THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

BETWEEN

OSWIN

Respondent/Claimant

and

(1) OTILA (2) ONDRAY

Applicants/Defendants

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

UPON the Order with Reasons of H.E. Justice Sir Jeremy Cooke dated 16 September 2025 (the "Order")

AND UPON the Order with Reasons of H.E. Justice Sir Jeremy Cooke dated 10 November 2025, dismissing the Second Defendant's application for permission to appeal the Order

AND UPON the Second Defendant's Appeal Notice dated 3 December 2025, seeking renewed permission to appeal the Order (the "Renewed Application")

AND UPON the Second Defendant's Application dated 3 December 2025, seeking a stay of the injunction granted by the Order (the "Stay Application")

AND UPON the Second Defendant's Application No. ARB-032-2025/6 dated 3 December 2025, seeking declarations, including authorisation of certain persons and the Second Defendant to act on behalf of the First Defendant (the "Authorisation Application")

AND UPON the Second Defendant's Application No. ARB-032-2025/9 dated 19 December 2025, seeking permission to adduce new evidence in respect of the Renewed Application (the "New Evidence Application") (together, the "Applications")

AND UPON review of the evidence filed in respect of the Applications

IT IS HEREBY ORDERED THAT:

1. The Renewed Application is dismissed.

2. The Stay Application is dismissed.

3. The Authorisation Application is dismissed.

4. The New Evidence Application is dismissed.

5. The Second Defendant shall pay the Claimant's costs of all Applications to be immediately assessed on an indemnity basis in accordance with the following orders.

6. Within **fourteen (14) days** of the date of these orders the Claimant shall file a single Statement of Costs dealing with all four Applications, together with any short submissions in support of its claim for costs.

7. Within **fourteen (14) days** of service of the Statement of Costs the Second Defendant shall file any submissions in opposition to the quantum of the costs claimed by the Claimant.

8. Within **ten (10) days** of the service of the Second Defendant's submissions pursuant to the preceding order, the Claimant shall file any submissions in reply.

9. The quantum of the Claimant's costs will thereafter be assessed on the papers by H.E. Chief Justice Wayne Martin.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 23 January 2026
At: 2pm

SCHEDULE OF REASONS

Summary

1. The Second Defendant, Ondray (the "Second Defendant") has applied to the Court of Appeal for permission to appeal from the decision of the Judge at first instance (the "Judge") dated 16 September 2025 continuing an interim injunction until further order of the Court or, until the matters the subject of the injunction were addressed by the arbitral tribunal which was to be constituted (the "Renewed Application"). The application was made to the Court of Appeal because the Judge dismissed an earlier application for permission to appeal (the "Initial Application").

2. The Second Defendant has made three other applications contemporaneously with and/or ancillary to the Renewed Application. They are:

(a) An Application for a Stay of the injunction until the appeal is determined;

(b) An Application for Declarations in various terms, including relating to the authorisation of certain persons and the Second Defendant to act on behalf of the First Defendant;

(c) An Application for the Admission of new evidence on the hearing of the appeal.

3. For the reasons which follow, the Second Defendant has failed to establish that any of the proposed grounds of appeal has a real prospect of success or that there is some other compelling reason why permission to appeal should be granted. It follows that the Renewed Application must be dismissed. It further follows that the Stay Application pending appeal must also be dismissed. Further, the Authorisation Application and the New Evidence Application lack any substance and must also be dismissed.

The ex parte orders

4. On 29 August 2025 after hearing an application made by the Claimant without notice to the Defendants, the Judge made the following orders (amongst others):

"5. Until the Return Date or further order of the Court:

(a) The Second Defendant shall not, directly or indirectly, purport to act on behalf of the First Defendant in relation to the management or operation of the medical and hazardous-waste facility at Obando ("Plant") unless and until there is:

i. a unanimous resolution of the Board of Directors of the First Defendant as required by Clause 9.3 of the JVA; or

ii. a shareholders' resolution that satisfies the voting thresholds prescribed by Clause 10.3 of the JVA.

(b) the Defendants must not take any step(s), implement any decision(s), or instruct any third party(ies) or public authority(ies) in relation to the management or operation of the Plant, including without limitation, replacement or removal of the Claimant, unless that step or decision has been approved in accordance with the requirements in JVA Clause 9.3 and JVA Clause 10.3.

6. The Second Defendant is restrained from / must not:

6.1. alter bank mandates or signatories of the First Defendant, or give instructions to any bank that would change control over operational payments or divert receipts;

6.2. directly or indirectly solicit, induce or attempt to procure any transfer of employment or visa sponsorship of the Claimant's employees, consultants or contractors working at or for the Plant to the First Defendant or any third party;

6.3. undertaking any action expressly reserved to the Claimant under Annexure C of the JVA (incorporated by reference in Clause 5.4 thereof).

7. Pending the Return Date and/or further order of this Court, the Claimant shall continue to act as operator of the Plant under and in accordance with the O&M Agreement dated 25 August 2021, and the Environmental Permit issued by the Environment Agency Abu Dhabi, until such time as a duly convened meeting of the Board of Directors of the First Defendant (satisfying quorum and unanimity requirements under JVA Clause 9.3), or a General Assembly resolution under JVA Clause 10.3, resolves otherwise."

5. The orders were to remain in force until the return date, which was fixed for 8 September 2025 on the basis that the Defendants would be served with the orders prior to that date and would have the opportunity to oppose any continuation of the orders beyond that date.

The decision at first instance

6. Counsel representing the Second Defendant appeared at the hearing on the return date of 8 September 2025 and opposed the continuation of the injunctive relief on very limited grounds. After hearing argument the Judge determined that the injunctive relief should continue until further order or until the matters raised in the Notice of Arbitration dated 15 August 2025 were determined by the duly appointed Tribunal, whether in the context of interim measures granted by that Tribunal or finally in an Award issued by the Tribunal.

7. The Judge's reasons for his continuation of the injunctive relief were published on 16 September 2025. In those reasons he confirmed that he had granted injunctive relief at the *ex parte* hearing because he was satisfied that the appropriate test for an interim injunction had been met on the basis of the evidence adduced in support of the application in the form of the first witness statement of Mr Orman and its exhibits. He further confirmed that the relief which he had granted was intended to maintain the status quo until the return hearing date and if continued, until such time as the arbitration tribunal, which is still to be appointed, could determine the matters in dispute between the parties.

8. The Judge also recorded that on the return date of 8 September 2025 counsel appearing for the Second Defendant purported also to represent the First Defendant. As will be seen, the evidence establishes that there is a deadlock in the management of the First Defendant, which is a company incorporated for the purposes of conducting what is, in effect, a joint venture between its shareholders - the Claimant holding 49% and the Second Defendant holding 51% of the issued shares in the First Defendant. The Memorandum of Association of the First Defendant provides

that any decisions of the Board of Directors are only valid if passed by a majority of directors comprising at least one director nominated by both shareholders, and further provides that resolutions at meetings of shareholders are only valid if adopted by shareholders collectively holding at least 75% of the shares in the capital of the company.

9. As the Judge noted, counsel for the Claimant objected to counsel for the Second Defendant representing the First Defendant, on the basis that neither the Board nor the shareholders of the First Defendant had resolved to appoint legal representation in relation to the proceedings in this Court. The Judge upheld that objection and the hearing proceeded as between representatives of the Claimant and representatives of the Second Defendant without representation on behalf of the First Defendant.

10. The Judge noted that on the morning of the return date the Second Defendant filed an Application Notice and produced a Draft Order. No evidence or skeleton argument was filed or served in support of Application No. ARB-032-2025/3, which sought the discharge of the proceedings for want of jurisdiction, the discharge of the injunction on the same basis and a declaration of the absence of such jurisdiction on the ground that the Courts of Abu Dhabi have exclusive jurisdiction to determine disputes arising from the agreements between the parties and on another ground which is no longer pursued.

11. As the Judge noted, counsel for the Second Defendant advised the Court that he did not wish to adduce any further evidence and was happy to proceed on the basis of the material then before the Court.

12. The Judge noted that counsel for the Second Defendant relied upon the Memorandum of Association to which reference has been made above, and particularly relied upon the provisions of the Operations and Management Agreement (the "O&M Agreement") which contained clauses relating to governing law and jurisdiction in terms different to those contained within the Joint Venture Agreement ("JVA").

13. The saliant features of the Memorandum of Association, and in particular those constraining the powers of the Board of Directors and the shareholders in General Meeting have already been noted. As the relationship between the O&M Agreement and the JVA appear to lie at the heart of the proposed appeal, it is appropriate to digress to say a little more in relation to those agreements.

The JVA

14. The JVA is dated 12 March 2019. The parties are the three parties to these proceedings - namely the Claimant, the First Defendant and the Second Defendant. The preamble to the JVA describes the Second Defendant as "part of a large conglomerate with diversified business interests in UAE and India", and the Claimant as "a part of the Ombeline, which is a well-established, reputed, multi-disciplinary organisation focused on construction, operation and maintenance of hazardous, municipal and biohazardous waste management facilities".

15. The preamble further records that in 2017 the Centre of Waste Management, Abu Dhabi ("Olwen") invited applications for the management and treatment of medical and hazardous waste in Abu Dhabi, and the Claimant and an associated company of the Second Defendant signed an MOU forming an informal consortium to bid for the project.

16. The preamble further notes that the consortium was successful in its bid for the project and a contract was signed with Olwen on 28 December 2017, after which the First Defendant was incorporated as a joint venture company and took an assignment of the contract to implement the project. The preamble notes that 51% of the share capital of the First Defendant is held by the Second Defendant and 49% by the Claimant.

17. Clause 4 of the JVA describes the business carried on by the First Defendant in the area of waste management, treatment and disposal. Clause 3 of the JVA records that the parties agree to collaborate for the purpose of carrying on the business of the joint venture in the manner and subject to and on the terms and conditions set out in the JVA.

18. Clause 5 contains particular provisions with respect to the conduct of the First Defendant's business, including the requirement that it be conducted independently of the business of its shareholders, although clause 5.2 specifically provides that the First Defendant may transact business with either shareholder on mutually agreed terms which are competitively priced. Clause 5 also requires the Claimant and the Second Defendant to perform roles and responsibilities with respect to the business to be documented by the First Defendant set out in annexures to the JVA. Annexure A to the JVA sets out the manner in which the First Defendant was to conduct its business.

19. Clause 7 of the JVA provides that profits are to be shared between the shareholders in proportion to their shareholding. Clause 8 contains provisions relating to the sale of shares by shareholders.

20. Clause 9 contains provisions relating to the operation of the Board of Directors and modifies the provisions of the Memorandum of Association by providing that the decisions of the Board are only valid if passed unanimously by all directors present and voting.

21. Clause 10 deals with general meetings of shareholders and replicates the provision in the Memorandum of Association to the effect that resolutions at such General Meetings are only valid if adopted by shareholders collectively holding at least 75% of the shares in the capital of the First Defendant.

22. Other clauses in the JVA deal with funding, accounts and audit, the preparation of a business plan, restraints on competition by the shareholders in the First Defendant and confidentiality.

23. Clause 17 deals with deadlock and applies when matters which require the approval of the Board of Directors or the shareholders in General Meeting are put to such meetings without approval. The clause provides that if the deadlock cannot be resolved by discussions initially at management level, and in default of agreement, subsequently approval of the Chief Executive officers of the Parties, either party may serve a Deadlock Notice in which event the deadlock can be referred to arbitration in accordance with clause 21.3 of the JVA.

24. Clause 21 of the JVA provides:

> "21. GOVERNING LAW AND DISPUTE RESOLUTION

21.1. This JVA and any dispute or claim arising out of or in connection with it or its subject matter or formation of Olivet shall be governed and construed in accordance with the laws of the United Arab Emirates.

21.2. In the event of any dispute between the Parties arising out of or relating to this JVA, representatives of the Parties shall, within 15 working days of a written notice from one party to the other ("Dispute Notice"), hold a meeting between the Parties ("Dispute Meeting") to resolve the dispute amicably. Each Party's representative shall have the authority to settle the dispute.

21.3. Any dispute which is not resolved within thirty (30) days after the service of a Dispute Notice, whether or not a Dispute Meeting has been held, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be one. The seat, or legal place of arbitration shall be DIFC. The language to be used in the arbitration shall be English.

21.4. Subject to Clause 21.2 and clause 21.3, the Courts of Emirate of Abu Dhabi shall have exclusive jurisdiction."

25. The proper construction and effect of clause 21 is central to a number of the contentions advanced in support of the Renewed Application.

26. Clauses 22-24 of the JVA are concerned with termination. As it is not contended that either party has terminated the JVA, it is unnecessary to consider those provisions.

27. Clause 26.2 provides that no shareholder, acting solely in its capacity as a shareholder, shall act as an agent of the First Defendant or have any authority to act for or bind the First Defendant except as authorized by the Board in accordance with the terms and conditions of the JVA.

The O&M Agreement

28. The O&M Agreement was entered into on 25 August 2021, some time after the JVA. There are two parties to the Agreement - the Claimant and the First Defendant. It is of some significance to the issues in the proposed appeal that the Second Defendant is not a party to the Agreement.

29. The recitals to the O&M Agreement record that the First Defendant has built, owned and operated a hazardous and biomedical waste management facility in Obando, Abu Dhabi. The recitals note that the First Defendant was desirous of appointing a person for the operation, management and maintenance of the facility and to that end had agreed to appoint the Claimant to undertake such responsibilities.

30. Clause 3 provides for the handover of the facility to the Claimant in order that it could perform its operation and management services, and clause 4 defines the scope of those services. Clause 5 provides that the services shall be provided for a term of four years from the commencement date (25 August 2021).

31. Clauses 6 and 7 are concerned with covenants on the part of the Claimant in respect of the performance of its operation and management services.

32. Other provisions of the O&M Agreement relate to representations and warranties and the payment of fees to the Claimant for the provision of its services.

33. Clause 17 provides that the Agreement shall be governed by and construed in accordance with the laws of the UAE. Clause 18 contains a dispute resolution clause, which includes an arbitration agreement in the event that prior negotiation does not resolve the dispute. The arbitration agreement provides that the seat of the arbitration shall be Abu Dhabi. The Agreement also provides that arbitration shall be the sole and exclusive remedy between the parties regarding the dispute referred to arbitration, although it also provides that subject to the provisions of the clause "the courts of Emirate of Abu Dhabi shall have jurisdiction on any matter connected with or arising under this Agreement".[1]

34. Clause 20 contains various miscellaneous provisions including the following:

"This Agreement, together with the Project Documents constitutes the entire agreement and contains all of the understandings and agreements of whatsoever kind and nature existing between the Parties, and replaces and supersedes, all prior written or oral arrangements, agreements, commitments, representations, communications and understandings between the Parties."[2]

35. Returning to the decision at first instance, the Judge noted that although the Second Defendant contended that in some way the O&M Agreement superseded the JVA, counsel did not develop the point to contend that the arbitration agreement in the JVA had disappeared and had been replaced by the dispute resolution provisions in the O&M Agreement. The Judge observed:

Such an argument is untenable in the light not only of the entire agreement clause in the JVA but because the Olivet is, self evidently, the over arching primary agreement upon which the others are based. In those circumstances, it is impossible to say that a dispute falling within the terms of the JVA arbitration clause must nonetheless be referred to another forum and determined in accordance with the provisions of any of the jurisdiction or arbitration clauses in any of the other agreements.[3]

36. After referring to the terms of the injunction granted, the Judge noted that the effect of the orders necessarily meant that the Claimant would continue to act as operator of the plant in accordance with the O&M Agreement and the environmental permit issued by the Environmental Agency of Abu Dhabi until such time as resolutions were passed which complied with the requirements set out above, notwithstanding the fact that the O&M Agreement had expired on 21 August 2025. In that context he observed:

"The status quo was thus to be preserved in circumstances where damages for breach of the JVA would be an inadequate remedy and there was significant risk to the public if the Claimant was not to continue to operate and manage the plant, in the absence of any substitute appointment of any entity with appropriately qualified personnel, which the evidence showed had not happened and could not happen because of the deadlock between the joint venturers."[4]

37. In his reasons the Judge reiterated that the Second Defendant took no point with respect to the merits of the Claimant's application for injunctive relief, and the only point taken related to the jurisdiction of the Court to grant the injunctions. In the course of addressing the point taken with respect to jurisdiction, the Judge ruled that the arbitration agreement contained in clauses 21.2 and 21.3 of the JVA is governed by the Law of the DIFC and not by the Law of the UAE. The agreement to arbitrate provided for reference to the DIFC/LCIA under its Rules, and although the DIFC/LCIA Arbitration Centre no longer exists, the clause clearly identified the DIFC as the seat of the arbitration, which carried with it an agreement by the Parties that the Law of the DIFC would the lex arbitri and the law of the arbitration agreement.

38. The Second Defendant does not challenge this aspect of the Judge's decision. The Judge noted that a Dispute Notice in accordance with clause 21.3 had been served on 15 August 2025, and the expiry of the 30 day period specified in that clause expired after the return hearing but before publication of his reasons.

39. The Judge noted that the Notice of Dispute was said to report "a series of material corporate governance breaches and unauthorized unilateral acts" and identified corporate governance provisions of the JVA which protected shareholders against any unauthorized unilateral actions and complained that:

> (a) The Second Defendant was purporting to make decisions of strategic importance on behalf of the First Defendant, including, by way of example, instructions affecting the renewal or non-renewal of the O&M Agreement and the engagement of an external law firm to issue adversarial notices in respect of board level matters which, absent unanimity, are without the authority of the First Defendant;
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> (b) There was a fear that the Second Defendant would seek to conduct activity for the First Defendant, such as opening/closing bank accounts, delegating signing authorities, distributing profits, making material changes to the business, borrowings and the granting of security or affecting acquisitions/disposals or other exceptional transactions, all of which were matters which were reserved to the General Meeting and which were unauthorized without 75% shareholder approval; and
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> (c) The Second Defendant had purported to act for the First Defendant in circumstances where clause 26.2 of the JVA specifically provided that no shareholder could act as agent for the First Defendant company save as authorized by the Board in accordance with the terms and conditions of the JVA.[5]

40. After referring to the terms of the Notice of Dispute, the Judge observed:

> "Whilst reference is made both to the Memorandum of Association and to the Inter-Corporate Loan Agreement, there is no doubt that the essential complaints set out in the written Notice of Dispute focus on the unilateral actions taken by the Second Defendant in relation to those other agreements, in breach of the terms of the JVA. The JVA is, self-evidently, the overarching document which gave rise to the Memorandum of Association, the O&M Agreement and the Internet Corporate Loan Agreement. Clause 26.3 of the JVA is an "entire agreement" clause and unless subsequent agreements specifically vary its terms, the JVA provides for dispute resolution in clause 21 and cannot be affected by dispute resolution clauses in the other agreements. Of course, it may very well be that a dispute which arises under one agreement may also constitute a dispute which arises under one of the other agreements for the purposes of the arbitration or jurisdiction clauses therein."[6]

41. The Judge then referred to the Second Defendant's contention that the effect of clause 21.4 was to give exclusive jurisdiction to the Courts of Abu Dhabi to grant interim measures in relation to any arbitration commenced in accordance with clause 21.3. The Judge noted that when asked whether the Abu Dhabi Court, as opposed to the DIFC Court, could effectively exercise supervisory powers over an arbitration taking place in the DIFC, counsel for the Second Defendant could provide no clear answer.

42. The Judge rejected the Second Defendant's submission. He observed that clause 21.4 was expressly subject to clause 21.2 and clause 21.3, with the result that it could not derogate from the earlier two sub-clauses. The agreement of the Parties to undertake arbitration seated in the DIFC carried with it the powers of the DIFC Court in relation to such arbitrations.

43. The Judge then referred to the legislative sources of jurisdiction, including Articles 14 and 15 of the DIFC Courts Law 2025[7] and Article 24 of the DIFC Arbitration Law.

44. The Judge then ruled in the following terms:

> "It is therefore, to my mind, clear that in agreeing to the DIFC as the seat of the arbitration, the parties have agreed to the supervisory jurisdiction of the DIFC Court. The provisions of clause 21.4 of the JVA therefore only apply in respect of disputes which are, for one reason or another, not arbitrable under clause 21.2 and 21.3. The disputes as framed in the written Notice of Dispute are, on their face, arbitrable under those provisions and in consequence, this Court has jurisdiction to issue injunctions as interim and precautionary measures in support of the prospective arbitration which the Claimant has undertaken to commence on expiry of 30 days following the Notice of Dispute."[8]

45. The Judge concluded his reasons dealing with an argument relating to the provisions of UAE Federal Law and a contention that the arbitration agreement in clause 21.3 of the JVA was contrary to *Ordre Publique*, neither of which contentions are pressed in the application for permission to appeal. It is therefore unnecessary to refer to the Judge's reasons with respect to those matters.

Permission to appeal - legal principles

46. RDC 44.117 provides:

> "44.117 The Court of Appeal will allow an appeal from the decision of the Court of First Instance where the decision of the lower Court was:
>
> (1) Wrong; or
>
> (2) Unjust because of a serious procedural or other irregularity in the proceedings in the lower Court."

47. RDC 44.5 requires that an appellant obtain permission to appeal to the Court of Appeal except where the appeal is against a committal order.

48. RDC 44.19 provides:

> "44.19 Permission to appeal may only be given where the lower Court or the Appeal Court considers that:
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> (1) The appeal would have a real prospect of success; or
>
> (2) There is some other compelling reason why the appeal should be heard."

49. RDC 44.19 provides that permission to appeal may only be given where the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.

50. In the context of an assessment of the prospects of success "real" means realistic rather than fanciful and involves the same test as is applied in applications for immediate judgment.[9]

51. A real prospect of success does not mean a probability of success, but more than mere arguability.[10]

52. "Some other compelling reason why the appeal should be heard" may include the public interest in clarifying the meaning and scope of relevant practice and provisions of DIFC and wider UAE law.[11]

53. It is established that "real" in the context of an assessment of the prospects of success means realistic rather than fanciful, applying the same test as is applied in an application for immediate judgment.[12]

54. It is also established that a real prospect of success does not mean a probability of success, but more than mere arguability.[13]

55. Accordingly, in order to obtain the grant of permission a prospective appellant needs to establish more than the proposition that the proposed appeal is reasonably arguable - rather, it must be established that there is a real prospect of success.[14]

56. Particular principles apply to applications for permission to appeal against case management decisions and multi factorial assessments undertaken by a Judge at first instance, given the hurdles which must be overcome to obtain appellant intervention in such cases.[15] However, as this case does not involve either an application to appeal against a procedural or case management decision, or against a multi factorial assessment by the trial Judge, it is unnecessary to essay the relevant principles in these reasons.

Grounds of appeal

57. The document setting out the proposed grounds of appeal is longer than the skeleton argument in support of those grounds. The so-called Appeal Notice is written in narrative and argumentative form which makes it difficult to synthesise the propositions which are said to underpin the narrative. Further, although there are four numbered grounds of appeal, within each "ground" a number of disparate and apparently unconnected propositions are advanced.

58. In these circumstances the best that can be done is to work through the Appeal Notice, doing the best one can to identify the propositions upon which reliance is placed. I will deal with each of those propositions under the ground within which they are contained, although as already noted, on some occasions the connection between propositions grouped under one ground is loose or non-existent.

Ground 1

59. Included in ground 1 is the contention that the Judge erred by concluding that the dispute arose under the JVA when he should have found that the dispute arises exclusively from the expired O&M Agreement, which has different provisions relating to dispute resolution.

60. There are a number of fundamental flaws in this proposition. The Second Defendant does not contend that the dispute resolution agreements in the various agreements which the Parties have entered into are mutually exclusive so that, if a dispute falls within one arbitration agreement it cannot fall within another. As the Judge noted, the Second Defendant does not contend that the inclusion of an arbitration agreement in the O&M Agreement constituted an agreement to rescind the arbitration agreement in the JVA. It follows that the Second Defendant is driven to contend that the Judge should have found that the disputes the subject of the Notice fell exclusively within the arbitration agreement contained within the O&M Agreement, and not at all within the arbitration agreement contained in the JVA.

61. That proposition is untenable for a number of reasons. First, the only parties to the O&M Agreement are the Claimant and the First Defendant. The Second Defendant is not a party to that agreement, or the arbitration agreement which it contains. It is clear from the evidence that the essence of the dispute is between the Claimant and the Second Defendant in relation to the governance of the First Defendant. Obviously, that is not a dispute that can fall within the arbitration agreement in the O&M Agreement.

62. Further, apart from the fact that the JVA and the O&M Agreement have different parties, they are concerned with quite different subjects. The JVA is concerned with the governance of the First Defendant, whereas the O&M Agreement is concerned with the operation and management of the waste plant in Abu Dhabi. The Second Defendant's assertion that the Judge should have found that the dispute arose exclusively in relation to the operation and management of the waste facility is not sustained by any argument in either the Appeal Notice or the skeleton. It has no support in the evidence, and is contradicted by the terms of the Dispute Notice, in which all disputes identified are concerned with the governance of the First Defendant.

63. The next series of contentions under the heading of ground 1 are concerned with the Judge's observation that the JVA was "self evidently, the overarching document". However, it is clear that this was not an essential component of the Judge's reasoning. Rather, it was an observation made to counter the Second Defendant's proposition that the dispute arose under the O&M Agreement, rather than the JVA. The Judge's primary

answer to that proposition was that there is no reason why a dispute could not arise under both, without precluding the applicability of the arbitration agreement under the JVA, and therefore without excluding the jurisdiction of the DIFC Court as the Court responsible for the supervision of any arbitration commenced under the JVA arbitration agreement.

64. The Judge's primary reason for rejecting the Second Defendant's contention is plainly correct and has not been directly challenged in any of the grounds of appeal. It is therefore unnecessary to spend any time debating the question of whether the Judge was correct to characterise the JVA as "overarching".

65. The next proposition advanced under the heading of ground 1 relies upon the provision of the O&M Agreement which provides that it supersedes all previous agreements. However, neither the Appeal Notice, nor the skeleton argument explain how this provision could result in the success of an appeal.

66. Although not expressed, it seems that the only way the provision to the effect that the O&M Agreement superseded all previous agreements could result in the success of the appeal is if it had the effect of rescinding the JVA, or at least the portion of the JVA which contains the arbitration agreement. However, the Second Defendant does not explain how a clause generally expressed could have the effect of only rescinding the arbitration agreement in the JVA.

67. In any event, the proposition is untenable. As already noted, the O&M Agreement and the JVA have different parties and deal with different subject matters. There is no basis upon which the terms of the O&M Agreement could be construed as giving rise to a common intention by the Parties to that Agreement to the effect that either the JVA, or the arbitration agreement within the JVA would no longer apply, when they deal with different subject matters and one of the parties to the JVA was not a party to the O&M Agreement.

68. The next contentions advanced in the Appeal Notice relate to the construction of the O&M Agreement and the assertion that it confers exclusive jurisdiction on the Courts of Abu Dhabi for any disputes arising from it. The first problem with this proposition is that the issue is not whether the dispute clause under the O&M Agreement applies, but rather, whether the dispute clause under the JVA applies. As already indicated, the Judge did not find, and the Second Defendant does not contend, that the two clauses are mutually exclusive. It follows that even to the extent that the O&M Agreement confers jurisdiction upon the Courts of Abu Dhabi, it does not exclude the supervisory jurisdiction of the DIFC Courts in relation to an arbitration seated in the DIFC.

69. But in any case, the premise of the proposition is wrong. The dispute clause in the O&M Agreement does not confer exclusive jurisdiction on the Courts of Abu Dhabi any more that the dispute clause in the JVA confers exclusive jurisdiction upon those Courts. That is because in each Agreement, the provision referring to the jurisdiction of the Courts is expressly made subject to the arbitration agreements which are contained within the same clauses. The Judge's ruling that an arbitration agreement which identifies a seat necessarily carries with it an agreement that the Courts of the seat will have supervisory jurisdiction cannot be gainsaid and has not been challenged in the proposed grounds of appeal.

70. Next, various assertions are made in relation to the evidence pertaining to the dealings between the First Defendant and Olwen . None of those contentions are relevant to the jurisdiction of the DIFC Courts and in any event raise factual issues which were not the subject of dispute at first instance. Rule 44.110 of the Rules of the DIFC Courts ("RDC") provides that every appeal will be limited to a review of the decision of the lower court unless the Court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing. The Second Defendant does not contend that there are any circumstances which would sustain a conclusion to the effect that it would be in the interests of justice to hold a re-hearing of this matter and thereby allow the Second Defendant to raise factual issues which it eschewed at first instance.

Ground 2

71. Ground 2 is expressed to challenge the Judge's finding that there was a serious issue to be tried under the JVA. In its first iteration it appears to be limited to a repetition of ground 1, because the error is said to arise from the Judge's failure to conclude that the dispute arose only under the O&M Agreement, and not under the JVA.

72. However, the next proposition contained under the ground gives it a completely different focus, by asserting that the learned Judge erred by giving weight to the Claimant's allegation that there would be a serious risk to public safety if it did not remain as the operator and manager of the plant in Abu Dhabi. Obviously that assertion gives rise to issues of fact. None of those issues were raised at the return hearing. As the Judge noted, the Second Defendant took no issue with respect to the merits of his determination that there was a serious issue to be tried. As any appeal would be by way of review of the Judge's decision, no appeal court could conclude that he was in error in not acceding to a proposition that was never put.

Ground 3

73. Ground 3 challenges the Judge's finding that damages were not an adequate remedy and that the balance of convenience favoured the injunction. This ground suffers the same fundamental flaw as the second aspect of ground 2, in that it seeks to advance a position which was never advanced at first instance and which raises issues of fact. A ground of that kind would not be countenanced by the Court of Appeal.

Ground 4

74. Ground 4 asserts that there was a serious procedural irregularity in that the Judge should have discontinued the injunction at the return hearing because of the Claimant's breach of the duty of full and frank disclosure at the *ex parte* hearing.

75. There are a number of fundamental flaws in this proposition. The first is that it is another proposition that was not put to the Judge at the return hearing. At the risk of repetition, there is no prospect that the Court of Appeal reviewing the Judge's decision would conclude that he erred by not accepting a proposition that was never put to him.

76. The second fundamental difficulty with the proposition is that the Second Defendant was provided with every opportunity to bring to the attention of the Judge the matters which it is said were not drawn to his attention at the ex parte hearing but failed to do so. The return hearing

provided the Second Defendant with the opportunity to raise any and all matters it wished. An appeal court would give extremely short shrift to a contention that an applicant should have drawn matters to the Court's attention in an ex parte hearing which the other party failed to draw to the Court's attention at the return hearing.

77. The third fundamental problem with this proposition is that all of the matters which are said to have been not disclosed were in fact in evidence before the Judge at the ex parte hearing. The complaint appears to be that they should have been given particular attention by counsel for the Claimant in the course of the application for the ex parte relief. However, the fundamental problem with that proposition is that none of the matters relied upon appear to have any material bearing upon the question of whether the injunctive relief should have been granted.

Grounds of appeal - summary

78. None of the grounds of appeal has any prospect of success, indeed they are not arguable. As they are not arguable, there can be no other compelling reason why permission to appeal should be granted. Accordingly, permission to appeal must be refused.

The ancillary applications

79. As noted, it follows from the refusal of the Renewed Application that the application for a stay of the injunctive relief must also be dismissed.

80. Turning to the application to adduce fresh evidence, the documents which are sought to be adduced into evidence fall into 3 categories:

(a) Judgments of the courts of Abu Dhabi in proceedings between the parties in those courts; and

(b) A memorandum served by the Claimant in the course of the Abu Dhabi proceedings; and

(c) A letter from Olwen.

81. The Abu Dhabi Court judgments are said to go to the issue of whether the dispute arises under the JVA or the O&M Agreement. There are number of reasons why they are irrelevant to that issue.

82. First, the judgments are concerned with the disputes before that Court, whereas these proceedings are concerned with the dispute that the Claimant undertook to refer to arbitration. It is clear that these disputes are different in character. Observations made in the context of different disputes are irrelevant to the question of whether this Court has supervisory jurisdiction in relation to an arbitration of a dispute which clearly arises under the JVA.

83. Second, as noted, the question is not whether the Courts of Abu Dhabi have jurisdiction with respect to the matters before that court, but whether this court has jurisdiction with respect to the matters before it.

84. Third the judgments are said to cast doubt on the Judge's observations with respect to the primacy of the JVA. However, for the reasons already given, those observations would have no bearing on the outcome of any appeal.

85. The other 2 documents are said to go to the merits of the decision to grant injunctive relief and non-disclosure at the *ex parte* hearing. However, for the reasons already given, as those matters were not ventilated before the Judge, they would not be considered by the Court of Appeal.

86. For these reasons the application to adduce new evidence has no substance and must be dismissed.

87. Turning to the authorisation application, there is a very real doubt as to whether the Court would have the power to make declarations with respect to the authority of individuals or corporate entities to act on behalf of the First Defendant, given that its powers are limited to interim measures in support of DIFC seated arbitration. But leaving the question of power to one side, there is no basis upon which the Court would exercise any such power in the current circumstances. The evidence establishes that there is a deadlock in the management of the First Defendant. The Claimant undertook to refer the resolution of that deadlock to arbitration in accordance with the terms of the JVA, and at the time the matter was before the Court of First Instance, there was no reason to doubt that the Claimant would honour that undertaking. The resolution of the deadlock in management is a matter for the arbitral tribunal, not this Court. The Judge granted injunctive relief in order to maintain the status quo until the arbitral tribunal could resolve the deadlock in relation to the management of the First Defendant or deal with appropriate interim measures itself. There is no basis upon which this Court would usurp the functions of the arbitral tribunal in this regard.

88. For these reasons the authorization application also lacks any substance and must be dismissed.

The ancillary applications - conclusion

89. For these reasons, all ancillary applications must also be dismissed.

Costs

90. The propositions advanced by the Second Defendant in support of the Renewed Application are entirely lacking in substance. The flaws in the propositions were pointed out by the Judge at first instance and again in his rejection of the Initial Application, and by the Claimant's lawyers in their skeleton argument in response to the Initial Application. Further, the manner in which these proceedings have been conducted by the Second Defendant, including the convoluted and opaque way in which the grounds of appeal were enunciated were compounded by the bringing of three ancillary applications in conjunction with the Renewed Application, none of which had any prospect of success. In these circumstances the Second Defendant has exposed the Claimant to costs which could and should have been avoided. Accordingly, this is an appropriate case in which costs should be assessed on an indemnity basis.