Claim No: CA 001/2021

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 APPEAL

BEFORE JUSTICE ROGER GILES, JUSTICE WAYNE MARTIN AND H.E JUSTICE ALI AL MADHANI

BETWEEN

LAKHAN

Appellant/Defendant

and

LAMIA

Respondent/Claimant

JUDGMENT

Hearing :	**22 March 2021**
Counsel :	James Counsell QC assisted by Stephen Doherty instructed by Law firm on behalf of the Appellant The Respondent as a litigant in person
Judgment :	**8 April 2021**

UPON the Order of H.E Justice Shamlan Al Sawalehi issued on 21 October 2021 (the **"Order"**)

AND UPON the Order with Reasons of H.E Justice Shamlan Al Sawalehi granting the Appellant permission to Appeal issued on 7 January 2021 (**"Appeal"**)

AND UPON hearing counsel for the Appellant and counsel for the Respondent at a hearing on 22 March 2021

AND UPON reading the submissions and evidence filed and recorded in the Court file

IT IS HEREBY ORDERED THAT:

1. The Appeal is allowed.

2. The Order is set aside.

3. The proceedings are remitted to the Court of First Instance for determination of the Defendant's challenge to jurisdiction.

4. Costs of the Order to be borne as ordered by the Judge determining the challenge to jurisdiction.

5. The Claimant shall pay the Defendant's costs of the Appeal, to be assessed by a Registrar if not agreed, with liberty to apply by application filed within 14 days should either party seek a different or additional order in relation to costs.

Issued by:
Nour Hineidi
Registrar
Date of issue: 8 April 2021
At: 11am

JUDGMENT OF THE COURT

1. This is the Defendant's appeal, by permission granted on 7 January 2021, from an or-der made on 21 October 2020 staying proceedings brought by the Claimant. The stay was imposed by reason of an application made to the body commonly known as the Joint Judicial Committee (the **"JJC"**) established pursuant to Dubai Decree No 19 of 2016 (the **"Decree"**), and the appeal raises for consideration when there is a dispute concerning jurisdiction as between the Dubai Courts and the DIFC Courts as referred to in the Decree.

Background

2. The Claimant was the developer of the Lisan project. In November 2016 the Defend-ant entered into a sub-contract with Labian, the contractor with the Claimant for the construction of the Lisan, for the supply and installation of swimming pools and per-formance of landscaping works. The sub-contract contained a clause providing for resolution of disputes by arbitration under the Rules of the DIFC-LCIA Arbitration Cen-tre, with the seat of the arbitration in the DIFC.

3. In July 2017 the Defendant, Labian and the Claimant entered into a novation agree-ment by which the Claimant took the place of Labian. The novation agreement provid-ed that the terms and conditions of the sub-contract had not been amended or varied "other than by way of this Agreement"; however, it included provision for resolution of disputes "pursuant to the exclusive jurisdiction of the Dubai Courts".

4. A dispute arose over money claimed by the Defendant from the Claimant.

Two proceedings are brought

5. In October 2019 the Defendant brought proceedings in the Dubai Courts, seeking an order for payment of the money claimed by it. According to the petition to the JJC mentioned below, the Claimant "pleaded the DIFC-LCIA arbitration clause in the Sub-Contract from the outset"; this was not clarified in the evidence before us. The pro-ceedings progressed through the appointment of an independent engineering expert, who reported in favour of the Defendant in a total amount in excess of AED 6 million.

6. The Dubai Courts had yet to consider judgment consequent to the expert's report, in-cluding the pleading of the arbitration clause, when on 1 July 2020 the Claimant brought proceedings in the DIFC Courts. It claimed a declaration that the arbitration clause in the sub-contract was binding on the parties notwithstanding the provision in the novation agreement for resolution of disputes in the Dubai Courts.

7. On 19 August 2020 the Defendant filed an acknowledgement of service in the DIFC Courts proceedings, indicating its intention to contest the jurisdiction of the DIFC Courts in addition to disputing the existence of a binding arbitration agreement.

Application to the Joint Judicial Committee

8. On 9 August 2020, prior to the filing by the Defendant of the acknowledgement of ser-vice, the Claimant filed a petition to the JJC asserting a conflict of jurisdiction "in the form of the question of the standing of the arbitration clause and its binding effect on the Respondent being heard by both the Dubai Courts. and the DIFC Courts.", and contending for the jurisdiction of the DIFC Courts. It sought "an immediate stay of the two conflicted proceedings. until the petition is adjudicated", and an order that the Dubai Courts cease hearing the case in those Courts.

9. In relation to the stay, in the body of the petition it was said that Article 5(1) of the De-cree provides that "the lodging of the petition results in an automatic stay of the two proceedings forming the subject matter of the conflict of jurisdiction petition" until the JJC resolves the conflict, and that the Claimant "applies for the two courts to be noti-fied to stay their proceedings pending the determination of this petition".

10. There was no evidence before us that the JJC gave such notice. In circumstances not revealed by evidence, on 15 September 2020 the Dubai Courts ordered a stay of the Dubai Courts proceedings until the decision on jurisdiction by the JJC. It can readily be inferred that the Claimant, having an interest in informing the Dubai Courts of the application to the JJC, did so itself. However, the Claimant did not at the time of filing the petition, or thereafter until 19 October 2020 as next described, inform the Defend-ant that it had made the application to the JJC.

The stay under appeal is ordered

11. A hearing was listed for 19 October 2020 in the DIFC Courts proceedings, to determine the Defendant's jurisdictional challenge and, subject to that, the question of a binding arbitration agreement. At the hearing, the Claimant for the first time gave no-tice that it had filed the petition with the JJC.

12. The hearing did not proceed. The Claimant provided evidence of the filing of the peti-tion, whereupon on 21 October 2020 the Judge ordered the that the proceedings be stayed -

> ". pursuant to Article 5 of Dubai Decree No 19 of 2016 (with respect to the Joint Judicial Committee) and the Court's case management powers pursu-ant to Rule 4.2(6) of the Rules of the DIFC Courts".

13. The Judge ordered that there be no order as to costs.

14. No reasons were given by the Judge at the time. In his reasons later given for granting permission to appeal, the Judge indicated that he followed the then practice of imme-diately staying proceedings upon application made to the JJC, under the prevailing understanding of the effect of the Decree. He noted the Defendant's contention that the dispute referred to in Article 5 of the Decree concerned conflicting claims as to ju-risdiction by the Courts and not by the parties to the proceedings, so that both Courts must assert jurisdiction in order for the provision to be engaged, and considered that it had a real prospect of success. He also said -

> "Applications to the JJC are capable of halting proceedings for very long pe-riods of time - I am aware of one set of proceedings in the Court of First In-stance that has been stayed for around a year now - and can be made even if there is no genuine dispute as to jurisdiction or if the applicant's position has no merit whatsoever. If this is what the law requires, so be it. But if the law does not require a stay on DIFC proceedings upon a litigant's mere ap-plication to the JJC, then, in my view, it is time that this practice was aban-doned."

Objection to the permission to appeal

15. In its skeleton argument, although not taken up in oral submissions, the Claimant submitted that the Judge was wrong to have granted permission to appeal. The point of the submission is not clear - permission had been granted, and it was not submitted that it should be revoked - but in any event it is without merit.

16. It was first said that the Judge erred because the appeal was against a discretionary case management decision. While the Judge referred to the Court's case manage-ment powers, the real question is one of the operation and effect of the Decree, and not of the exercise of a discretionary power. The inhibitions on interference with the exercise of such a power in case management do not apply, and the Judge correctly recognised the importance of the question in the exercise of their jurisdiction by the DIFC Courts.

17. It was then said that it was not permissible to have granted permission to appeal "since the permission was granted during the period of the

Stay ordered by the Court itself"; indeed, it was said that it had not even been open to the Defendant to file the application for permission to appeal during the period of the stay. This cannot be ac-cepted. It would be a nonsense if a stay order prevented an appeal against the stay order, making it unappealable; that must be regarded as outside the stay.

The Decree

18. The Decree was issued on 9 June 2016. The Arabic text is authoritative, and there is no official translation into English. The materials before us contained three transla-tions, which may be described as the Supreme Legislation Committee translation, the Wilberforce Chambers translation, and the Westlaw translation. There was no agree-ment on the translation to be adopted, or that the Arabic speaking member of the bench should be the arbiter. The Claimant rested its submissions on the Westlaw translation as more favourable to its position; the Defendant said that it did not matter which translation was adopted.

19. For an overview, I take the material provisions of the Wilberforce Chambers translation which, from his citations from it, was the translation adopted by the Judge.

20. Article 1 establishes the JJC, referred to as the Joint Committee. Article 2 sets out its "competencies and powers", relevantly being -

> "(1) Determining the competent court to hear a claim or application in respect of which there may arise a conflict as to whether the Dubai Courts or the DIFC Courts have jurisdiction.
>
> (2) Determining the judgment that should be enforced in a case of conflicting judgments issued by the Dubai Courts and the DIFC Courts in relation to the same parties and the same subject matter."

21. Article 3 sets out matters to do with the operation of the JJC. They include that the JJC "shall consider the applications submitted to it and issue a final decision in a period not exceeding 30 working days from the date of submission of the application", and that it shall provide reasoning for its decisions.

22. Articles 4 and 5 provide -

> **"Article 4**
>
> In the event that there is a dispute as to jurisdiction between the Dubai Courts and the DIFC Courts either where both Courts had claimed or disclaimed jurisdiction or where the two Courts have issued inconsistent decisions on jurisdiction, the following procedure shall be followed.
>
> (1) An application for the determination of the competent Court or the judgment to be enforced shall be submitted to the Judicial Committee by any of the parties or by the Attorney General.
>
> (2) The Applicant shall attach a verified copy of the pleadings, the appli-cations or the conflicting judgments as appropriate.
>
> (3) The Judicial Committee shall decide on the applications submitted to it pursuant to this Decree in accordance with current legislation and the applicable rules of jurisdiction.
>
> **Article 5**
>
> The reference of any dispute to the Judicial Committee shall have the follow-ing consequential effects:
>
> (1) The claims or applications in respect of which there is a dispute as to jurisdiction shall be stayed pending a decision of the Judicial Committee in determining the competent Court.
>
> (2) There shall be a stay of execution in respect of any conflicting judgments pending a decision of the Judicial Committee as to which judg-ment is to be enforced in accordance with its decision in the matter."

23. Article 6 suspends limitation periods "from the date of submission of the application to the Joint Committee".

24. Strangely, the Wilberforce Chambers translation in the materials before us omits Article 7. In the other translations, Article 7 provides that the decision of the JJC de-termining the competent court or the enforceable judgment will "be final and non-appealable".

25. In the appeal attention was focused on the opening words of Article 4, and it is suffi-cient to set out the alternative translations of those words and of Article 5.

26. In the Supreme Legislative Committee translation, they are -

> Article 4
>
> "Where a conflict of jurisdiction arises between the Dubai Courts and the DIFC Courts by reason that both of them assert or decline jurisdiction over a claim, or that they deliver conflicting judgments on a claim, the following pro-cedures must be applied:
>
> 1. An application to determine the competent court or the enforceable judgment will be referred to the Judicial Committee by means of a petition."
>
> Article 5
>
> "The referral of a dispute to the Judicial Committee pursuant to Article (4) of this Decree will result in:

1. the stay of proceedings for hearing the claims or applications in re-spect of which a conflict of jurisdiction arises until the issuance of the Judicial Committee's decision determining the competent court having jurisdiction over these claims or applications; and

2. stay of execution of conflicting judgments until the enforceable judgment is determined pursuant to a relevant resolution issued by the Judicial Committee."

27. In the Westlaw translation, in which the JJC is referred to as the Judicial Body, they are -

Article 4

"In case of a conflict of jurisdiction between Dubai Courts and the DIFC Courts, so that no court decides to waive hearing of the action or both courts waive the hearing thereof or enter contradicting judgments thereon, the following procedures shall be followed:

1. A Motion for designation of the competent court or the executable judgment shall be submitted to the Judicial Body."

Article 5

"In accordance with the provisions of Article (4) hereof, referral of disputes to the Judicial Body shall result in the following:

1. Actions or Motions subject of the conflict of jurisdiction shall not proceed further until the Judicial Body issued a decision determining the court having jurisdiction to hear the same.

2. Stay of execution of the contradicting judgments until the executable judgment is determined under a decision to be issued by the Judicial Body in this regard."

What triggers a stay?

28. That there should be a stay is by force of Article 5, without an order or other adjudica-tion by the JJC: no doubt it is for that reason that the petition asked that the two Courts "be notified to stay" their proceedings. But it remains necessary that the Courts deter-mine whether the circumstances of a stay, in accordance with Article 5, have arisen.

29. In all the translations of Article 5, what triggers a stay is referral or reference of a dis-pute to the JJC. None takes the course of describing the triggering event as the previ-ously provided application to the JJC, as is done in Article 6 in all translations, such as "The submission of an application to the Judicial Committee shall result in.", or "The reference of an application to the Judicial Committee shall result in.", or "The filing of a Motion to the Judicial Body shall result in.", so that the making of an application is itself the trigger. Instead, while there must be the making of an application, being the referral or reference, it must be an application by referral or reference of a dispute: that is, before there is a stay it must be able to be said that there is a dispute.

30. What must the dispute be? It must be to do with jurisdiction concerning claims or judgments as referred to in Article 4. Only the Wilberforce Chambers translation uses the word "dispute" in Article 4, going on to describe it as a dispute either where both Courts have claimed or disclaimed jurisdiction or where the two Courts have issued inconsistent decisions on jurisdiction. The other translations refer directly to a conflict of jurisdiction between the two Courts, arising as then described in similar manner to the description in the Wilberforce Chambers translation. The dispute is the conflict of jurisdiction between the Courts in one of the forms in the chapeau to the Article.

31. What triggers a stay, then is the existence of a conflict of jurisdiction in one of the forms in the chapeau to Article 4, and an application to the JJC to determine the "com-petent court" or the judgment to be enforced. Mere application to the JJC does not trigger a stay, and the Court must be satisfied that there is a conflict of jurisdiction.

32. This makes good sense. There would otherwise be opportunity for abuse by making an application to the JJC asserting a spurious conflict of jurisdiction, with a stay effec-tive until the JJC determined that there was no basis for the exercise of its function - which (despite Article 3 of the Decree) as the Judge indicated, could be for a long pe-riod.

Was there a conflict of jurisdiction in this case?

33. In broad terms and without at this point going to the different translations, the conflict of jurisdiction can be either through inconsistent judgments or through both Courts maintaining or declining jurisdiction over a claim. This case is not a case of incon-sistent judgments, but the dichotomy is of some importance. Maintaining or declining jurisdiction over a claim must be something less than judgment on the substance of the claim; conversely, mere existence of proceedings with the same claim in both of the Courts cannot be enough for conflict of jurisdiction, as if that were so there would be no point in making inconsistent judgments an occasion of conflict of jurisdiction - there would be conflict of jurisdiction before getting to judgment.

34. That suggests an immediate difficulty for the Claimant's submission. As noted, the submission rested on the Westlaw translation, taking up the words "no court decides to waive hearing of the action or both courts waive the hearing thereof". The Claimant said that it was not necessary that the Court make a decision on hearing the matter, and that it was enough that there was a "negative act" meaning that it had not aban-doned its jurisdiction. Thus, it submitted, so long as the two cases were "alive" without a ruling on jurisdiction, there was a conflict of jurisdiction. If that were correct, there would be a conflict of jurisdiction from the moment of commencement of proceedings with the same subject matter in both Courts, with no need or occasion for reference to inconsistent judgments.

35. The submission should not be accepted. When a party commences proceedings, it asks the Court to exercise jurisdiction. The Court does not do so by the administrative act of receiving the initiating process when filed. At the least, there must be some step in the proceedings amounting to a relevant exercise of jurisdiction by the Court, or re-fusal of the step on jurisdictional grounds, in order that there be maintenance or declin-ing of jurisdiction within the words in the chapeau to Article 4. All translations require a positive act on the Court's part ("claimed or disclaimed

jurisdiction"; "assert or decline jurisdiction over a claim"; "no court decides to waive hearing of the action or both courts waive the hearing thereof"). As to "no court decides to waive the hearing of the action", which had to be the nub of the Claimant's submission as the negative act, it must be read with the alternative of waiving the hearing, indicating a choice; there must be at least an occasion for deciding to waive or not waive, as is clear from the other translations.

36. This again makes good sense, since otherwise there would be opportunity for abuse by commencing proceedings without a jurisdictional basis and thereby, upon applying to the JJC, without more obtaining a stay. The Claimant submitted that the purpose of the Decree was that a conflict of jurisdiction should come before the JJC as early as possible, in order to avoid wasting of costs, but it is scarcely beneficial if it does so when there is no conflict of jurisdiction and before the Courts have had occasion to exercise or decline to exercise jurisdiction; and in any event the terms of the Decree must prevail.

37. It is unnecessary to decide in this case whether the step must be a decision on juris-diction, or whether it suffices that the Court exercises jurisdiction towards determining the claim. The DIFC Courts did not do even that - the hearing on 19 October 2020 did not proceed. The first matter for the Courts' determination was the Defendant's juris-dictional challenge, and if entertaining that challenge be regarded as an exercise of ju-risdiction, as a matter of common sense it cannot be a relevant exercise of jurisdiction for the purposes of any of the wordings in the translations - it is entertaining the ques-tion of whether it has jurisdiction. There was no relevant exercise of jurisdiction.

The *Standard Chartered Bank* decision

38. This is consonant with the decision of the Deputy Chief Justice in *Standard Chartered Bank v Investment Group Private Ltd* [2014] DIFC CFI 026 (1 August 2016). Parallel proceedings had been issued in the Dubai Courts and the DIFC Courts. There was a pending challenge to the jurisdiction of the DIFC Courts. Application was made for a stay of the DIFC Courts proceedings in reliance on Article 60 of Federal Law No 10 of 1973, the Union Supreme Court Law, concerning resolution of jurisdictional disputes between Courts of the Emirates. It provides (in the translation in the judgment) -

> "In the event of a conflict of jurisdiction between two or more of the judicial authorities referred to in article 33 (9) and (10), that these authorities would not abandon the hearing of the action, that all of these authorities have abandoned the hearing the same, or issued contradictory judgments there-on, the petition for designation of the competent court shall be submitted to the Supreme Court by virtue of a petition based on the demand of one of the litigants or the public prosecutor".

39. The Deputy Chief Justice refused a stay, holding that there was no conflict of jurisdiction engaging Article 60. He considered that the Article was directed at conflicts between two judicial authorities and not conflicts between the parties as to which ju-risdiction they prefer (at [24]). With reference to decisions of the Union Supreme Court, he said (at [30]) that it was necessary that the two Courts both assert their jurisdiction over the matter and that there had to be a positive assertion or decision by the two Courts to exercise jurisdiction, and (at [33]) that it was not sufficient for the jurisdiction of the Courts to be invoked.

40. While the translated words are different, there is a close similarity with Article 4 of the Decree as the key provision in a scheme for circuit-breaker reference of a conflict of jurisdiction. It seems likely that Article 4 in the Decree was drafted with Article 60 of Federal Law No 10 of 1973 in mind, such that they should have similar effect. It may be added that the Deputy Chief Justice said (at [24]) that he would "shy away from" al-lowing mere invocation of jurisdiction to create a conflict of jurisdiction, because -

> " It would occur without any input from the relevant judicial authority and would allow a reluctant defendant to dispatch into the long grass a good, val-id claim by the simple device of issuing proceedings in another emirate [sic] and then claiming that there is a conflict of jurisdiction. This on the Defend-ant`s case would create the need for a stay so as to await a decision of the Supreme Court, which no doubt would take a considerable period of time to emerge."

The result

41. It follows that the appeal must be allowed and the Judge's order set aside. The pro-ceedings should be remitted to the Court of First Instance for determination of the chal-lenge to jurisdiction. I note that the Defendant accepted that, if the challenge is unsuc-cessful, there should be referral to the JJC and a stay.

Decisions of the Joint Judicial Committee

42. Both parties sought support from decisions of the JJC.

43. The Defendant referred to *Essar Projects Ltd v McConnell Dowell South East Asia Pte Ltd* Cassation No 5/2019 ("Essar"). McConnell Dowell brought proceedings in the DIFC Courts to enforce a Singapore judgment on a guarantee. Essar challenged the Court's jurisdiction, and brought a claim in the Dubai Courts seeking a declaration that the guarantee was invalid and an order setting aside the Singapore judgment, and ap-plied to the JJC for a determination in favour of the Dubai Courts. The application was described as misconceived, and was dismissed, in part because -

> "The DIFC Court has not yet ruled on [Essar's] challenge to its jurisdiction to enforce the Singapore Judgment and therefore it is premature to conclude finally that there is a conflict of jurisdiction between the DIFC Court and the Dubai Court."

44. The Claimant referred to four decisions: *Al Zaitoon v Al Delma Cassation No 2/2017 ("Al Zaitoon"); Emirates Trading Agency LLC v Bosimar International NV Cassation No 5/2017 ("Emirates"); Tabarak Investment LLC v Al Tabri Cassation No 2/2019 ("Tabarak"): and Arloid Real Estate Development v Hazrat Ali Cassation No 6/2019 ("Arloid")*.

45. The Claimant relied on *Al Zaitoon* for the statement, "It is appropriate for the JT to in-tervene if both of the two courts. have abandoned their jurisdiction for handing the case or if both courts have not abandoned their jurisdiction or if they have issued con-flicting judgments". However, the application was dismissed because, while a case had been filed in the Dubai Courts, "there is no evidence in the file to show that a re-lated case

has been lodged before the DIFC Courts with regard to the same subject nor has either court released a judgment to abandon their competence": thus there was no conflict of jurisdiction.

46. In *Emirates*, the DIFC Courts had recognised an award in favour of Linde and execu-tion was under way. Emirates' application to the JJC was dismissed as groundless, because there was no indication "that [Emirates] has filed a lawsuit before Dubai Courts on the same matter or obtaining a judgment from that court or it has abandoned its jurisdiction, where this would result in a dispute over jurisdiction.". The Claimant relied on the case for a reference to "abandoning hearing the case" as an instance for the JJC's intervention.

47. In *Tabarak*, one party sued on an agreement in the DIFC Courts and the other party applied in the Dubai Courts for "dissolution" of the agreement. The JJC's reasons did not further describe the courses of the proceedings. It was said that there was a con-flict of jurisdiction between the two courts with respect to the agreement, with the ex-planation that "[t]here is a dispute related to the jurisdiction as long as there is a case in each of the two courts in respect of the undertaking agreement dated 27/2/2017 and it does not affect in the matter the date of submitting it, as long as they were estab-lished before the JT issued its judgment".

48. Finally, in *Arloid* one party had brought proceedings in the DIFC Courts and the other party had brought proceedings before the Dubai Courts regarding the same project, re-lying respectively on the former Court's "opt in" jurisdiction and the latter Courts' gen-eral jurisdiction. Again, the courses of the two proceedings were not described. It was said without elaboration that "the above facts show that there is a conflict of jurisdiction between the two courts".

49. *Al Zaitoon* and *Emirates* do not elucidate abandonment - it is difficult to see how a Court could fail to abandon a case unless there was at least an occasion for it to exer-cise jurisdiction and it did so. (They do, however, illustrate how groundless assertion of a conflict of jurisdiction could bring an unjustified stay if the Claimant's submission were accepted.) On the surface, *Tabarak* and *Arloidprovide* some support to the Claimant, but Essar is a firm decision to the contrary with a direct relationship to the present case. With respect, the JJC decisions do not seem to have taken a consistent line, and this Court must, while paying due regard to them, come to its own decision on the facts of this case.

Costs

50. The Defendant submitted that when the hearing on 19 October 2020 was aborted because the Claimant for the first time gave notice that it had filed the petition with the JJC, the Judge should not have ordered that there be no order as to costs. It first sub-mitted that there should be a costs order in its favour, as was done in similar circum-stances in *Tabari v Tabarak Investments LLC CFI 061/2018* (28 November 2019). When it was pointed out that the costs of preparation would not be thrown away if the proceedings were remitted for determination of the challenge to jurisdiction, it sug-gested that the costs of 19 October 2020 be reserved to the Judge dealing with the remitted proceedings. The Claimant said nothing to the contrary, and that is an appro-priate course.

51. As at present advised, I see no reason why the costs of the appeal should not follow the event. It should be ordered accordingly, but with liberty to apply. A statement of costs was provided, but I consider that costs should be assessed if not agreed.

Orders

52. I propose the following orders -

1. The Appeal is allowed.

2. The Order is set aside.

3. The proceedings are remitted to the Court of First Instance for determination of the Defendant's challenge to jurisdiction.

4. Costs of the Order to be borne as ordered by the Judge determining the challenge to jurisdiction.

5. The Claimant shall pay the Defendant's costs of the Appeal, to be assessed by a Registrar if not agreed, with liberty to apply by application filed within 14 days should either party seek a different or additional order in relation to costs.