

HFW LITIGATION | JANUARY 2024

PARALLEL PROCEEDINGS – WILL THE DIFC COURTS SEIZE JURISDICTION?

HFW acts for liquidator in high-profile insolvency claims in the DIFC Courts, and successfully defends the jurisdiction challenges.

In DIFC Case CFI-009/2023, HFW recently acted to successfully resist jurisdiction challenges (amongst other things) to a claim by Bank Sarasin-Alpen (ME) Limited (In Liquidation) (**BSAME**) and Mr Shahab Haider (on behalf of and alongside BSAME) (the **Liquidator**) brought against Bank J Safra Sarasin Limited, Bank J Safra Sarasin Asset Management (Middle East Limited), Bank J Safra Sarasin Asset Management (Middle East) Limited (the **Corporate Defendants**) and three former and current members of senior management of the bank (the **Individual Defendants**).

By two judgments, made orally in hearings on 7 September 2023 and 18 October 2023 (with written judgments handed down shortly thereafter), the DIFC Court of First Instance confirmed the jurisdiction of the DIFC Courts, whilst issuing welcome clarification on the applicability of *lis alibi pendens* in connection with the *forum non conveniens* doctrine. The Defendants also raised the same applications to challenge the jurisdiction of the DIFC Court in separate insolvency proceedings, which applications were also dismissed by the judge.

In giving his judgment, the judge also provided useful guidance in connection with the conduct of defendants in connection with service. The proceedings were subject to appeal, but the appeals have now been determined in HFW's clients' favour.

Background

BSAME was incorporated in the DIFC as a joint venture (regulated by the DFSA) to provide investment advisory and management services. In May 2016, BSAME was put into compulsory liquidation by order of the DIFC court. The petition was based on an unpaid judgment debt against BSAME of additional damages of US\$35,028,474 awarded to the petitioners during investment product mis-selling litigation.

Following the Liquidator's investigations, proceedings were commenced in the DIFC Courts against the Defendants, seeking to recover allegedly misappropriated business and any profits derived from the allegedly misappropriated business.

The Corporate Defendants issued applications to challenge the jurisdiction of the DIFC Courts in June/July 2023, primarily on the basis that there were parallel proceedings in Switzerland that had been commenced by them shortly before the DIFC Courts proceedings. The Individual Defendants also issued a collective application to challenge the jurisdiction of the DIFC Courts in September 2023. All jurisdiction applications were dismissed by Justice Sir Jeremy Cooke, with costs.

Lis Pendens and Forum Non Conveniens

One of the important questions considered by the Court in the course of these jurisdiction applications was the weight to be given to *lis alibi pendens*, which was raised by the Defendants as part of their submissions on *forum non conveniens* (namely that Switzerland was a more appropriate forum for the determination of the dispute between the parties). The Defendants had filed a conciliation request before the Geneva First Instance Tribunal in Switzerland in January 2023, although those proceedings had not been served, and accordingly argued that there was *lis alibi pendens* in Geneva which should take precedence over the claims in the DIFC.

In giving judgment, the judge held that:

"it has never been part of the law of the DIFC that a case should be stayed on [the grounds of lis alibi pendens] alone. It is nothing to the point whether proceedings were begun first in another forum or not. The question is

always which is the most appropriate forum in the interests of the parties and the ends of justice. The DIFC has never been a party to the Brussels Regulation or the Lugano Convention and the concept of “the court first seized” plays no part, as such, in its considerations.”

The judge did find that for the purpose of a determination on *forum non conveniens* the existence of proceedings elsewhere should be taken into account, as well as whether one set of proceedings was sufficiently further advanced than the other, but this would not be determinative. On the facts in the present cases, the applications could not succeed on this ground.

As to the rest of the Defendants' arguments on *forum non conveniens*, Justice Cooke applied the test in seminal English case of *Spiliada*¹, as endorsed in the DIFC Court case of *Protiviti*², that the burden was on the Defendants to show that not only was the DIFC not the appropriate forum, but that the courts of the other jurisdiction were clearly or distinctly more appropriate. The judge confirmed that a comparison of procedures of the respective courts is not an appropriate measure and it is necessary to prove substantial injustice in order to rely on any personal/juridical advantage to challenge the jurisdiction of one court or other.

Justice Cooke was ultimately not satisfied that the Defendants had met this burden and held that on the facts of these cases the “centre of gravity” in the dispute was the DIFC, not least due to the existence of claims under the DIFC insolvency regime, in tort and in connection with alleged breaches of duties of directors and officers of a DIFC company.

Appeal

The Defendants sought permission to appeal from the Court of Appeal, which application was heard and dismissed by the Chief Justice on 18 December 2023.

The judgments of the Court of First Instance are available at [[Order with Reasons](#)] and [[Order with Reasons](#)], and of the Court of Appeal [[Order](#)].

The HFW team was led by Partner, Nick Braganza, and included Senior Associate, Thomas Neighbour, Associate, Tanisha Saxena and Paralegal, Emily Hook. The Counsel team included Sharif Shivji KC, Albert Sampson and Hossein Sharafi of 4 Stone Buildings.

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¹ *Spiliada v Cansulex* [1987] 2 AC 460

² *Protiviti Member Firm (Middle East) Limited v Mohammed Been Hammad Abdul-Karim al-Mojil* [2016] DIFC CA 003

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