ORDR-4712261123-1852

Claim No. CFI 009/2023

Claim No. CFI 005/2016

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

In Claim No. CFI 009/2023

(1) BANK SARASIN-ALPEN (ME) LIMITED

(2) SHAHAB HAIDER
(in his capacity as Liquidator of Bank Sarasin-Alpen (ME) Limited)

Claimants

and

(1) MR ELIE VIVIEN SASSOON

(2) MR STEPHANE EMILE ASTRUC

(3) MR EDMOND CARTON

(4) BANK J SAFRA SARASIN LIMITED

(5) BANK J SAFRA SARASIN ASSET MANAGEMENT (MIDDLE EAST) LIMITED

Defendants

In Claim No. CFI 005/2016

(1) MR RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) MRS AMRAH ALI ABDEL LATIF AL HAMAD

(3) MRS ALI MOHAMED SULAIMAN AL RIFAI

Claimants

and

(1) BANK SARASIN-ALPEN (ME) LIMITED

Defendant / First Respondent

(2) SHAHAB HAIDER

(in his capacity as Liquidator of Bank Sarasin-Alpen (ME) Limited)

Second Respondent

(1) MR ELIE VIVIEN SASSOON

(2) MR STEPHANE EMILE ASTRUC

(3) MR EDMOND CARTON

Applicants

REASONS FOR THE ORDER OF JUSTICE SIR JEREMY COOKE DATED 1 NOVEMBER 2023

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1. The First to Third Defendants, who I shall describe as the individual defendants (the "Individual Defendants"), challenge the jurisdiction of this court on the basis that, first, proceedings served on them in Switzerland were out of time, and no extension should be granted in respect of service effected there. Secondly, on the basis there is a **lis pendens** in Geneva in relation to the same matters as are in issue in the DIFC and proceedings began there before proceedings were commenced in the DIFC. Thirdly, on the basis that Geneva is a more appropriate forum for the hearing of the dispute than DIFC.

2. The applications by the Individual Defendants represent, essentially, a re-run of the submissions made by the Fourth Defendant at a previous hearing. The Fourth Defendant is the entity by which each Individual Defendant says he was employed in Switzerland where he carried out most of his business activities even when acting as a director or employee of the First Claimant or the Fifth Defendants, both of which are DIFC companies.

3. There is additional factual evidence before the court which was not before it at the time of the applications of the Fourth and Fifth Defendants essentially to the effect that many board meetings were attended by the Individual Defendants on the telephone in Switzerland with the result that board meetings, although not happening in Switzerland, are deemed to have taken place there under the articles of association of the companies.

4. It is also said that particular communications and activities took place to and from or in Switzerland. It appears to me that this new evidence does not change the substance of my reasoning in relation to the applications made last time nor, therefore, does it impact upon my reasoning for the decision I have to make today. The reasons given for my decision on the applications of the Fourth and Fifth Defendants still hold good and I shall refer to them hereafter simply as "the reasons".

5. The question as to where various acts took place is a matter of some dispute, some of which is perhaps clear enough, but others of which cannot be finally resolved here. The impact of such acts being effected in Switzerland is said to be that the Geneva court does have jurisdiction in relation to both the tort claims and the claims for breach of duty as directors and employees. Whether or not those activities are sufficient to create jurisdiction in the Geneva court, that is not enough to make Geneva the more appropriate forum. Reference should be made to the reasons, which specifically took into account the position of the individual defendants as referred to in paragraph 17, in the context of deciding with which was the more appropriate forum for the claim against the Fourth and Fifth Defendants.

6. I first deal with the question of extension of time. The Claimants applied for an extension of time which is resisted by the Individual Defendants (the “EOT Application”). The history of the matter appears, to a significant extent, from the terms of paragraphs 4 to 14 of the reasons given by me before. However, additional points now emerge from the evidence which reinforce the conclusion that the Defendants were deliberately seeking to delay matters in order to require the claimants to seek an extension of time in the hope that this would, in some way, delay or block the DIFC proceedings altogether.

7. On 25 May 2023, the lawyers for the Claimants wrote to Clifford Chance, which was then acting for all the Defendants, enclosing a copy of the claim form and the consolidated points of claim and inviting the First to Third Defendants to make an appointment for personal service. On 26 May, Clifford Chance confirmed it had no

instructions on behalf of the Defendants. On 9 June, the Claimants' lawyers again wrote to each of the First to Third Defendants directly, in this case enclosing both the claim form and the consolidated points of claim and told them that the Claimants had initiated service by diplomatic channels and invited them to make an appointment for personal service.

8. The Swiss lawyers acting for all the Defendants, Lenz & Staehelin, replied on 23 June, stating that the Individual Defendants would not agree to be served otherwise than at their place of domicile in Switzerland. On or before 20 July 2023, the claim form was received by the Geneva court. On that date, it sent a letter to the Fourth Defendant ordering it to collect the claim form before 11 August 2023, failing which the document would be served upon it by the police. That letter appears to have been received, or is stamped as being received, on 24 July 2023, and from enquiries made with the Geneva court, it emerges that similar summonses were sent to the Individual Defendants.

9. On 26 July, the lawyers for the Claimants wrote to Lenz & Staehelin requesting that the Individual Defendants collect the claim form from the Geneva court by 1 August identifying that as the date by which the claim form had to be served, failing which it would be necessary to apply to this court for an extension of time. On 28 July, Lenz & Staehelin replied saying their clients would not comply with the request since it was summer holiday season and, as such, the availability of their clients to comply with the deadline on what was, effectively, one business day's notice, was doubtful. They said they were unaware of 1 August 2023 being a deadline, save to the extent that that was effectively self-imposed.

10. It is now clear from documents which have emerged that, in fact, Lenz & Staehelin had standing authority from the Individual Defendants to collect such documents. They were authorised to do so, and could have done so if they so wished, their offices being close to the Geneva court. There was no need for any powers of attorney to be issued which was, in fact, the course then taken by which the Individual Defendants authorised the Second Defendant to collect the documents on their behalf.

11. From the point of notification by the Geneva court, it would seem that Lenz & Staehelin had some six days to collect the documents, should the Individual Defendants or they have chosen to do so. It is perfectly plain that, had the Defendants wished to be co-operative, they could have done so and, although not obliged to go to the court to collect those documents before 11 August, the date set by the Geneva court, it is clear

that the reason for not doing so would be to create as much difficulty as possible in the way of the progress of these claims in the DIFC.

12. In the case of the Third Defendant, not only did he issue an unnecessary power of attorney in favour of the Second Defendant, since Lenz & Staehelin were already authorised to act, but although he signed it on 31 July, he dated it 1 August 2023. The reason for that is not at all obvious, unless it was specifically to give the impression that the date of 1 August had already passed by the time that he put his signature to such a document in such a way as to indicate that collection prior to 1 August was impossible. It is in that connection that reference has been made to paragraph 34 of the Sixth Witness Statement of Mr Devenish which is therefore not accurate.

13. In this context, it is also pointed out - and this is a matter of dispute between the Swiss lawyers - that there was the possibility of powers of attorney being signed electronically or signed and scanned and such documents being presented to the Geneva court in any event without the need for the originals to be put forward. I need not make any decision about which of the Swiss lawyers' views are accurate on that but it does appear to me that the points taken by the Defendants are all part and parcel of the same objective, to which I have already referred.

14. Whatever delay there may have been between February and the end of May on the part of the Claimants, as noted in the reasons previously given, it is clear that the Defendants all sought to delay service in the hope of gaining some advantage thereby:

> "Although [as I stated in paragraph 12 of those reasons] no defendant is bound to accept service by any means other than those provided by ... [any applicable] statutory or treaty regime ... it does not lie in the mouth of an unco-operative defendant ..."

who has been given every opportunity to accept service, to complain when an extension is sought as a result of the approach taken by him.

15. The Claimants' attempts to serve proceedings by one means or another and to avoid the need for service through diplomatic or judicial channels and then to encourage acceptance of service by such means within the time limit set by this court of six months represented a reasonable course of conduct. To refuse an extension of eight days would be wholly unjust in such circumstances.

16. As I found in the reasons given before, the Claimants' approach was entirely reasonable. Whilst no specific criteria are set out in relation to extensions of time for

service of proceedings where the application is made before the expiry date, a proper exercise of judicial discretion inevitably results in an extension of time for such a limited period in the circumstances which I have described. As a result, I extend time and the Individual Defendants therefore have all now been validly served with the DIFC proceedings.

17. I turn then to the question of **forum conveniens** embracing within it the arguments that have been raised about **lis alibi pendens**. In my previous reasons, I set out the relevant principles of law. **Lis alibi** does not constitute a separate ground for objecting to the court's jurisdiction. It is a factor only in the context of **forum conveniens** and consideration of which is the more appropriate forum for the hearing of any claims.

18. Whilst there may be room for argument about where various acts took place - and I now have additional evidence about that from the Defendants - and therefore whether the Geneva court can itself consider that it has jurisdiction over the claims in tort and for breach of directors' duty, the following is now clear as matters currently stand.

19. Firstly, the claims will proceed in the DIFC against the Fourth and Fifth Defendants in accordance with my previous decision. They will proceed on the basis of breach of duty as directors in misappropriating the First Claimant's business and diverting it to the Fifth Defendant, regardless of any banking relationships, credit facilities and products or assets of customers in Switzerland or other locations. The claims will also proceed against those two defendants, one of which, the Fifth Defendant, is in any event a DIFC company, both in tort and under the insolvency regime to which I shall refer again in a moment.

20. Secondly, the Third Defendant is bound by an exclusive jurisdiction clause in his contract of employment with the First Claimant which means that the court would need very strong reason to say that he should not be kept to his contract. The claims against him for breach of his duties as an employee in tort and under the insolvency regime will all proceed against him also where I find there is no strong reason why they should not.

21. Thirdly, it is clear that, for any claim made under the insolvency regime and the DIFC, the DIFC court is clearly the more appropriate forum. See paragraph 24 of my previous reasons. It is DIFC insolvency law which is in issue in relation to a DIFC-registered company with a DIFC officer of the court as liquidator.

22. Fourthly, a claim for breach of duty as a director of a DIFC company governed by the law of the DIFC is much better heard in the DIFC than in Geneva, even if the Geneva court considers it has jurisdiction also.

23. The location of board meetings has limited bearing on the question of where the company is administered and there are many other factors which indicate that the company was administered in the DIFC. Reference can be made to paragraph 22 of the reasons that I gave previously:

> "... the first claimant was incorporated in the DIFC. Its head office and registered office were located there, it was regulated by the DFSA and ... most of its staff were based [there]. The Shareholders Agreement to which the Fourth Defendant was a party, required the management and control of the First Claimant to be exercised in the Emirate of Dubai [in], the UAE, and required shareholders to use all reasonable endeavours to ensure it was ... treated for all purposes including taxation as a UAE resident."

24. Whilst of course onshore Dubai is not the same as DIFC, as is obvious, nonetheless the connection with the DIFC is much closer than the connection with Switzerland.

25. Criticism is made of the suggestion that the Third Defendant was resident in DIFC when the evidence now shows that he resided in Dubai but he, nonetheless, worked from the DIFC. Moreover, insofar as board meetings took place and were deemed to take place in Geneva because representatives were in Geneva, that really can make very little difference to the questions that I have to decide. The fact that something is deemed to take place in a particular location is not conclusive as to the administration of the company in fact.

26. Fifthly, when one looks at the question of location of the tort claims, one has to consider the nature of the claims in question. They are for unlawful conspiracy. The Geneva court is an available forum if the place of the act or event giving rise to the damage was in Geneva or the place where the result occurred was in Geneva. Assuming that this point is sufficiently evidenced by the materials that are now being produced, what it goes to is to show that Geneva would be an available forum. It does not, however, make it the more appropriate forum.

27. Sixthly, it is clear that if the claims already mentioned against the Third, Fourth and Fifth Defendants will go ahead in the DIFC, it is obviously in the interests of justice and in the interests of the parties that all related claims should be heard together in one jurisdiction. That is whether those claims be in tort, for breach of duty as directors or employees, or under the insolvency regime of the DIFC.

28. Seventhly, this is not a case about shareholder actions or a breach of the shareholders agreement. It is an action brought by the First Claimant company and the Second Claimant as its liquidator against the Individual Defendants in addition to the Fourth and Fifth Defendants as the former directors and employees of the First Claimant for breach of their duties in a number of different ways. The governing law of their employment by the Fourth Defendant is irrelevant. It is the governing law of their employment by the First Claimant that matters and the governing law of the claims as framed. The location of the Fourth Defendant and their location is not of any great significance either, save in relation to questions of availability of evidence and documents.

29. The fact remains that the case, as presented by the Claimants, centres on the movement of business from one DIFC company to another by the directors of the former in breach of their duties imposed by DIFC law as alleged by the Claimants. The scheme, according to the plaintiffs' pleadings, was primarily enacted in the DIFC. It related to a largely DIFC-based business, operated by a DIFC registered and DFSA regulated company and resulted in the transfer of that business to another DIFC registered and DFSA registered company which continues to operate in the DIFC today.

30. The key individual in proposing and executing the scheme is said to be the Third Defendant who, at all material times, was the chief executive or senior executive officer of the First Claimant. Wherever the Individual Defendants were at any particular time, the scheme, as alleged, at least appears to have been hatched in Dubai and the DIFC. On the evidence, it was proposed from Dubai through the re-launch plan email which included an appraisal of the value of the business of the First Claimant. It was then primarily enacted in the DIFC through the solicitation of the relationship managers and their solicitation of clients on behalf of the Fifth Defendant. Even if meetings with clients took place in Dubai rather than the DIFC, this still points to the DIFC as being a more appropriate forum than Switzerland.

31. It matters not in this context that the transfer of clients mainly involved their former relationship managers, now engaged by the Fifth Defendants, contacting them and inviting them to terminate their relationship with the first defendant and to establish a new relationship with the Fifth Defendants in the DIFC whilst also authorising the Fourth Defendant to communicate with the Fifth Defendant in respect of the custody accounts.

32. The place where the internal records were kept does assist in relation to where documents will have to be found for the purpose of these proceedings but that does not change the fundamental question which is where the centre of gravity of this dispute is located. The centre of gravity of this dispute, as I see it, is the DIFC. Witnesses may have to travel, though it is not said that any of the Defendants will specifically participate in any trial and appear for the purposes of giving evidence. In any event, it is not significant in an age of international travel or with internet platforms exactly where those individuals are located. It seems that the Third Defendant is essentially resident in the USA and would have to travel in any event to one jurisdiction or another. English language in English documents point to the DIFC as more appropriate in any event, as previously pointed out.

33. The reality is also that, although I do not consider there to be any question of abuse of the court, the Individual Defendants have brought applications which could have been brought earlier, together with those of the Fourth and Fifth Defendants. They are on much the same grounds but with some additional evidence of fact which could have been adduced at the earlier stage by the Fourth and Fifth Defendants.

34. These Defendants are represented by the same lawyers, as they have been from earlier days albeit by different lawyers and are co-operative, one with the other. The evidence now shows that there was a letter of engagement sent by Jones Day, the current lawyers engaged by all the Defendants in the DIFC, to the Individual Defendants on 10 August 2023 which they had returned, signed on 5 September. The terms of that letter, albeit made out in standard form, certainly indicate that not only were the Swiss lawyers representing each of the Defendants from that date onwards but that the Fourth Defendant was giving instructions which were to prevail over any instructions which the others might give. It is clear as a matter of inference that these Defendants work together and that the Fourth Defendant is pulling the strings as well as paying the bill of each of the Individual Defendants.

35. Ultimately, the applications of the Individual Defendants must fail for much the same reasons as I gave before in relation to the applications of the Fourth and Fifth Defendants. The centre of gravity of this dispute, as already mentioned, is in the DIFC. In particular, claims under the insolvency regime and claims in tort and, indeed, the claims as breach of duties as directors and employees, all being governed by DIFC law, must be better heard in the DIFC than anywhere else.

36. The fact that the Defendants sought to pre-empt such proceedings in the DIFC by launching proceedings for negative declarations in Switzerland does not really assist. What the Defendants' argument comes down to is that this court should not exercise its jurisdiction simply because the Defendants have launched such pre-emptive proceedings in Switzerland even though this court is much better equipped and is much more suitable to try the issues that arise between the parties.

37. At paragraph 34 of the reasons that I previously gave, I invited the Individual Defendants to consider their position. When I was told that they were likely to launch applications challenging the jurisdiction, I invited them to consider the reason that I had given in order for them to evaluate the prospects of success in doing so. They chose to bring this application regardless of that and it fails for much the same reasons as given.

38. In circumstances where the court has dismissed the arguments made by the Fourth Defendant, the jurisdiction applications which are brought by the First to Third Defendants do not disclose any new grounds which would lead to a different result. This is a claim which is alleged to be based on fraudulent activities perpetrated in the DIFC and based on issues of DIFC law with the removal of assets from a DIFC company in liquidation with a view to avoiding payment of a judgment to which that company was subject.

39. Though it cannot properly be said that the applications made by the Individual Defendants are an abuse of process, the Defendants being different and it being open to them to take such points as they wish, the lawyers representing them are the same. The Defendants co-operate with one another, as they have throughout. Considerable expense has been incurred when these Defendants could have accepted that the reasons I had already given applied with equal force to their application whilst preserving their right to seek any permission to appeal they might think appropriate from what would properly be regarded as an almost inevitable decision in the light of what I had previously said. If an application is now made for permission to appeal, I shall deal with it but it is fairly obvious from what I have said that I am likely to refuse it.

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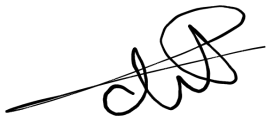
40. I refuse leave to appeal on the basis that there is no realistic prospect of success on an appeal.



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Assistant Registrar
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