Emirates NBD Bank P.J.S.C. v Rashed Abdulaziz Almakhawi

Jurisdiction:	Jersey
Judge:	David Michael Cadin
Judgment Date:	05 December 2023
Neutral Citation:	[2023] JRC 243
Court:	Royal Court

Text

Between
Emirates NBD Bank P.J.S.C.
Plaintiff
and
Rashed Abdulaziz Almakhawi
First Defendant
HSBC Trustee (C.I.) Limited
Second Defendant
HSBC Private Banking Nominee 3 (Jersey) Limited
Third Defendant
Vojin Investments Limited
Fourth Defendant
Redington Holdings Limited
Fifth Defendant

[2023]JRC243

Before:

Advocate David Michael Cadin, Master of the Royal Court.

ROYAL COURT

(Samedi)

Summary judgment

Authorities

Hard Rock Ltd v HRCKY Limited [2018] JCA 152.

JTC v Fanning [2023] JRC 122.

Sainsbury's Supermarkets Ltd v Condek Holdings Ltd (formerly Condek Ltd) [2014] EWHC 2016 (TCC).

Henderson v Henderson 3 Hare 100.

Dubai Islamic Bank v Ridley [2016] JRC 102.

Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46, [2014] A.C. 160.

Dicey, Morris & Collins (16th Edition).

Strategic Technologies Pte Ltd v Procurement Bureau of China Ministry of National Defence [2020] EWCA Civ 1604.

Yokos Capital S.A.R.L v OJSC Rosneft Oil Company [2012] EWCA Civ 855.

Pemberton v Hughes [1899] 1 Ch. 781, 790 (CA)

Advocate M Maletroit **for the Plaintiff**.

Advocate D Steenson **for the First Defendant, not appearing**.

Advocate A Kistler **for the Second to Fifth Defendants, not appearing**.

THE MASTER:

Introduction

1 On 29 November 2023, for reasons which were to follow, I ordered summary judgment against the Defendant in relation to the first limb of his Answer, namely his objection to recognition of the Dubai Judgment and ordered him to pay the costs of the application on an indemnity basis. This judgment sets out my reasons for so doing.

Background

2 The Plaintiff is a bank registered in Dubai, United Arab Emirates (the “Bank”).

3 The Defendant, Dr Almakhawi, with others, guaranteed substantial loans provided by the Bank to an Emirati business, System Construct LLC, in which he had an interest. Those loans were provided pursuant to a facility agreement dated January 2010 which was subsequently extended and amended (the “Facility Agreement”). Under the terms of the Facility Agreement, the Bank provided various credit facilities to System Construct LLC.

4 System Construct LLC went into insolvent liquidation on 28 September 2014 having suffered substantial losses.

5 On 19 October 2015, the Bank brought proceedings in the Dubai Court of First Instance seeking repayment of the amount outstanding under the Facility Agreement and payment of an equivalent sum from the guarantors under their personal guarantees. On 16 January 2017, the Dubai Court of First Instance gave judgment in favour of the Bank. System Construct LLC and the guarantors appealed to the Dubai Court of Appeal and subsequently to the Dubai Court of Cassation, Dubai's highest court. On 7 July 2019, the Court of Cassation entered judgment ordering System Construct LLC, Dr Almakhawi and the other guarantors to pay the Bank AED 211,299,040.31 (approximately £46 million at current exchange rates) plus interest (“the Dubai Judgment”).

6 In November 2021, the Bank issued an Order of Justice in Jersey (the “Jersey Proceedings”) against Dr Almakhawi and others seeking firstly, to enforce the Dubai Judgment and secondly, to do so against assets belonging to Jersey trusts which, it alleges, were placed into those trusts by Dr Almakhawi in order to defeat creditors.

7 Dr Almakhawi denies that the Bank is entitled to enforce the Dubai Judgment on the basis that, as set out in his Answer, it is:

> ***“16.…impeachable and/or unenforceable, in whole or alternatively in part, because (i) [it was] were obtained in breach of natural justice and/or (ii) the First Defendant did not have a fair hearing in the Dubai Courts by an independent and impartial tribunal within the meaning of Article 6 paragraph 1 of the European Convention on Human Rights and/or (iii) their enforcement would be contrary to public policy for the following reasons (on which the First Defendant relies individually, or alternatively cumulatively):…”***

8 In support of this averment, the Answer sets out in paragraphs 16.1 to 16.6 particulars of various complaints concerning the banking expert appointed by the Dubai Courts and the process adopted by those courts.

9 The terms of paragraph 16 of Dr Almakhawi's Answer in the Jersey Proceedings are almost identical to paragraph 13 of his pleaded Defence in proceedings brought by the Bank against him in England to enforce the Dubai Judgment against English-situate assets which the Bank alleged had been transferred away to defeat creditors (the “English Proceedings”). The only substantive differences are:

(i) a refence to “Jersey Law” at paragraph 16.6 (as opposed to a reference to “English Law” in paragraph 13.6 of his Defence to the English Proceedings); and

(ii) additional grounds added to his Defence in the English Proceedings by way of a subsequent amendment.

10 The English proceedings were heard between 27 February and 2 March 2023. For reasons set out in a judgment delivered in May 2023, the Court rejected Dr Almakhawi's complaints about the Dubai Judgment, declared that the Dubai Judgment was enforceable in England and Wales and entered a monetary judgment against him.

11 The Bank now seeks summary judgment against Dr Almakhawi in the Jersey Proceedings on the first issue only, namely the enforcement of the Dubai Judgment.

12 In support of that application, the Bank has filed five affidavits from Mr Harris, an English Solicitor employed by the Bank's Jersey advocates, together with a skeleton argument. Dr Almakhawi's Jersey Advocates wrote to the Court stating that they were without instructions and would not be appearing. Dr Almakhawi himself did not appear. Nor did he file any evidence specifically in response to the application. However, he has previously filed two witness statements together with an affidavit from his lawyer, Mr Khalf, and I have taken those documents into account as part of the evidence that can reasonably be expected to be available at trial.

The English Proceedings

13 The English Proceedings were between the Bank, Dr Almakhawi (as First Defendant) and his son (as Second Defendant). Dr Almakhawi gave evidence in those proceedings and was represented by Counsel. The issues were recorded in the judgment (“the English Judgment”) in the following terms:

> ***“10. First, as against Mr Almakhawi Sr, the Bank seeks to enforce the Dubai Judgment in this jurisdiction. There is no treaty providing for the recognition and enforcement of judgments between the United Kingdom and the UAE, and so the Bank seeks to enforce the judgment by way of a common law action on the judgment*** .
>
> ***11. Secondly, the Bank seeks relief against both Defendants in respect of***

transfers of property and money made by Mr Almakhawi Sr to Mr Almakhawi Jr in 2019, specifically in respect of:

i) A property at 193 Warren House, Beckford Close, London W14 8TR ("the Warren House Property") transferred to Mr Almakhawi Jr on 8 July 2019; and

ii) Sums of £200,000 and £2,336,873.28 transferred to Mr Almakhawi Jr on, respectively, 16 August 2019 and 18 October 2019 ("the Money Transfers"), still held intact by him in a UK bank account .

12. In relation to these transfers, the Bank seeks either declarations that Mr Almakhawi Sr retained beneficial title to the relevant assets and that they are held by Mr Almakhawi Jr on resulting trust, or alternatively relief under section 423 of the Insolvency Act 1986 ("the 1986 Act") on the ground that the transfers were transactions defrauding creditors within the meaning of the section .

13. As set out in more detail below, in relation to the issue of enforcement of the Dubai Judgment, Mr Almakhawi Sr contends that the judgment was obtained as a result of a breach of natural justice concerning the terms of the two reports submitted by the court- appointed expert in Dubai and, as such, the judgment falls within a recognised English law exception to enforcement."

14 As to the question of enforcement of the Dubai Judgment, the Court noted that:

"21. There was no dispute between the parties as to the English law principles relating to the enforceability of foreign judgments .

22. The basic principle is set out in Dicey, Morris & Collins on the Conflict of Laws (16th ed.), Rule 46 at paragraph 14R-024. As there stated, subject to certain exceptions:

"… a foreign judgment in personam given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 47 and 48, and which is not impeachable under any of Rules 52 to 55, may be enforced by a claim or counterclaim for the amount due under it if the judgment is (a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and (b) final and conclusive, but not otherwise."

23. There was no dispute that the Dubai courts had jurisdiction to give the judgments they did or that the requirements set out in sub-paragraphs (a) and (b) of Rule 55 are satisfied. The issue between the parties concerned the exceptions to enforcement, specifically the exception recognised in Dicey, Morris & Collins (op. cit.), Rule 55 at paragraph 14R—158 that:

"A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice."

15 In determining the claim, the Court summarised Dr Almakhawi's case on enforcement in the following terms:

"26. Mr Almakhawi Sr advanced a variety of points in paragraph 13 of his Amended Defence as to why, he said, the Dubai Judgment had been obtained in breach of natural justice (or, insofar as different, as to why the judgment had been obtained in breach of Article 6 of the European Convention on Human Rights or its enforcement would be contrary to English public policy) .

27. By the time Mr Lewis, who appeared for both Defendants at trial, lodged his skeleton argument, however, these various points had been reduced to three; and, as reflected in a speaking note Mr Lewis handed up for use in his oral closing submissions, by the conclusion of the trial these three points had been reduced to one. As explained in Mr Lewis' speaking note:

"The only issue relied upon by the Defendants is the reliance placed by the Dubai Courts on the two expert reports dated 18 September 2016 (the 'First Report') and 20 November 2016 (the 'Second Report") which each referred to the superseded Law No. 8 of 1974 when they should have be[en] prepared in accordance with the Law No. 7 of 2012."

28. The essence of the point advanced was this:

i) The banking expert appointed by the Dubai Court of First Instance had (as was common ground) referred in his two reports to an outdated and superseded Dubai law regulating the use of expert evidence;

ii) This mis-reference — regardless, as Mr Lewis made clear, of whether there was anything wrong with the substance of the expert's reports, and regardless of whether the expert had, as a matter of fact, complied with his duties under the current regulatory law — meant that the two reports were "null and void" as a matter of Dubai law; and

iii) For the Dubai courts to rely, and to base their judgments, upon expert reports (as they obviously had) which were null and void, meant that the judicial process in Dubai was substantially unjust."

16 This latter ground was introduced into the English Proceedings by amendment to add paragraph 13.2A in the Defence. It is not an amendment which has been replicated in the Jersey Proceedings. The Court considered this issue at length and held that:

"104. The natural justice exception in Dicey, Morris & Collins (op. cit.), Rule

55 is not made out. I will, therefore, declare that the Dubai Judgement is enforceable in England and Wales and enter a monetary judgment against Mr Almakhawi Sr accordingly."

17 Dr Almakhawi has not appealed that decision.

Summary Judgment

18 The law on summary judgment is well known and was succinctly encapsulated by McNeill JA in *Hard Rock Ltd v HRCKY Limited* [2018] JCA 152 in the following terms:

> ***"In essence the principles are those set out by Lewison J in*** *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) ***at paragraph 15:-***
>
> ***"(i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success*** : *Swain v Hillman* [2001] 2 All ER 91;
>
> ***(ii) A "realistic" claim is one that carries some degree of conviction.*** This means a claim that is more than merely arguable : *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 ***at [8];***
>
> ***(iii) In reaching its conclusion the court must not conduct a "mini—trial"*** : *Swain v Hillman*;
>
> ***(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court.*** In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents : *ED & F Man Liquid Products v Patel* ***at [10];***
>
> ***(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application of a summary judgment, but also the evidence that can reasonably be expected to be available at trial*** : *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> ***(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment.*** Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case : *Doncaster Pharmaceuticals Group Limited v Bolton Pharmaceutical Co 100 Limited* [2007] FSR 63;

> ***(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.*** The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form or documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction : *ICI Chemicals & Polymers Limited v TTE Training Limited* [2007] EWCA Civ 725."

19 Determination of an application for summary judgment has to take place on the basis of evidence, with the burden of proof being on the applicant. However, as I noted in *JTC v Fanning* [2023] JRC 122 (following *Sainsbury's Supermarkets Ltd v Condek Holdings Ltd (formerly Condek Ltd)* [2014] EWHC 2016 (TCC)) " ***If the applicant adduces credible evidence in support of the application, the respondent comes under an evidential burden of proving some real prospect of success or some other reason for having a trial***."

Discussion

20 The Bank submits that:

> (i) the grounds set out in his Answer and relied upon by Dr Almakhawi in the Jersey Proceedings were also included in his Defence in the English Proceedings but in those proceedings, all of the grounds common to both proceedings were ultimately abandoned and not pursued by Dr Almakhawi;
>
> (ii) the only ground actually advanced in the English Proceedings as to why the Dubai Judgment was " *opposed to natural justice*" has not been pleaded in Jersey but having heard evidence, the English court determined that the Dubai Judgment had not been obtained in breach of natural justice and could be enforced; implicit in that decision is a determination that the Dubai Judgment does not offend public policy;
>
> (iii) given his litigation conduct in the English Proceedings Dr Almakhawi has no realistic defence to enforcement of the Dubai Judgment in Jersey on the basis of:
>
> (a) *res judicata*;

(b) *Henderson* estoppel (*Henderson v Henderson* 3 Hare 100) and/or alternatively an abuse of process; and

(c) the available evidence.

Res Judicata

21 In *Dubai Islamic Bank v Ridley* [2016] JRC 102 at paragraph 108, Master Thompson set out and adopted Sumption LJ's comprehensive definitions of *res judicata*, cause of action estoppel, issue estoppel and abuse of process (from *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2013] UKSC 46, [2014] A.C. 160). For the purposes of this judgment, the relevant part is as follows:

> ***"17 Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins.*** As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. ***Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment.*** Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 ***(Parke B).*** At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier ***occasion and is binding on the parties***: *Duchess of Kingston's* ***Case*** (1776) 20 State Tr 355. ***"Issue estoppel" was the expression devised to describe this principle by Higgins J in*** *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 ***and adopted by Diplock LJ in*** *Thoday v Thoday* [1964] P 181, 197–198. ***Fifth, there is the principle first formulated by Wigram V-C in*** *Henderson v Henderson* (1843) 3 Hare 100, 115, ***which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.*** Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying

all of the above principles with the possible exception of the doctrine of merger.

18 It is only in relatively recent times that the courts have endeavoured to impose some coherent scheme on these disparate areas of law. The starting point is the statement of principle of Wigram V-C in *Henderson v Henderson* 3 Hare 100, 115… ***at pp 114–116:***

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time … Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

19 Wigram V-C's statement of the law is now justly celebrated. The principle which he articulated is probably the commonest form of res judicata to come before the English courts…

22 As Master Thompson found, these principles represent Jersey Law. They are applicable in Jersey to decisions of both Jersey, and foreign (i.e. non-Jersey), courts and are reflected in Rule 51 of Dicey, Morris & Collins (16 th Edition) ("Dicey, Morris & Collins") which provides that:

"A foreign judgment which is final and conclusive on the merits and not impeachable under any of Rules 52 to 55 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either (1) of fact; or (2) of law."

23 There are, however, limits to this broad principle and the learned editors of Dicey, Morris & Collins state at paragraph 14–118 (referring to Rule 51) that:

14–118 It is unlikely, however, that "judgment" in this sense extends to a decision of a foreign court that the judgment of a court of a third country is entitled to be enforced under the law of the foreign country, even where the proceedings in the foreign court were contested by parties who

> ***submitted to its jurisdiction in relation to this issue.*** The civil law principle that exequatur sur exequatur ne vaut is sometimes used to help explain why a judgment from the third State is not converted into an enforceable foreign judgment by virtue of its recognition or endorsement by another court. The principle is sound for at least three reasons: the effect of the foreign proceedings will often only be to declare the third country judgment to be enforceable or executable within the territory of the foreign court, an order which by its very terms can have no effect in England; the foreign judgment will not usually be on the merits of the claim; and because of the confusion liable to result if both the judgment of the third country and the foreign (enforcement) judgment were to be separately enforceable in England. In addition, it was held in *Yukos Capital Sarl v OJC Rosneft Oil Co (No.2)* ***that a foreign judgment which refuses to recognise a judgment from a third State on the basis of public policy should not give rise to an estoppel, as the public policy of each State may be different and English public policy is a matter for determination by the English courts.*** However, there is no reason why issue estoppel may not, in an appropriate case, arise from other rulings made by the foreign court in such cases. (emphasis added)

24 For the purposes of the application before me, I read that commentary with the reference to the *"decision of the foreign court"* being a reference to the English Judgment and that to the " *the third country judgment*", as being to the Dubai Judgment. According to the editors of Dicey, Morris & Collins, the English Judgment may not give rise to the estoppels for which the Bank contends in Jersey.

25 Determining the precise estoppels which flow from the English Judgment is not, in my view, a short point of law which I can necessarily grasp on an application for summary judgment, particularly given that in the absence of Dr Almakhawi and/or his advocate, I have not had the benefit of adversarial argument:

26 Firstly, this appears to me to be somewhat nuanced, and still evolving, area of law as is illustrated by the English Court of Appeal's relatively-recent decision in *Strategic Technologies Pte Ltd v Procurement Bureau of China Ministry of National Defence* [2020] EWCA Civ 1604, when it allowed an appeal against a decision of Carr J in the following terms:

> ***"A claimant obtains a money judgment in the courts of a Commonwealth state which it then seeks to enforce by a common law action on the judgment in a second Commonwealth state.*** The issue arising on this appeal is whether the judgment thus obtained in the second Commonwealth state ("a judgment on a judgment") can be registered for enforcement here…That issue has never been decided, although it has been debated in academic writings, with a consensus that the answer should be No. In this case, however, Carr J held that the answer is Yes."

27 Secondly, the challenges are compounded by the fact that Dr Almakhawi asserts that enforcement of the Dubai Judgment in Jersey would be contrary to public policy and/or opposed to natural justice:

(i) In *Yokos Capital S.A.R.L v OJSC Rosneft Oil Company* [2012] EWCA Civ 855, the claimant applied in England, to enforce a Russian arbitral award. That arbitral award had subsequently been set aside by a Russian court. The claimant had previously sought to enforce the award in the Netherlands and the Amsterdam Court of Appeal had held that the Russian court's decision was partial and dependent. In England, the claimant raised a plea of issue estoppel to the effect that the defendant was estopped by the Amsterdam decision from saying that the Russian court's decision was not partial and dependent. The question on appeal was whether the issue to be decided by the English Court was the same as that decided by the Dutch Court. Rix LJ held that:

> ***"151. The difficulty with [the claimant's] submission is that "public order" or "public policy" is inevitably different in each country. The standards by which any particular country resolves the question whether the courts of another country are "partial and dependent" may vary considerably and it is also a matter of high policy to determine the circumstances in which this country should recognise the judgments of a state where the interests of that very state are at stake…It is our own public order which defines the framework of any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court according to that court's notions of what is acceptable or otherwise according to its law."***

(ii) Rix LJ did not expressly determine whether an issue estoppel in relation to public policy could arise if the foreign court had applied English principles. However, he stated (in paragraph 155) that " ***the English court will make up its own mind according to its own concept of public order not that of some other state***" and repeated a similar phrase in the following paragraph which might tend to suggest that such considerations are reserved for the English courts alone (and this is the view of the editors of Dicey, Morris & Collins in paragraph 14–118 set out above).

(iii) Similarly, the natural justice exception to enforcement identified in Rule 55 of Dicey, Morris & Collins (which was the only exception relied on in the English Proceedings, albeit on grounds not relied upon in Jersey) was expressed by Lindley LJ in *Pemberton v Hughes* [1899] 1 Ch. 781, 790 (CA) as concerning a judgment which offends " ***English views of substantial justice***". In my judgment, that phrase is highly suggestive of the fact that the reasoning in *Yukos* applies equally to decisions in relation to natural justice such that a determination on natural justice is one for Jersey law and/or the Royal Court.

28 Advocate Maletroit for the Bank submitted that, for the purposes of determining whether or not the Dubai Judgment should be recognised, there is no difference between England and Jersey for the purposes of public policy and/or natural justice. Given Jersey's constitutional position, there is much force in that submission. However, no evidence has been adduced on this issue and I have not had the benefit of adversarial argument such that it would not be appropriate for me to determine it. In the absence of such a determination, I cannot rule out the possibility that there may be a tangible divergence between the jurisdictions on some relevant issue.

29 On an application for summary judgment the Court should only deal with matters that are plain and obvious. In my judgment, the precise estoppels which might arise in Jersey from the English Judgment are not plain and obvious and I decline to find that Dr Almakhawi has no realistic prospect of success as a consequence of such estoppels.

Henderson estoppel and/or alternatively an abuse of process

30 The Bank's alternative case is that the objections raised by Dr Almakhawi to enforcement of the Dubai Judgment in Jersey are subject to a *Henderson* estoppel and/or are an abuse of process given that he could, and should, have raised them in the English Proceedings and chose not to.

31 In my judgment, this submission is answered by the reasoning in *Yukos*. If consideration of whether the Dubai Judgment offended Jersey's public policy and/or Jersey's view of natural justice have to be determined according to Jersey law and/or the Royal Court, and not the High Court of England and Wales, Dr Almakhawi cannot be in a worse position if he chose not to argue them, than if he had in fact argued them and lost.

32 Given that I have found that the precise estoppels which might arise in Jersey from the English Judgment are not plain and obvious, similarly it is not plain and obvious that any Henderson estoppel arises, and I decline to find that Dr Almakhawi has no realistic prospect of success on that basis.

33 Similarly, whilst Dr Almakhawi's litigation conduct in the English Proceedings and in the Jersey Proceedings is wholly inconsistent and redolent of an abuse of process, it was (until this application) theoretically a tenable position to the extent that questions of public policy and natural justice have to be determined according to Jersey law and/or are reserved for the Royal Court. Having chosen not to file any evidence in support of his position, it is no longer tenable and but for my decision in relation to the evidence, I would have struck out paragraph 16 of Dr Almakhawi's Answer as being an abuse of process.

No Realistic Defence on the Evidence

34 The Bank submits that given what occurred in the English Proceedings, the Court can be satisfied that there is no realistic defence to enforcement and that further or alternatively, the individual allegations have no realistic prospect of success.

35 Dr Almakhawi was represented by Counsel in the English Proceedings. The issue in those proceedings in relation to enforcement was almost identical to that raised in the Jersey Proceedings and was contested. The trial lasted 4 days and Dr Almakhawi gave evidence. In my judgment, the evidence adduced for the purposes of that trial represents the totality of the evidence that can reasonably be expected to be available at trial of this issue in Jersey.

36 According to the English Judgment, having pleaded the case in full at paragraph 13 of the Amended Defence, Dr Almakhawi's counsel reduced the complaints to three points in his Skeleton Argument, and by the time of closing had reduced them to one, namely that the banking expert had referred to a superseded Law. The Bank submits that Dr Almakhawi abandoned all of the other grounds of his defence because they had no realistic prospect of success on the basis of the evidence available to him. In my judgment, this is a credible submission; in a contested application for recognition of a substantial foreign judgment, had any of the other grounds pleaded in paragraph 13 of Dr Almakhawi's Amended Defence had a realistic prospect of success, they would have been pursued. It is a submission which has not been answered by Dr Almakhawi.

37 The issue in the English Proceedings was different to that in the Jersey Proceedings insofar as it is Jersey's public policy and concept of natural justice that must be considered. As I have recognised above, there are likely to be significant similarities between the two, albeit that I cannot rule out the possibility of a divergence on some point. However, no evidence whatsoever has been adduced by Dr Almakhawi of any matter which might offend issues of public policy or natural justice that are unique to Jersey or might be different to English notions. In my judgment, I can therefore take the outcome of the English Proceedings on this issue to be the likely outcome of the Jersey proceedings on the similar issue.

38 In my judgment, Dr Almakhawi has failed to discharge the evidential burden on him to show that notwithstanding his litigation conduct in the English Proceedings, the matters pleaded in paragraph 16 of his Answer have any realistic prospect of success.

39 Consideration of his prospects of success does not stop with his litigation conduct in the English Proceedings. In support of its application, the Bank has adduced, amongst other things, the reports of the banking expert and the judgments from the Dubai Court of First Instance and the Court of Cassation. Dr Almakhawi has not adduced any evidence to support his averments about the appointment and conduct of the banking expert in Dubai and/or the process adopted by the Dubai courts.

40 In relation to those individual complaints:

(i) paragraphs 16.1 and 16.3 of the Answer allege that the banking expert in Dubai was given an unlawful mandate and was not independent and/or impartial. On the basis of the material before me, these issues do not appear to have been raised before any of the Dubai courts and nor were any of the courts in Dubai troubled by any concerns, actual or perceived, about the expert's mandate or impartiality. Accordingly, I find that this aspect of Dr Almakhawi's defence has no realistic prospect of success.

(ii) paragraph 16.2 asserts that the banking expert's reports were relied upon "extensively and uncritically" by the Dubai Courts. In my judgment, and in the absence of any evidence to the contrary, that allegation is patently incorrect in that:

(a) the banking expert produced an initial report in September 2016 which Dr Almakhawi considered was flawed; Dr Almakhawi made a successful application to the Court for the matter to be referred back to the expert for a further report;

(b) once that further report had been prepared, the matter came back for determination and the Dubai Court of First Instance disagreed with the expert's conclusions and in fact, found in favour of Dr Almakhawi, to the extent that it excluded unpaid guarantees from the amount that it found was owing to the Bank;

(c) in determining the appeal, the Court of Cassation held that:

> ***"Such is the case, whereas it is evident from the original and supplementary reports produced by the expert, with which the Court is satisfied due to being based on plausible grounds substantiated by the papers, that the Second Respondent Company benefited from the guarantees by entering into tenders and having contracting projects awarded"*** (emphasis added)

(iii) paragraphs 16.4 and 16.5 allege that neither the banking expert, nor the Dubai Courts conducted a proper or diligent examination of the nature, existence, and quantum of the alleged liabilities of System Construct and/or (by extension) Dr Almakhawi to the Bank, nor gave reasons for their findings. In my judgment, and in the absence of any evidence to the contrary, these allegations have no realistic prospect of success in that:

(a) the expert's reports record that:

(1) he corresponded with, and met, the parties (and provided minutes of those meetings);

(2) he obtained copies of the relevant requests for guarantees, facility letters, performance guarantees, bank statements and other documents;

(3) he viewed the Bank's paper and electronic records;

(4) he verified receipts and credits, together with each of the performance guarantees, and attached those records to his report;

(5) the expert's reports set out his conclusions and the rationale for those conclusions.

(b) the expert reports and the judgments of the Dubai Courts are cogent, detailed and compelling.

(iv) paragraph 16.6 alleges that the banking expert and the Dubai Courts failed to respect the separate legal personalities of System Construct LLC and System Construct Abu Dhabi and/or because the claim against Dr Almakhawi for liabilities of System Construct Abu Dhabi was of a nature not known to (or permitted by) Jersey Law:

(1) on this point, when determining an application by Dr Almakhawi for specific discovery, I found that:

"37(v) the expert considered and reported on, Dr Almakhawi's contentions that System Construct LLC was not liable for System Construct Abu Dhabi;

37(vi) the Court of Cassation reached a determination on the basis of the evidence before it, rejected Dr Almakhawi's contentions that System Construct LLC was not liable for System Construct Abu Dhabi, and held that the payment made under the ADNOC Guarantee was a liability of System Construct LLC and therefore of Dr Almakhawi"

(2) in my judgment, this averment has no realistic prospect of success.

41 For the reasons set out above, I find that paragraph 16 of Dr Almakhawi's Answer has no realistic prospect of success and I grant summary judgment to the Plaintiff in respect thereof. It therefore follows that the Dubai Judgment will be recognised and enforced in Jersey. This claim will therefore proceed to trial (currently scheduled for January 2024) in relation to the Pauline claim.

Costs

42 In terms of the basis for awarding indemnity costs, the law is clear:

"…in order for an indemnity award to be made there must be something to take the case out of the ordinary and a degree of unreasonableness (of which abuse of process is but an example) but recognizing that there is an "infinite variety" of circumstances where it may be right and proper for the court to make such an award." (*C v PS* [2010] JLR 645, ***paragraph 12).***"

43 In this case:

(i) Dr Almakhawi's Answer in the Jersey Proceedings was filed on 1 March 2022;

(ii) the grounds common to both sets of proceedings were abandoned entirely by the conclusion of the English Proceedings, on 2 March 2023, yet Dr Almakhawi persisted with those grounds in Jersey;

(iii) in the course of a hearing in Jersey in August 2023, Dr Almakhawi's Advocate confirmed to the Court that “all issues in the pleadings remain live for trial”;

(iv) notwithstanding such confirmation, he chose not to provide any evidence or submissions for the purposes of this application;

(v) whilst his stance might have previously been theoretically tenable, it was wholly undermined by his failure to engage and to adduce any evidence, without explanation.

44 In such circumstances, I had no hesitation in concluding that there was no proper basis for the averments made in paragraph 16 of his Answer and that Dr Almakhawi's litigation conduct on this aspect of enforcement was unreasonable such that an award of costs on an indemnity basis was justified.