CFI 035/2016 Firas Esreb v ES Bankers (Dubai) Limited (In Liquidation)

MARCH 06, 2017 COURT OF FIRST INSTANCE - ORDERS,ORDERS

Claim No: CFI 035/2016

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS (/glossary/court/)

IN THE COURT (/glossary/court/) OF FIRST INSTANCE

BEFORE THE DEPUTY CHIEF JUSTICE (/glossary/chief-justice/) SIR DAVID STEEL

BETWEEN

FIRAS ESREB

Claimant (/glossary/claimant/)

and

ES BANKERS (DUBAI) LIMITED (IN LIQUIDATION)

Defendant (/glossary/defendant/)

ORDER WITH REASONS OF THE DEPUTY CHIEF JUSTICE SIR DAVID STEEL

UPON reviewing the Part 8 Claim form no. CFI-035-2016 dated 25 September 2016

AND UPON reviewing the correspondence filed by the Claimant and the Defendant

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant at a hearing on 27 February 2017

IT IS HEREBY ORDERED THAT the Claimant shall pay the Defendant's costs.

Issued by:

Maha Al Mehairi

Judicial Officer

Date of issue: 6 March 2017

At: 2pm

SCHEDULE OF REASONS

1. On 25 September 2016, the Claimant issued a claim for pre-action disclosure under RDC 28.48 and for permission to commence proceedings under Article 56 of the DIFC (/glossary/difc/) Insolvency Law in respect of that application and generally.

2. In the course the applications were withdrawn on 23 January 2017. Both parties seek to recover their legal costs. In the alternative the Claimant contends for no order as regards costs. The sums involved are not insignificant each side having expended something in the region of $150,000 to $200,000.

3. The matter was extensively argued before me at a hearing on 27 February 2017. I am grateful to Counsel for both their written and oral arguments. Since the matter was not without its complicating features I decided to take time to reduce my reasons to writing rather than deliver an extempore judgment.

4. Before setting out the relevant legal principles, it is worth jumping ahead to the letter of 23 January 2017 in which the Claimant's legal representatives explained their strategy in regard to the proposed withdrawal of the claim:

> "Based on the information you have presented since the submissions of the pre-action claim, our client is prepared to withdraw its claim against ESBD and (as you suggest) commence a separate claim against Deloitte LLP for pre-action disclosure (if necessary) prior to commencing proceedings against the firm"

5.It follows as the liquidators emphasised in argument that the purported outcome of the application is the potential for an unidentified claim against a third party. This is not just ironical but justifies focus on the terms of RDC 28.48 which provide:

> 'The court may only make an order [for pre-action disclosure] where:
>
> (1) The respondent is likely to be party to subsequent proceedings;
>
> (2) The applicant is also likely to be a party to those proceedings;
>
> (3) If proceedings had started, the court would make a Document Production Order directly(?) the production of the documents or classes of documents of which the applicant seeks production; and
>
> (4) Production before proceedings have started is desirable in order to:
>
> (a) Dispose fairly of the anticipated proceedings;
>
> (b) Assist the dispute to be resolved without proceedings
>
> (c) Save costs."

6. If, as suggested, the outcome was merely to furnish material identifying potential claims against third parties, this would flow from a misuse of the rules. In short the application failed to comply with most if not all of the criteria. As a threshold point this puts the Claimant in an uncomfortable position vis-à-vis costs.

7. The point is reinforced when the application is considered in greater detail. The claim is set out in a document entitled "Claimants' Details of Claim" served with the application. The thrust of the application was to extract documentation in support of a claim against the Defendant bank in the form of a trust claim. This claim was said to flow from a failure to complete a purchase of securities in early September 2014 shortly before the bank went into liquidation.

8. In summary the point was put as follows:

> "The Claimant's position in summary is that, in the absence of securities to which it has title, the monies in the Claimants' accounts or other monies held by the Defendant intended to be used to purchase the securities on the Claimants' behalf are impregnated with a trust under the principles established in the line of authorities commencing with the English House of Lord's case **Barclays Bank Ltd. v. Quistclose Investments Ltd.** [1970] AC 567 and/or general trust principles or alternatively monies are held by the Defendant on constructive trust by virtue of the Defendant's wrongful conduct, profits made in breach of fiduciary duty and/or the Defendant's unconscionable retention of monies."

9. It has been and remains the position of the liquidators that the trust claim is wholly misconceived on the basis that:

> (a) A floating trust over the bank's assets is unknown to the law **(/glossary/the-law/)**
>
> (b) A private law trust claim in respect of money which should have been but was not held is incompatible with the DFSA **(/glossary/dfsa/)**'s Client Money Rules and thus impermissible.
>
> These propositions now appear to be accepted by the Claimant. Equally it seems to be accepted that the other causes of action based on wrongful conduct of the bank cannot be sustained.

10. Notably the Claimant added the following coda to its trust claims:

> "In addition to the trust claims the Claimants are also considering joining Deloitte to the proceedings to advance a claim against them based on breach of their regulatory and/or fiduciary duties or misfeasance in failing to carry out the Claimants' instructions or put matters right when acting as Manager of the Defendant when it was obvious that such instructions had not been fulfilled and the Claimants were financially exposed."
>
> Despite this indication Deloitte were not and have not been joined to this or any proceedings to this day.

11. Before the application was issued, the liquidator had already provided a considerable amount of material in response to the Claimant's queries. For example, in their e-mail dated 28 January 2016, the liquidators spelt out the essential background in some detail and explained why it was that the Claimant had a Subordinated Client Money Claim but no status as a beneficiary of a trust.

12. The liquidator maintained that position throughout the ensuing correspondence between the legal representatives of the parties which continued through April 2016 with the Claimant focusing throughout on the trust claim. As regards Deloitte the only reference in Messrs. Payne Hicks Beach's letter of 11 April 2016 was to the effect:

> "We shall seek assurance that Deloitte is very separately advised on this matter (given that there is a potential conflict of interest between your client's interests and Deloitte's) and we should be grateful for their solicitor's details for correspondence"
>
> Matters were not in fact taken any further but at least it was made clear that the application was not directed at Deloitte as such.

13. The liquidators disclosed the legal advice they had received from Swiss and Belgian counsel in April and June 2016 respectively. In July a number of further documents were disclosed none of which it was accepted took matters in regard to the existence or otherwise of a trust any further. Furthermore I am wholly unpersuaded that the few additional e-mails produced after the application was made in September had any significance in regard to the merit of any claim against the Bank whether on the basis of a trust or indeed otherwise.

14. The position of Deloitte was raised in Messrs. Al Bawardi Critchlow's letter of 10 January 2017. Up to then as the liquidator's Counsel put it "the trust claim was the only claim in town." I am quite unable to assess the merit of any claim against Deloitte. At first blush I share the proposition advanced on behalf of the Defendants that the claim is shadowy. But it matters not. It has no relevance in the costs issue which is before me.

15. There was no dispute between the parties as to the legal principles. RDC 34.15 provides:

> "Unless the court orders otherwise, a claimant who discontinues a claim is liable for the defendant's costs incurred up to and on the date on which notice of the discontinuance was served on him or his legal representatives…"
>
> It was also common ground that the commentary to the identical provision in the English Civil Procedure Rules was apposite. Importantly the underlying theme to be derived is that a claimant must show some unreasonable conduct on the part of the defendant for there to be a departure from this default rule.

16. It did not strike me that the Claimant was able to point to any unreasonable conduct on the part of the liquidators. To the contrary the liquidators persistently and politely insisted that the trust claim which was at the forefront of the Claimant's claim was misconceived, at the same time volunteering documents to evidence the history of the failed securities purchase. The subsequent application furnished no further substance to that account let alone a change of circumstance.

17. I sympathise with the Claimant in its discovery that its instructions had not led to a definitive purchase. But the fact remains that it is stuck with the DFSA Client Money Rules and the attempt to circumvent them by the device of a trust was hopeless. If and to the extent that any progress in regard to a claim against Deloitte has been achieved this is not to the point. The Claimant must pay the Defendant's costs.

Operations
Monday to Friday
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**Office Times are subject to change for the Holy Month of Ramadan*

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