Claim No: CFI-032-2014

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

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

IN THE COURT OF FIRST INSTANCE BEFORE JUSTICE SIR DAVID STEEL ﷺ

BETWEEN

ﷺ

THE DUBAI FINANCIAL SERVICES AUTHORITY ﷺ

ﷺPetitioner

and

ﷺ ﷺES BANKERS (DUBAI) LIMITED

Respondent

Hearing:**ﷺ19 October 2014**

Counsel:Tom Smith QC and Peter Wood (Norton Rose Fulbright) for the Petitioner

David Russel QC and Jonathan Moffatt (Hussain Lootah & Associates) for the Creditors in support of the Petition Ali Al Zarooni and Ahmed Ragab Al-Kotby for the Creditors opposing the Petition.

Judgment:**19 October 2014**

JUDGMENT OF JUSTICE SIR DAVID STEEL

Transcribed from the oral judgment delivered on 19 October 2014, revised and approved by the Judge. **ORDER ﷺ UPONﷺ**the petition of the Dubai Financial Services Authority (**"the Petitioner"**) presented to the Court on 24 September 2014 ("the**ﷺPetition**"); ﷺ **AND﷿UPONﷺ**hearing Tom Smith QC for the Petitioner, David Russell QC for the supporting creditors and Ali Al Zarouni and Ahmed Ragab Al-Kotby for the creditors opposing the Petition; ﷺ **AND﷿UPONﷺ**reading the Petition, the evidence recorded on the Court file as having been read and the list of appearances of creditors on the hearing of the Petition;

IT IS HEREBY ORDERED THAT:

1.ES Bankers (Dubai) Limited, registered in the DIFC under registration number 0434 and with its registered offices at Office 1203, Level 12, The Gate West Wing, Dubai International Financial Centre, PO Box 506527, Dubai, UAE be wound up under the Insolvency Law DIFC Law No 3 of 2009.

2. Pursuant to Article 58(1) of the Insolvency Law, Mr Phil Bowers and Mr Neville Kahn both of Deloitte LLP are hereby appointed as Joint Liquidators of ES Bankers (Dubai) Limited.

3. Permission be granted for the Joint Provisional Liquidators to apply to the Court for the fixing of their remuneration.

4. The costs of the winding-up petition and of the application for the appointment of the joint provisional liquidators together with the costs of single representation of the creditors supporting the application be paid as an expense of the liquidation.

Issued by:

Amna Al Owais

Deputy Registrar

Date of Issue:ﷺ 22 October 2014

At: 11am

ﷺ JUDGMENT

1.This is a hearing of the DFSA's petition for a winding up order made under Article 93 of the DIFC Regulatory Law 2004 in regards ES Bankers Dubai Ltd (**"ESBD"**). The application is supported by a number of creditors.ﷺ There is, however, objection to the making of the winding up order made by one creditor in conjunction with another company who in fact was an asset manager for that creditor.

2. The situation is complicated by steps taken in other jurisdictions in relation to members of the group of companies of which ESBD forms a part. First, the group was for overall banking supervision purposes a Portuguese group.ﷺ Accordingly it had been under the supervision of the Bank of Portugal. That supervision has ceased. Furthermore, the relevant Portuguese companies are in liquidation.ﷺ So far as the principal company is concerned, namely Banco Espirito Santo, this has been split so that its valuable assets have been transferred to a new entity, leaving the residual

bank with effectively all the bad assets; it has become a bad bank.

3. Secondly, there is a company with which ESBD is particularly associated called Banque Privee Espirito Santo SA ("**BPES**"). This is a Swiss entity. It is also in liquidation. That is of importance because BPES was the custodian of the assets of ESBD together with the assets of its clients. It also provided a range of banking services to ESBD which are no longer effectively available.

4. The Court has already made a provisional liquidation order on 29 September 2014 based on the prima facie case that the bank was insolvent and an order of that kind was likely to be made. I am fully persuaded from the material that has been put before me that the bank is indeed insolvent, both from the perception of cash flow and also from the perception of balance sheet insolvency. That situation does not appear to be challenged. On those grounds alone, the Court would be justified in making a winding up order.

5. I am also satisfied that it is just and equitable to make a winding up order both in the public interest and perhaps more particularly in the interest of the DIFC. In reality, it is impossible for this bank to continue in business. If the regulatory control which has been temporarily imposed upon it by the DFSA was removed, there would be a run on the bank and it would be unable to meet the claims being made against it.

6. To my mind there are no countervailing considerations which would call for the refusal of the application for a winding up order. Objection has been put forward by one of the creditors, namely Klenz, Inc. ("**Klenz**"). It is contended that it has a claim for substantial sums of money. First for a sum in the region of 6 million euros which is said to have been improperly transferred to a Panamanian entity within the Banco Espirito Santo group and which for reasons that remain unexplained has not been repaid to ESBD as requested (though whether in fact repayment would have any beneficial consequences is very uncertain). Second it is said that there may be a further claim for 15 million euros which it is asserted have been transferred to a Swiss Bank, most probably BPES, with the result that neither the creditor nor its asset manager has been able to gain access to those funds because of BPES' liquidation.

7. It is against that background that Klenz and its asset manager expressed concern that if the petition was granted and ESBD was wound up, and I quote: "the bank's assets would be disbursed before the criminal and civil claims have made their way through the courts". The difficulty with formulating opposition to the winding up order on that basis is that, first of all there is absolutely nothing to prevent Klenz and its asset manager pursuing, if it so wishes, criminal charges against ESBD's management, whether or not the winding up order is made. So far as monetary claims are concerned, they will be able to put forward proofs in the liquidation.

8. In any event, in my judgment if the winding up order is not made that will enhance the risk of dispersal of assets as has been explained in some detail both by Mr Smith QC for the DFSA and by Mr Russell QC for those creditors who support the DFSA. The one thing that is really needed is a thorough investigation into the way in which this bank and members of its group have conducted affairs and the only way that that investigation will ever get underway is by virtue of the appointment of liquidators. The purpose of appointing liquidators is to recover the assets under management of ESBD and that, it seems to me, should be a source of comfort to the opposing creditors rather than a source of concern.

9. If Klenz is anxious to pursue a civil claim against ESBD, again, it can seek leave of the court to pursue it separately from a claim within the liquidation. In addition, again subject to the requirements of Swiss law, it can pursue claims in Switzerland. So also it is presumed in Panama.

10. In my judgment, the making of the winding up order will not in any way prejudice claims for recovery and distribution of ESBD's assets. To the contrary it is much in the interest of all creditors. So for all those reasons I grant the winding up order of ESBD, the terms of that order perhaps need some further consideration.

Issued by:

Amna Al Owais

Deputy Registrar

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