

OMAN INSURANCE COMPANY PSC V. GLOBEMED GULF HEALTHCARE SOLUTIONS LLC [2021] DIFC CA 009

DIFC: LATE AMENDMENTS AND JURISDICTION CHALLENGES

A Case Note from the 2TG Commercial Dispute Resolution Team

January 2022

Introduction

1. On 26th December 2021, the DIFC Court of Appeal handed down judgment in *Oman Insurance Company PSC v Globemed Gulf Healthcare Solutions LLC* [2021] DIFC CA 009 allowing the appeal and granting permission to the appellant OIC to re-amend its defence and bring a counterclaim.
2. This Judgment provides guidance for DIFC Practitioners considering late applications to amend statements of case as well as insight into the DIFC Court's approach to the complex jurisdictional question of whether the court of a place of a company's incorporation should have exclusive jurisdiction to rule on the issue of its validity or existence as an entity.

Factual background to the dispute

3. The dispute arises out of a joint venture agreement (the "**Agreement**") entered into between the parties relating to the provision of administrative services ("**TPA Services**") in respect of the health insurance portfolio of OIC in the UAE.
4. Under the terms of the Agreement, the TPA Services would be provided by the respondent ("**GMGHS**"), an onshore Dubai registered company, with 51% of the profits going to OIC and 49% to be split between a BVI registered company ("**Globemed**") and a Lebanese registered company ("**Kharma Holding**").
5. Significantly, at the time of the Agreement, the ultimate beneficial ownership of GMGHS' share capital was split between Kharma Holding and Globemed 8.95% and 91.05% respectively. It was a term of the Agreement that 51% of GMGHS' share capital would subsequently be transferred to OIC (to be held through a subsidiary company).



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6. However, prior to the TPA Services commencing (or the Share Transfer being effected), OIC sent a letter to GMGHS saying that it no longer wished to proceed with the parties' "joint activities". As a result, GMGHS issued proceedings against OIC for breach of the Agreement on 16 November 2017.

The Application and the Nullity Issue

7. On 2 February 2020, OIC issued an application seeking: (i) permission to re-amend its Defence pursuant to RDC 18.12; and (ii) permission to bring a counter claim pursuant to RDC 21.8(2) (the "Application").
8. By the Re-Amended Defence and Counterclaim (the "RADCC"), OIC pleaded that, as at the date of the Agreement, GMGHS was a nullity under UAE Law as 51% of the business was not held by a UAE citizen or company wholly owned by UAE nationals as required under Article 22 of Federal Law No. 8 of 1984 on Commercial Companies and/or Article 10(1) of the Federal Law No. 2 on Commercial Companies 2015. OIC argued that if GMGHS was a nullity at the date of the Agreement, it followed that the Agreement itself was (and is) null and void (the "Nullity Issue"). OIC both relied on the Nullity Issue in its Re-Amended Defence and sought a declaration on the same, amongst other things, by its Counterclaim.

The Decision of the Court of First Instance

9. The Judge at first instance, Sir Richard Field, dismissed the Application. While he considered that the RADCC did "*albeit by a narrow margin*" meet the merits threshold of a real prospect of success,¹ he considered that this

was not a case suitable for the exercise of discretion in favour of the applicant having regard to, amongst other things, the delay in bringing the application and the overriding objective under RDC 1.6.²

10. Importantly, a primary consideration in the exercise of the first instance Judge's discretion is what he perceived as "*delaying tactics*"³ on the part of OIC. In particular, as the Court of Appeal⁴ noted, Sir Richard Field was critical of OIC's decision (after GMGHS had issued proceedings in the DIFC Court) to bring a claim in the "onshore" Dubai Court (the "**Dubai Court Claim**") in respect of the Nullity Issue before referring the matter to the Joint Judicial Committee (the "JJC") to determine whether there was a conflict of jurisdiction between the DIFC Court proceedings and the Dubai Court proceedings. Indeed, the JJC itself commented that OIC had "*caused delay*" by filing the action in the Dubai Court.⁵

The Decision of the Court of Appeal

11. The Court of Appeal allowed OIC's appeal and granted the Application. Notwithstanding the period of time between the commencement of proceedings and the Application (being over two years⁶), the Court of Appeal found that OIC could not be accused of employing delaying tactics and did not "*blame*" OIC for issuing the Dubai Court Claim and referring the matter to the JJC.⁷ Once that factor was removed from the competing considerations, the Court of Appeal ultimately concluded that the balance of justice favoured allowing the amendment rather than precluding OIC from advancing a defence and counterclaim with a real prospect of success.⁸

¹ Per Justice Martin, at [40].

² Per Justice Martin, at [39].

³ Per Azmi CJ, at [32].

⁴ Per Azmi CJ, at [32]; and per Martin J at [37].

⁵ Per Azmi CJ, at [29].

⁶ Per Azmi CJ, at [1].

⁷ Per Azmi CJ, at [35].

⁸ Per Justice Martin, at [66].

Discussion

12. The first point to note, is that the Court of Appeal cited (without disapproval) the House of Lords decision of *Biogen Inc v Medeva PLC* (1997) RPC 1 and the dicta of Lord Hoffman warning appellate courts from interfering with the case management decisions of first instance judges.⁹ Despite this, the Court of Appeal were satisfied that this was a case management decision which should be overturned primarily because (as discussed above) unlike the first instance Judge (and indeed, the JJC), the Court did not consider the Dubai Court Claim and subsequent JJC referral to be unreasonable. In those circumstances, the case management decision taken at first instance was considered to be “wrong”¹⁰ and therefore it was proper for the Court of Appeal to substitute a different order.
13. Further to this, it is informative that the Court of Appeal paid close attention to English and European conflict of law principles in determining that OIC were not unreasonable in their decision to raise the Nullity Issue before the onshore Dubai Court (where GMGHS was incorporated). Justice Martin quoted passages of *Dicey, Morris & Collins on the Conflict of Laws*, relied on by both parties. OIC noted¹¹, amongst other things, the position under the Recast Brussels Regulation¹² and the Lugano Convention conferring exclusive jurisdiction on the court of the place of a company's incorporation, proceedings which have as their object that company's nullity¹³. GMGHS emphasised the distinction between the question of applicable law (accepting the proposition that the law applicable to the issue of a company's constitution is the law of the place of its

incorporation) and jurisdiction, arguing that a court with jurisdiction to resolve contractual issues can resolve related issues concerning incorporation using the appropriate applicable law.¹⁴ Ultimately however, as Justice Martin observed, the JJC had decided “authoritatively” that the Dubai Court did not have exclusive jurisdiction to determine whether GMGHS was a nullity¹⁵ (a significant ruling in circumstances where, as submitted by OIC, there appeared little prior authority to support GMGHS' proposition to the contrary).¹⁶

14. Finally, it should be noted that this case should give some future comfort to parties seeking what might be considered to be “late” amendments. Despite the fact that proceedings had been afoot for over two years by the time of the Application and that a trial date had been previously listed and vacated (although, significantly, no new trial date had been listed as the date the Application was made), the Court of Appeal were unanimous in allowing the appeal. Absent deliberate delay by OIC, the Court considered allowing the amendment so that the new defence (with real prospects of success against a USD36m claim) could be advanced as the “only reasonable conclusion available”.¹⁷

Conclusion

15. This Judgment provides useful guidance for DIFC practitioners seeking to advise their clients on the merits (or otherwise) of making or opposing a late application to amend a statement of case under RDC 18.2. Moreover, this case provides insight into the DIFC Court of Appeal's approach to complex questions of jurisdiction. While the jurisdictional question in

⁹ Per Azmi CJ, at [31].

¹⁰ Per Justice Martin at [65].

¹¹ Per Justice Martin, at [47].

¹² Regulation (EU) No 1215/2012.

¹³ See Article 24(2) and Article 22(2) respectively.

¹⁴ At [53].

¹⁵ At [59].

¹⁶ At [57].

¹⁷ Justice Martin, at [66].

this matter had been “authoritatively” resolved by the JJC, it is informative that DIFC Court of Appeal were not critical of OIC’s bases for arguing that the Nullity Issue was a matter for the exclusive jurisdiction of the Dubai Court.

Timothy Killen appeared on behalf of the successful appellant, led by *Rupert Reed QC* and instructed by *Al Tamimi & Co.*

The Judgment can be found at:

<https://www.difccourts.ae/rules-decisions/judgments-orders/court-appeal/oman-insurance-company-psc-v-globemed-gulf-healthcare-solutions-llc-2021-difc-ca-009>

Case note by *James Partridge*

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James has a diverse commercial practice and has gained particular experience in cases concerning contract interpretation and shareholder disputes. He has worked on a number of cases before the DIFC Courts, including:

- *Khalifa v SWIFT (Dubai) Limited* – Acting as sole counsel for the claimant in the first whistleblowing claim brought in the DIFC Courts.
- *X v Y* - Acting (led by Patrick Dillon-Malone SC and Timothy Killen) in a multi-million dollar DIFC Court cross-border fraud claim concerning alleged breach of fiduciary duties, trust and contract.
- *X v Y* - Assisting in a high value DIFC Court claim, concerning the proper shareholding of a Dubai company.

Other commercial cases of note include:

- *Davies v Naylor & Anor* [2022] – acting as sole counsel for the defendants in a million pound cross-border fraud claim arising out of a loan made to a Gibraltar based wealth management fund.
- *Al Jaber & Ors v Salfiti & Ors* [2021] – acting (led by Olivier Kalfon and Zac Sammour) for the first, third and fifth defendants in a multi-million pound cross-border fraud claim involving alleged breaches of directors' duties, knowing receipt, dishonest assistance, breaches of trust and conspiracy.
- *O'Toole v Demarca Gaming Limited* [2020] – acting as sole counsel for the defendant in a successful jurisdiction challenge to a breach of contract claim against a Maltese casino.
- *Liberty Partnership Ltd v Tancred* [2020] – acting as sole counsel for the defendant in a longstanding dispute concerning alleged breaches of a share purchase agreement.

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