants onto D1 and D2). It is submitted that the law governing the Pledge Agreements has no bearing on the fundamental question of whether D1 and D2 acted in breach of the fiduciary obligations owed to the Claimants.

8. With respect to the jurisdiction of the DIFC Courts in determining the clam against D3 it is important to bear in mind that there is likely to be a trial of the very same issues against D1 and D2 in the DIFC Courts in any event. The only basis upon which D3 appears to contend jurisdiction is on the basis of the Jurisdiction Clauses contained within the Pledge Agreements and/or account opening documents. The Claimants submit that the DIFC Courts have jurisdiction over the claim against D3 for the following reasons:

(i) The claim against D3 falls within one or more of the jurisdiction gateways in Article 5 of the JAL. As the claim is one to which a DIFC establishment is a party, arises out of or in connection to a contract performed within the DIFC and acts /omissions that occurred within the DIFC (including the failure of D1 and D2 to disclose a conflict of interest in relation to the prospective Pledge Agreements and breach of fiduciary duties). Furthermore, D3 is a necessary and proper party to the claim against D1 and D2 which involves identical/overlapping subject matter with the claim against D3, therefore, the Court would have power to join D3 to the proceedings on that basis.

(ii) The Jurisdiction Clauses do not impinge on issues relating to the director/company relationship as they do not purport to extend beyond

the relationship between "pledgor" and D3.

(iii) The Jurisdiction Clauses are vitiated in any event, as they were (as D3 knew to be the case) concluded contrary to the interests of the Claimants and in breach of fiduciary duty and without authority. There will need to be a trial in this Court to determine whether the Jurisdiction clauses were validly concluded at all events.

(iv) The DIFC Courts should nevertheless assume jurisdiction over the claim against D3, regardless of the Jurisdiction Clauses, in line with the DIFC Courts of Appeal decision in *Al Khorafi v Bank Sarasin [2011] DIFC CA 003*. The reasoning in *Khorafi* can be applied to the present case as follows: there will inevitably be a trial in the DIFC Courts to determine the case against D1 and D2 concerning matters of DIFC law and which require the giving of witness evidence, therefore, there is a risk of inconsistent findings in relation to the claim, duplication of costs and inconvenience being caused to witnesses on all sides by having to attend two trials. Ultimately, procedural dislocation will be caused if the Jurisdiction Application were to succeed.

9. With respect to an argument of *forum non conveniens*, which the Claimants suggest is not being made by D3, it is submitted that the DIFC Courts are the most appropriate and convenient forum for the claim against D3. This is due to the fact that there shall be a DIFC Courts trial against D1 and D2 raising identical issues to the claim against D3; if the Claimants were forced to pursue litigation in another forum the entire claim would be stifled due to limited funds of the Liquidator; the Claimants are resident in the DIFC and the claims arise in the context of liquidation which is subject to the supervision of the DIFC Courts; the issues are principally/solely issues of DIFC law and the relevant witnesses likely to be based in the DIFC; the facilities of the DIFC Courts can easily accommodate any requirements arising out of the litigation and obviate the need to translate documents.

10. The Claimants rebut D3's assertion that by reason of alleged confidentiality provisions applicable to Swiss banks, it is precluded from properly advancing its defence, as the Claimants submit that the Liquidator has assumed the rights of the Claimants under the applicable local law, therefore, no confidentiality rights belonging to the Claimants can be infringed by divulging information belonging to the claimants with him. The Claimants also deny that an Order of the DIFC Courts would not be enforceable against D3 in Switzerland but submit that ultimately it is a matter for the Claimants whether they wish to run the risk of D3 breaching a Court Order.

Finding

11. Although D1 and D2 have yet to be served the claim, it is likely that the DIFC Courts would be found to have jurisdiction in respect of their cases pursuant to Article 5(A)(1)(a) of the JAL, as C1 and C3 are DIFC establishments and are parties in the proceedings. D3's challenge to the jurisdiction of the DIFC Courts is largely based on the Jurisdiction Clauses contained within the Pledge Agreements, however, I am persuaded by the Claimants argument that the law governing the Pledge Agreements has no bearing on the fundamental question of whether D1 and D2 acted in breach of the fiduciary obligations owed to the Claimants. In any event, the validity of those Pledge Agreements is called into question and will undoubtedly be considered and determined at an eventual trial.

12. I am of the view that the claim against D3 falls within at least one of the jurisdiction gateways in Article 5 of the JAL, as DIFC establishments are parties in the proceedings. In light of this fact, I am also convinced by the Claimants' assertion that their claim arises out of or in connection to a contract performed within the DIFC and acts /omissions that occurred within the DIFC, therefore, Article 5(A)(1)(c) of the JAL shall also apply in respect of the claims against D1 and D2. Given the prima facie jurisdiction over those claims, I find merit in the Claimants' submission that D3 is a necessary and proper party to the DIFC Courts proceedings in relation to D1 and D2 which involves identical/overlapping subject matter with the claim against D3, therefore, D3 ought to be joined to the proceedings on that basis.

13. The Court of Appeal's reasoning in *Khorafi* can be applied here as I have found that (prima facie) there is likely to be a trial in the DIFC Courts to determine the case against D1 and D2 concerning matters of DIFC law, therefore, there is a risk of inconsistent findings in relation to the claim and also a real likelihood of duplication of costs and inconvenience being caused to witnesses if two trials take place. Accordingly, if the Jurisdiction Application were to succeed, procedural dislocation will be caused.

14. With respect to the argument of *forum non conveniens*, I am of the view that the DIFC Courts are the most appropriate and convenient forum for the claim against D3 due to fact that there is likely to be a DIFC Courts trial against D1 and D2, raising identical issues to the claim against D3; the Claimants are resident in the DIFC and their liquidation is subject to the supervision of the DIFC Courts; the issues relate to DIFC law; and the relevant witnesses are likely to be based in the DIFC.

15. In light of the considerations above, the Jurisdiction Application is dismissed and I find that the DIFC Courts do have jurisdiction to hear and determine the claim against D3.

The Amendment Application

Claimants' submissions

16. The Claimants seek the permission of the Court to amend the Particulars of Claim pursuant to RDC 18.2(2). Essentially, the proposed amendments expand on the pleading of the fiduciary and other duties owed by D1 and D2; extend the allegations of breach of duty to D2; introduce new allegations that the Pledge Agreements are void or voidable; and introduce allegations as to D3's knowledge and that it was on notice that the Pledge Agreements were void.

17. It is submitted that the allegations against D3 have a real prospect of success and would appear to be unanswerable. The Claimants assert that the Pledge Agreements are obviously contrary to the interests of the Claimants and the overwhelming inference is that D1 and D2 knew this and it is equally clear that D3 knew or must be taken to have known that the Pledge Agreements were dishonest transactions.

18. In response to any alleged limitation defence raised by D3, the Claimants rely on Article 9(1) of the DIFC Law of Obligations which states:

"Notwithstanding Article 38 of the court Law, where a cause of action arises as a result of fraud by the defendant, there is no time limit before

which the action must be commenced."

19. The Claimants also aver that the Particulars of Claim do not seek to uphold and/or rely on the Pledge Agreements but sought to impugn them on the basis that they were entered into in breach of duty. Moreover, the relief sought by the Particulars of Claim (the repayment of all sums paid under the Pledge Agreements) was equivalent in effect to the Pledge Agreements being set aside and/or being declared void *ab initio*. Therefore, the Pledge agreements are incapable of being affirmed, as D3 suggests.

Third Defendant's submissions

20. D3 submits that the Court should not grant permission for the proposed amendments because the pleading of the new case is inadequate and speculative as well as being time barred; and even if the Pledge Agreements were voidable, they were affirmed by the Liquidator.

21. In summary, D3 makes the following submissions:

(i) The pleadings do not state any grounds for alleging that the Pledge agreements were void, as opposed to voidable.

(ii) The draft amended Particulars of Claim do not assert that D3 is on notice of matters which render the Pledge agreements voidable.

(iii) No facts are pleaded to support the Claimants' allegation that D3 knew or must be taken to have known that the Pledge Agreements were at the expense of the Claimants.

(iv) The alleged breach of duty arises from an alleged failure to disclose, therefore, the Claimants have to allege that D3 was on notice of actual breaches of fiduciary duty.

(v) The Claimants' pleading that D3 knew or ought to have known that there had been breaches of fiduciary duty fail to make clear whether it is alleged that D3 had actual knowledge or was under some duty to enquire with which it did not comply.

(vi) The Claimants' are effectively alleging that D3 was involved in an improper or fraudulent scheme in concluding the Pledge Agreements which should only be permitted if the facts relied on are fully and specifically set out.

(vii) The events which give rise to the new claim took place more than six years ago (when the Pledge Agreements were entered into), therefore, the claim to set aside the Pledge Agreements is time-barred pursuant to Article 38 of the Court Law.

(viii) The Liquidator has already affirmed that Pledge Agreements by relying on them to advance the original claims against D1 and D2.

Finding

22. The test for whether the Court ought to grant permission to amend under RDC 18.2(2) requires that the amendment be properly pleaded and have a real prospect of success.

23. I am persuaded by the Claimants' arguments and find that the proposed amendments to the Particulars of Claim, as set out in the Claimants' Amendment Application have a real prospect of success. I consider that the amendments are properly pleaded and essentially expand the fiduciary and other duties owed by D1 and D2 to the Claimants, as well as introducing allegations that the Pledge Agreements are void or voidable and that D3 had or ought to have had knowledge that the Pledge Agreements were dishonest transactions.

24. I do not consider the limitation defence raised by D3 to have merit in light of Article 9(1) of the DIFC Law of Obligations and the nature of the allegation against D3. There are several other arguments made by D3 that have not succeeded as objections to the Amendment Application but may be considered as part of any substantive defence subsequently forwarded.

25. It is noted that the Amendment Application has been made early on in these proceedings, before it has been served on D1 and D2 and prior to any defence being filed by D3. Therefore, I am inclined to permit the amendment of the Particulars of Claim for the reasons outlined above and on the basis that the Defendants shall not be prejudiced procedurally as a result.

Conclusion

26. The Jurisdiction Application is dismissed.

27. The Amendment Application is granted.

28. Costs are in the case.