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OCTOBER 06, 2023 COURT OF FIRST INSTANCE - ORDERS

Claim No. CFI 096/2022

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

MUREX GULF PROPERTIES COMPANY K.S.C.C.

Claimant

and

THE INVESTMENT DAR COMPANY K.S.C.C

Defendant

AMENDED REASONS FOR THE ORDER OF JUSTICE SIR JEREMY COOKE DATED 22 SEPTEMBER 2023

SCHEDULE OF REASONS

1. I have before me an application on the part of the Claimant for permission to amend the Claim Form. Whereas previously the Claimant had been seeking recognition and enforcement of a judgment of 24 October 2021 of the Court of Cassation, what is now sought in the amendment is a recognition of the judgment of the Court of Appeal in Kuwait given on 23 June 2021 (the "CA Judgment").
2. At the time of the original Claim Form, it was the understanding of the DIFC lawyers acting for the Claimant that the Court of Cassation in Kuwait had dismissed an appeal from that decision. But in fact, what had happened was that on 17 October 2021 the Cassation Court had rejected the Defendant's application for a stay of execution of the CA Judgment. The appeal to the Court of Cassation remained in being but nothing has happened in the two years since that time by way of any hearing of that appeal.
3. The way that the matter is put, both in the proposed amendment and in an accompanying witness statement, is that the CA Judgment is a "fully executable judgment", whereas previously it had been said that the judgment was final and binding. Whether or not the former expression is intended as shorthand for the latter is unknown. In my judgment, in accordance with ordinary principles of private international law, any judgment of a court, even if subject to appeal, can be final and binding and conclusive on the merits at that point. It constitutes res judicata, which is the essence of the point which matters for the purpose of enforcement.
4. As I have already mentioned, the Claimant is not seeking enforcement at this stage but merely recognition of the CA Judgment, which is, as I find, final and binding but is not, as has been contended by the Claimant, fully executable. This is because a stay of execution has been imposed in Kuwait. Whilst Mr McKenzie argues for the Claimant that the status of the CA Judgment remains unchanged - in other

words, it is in itself a judgment which is capable of being executed - it is not now fully executable because the court has said that its execution is to be stayed.

5. So far as the appeal to the Court of Cassation is concerned, there is no evidence before this court that it has been stayed in itself. There is, moreover, no evidence that the appeal to the Court of Cassation has been dismissed. The result is that the claim is still pending in the Court of Cassation despite nothing happening for over two years. It is wholly unclear from 3 of 6 the evidence put before the court whether in fact the effect of bankruptcy proceedings, which have been confirmed by the Court of Cassation itself in March or May of this year, has the effect of either an automatic stay of the proceedings or whether there has been an order to that effect.

6. It is in this context that I have to determine for the purposes only of the test in relation to amendment, which is whether or not a claim has a realistic prospect of success, what the effect of article 24 of the DIFC Courts Law is. Article 24 provides for ratification of judgments and states that:

"The Court of First Instance here has jurisdiction to ratify any judgment, order or award of any recognised foreign court for the purposes of the enforcement thereof in the DIFC."

7. There cannot be any doubt that, in this context where the word "enforcement" is being used, that is intended to cover the position of recognition as well because the whole provision relates to the ratification of any judgment, order or award.

8. In passing, I note that any judgment, order or award must be subject to common law principles of it being final and binding and that an interlocutory order of some kind, which did not determine matters on a final and binding basis, would not qualify for this purpose.

9. The real issue here arises, however, in relation to article 24(2), which reads as follows:

"Where the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the Court of First Instance shall comply with the terms of such treaty."

10. The effect of that, as Mr Yates submits for the Defendant, is that, if there is such an applicable treaty, its terms have to be applied by the DIFC Court as a matter of DIFC domestic law. The Courts Law itself incorporates for these purposes the terms of any applicable treaty relating to the mutual enforcement of judgments, orders or awards.

11. I am in no doubt that the Riyadh Convention is an applicable treaty for such purposes. Whilst it covers a number of matters including service out of the jurisdiction and letters rogatory and the like, it also specifically covers recognition and enforcement. It is notable that recognition and enforcement are dealt with in different sections of the Convention. Regardless of that, 4 of 6 the fact is that the Court of First Instance must comply with the terms of a treaty, which is a treaty for the mutual enforcement of judgments, orders and awards, and recognition is part of the overall process, a necessary preliminary to enforcement in any event.

12. When one turns, then, to the terms of the Riyadh Convention, one finds that article 30 says this:

"Recognition of judgments shall be refused in the following cases ... [and then subparagraph (e)] if the dispute is also the subject of a case being heard by the courts of the requested party and the action has been brought before the courts of the requested party on a date preceding the presentation of the dispute to the court of the requesting party."

13. There is a sentence which follows, to which I shall return in a moment. Leaving aside that sentence, however, the effect of article 30 is, in my judgment, clear. The court is bound to refuse recognition of a judgment if the dispute is the subject of a case being heard in Kuwait, which began before the presentation of the matter to this court. There is no doubt that the proceedings in Kuwait preceded the matters here by a distance, as might well be expected in a case involving recognition of a judgment. The question is whether or not the case is "being heard" by the courts of Kuwait. Whilst I am conscious that this is an English translation of an Arabic convention, in my mind, there is no doubt that if the case is in any sense pending in the foreign court, then it is "being heard" by the courts of the requested party. Until such time as any claim is dismissed, any action is concluded in Kuwait; therefore, the case is being heard by those courts, whether stayed or not.

14. Reliance was placed by Mr McKenzie for the Claimants on the final sentence of article 30, which states that:

"The judicial body examining the request for recognition in accordance with the text of this article may observe the rule of law in its own country."

15. That does not, in my judgment, give this court any discretion to depart from the express words of article 30(e), which requires recognition to be used in the circumstances there outlined.

16. It therefore appears to me that, on the face of the terms of the Riyadh Convention, as incorporated for these purposes by article 24(2) of the Courts Law, that there is no real prospect of success in a claim for recognition of the judgment of the Kuwaiti Court of Appeal. That is quite sufficient for these purposes, whatever may be the position in the future, should the proceedings in Kuwait be concluded.

17. There is, however, the additional complication which arises from the declaration of bankruptcy of the Defendant in Kuwait. As it appears from a judgment of the Kuwaiti Court of 1 May 2023, a claim for bankruptcy was originally accepted on 18 June 2019, which involved the appointment of a bankruptcy trustee and which has finally been upheld by the Court of Cassation.

18. Reference is then made to article 166 of the Kuwaiti Bankruptcy Law 71 of 2020, which states that:

After resolving initiation of bankruptcy proceedings, no claim may be filed or proceeded against the debtor except for ..."

19. Then, specific types of claims, which do not appear to include the claims which were made in Kuwait. Quite what the effect of the insolvency is in Kuwait has not been the subject of any detailed evidence before me and a degree of speculation has occurred. I had real doubts, in fact, as to whether Mr Yates was entitled to appear to represent the Defendant since it seems his instructions come from the Defendant's representatives rather than from any trustee in bankruptcy. Nonetheless, his presence has been helpful because of the need for the terms of the Riyadh Convention to be debated and resolved. It is self-evident, however, that there are issues which arise in the context of insolvency where there appears to be an insolvency decree of some kind in Kuwait but it has not yet been determined whether there will be a liquidation of the kind that is known in common law jurisdictions or a reorganisation of a kind which takes place in Middle Eastern countries, where the creditors agree to some form of arrangement or the court imposes some scheme of arrangement.

20. No application has been made to the courts of the DIFC to render the Defendant insolvent in this jurisdiction and it may very well be that claims could proceed in this jurisdiction until or unless insolvency proceedings were begun here. But none of that matters for today's purposes in the context of seeking to transport a judgment of the Kuwaiti court for recognition here. The Riyadh Convention does not allow me to recognise that judgment at this stage 6 of 6 and, if matters were to change, it would no doubt be in the context of the insolvency of the Defendant and the absence of any further purpose being served in what are still currently extant Kuwaiti proceedings.

21. The bottom line, therefore, is quite simply that, as matters stand, the Claimant has no realistic prospects of success in seeking recognition of the CA Judgment and that it is not even right to refer to the CA Judgment as being executable, even if it is final and binding for its own purposes.

22. This of course does not mean that it would not be open in circumstances which might obtain in the future to proceed with an action for recognition in this jurisdiction, but the complications are obvious, and the purpose might be very limited in circumstances where enforcement in the face of an insolvency proceeding elsewhere would present considerable difficulty to this court, so I offer no encouragement in that respect.

Conclusion

23. I simply dismiss the Claim because Mr McKenzie accepts that is the logical step to take, so the Claim is dismissed.

24. The Claimant shall pay the Defendant's costs of the action, costs to be the subject of assessment by the registrar if not agreed.

25. I add that following the giving of the judgment, evidence was presented which showed that Mr Yates was fully entitled to represent the Defendant, regardless of the appointment of the trustee in bankruptcy.

Issued by:

Hayley Norton

Assistant Registrar

Date of issue: 4 October 2023

Date of Re-Issue: 6 October 2023

At: 9am

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