THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BEFORE THE DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK

BETWEEN

(1) FABIOLA

(2) FAIRUZA

Claimants

and

(1) FADDEY LLC (also known as FADDEY PART 1 LLC)

(2) FAI PROPERTIES PJSC

Defendants

Hearing: **7 September 2015**

Counsel: Sarah Malik (Taylor Wessing (Middle East) LLP) for the Claimants

Harris Bor instructed by K&L Gates for the Defendants

Judgment: **7 September 2015**

JUDGMENT OF THE DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK

Transcribed from the oral judgment handed down on 7 September 2015, revised and approved by the Judge.

THIS JUDGMENT IS NOT TO BE PUBLISHED UNLESS ANONYMISED

JUDGMENT

Introduction

1.This application, made on 15 June 2015 by Faddey LLC (also known as Faddey Part 1 LLC) ("Faddey") in proceedings ARB-001-2015 brought against it and Fai Properties PJSC ("Edison") by Fabiola and Fairuza, seeks:

> "(a) an order under Rules 12.1(1) and 12.1(2) of the DIFC Courts Rules that the DIFC Courts has no jurisdiction or, alternatively, that it declines jurisdiction to determine the Claimant's/Applicant's claim for recognition and enforcement of an Arbitration Award dated 26 February 2015, as amended by a supplemental award, dated 11 April 2015, in DIAC Claim No. 34/2013 made under the Arbitration Rules of the Dubai International Financial Centre.
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> (b) in the alternative, an order pursuant to Article 44(2) of the DIFC Arbitration Law or Rule 4.2(6) of the DIFC Courts Rules that the enforcement proceedings be adjourned or stayed pending the final determination of the annulment proceedings with respect to the Award commenced by the Defendants in the Courts of Dubai on 31 May 2015.
>
> ."

2. The proceedings ARB-001-2015 were commenced by the issue of a Claim Form on 30 April 2015. The relief sought in the proceedings was recognition and enforcement of the Arbitration Award and, in particular, an order for payment by Faddey and Fai (together "the Defendants") within 14 days of the sums (in aggregate some AED 36,496,744) set out in paragraph 469, chapter 9, of the final Award by the Defendants on a joint and several basis.

3. Article 42(1) of the DIFC Arbitration Law (Law No 1 of 2008) requires the Court to recognise and enforce an arbitral award made in another state or jurisdiction save in circumstances set out in Article 44 of that Law. The power of the Court to refuse to recognise and enforce an Award is found in Article 44 of the Arbitration Law, which provides as follows, so far as material:

> "44 Grounds for refusing recognition or enforcement
>
> 44.1 Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it was made, may be refused by the DIFC Courts only:
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> (a) at the request of the party against whom it is invoked, if that party furnishes to the DIFC Courts proof that:
>
> (i) . . .; or
>
> (v) The award has not yet become binding on the parties or has been set aside or suspended a Court of the State or jurisdiction in which, or under the law of which, that award was made.
>
> 44.2 If an application for the setting aside or suspension of an award has been made to a Court referred to in paragraph (1)(a)(v) of this Article, the DIFC Courts may, if it considers it proper, adjourn its decision and may also, on the application of the party seeking recognition or enforcement of the award, order the other party to provide appropriate security."

4. Proceedings to annul the Award were commenced in the Civil Courts of Dubai on 31 May 2015. In those proceedings ("the annulment proceedings") the Defendants rely on Article 216 in Chapter III ("Arbitration) of the UAE Civil Procedures Law (Federal Law No. 11 of 1992). Article 216 provides, at paragraph 1, that:

> "216 The parties may apply for the Award of the arbitrators to be nullified when the Court considers whether it should be ratified, in the following circumstances
>
> . . .; or
>
> (c) "if there is a nullity in the Award or a nullity in the proceedings having an effect on the Award".
>
> That article, it is said, must be read in conjunction with Article 212 of that Law; paragraph 5 of which requires, among other things, that the award of the arbitrators must include the reasons for the award. Failure to include reasons, it is said, will have the effect that the award is a nullity.

5. The challenge to the Award in the annulment proceedings may be summarised as follows. First, that the Award itself provides no basis for an order for payment against both Faddey and Fai in the circumstances that, it is said, Fai was not a party to the Sale Agreement made on 3 January 2005 under which the liability to pay arises. Second, that the Award fails to specify whether the liability of the Defendants under the Award was a joint liability, a joint and several liability or liability on a several basis only.

6. It is submitted that there would be obvious difficulties in enforcement under an order made by the DIFC Courts, if that order did not make clear whether the obligation was to be enforced against the Defendants as joint obligors, as joint and several obligors or as several obligors. It is that potential difficulty on which the Defendants rely in seeking the relief claimed under paragraph (a) of their application notice in this Court: that is the basis, as it seems to me, on which they contend that this Court should decline jurisdiction to recognise or enforce the Award.

7. In my view, it would be premature to decide the question whether this Court should decline jurisdiction on that basis until it knows the views of the Dubai Civil Court on the question whether the Award is a nullity; or whether there is some process under which it can be clarified - perhaps by a further reference back to the arbitral tribunal - whether it was intended that liability under the Award should be joint, joint and several, or several. I think this Court should not address what I think is a difficult question - can it make an order for an enforcement of an award against two parties in circumstances where the award itself is silent as to the basis of liability - unless and until it has become clear that it is necessary for it to do so. That stage has not yet been reached.

8. In those circumstances, I am not minded to make an order under paragraph (a) of the Defendants' application until the Dubai Civil Courts have had the opportunity in the current annulment proceedings to give their view on that matter. The real contest, therefore, is whether there should be an order staying these proceedings under Article 44(2) of the DIFC Arbitration Law; or whether they should be dismissed at this stage.

9. The power to stay proceedings pending the determination of annulment proceedings in a court of another jurisdiction (which the Dubai Civil Court is in this context) under Article 44(2) of the DIFC Arbitration Law has been addressed in a number of recent decisions in this Court: *A v B*, ARB-002-2014 (22 January 2015), *Banyan Tree Corporate Pte Ltd v Meydan Group LLC,* ARB-003-2013 on 2 April 2015, and *A v B,* ARB-005-2014 (26 July 2015) In each of those decisions this Court referred to well-known observations in the judgment of Mr Justice Gross, sitting in London in the Commercial Court, in *IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm) [2005] 2 Lloyds Reports 326. It is sufficient, I think, to cite a passage from the judgment of Justice Sir David Steel in ARB-002-2014, *A v B*, at paragraph 31:

> "The last point taken by the Defendant is to invite the Court to adjourn the recognition and enforcement application pending the outcome of the appeal to the Dubai Courts pursuant to Article 42(2) of the Arbitration Law. In this regard I was reminded of the judgment of Gross J in IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corp [2005] EWHC 726 (QB) where he considered the relevant criteria for such an application:
>
> ".the Act does not furnish a threshold test in respect of the grant of an adjournment and the power to order the provision of security in the exercise of the court's discretion under s.103(5). In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual

case.'"

Justice Sir David Steel took the view on the facts in *A v B*, ARB-002-2014 that:

"The present case is at the bottom end of any sliding scale in regard to these considerations. The appeal in the Dubai Courts borders on the hopeless. It is clearly a device to delay matters and given the technical and unmeritorious nature of the challenge (further exemplified by the sort of points taken in the present application) is redolent of want of good faith. As regards delay I have received no assistance save that a further appeal to the Court of Cassation is contemplated. Any such delay and enhanced cost is clearly prejudicial."

The subsequent decisions in this Court have followed that approach: taking account of the three factors identified by Mr Justice Gross in the *IPCO* case.

10. In my view, it cannot be said that the annulment proceedings now pending in the Dubai Civil Courts were brought other than bona fide or that they were brought simply in order to delay the point by which the Award has to be satisfied. There are, in my view, real problems with the Award as it stands. As I have said, the first problem is whether there are indeed two parties who are liable for the obligations arising under the Sale Agreement. The second problem is whether, if there are two parties who are liable, the obligations which they assumed under the Sale Agreement were joint obligations or joint and several obligations or several obligations.

11. The first of those problems arises because the agreement is said to be entered into between "Faddey LLC, a subsidiary of Fai (hereinafter referred to as `the vendor') and Fabiola and Fairuza". Looking only at the description of the parties, the vendor is Faddey LLC, not Fai: Fai is introduced into the description merely to identify the holding company of Faddey LLC; not as a contracting party. I should add that I was shown material which indicated that it was realised that Faddey LLC was itself a misdescription of the company of which the true incorporated name is Faddey Part 1 LLC; and that a procedural order (Procedural Order No. 2), was made to correct that misdescription. Nothing turns on that. The execution of the Sale Agreement is in these terms:

"In witness whereof, the parties hereto have executed this Agreement by their duly authorised representatives, the day and year first above written"

Immediately thereunder there appear the words "Vendor: Fai Properties PJSC." That suggests that, notwithstanding the description of the vendor in the first paragraph of the Sale Agreement, the true vendor was Fai; although it may be that the true analysis is that Edison was executing the Sale Agreement as the duly authorised representative of Faddey. There are other indications which may point to Fai as the vendor. At clause 3.1, under the heading, "Title and Risk", it is said that:

"The Vendor shall transfer free and unencumbered freehold title of the Site to the Purchaser."

That again points to Fai as the vendor, in that it is common ground that the person having the freehold title to the property was Fai and not Faddey. Further, clause 7.3 provides that:

"The Vendor represents and warrants to the Purchaser that each of the following statements is true and accurate:

(a) the Vendor is the sole owner of the Side free and clear of all encumbrances;

(b) it is a public joint stock company duly authorised and validly existing under the laws of Dubai United Arab Emirates;

. . .."

It is, of course Fai, and not Faddey, that is the PJSC.

12. To my mind, those inconsistencies give rise to very real questions as to whether there were two vendors party to the Sale Agreement, both Faddey and Fai - a solution which is inconsistent with the provisions of clauses 3 and 7 that I have set out - and, whether, if there were only one vendor, the vendor was Faddey - the party with whom the agreement is said to be made - or Fai, the person which signed the Sale Agreement under the description `Vendor'. Those are matters which, for my part I would have expected to find analysed and determined in the Award. The arbitral tribunal plainly came to the conclusion that there were two vendors - that is implicit in the Award made against both the respondents to the arbitral proceedings - but nowhere in the Award does he give reasons for coming to that conclusion.

13. It is said on behalf of the Claimants that the tribunal did not need to give reasons: in that it was common ground throughout the arbitration proceedings that the Sale Agreement was made by two vendors and not one. That submission seems to me difficult to reconcile with some of the material which has been shown to me. It is not of course for me to determine which view is correct. It is enough, in the present context, for me to find - as I do - that it is impossible to say that this is not a bona fide problem which needs to be addressed in the annulment proceedings pending in the Dubai Civil Courts before enforcement proceedings can be ordered by this Court.

14. The second of those problems, as I have said, is that it is difficult to see how an order for enforcement can be made by this Court without specifying in that order whether the obligations of those against whom payment is ordered are joint or joint and several obligors. Again, that is not a matter which is addressed in the Award. The claimants say that it does not need to be. They say, variously, in reliance on Article 450 of the UAE Civil Procedure Code, that it is obviously a joint liability or again that an agreement to that effect can be implied. If the latter, then it seems to me necessary to ask "from what material is that agreement to be implied". The Award provides no assistance on that point.

15. For those reasons, I am not persuaded that this is a case in which either (i) the annulment proceedings have been brought without good faith solely for the purpose of causing delay; or (ii) that there is no realistic prospect of success in the annulment proceedings. It seems to me that those factors point firmly in the direction of awaiting the judgment of the Dubai Civil Court in the annulment proceedings before this Court takes any steps towards enforcing or recognising the Award.

16. The third factor to be considered is the delay consequent upon an adjournment. I was told, without contradiction, that there have already been two hearings before the Dubai Civil Courts; and that there is no reason to think that a judgment is not in the course of preparation. This is not a case in which this Court is asked to stay proceedings to enable the applicants to initiate annulment proceedings; nor where annulment proceedings have only recently been initiated. The Defendants have annulment proceedings in progress; which appear to be moving towards a determination, at least at first instance. It may be that there will be an appeal in those proceedings; but that must depend on the decision reached in the Dubai Court of First Instance: it is, I think, wrong to speculate as to what will happen once the judgment of that Court has been handed down.

17. For those reasons, I am satisfied that the right order to make in this case is an order under Article 44(2) staying the recognition and enforcement proceedings commenced in this Court under reference ARB-001-2015 until the Dubai Civil Courts have determined, one way or the other, the annulment proceedings that now are before them.

18. There has been no application to this Court for an order under Article 44(2) of the DIFC Arbitration Law for security in the meantime; accordingly I make no such order.

19. Costs of and incidental to this application (including the costs of responding to the letters sent on behalf of the claimants to the Joint Committee) are to be paid by the Claimants to the Applicants/Defendants; such costs to be assessed if not agreed.

Issued by:

Mark Beer

Registrar

Date of Issue: 16 September 2015

At: 3pm