



ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

COURT OF FIRST INSTANCE
CIVIL DIVISION

BETWEEN

ROSEWOOD HOTEL ABU DHABI LLC
CLAIMANT

AND

SKELMORE HOSPITALITY GROUP LTD.
DEFENDANT

JUDGMENT ON DEFENDANT'S JOINDER OF PARTY APPLICATION



Neutral Citation:	[2019] ADGMCFI 0003
Before:	His Honour Justice Stone SBS QC
Decision Date:	27 May 2019
Decision:	The application to join Mubadala Development Company as Second Defendant to these proceedings be dismissed.
Hearing Date(s):	No hearing.
Date of Orders:	27 May 2019
Catchwords:	Application to join new party; lease; justification of joinder; burden of joinder; failure to identify bases of claim and remedy sought against proposed new party in the event of joinder.
Legislation Cited:	ADGM Court Procedure Rules 2016
Case Number:	ADGMCFI-2019-003
Parties and Representation:	Freshfields Bruckhaus Deringer for the Claimant/ Respondent to the application LPA (Middle East) Limited for the Defendant/ Applicant to the application

JUDGMENT:

The Application

1. On 21 April 2019, the Defendant in this action (“Skelmore”) filed notice of application to join Mubadala Investment Company (“MIC”) as Second Defendant to these proceedings.
2. Skelmore also sought an Order that leave be given to file an amended Defence within 28 days of joinder, and that costs be in the cause.
3. The application was backed by witness statements of like date from Emain Kadrie, Chairman and founder of Skelmore, and from Justin Mostert, Chief Financial Officer of Skelmore.
4. By Order dated 24 April 2019, the Claimant (“Rosewood”) was permitted to file and serve its response thereto by 8 May 2019, with Skelmore to file and serve any reply by 15 May 2019.
5. Rosewood’s opposition to the joinder application was supported by a witness statement of Abdulla Mohammed Sharafi, a Senior Associate, UAE Real Estate, of MIC; this was accompanied by a submission made on behalf of Rosewood.



6. In turn, Skelmore joined issue with this response through a submission filed on its behalf. This document affirmed the application as mounted, *save that* it sought to amend the identity of the corporate party the subject of the joinder application to Mubadala Development Company (“MDC”), and *not* MIC, the company initially the subject of the application notice.

Factual Context

7. This dispute arises out of a lease dated 29 June 2016, whereby Rosewood let certain commercial premises at the Rosewood Hotel, Al Maryah Island, to Skelmore for a five year term.
8. In its current form this is an action on that lease, the allegation of the lessor, Rosewood, being that the lessee, Skelmore, has failed to pay certain sums of money now said to be due and owing under the lease terms. For immediate purposes the details of the claim do not greatly matter; suffice to say that the Amended Claim Form, filed on 11 March 2019, encompasses six separate heads of claim, with the total sum claimed amounting to in or about US\$1.362 million, together with contractual interest and costs.
9. By its Defence, filed on 21 April 2019, Skelmore disputed liability to pay any sum, its defences as pleaded amounting in substance to putting Rosewood to strict proof of its claims, coupled with pleas of lack of consideration and waiver, a denial of the claim for liquidated damages as a genuine pre-estimate of loss, and an assertion of Rosewood’s failure to mitigate its alleged loss.
10. Paragraph 14 of the Defence further states: “The Defendant reserves the right to amend and complete its Defence, should its Application to join Mubadala as party be approved.”
11. The Claimant’s Reply, filed on 12 May 2019, asserts, *inter alia*, that this is “a simple claim for unpaid dues under a lease agreement” and that the unparticularised Defence “fails to advance any credible defence to the Claimant’s claims.”

Witness Statements

12. The evidence in support of the application, in the form of witness statements from Emain Kadrie and Justin Mostert, focuses on the negotiations for the lease of the Rosewood premises, which it is said were conducted by representatives of Mubadala, albeit at the time of making these witness statements the Mubadala entity sought to be joined to this action was identified as “Mubadala Investment Company (formerly Mubadala Development Company)”.
13. Paragraphs 7 and 8 of the statement of Mr Kadrie states that all the negotiations and meetings with which he was involved or attended leading up to signing the lease “were conducted solely by representatives of Mubadala, without the presence of any representative of the Claimant”, and further that after signature of the lease, Mubadala had organised and attended meetings and had entered into correspondence with Skelmore regarding matters concerning the lease, and latterly matters arising from the current dispute.



14. This evidence is replicated in the witness statement of Mr Mostert, who states: “I consider that Mubadala acted throughout as the Defendant’s principal interlocutor in respect of the Lease. The Defendant will rely on correspondence and the matters discussed at meetings with Mubadala as part of its Defence in these proceedings. It is therefore of paramount importance to the Defendant that Mubadala be joined as a party.”
15. The statement of Mr Abdulla Mohammed Sharafi, made in support of Rosewood in opposition to the application, notes the inaccuracy in Skelmore’s application in terms of the incorrect identification of MIC as being “formerly MDC”, and avers that MDC is a wholly-owned subsidiary of MIC, which is said to be divided into four commercial platforms, of which the entity Mubadala Real Estate and Infrastructure (“MREI”) is a business unit falling within the Alternative Investments and Infrastructure Platform, and which contains its hospitality asset management team.
16. Mr Sharafi identifies three particular individuals involved in the negotiation of the lease on behalf of Rosewood, two of which, Mr Webster and Mr Al Nowais, respectively were officers of MREI and Directors of Rosewood, whilst a third, Mr Romaniello, was Managing Director of Rosewood; he states that all communications they had with Skelmore were made in their capacity as Rosewood officers or representatives. He also says that the drafting of the lease in question, and follow-up actions in respect of the alleged breaches thereunder, were performed by an officer of the Legal Governance Unit which supported the MDC portfolio companies, and further states that certain other directors and employees of Rosewood were seized with tasks relating to the administration of the executed lease.

Decision

17. This joinder application is contested on behalf of Rosewood, which filed a legal submission dated 8 May 2019. In addition to the contention that the Defendant was seeking to join the wrong Mubadala entity to these proceedings, the broad thrust of the argument advanced is that Skelmore clearly had failed to justify the joinder as now sought.
18. The submission in reply on behalf of Skelmore accepts that in light of the Rosewood witness statement that the proper defendant whom it is sought to join is Mubadala Development Corporation (“MDC”)– and specifically requests that the Court recognise this fact – but nevertheless maintains the argument that the personnel involved in the lease negotiations with Skelmore were acting on behalf of Mubadala, and thus the assertion that in so acting these gentlemen were wearing solely Rosewood hats, and had acted throughout in their capacity as Rosewood Board members is, in the Defendant’s view “neither logically nor legally demonstrable”.
19. The Defendant argues that, as the Claimant’s ultimate parent, it is not unreasonable to assume that Mubadala was taking the decisions, that this was what the Defendant had understood and had relied upon, and that “on this basis, joining MDC as a party to these proceedings is of paramount importance to the Defendant’s case”.



20. The Court has considered these legal submissions, and has reflected upon the somewhat unusual circumstances of this application, wherein the Defendant seeks to join *qua* additional defendant the Claimant's parent company.
21. In terms of basic principle there is no dispute that Rule 56 of the ADGM Court Procedure Rules is engaged in this application: Rule 56(1) states that where a claim form has been served, the Court's permission is required to remove, add or substitute a party, and that an application for such permission under subparagraph (1) may be made by an existing party or by a person who wishes to become a party. Nor is there any dispute that in dealing with such an application the Court has an unfettered discretion whether to grant such permission.
22. It also is not in dispute that the burden of demonstrating why such joinder is necessary and/or desirable lies upon the applicant seeking this relief, and it is clear that the discharge, or otherwise, of such burden must be depend upon the cogency of the evidence placed before the Court.
23. As matters have developed, there are two elements to this application.
24. First, the issue of the amendment of the party sought to be joined. Unsurprisingly, the Claimant contends that in the circumstances there can be no question that MIC should not be joined since, on the uncontradicted evidence, MIC was not created until 21 January 2017 as a holding company of MDC and of International Petroleum Investment Company, this event post-dating the creation of the lease the alleged breaches of which form the substance of this dispute.
25. This date of incorporation is not disputed by the applicant, and in light of this fact (said to be unknown to the applicant at the time of making the application), the request now is made by Skelmore to amend its original application by the substitution of MDC for MIC.
26. Were this matter not to be decided on the papers, it may have been that the Claimant – which could only deal with the application in the form in which it initially appeared – would not have made objection to such an amendment. In any event, whatever may have been the position, the Court is willing to grant the amendment sought, and to consider this application as if at the outset MDC had been the entity sought to be joined.
27. The second element at play is whether, on the amended basis that MDC is the entity sought to be joined, there is sufficient material before the Court upon which the Court is able properly to exercise its discretion in the applicant's favour, and thus to order joinder in the form as now sought.
28. Skelmore's repeated contention that joining MDC as a party to the current action is of "paramount importance to the Defendant's case begs the highly significant question of precisely what is the nature and extent of Skelmore's case against MDC.
29. The Defence as filed is in entirely general terms, and is of no assistance in this regard, notwithstanding express reservation of a right to amend should the current application be approved.



30. Somewhat surprisingly no draft amended Defence is exhibited to this application, so that the Court is unable to identify the allegation (or allegations) which Skelmore might wish to pursue against MDC, nor is there any indication of the remedy that the Defendant ultimately would wish to obtain against MDC in the event of joinder.
31. The two witness statements filed on behalf of the Defendant also are silent in this regard. True it is that Mubadala's alleged involvement in the lease negotiation process (and thereafter) is emphasised, and Mr Mostert asserts the "paramount importance" that Mubadala be joined as a party, but absent indication of the type and nature of claim which Skelmore might wish to bring against MDC, it remains unclear on the face of this statement why this should be the case; mere factual involvement in the disputed transaction provides no justification for joinder, and in and of itself is of no assistance in resolving the issues currently in dispute.
32. At this juncture, therefore, the Court remained uninformed about what it might be that Skelmore wished to assert and/or claim against MDC arising from entry into the lease dated 29 June 2016: in fact, in light of the missing information it may have been that this application, at least in the form as initially filed, was demurrable on its face.
33. In the event, the sole indication on the face of the papers as to the reason underpinning this application emerged not in the evidence filed on behalf of the applicant, but late in the day at the conclusion of the reply submission, which was filed on behalf of Skelmore on 15 May 2019.
34. Paragraph 6.3 of this submission states that in order to assist the Court in the exercise of its discretion to grant the application, the Defendant "affirms that it seeks the joinder of MDC as a party in order to enable the Court to have cognisance of all the aspects and issues of the dispute and to adjudicate accordingly", and says that if the application were to be granted, "the Defendant will bring evidence of the assurances and undertakings provided by Mubadala to the Defendant to enter into the lease and on which the Defendant did in fact rely in entering into the Lease. The Defendant will also provide evidence of the breach of such assurances and undertakings."
35. Paragraph 6.4 of the same document then states that if the joinder application is granted, "the Defendant proposes to amend its Defence to assert its rights in respect of such breach, including without limitation, rescission of the Lease, damages for breach of collateral contract, claim by way of indemnity or any other remedy to which it may consider itself entitled."
36. Given the procedural sequence, the Claimant has had no opportunity to respond to such assertions. It remains a matter of conjecture why these allegations, or any reference thereto, failed to find their way into the witness statements initially filed by Skelmore, and in the circumstances perhaps it is not unreasonable to assume that these assertions were prompted by the criticisms of the application contained within the Claimant's prior submission in response.



37. Whether or not that be the position, it is noteworthy that these allegations, when ultimately made, remain wholly unparticularised, both as to the time and provenance of the assurances and undertakings now alleged, and further in terms of what amounts to little more than recitation of a list of remedies potentially said to be available to Skelmore.
38. Had a draft Amended Defence, pleading and particularising such allegations, been exhibited at the outset, the complexion of this application may have changed, and the Court may have taken a broader and possibly more generous view.
39. However, as matters currently stand, and even in light of what seems to be a last-ditch effort to impart to this application a semblance of substance hitherto lacking, the Court has concluded that the Defendant has failed to discharge the burden which lies upon it to demonstrate why an Order for joinder, in its amended form, now should be made.
40. It follows that in the view of the Court this application must be dismissed, and the Court so orders.
41. If and in so far as Skelmore wishes to pursue the allegations now belatedly raised against MDC personnel – notwithstanding the Claimant’s contention, and supporting evidence, that in the lease transaction such personnel had been acting throughout for and on behalf of Rosewood - it remains open to Skelmore to bring a separate action against MDC.
42. As matters presently stand, however, in the exercise of its discretion the Court declines to permit that which currently is a straightforward case for unpaid sums allegedly accruing under a Lease executed between the existing parties to this action to be sidetracked by the raising of collateral allegations that Skelmore may, or may not, ultimately decide to pursue against MDC.

Costs

43. In light of the refusal of this joinder application, it is difficult to envisage an order for costs other than that costs should follow the event; however, if and in so far as there may be any contention to the contrary, the Court will make an Order *nisi* for costs, such costs’ order to become absolute if no application to vary is filed within 14 days of the date of the Order herein.

Issued by:



Linda Fitz-Alan
Registrar, ADGM Courts
27 May 2019