In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION
BETWEEN

IN THE MATTER OF THE INSOLVENCY REGULATIONS 2015

IN THE MATTER OF NMC HEALTHCARE LTD (in administration) (subject to a deed of company arrangement) **AND THE COMPANIES LISTED IN SCHEDULE 1 TO THE ADMINISTRATION APPLICATION**

AND

NMC HEALTHCARE LIMITED
(in administration) (subject to a deed of company arrangement)
Claimant

and

ABU DHABI ISLAMIC BANK PJSC

Defendant

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2022] ADGMCFI 0008
Before:	Justice Sir Andrew Smith
Decision Date:	28 October 2022
Decision:	1. ADIB's Application is granted and the Directions Application is struck out. 2. The Preliminary Issue Application is refused.
Hearing Date(s):	26 and 27 October 2022
Date of Order:	28 October 2022
Catchwords:	Order for preliminary issue; Issue not decisive; Striking out application; Administrators' application for directions; Insolvency Regulations s.95(7); Whether directions binding on third party.
Legislation Cited:	Insolvency Regulations 2015 Corporations Law 2001
Cases Cited:	Tilling v Whiteman, [1980] AC 1, 25 Steele v Steele, [2001] CP Rep 106 Re Sigma Finance Corp, [2009] UKSC 2 McLoughlin v Grovers, [2001] EWCA Civ 1743 TAQA Bratani Ltd and ors v Rockrose UKCSS Ltd, [2019] EWHC 2382 Re Ansett Australia Ltd, (2001) 39 ACSR 355 Re Stockport (Nq) Pty Ltd (subject to deed of company arrangement) (Carter and Lewis as joint admins), (2003) 44 ACSR 324 Re G B Nathan and Pty Ltd, (1994) 24 NSWLR 674 NMC Healthcare Ltd v Dubai Islamic Bank PJSC, [2021] ADGMCFI 0006 Barrow v Bankside Agency Ltd, [1996] 1 WLR 257, 263B Tinkler v Ferguson, [2020] EWHC 1467
Case Numbers:	ADGMCFI-2020-020 and ADGMCFI-2021-091
Parties and representation:	Mr Tom Smith KC and Mr Adam Al Attar instructed by Quinn Emanuel Urquhart & Sullivan UK LLP for the Joint and Deed Administrators of NMC Healthcare LTD (in administration) (subject to a deed of company arrangement) and the Claimant Mr Stuart Isaacs KC and Mr Bobby Friedman instructed by Clyde & Co for the Defendant

JUDGMENT

Background

1. NMC Healthcare Ltd ("**Healthcare**") is a company incorporated in the Abu Dhabi Global Market ("**ADGM**") and was a member of the NMC Group of companies, the largest provider of private healthcare in the United Arab Emirates ("**UAE**"). It did not itself provide medical services, and has never been licensed to do so. It was a holding company, medical services being provided by its direct and indirect subsidiaries. By an order of this Court dated 27 September 2020, Healthcare and 35 of its subsidiaries were put into administration, and Mr Richard Dixon Fleming and Mr Benjamin Thom Cairns (the "**JA's**") were appointed administrators of them all.

2. Most patients treated through the NMC Group have private medical insurance to cover the cost. Generally, insurance companies are invoiced after treatment. According to the evidence of Mr Fleming, *"[t]he invoice then gives rise to an 'insurance receivable' being due from the insurance company and payable to the relevant NMC Group operating company normally within 30 to 90 (or more) days of receipt of such invoice*". Thus, as Mr Fleming explains, "[a]*s healthcare operations accounted for the majority of the NMC Group's revenues, receivables from insurance providers were, and are, the NMC Group's main source of revenue*".

3. In 2021, the JA's presented to the creditors of the companies in administration a proposal for reorganisation through a scheme of Deeds of Company Arrangement ("**DOCA's**"). Accordingly, following a meeting of creditors, Healthcare and 34 of the subsidiary companies in administration (all those in administration other than NMC Holding Ltd) entered into DOCA's (respectively, the "**Healthcare DOCA**" and the "**Related DOCA's**"). In the words of Mr Fleming's statement, they were "*interrelated and set out restructuring and reorganisation proposals for the NMC Group approved by the DOCA Companies' creditors*", and the reorganisation "*was the final step to preserve the operation of hospitals and medical centres run by the NMC Group (and to allow the Related DOCA Companies to continue as going concerns) and were considered by [the JA's] to have the best prospect of maximising the returns to all creditors*". The JA's were appointed administrators of all the DOCA's. The new arrangements were to come into effect on what was referred to as the Restructuring Effective Date, or "**RED**", which occurred on 25 March 2022. The Related DOCA's then came to an end in accordance with their terms, and Mr Fleming and Mr Cairns ceased to be administrators of the Related DOCA Companies. They remain the JA's of Healthcare and of its DOCA.

4. In the reorganisation, Healthcare transferred its interests in the operating companies and substantially all its other assets to a newly created group (the so-called "**Holdco Group**"), comprising the companies entering into the Related DOCA's (the "**Related DOCA Companies**") and NMC Opco Ltd ("**Opco**"), which was incorporated for the purpose. Finance facilities were arranged for Opco, including a Primary Facilities Agreement dated 17 March 2022, to which Abu Dhabi Commercial Bank PJSC ("**ADCB**") is party as the Global Facility Agent. The facilities were made available on the basis, inter alia, of a Movables Security Agreement dated 25 March 2022, to which ADCB is party as the Security Agent and which was intended to provide security by way of insurance receivables.

5. Under the terms of the DOCA's, any unsecured claims against the Related DOCA Companies were assigned by the creditors, and subsequently released and extinguished. In exchange, creditors were to receive from Healthcare "*DOCA Creditor Entitlements*" by way of: (i) commitments in certain facilities so as to enable them to benefit from any uplift in the value of the Holdco Group and giving them indirect economic ownership of the Holdco Group, and (ii) an entitlement to future net proceeds of litigation that Healthcare might pursue. Under the provisions governing the distribution of DOCA Creditor Entitlements (the "**Holdback Arrangements**"), the JA's were to delay their distribution pending resolution of creditors' claims.

6. The DOCA's did not release secured claims against the Related DOCA Companies. However, they provide (at clause 1.2(o) of the Healthcare DOCA and clause 1.2(p) of the Related DOCA's) that "*a reference to a Secured Claim shall relate only to that amount of a Group*

Creditor Claim that is capable of being repaid following the sale of the relevant secured assets or property, with the remainder of the relevant Group Creditor Claim being unsecured".

The Applications

7. Abu Dhabi Islamic Bank PJSC ("**ADIB**") had a banking relationship with Healthcare dating from 2016, if not earlier, providing it with finance facilities. It has filed a proof of debt in the administration of Healthcare claiming that it is a secured creditor for AED 1,223,674,108.46. The applications before the Court arise from a dispute as to whether ADIB has security for its claim by way of insurance receivables, and if so which receivables.

8. The first application arises from an application for directions under section 95(7) of the *Insolvency Regulations 2015* ("**IR**"), which was made on 19 August 2022 by the JA's in their capacity as the Joint Administrators of Healthcare and of the Healthcare DOCA (the "**Directions Application**"). The JA's did not join any other party to the Directions Application, but they gave notice of it to Healthcare's pre-administration creditors. It is supported by the statement of Mr Fleming to which I have referred and a statement of Mr Jean-Philippe Sarther, who is the Chief Operating Officer of the Related DOCA Companies and Opco. By it, the JA's apply for directions that they shall "*act on the basis*" that the Related DOCA's, taken together with the IR, have the meaning and effect for which they contend.

9. On 16 September 2022, ADIB issued an application ("**ADIB's Application**") to strike out the Directions Application or alternatively, to have it stayed pending the judgment in proceedings brought in this Court by Healthcare against ADIB, in which it challenges ADIB's claim as to its security (the "**Proceedings**"). The grounds of ADIB's Application are set out in a witness statement dated 16 September 2022 made by Mr Michael Morris, a partner in Clyde & Co, ADIB's solicitors. In summary, they are that there is no jurisdiction to determine the Directions Application or it should be struck out because the JA's seek to determine ADIB's substantive rights and such a determination cannot be made by way of "*Directions*" under IR section 95(7); further, if it does not seek to determine substantive rights, it is "*pointless*", and the Court should not give directions sought; further, it duplicates an issue in the Proceedings, and seeks to "*pre-empt and subvert, and have an early and improper determination of, matters that are properly the subject of*" the Proceedings.

10. By an application in the Proceedings dated 3 October 2022, Healthcare applied to re-re-amend its claim form and its particulars of claim: permission was granted, and the amendments have been made. At the same time, Healthcare also made an application for the trial of a preliminary issue (the "**PI Application**", and the "**PI**"). It is supported by a witness statement of Mr Richard East, a partner in Healthcare's solicitors, Quinn Emanuel Urquhart & Sullivan UK LLP. In a skeleton argument presented for a case management hearing on 7 October 2022, the purpose of the PI Application was described as being to respond to ADIB's Application *"… in the hope of cutting through matters and with a view to presenting the Court with a choice as to how it wishes to resolve the important commercial issue as to the effect of the Related DOCA's … The Preliminary Issue … will also allow ADIB to be bound, and it will enable the Court to have the benefit of contrary argument on a defined legal issue without any risk of having to assess any commercial considerations as to the management of an administration*". Thus, the purpose of the PI Application is for the Court to give a judgment about the same question as gives rise to the Directions Application (to which, for convenience, I shall refer as the "**Related DOCA's Issue**").

11. I heard argument upon ADIB's Application and the PI Application on 26 and 27 October 2022. Mr Tom Smith KC and Mr Adam Al Attar appeared for the JA's on ADIB's Application and for Healthcare on the PI Application. Mr Stuart Isaacs KC and Mr Bobby Friedman represented ADIB. Mr Smith was instructed by the Related DOCA Companies to offer to the Court undertakings that they would be bound by any declaration that the Court might make in respect of the proposed PI, but they did not otherwise participate in the hearing. The parties needed to know my decisions urgently, and by an order on 28 October 2022 I refused the PI Application and granted ADIB's Application, striking out the Directions Application. I said that I would give my reasons in a later judgment.

The Proceedings

12. In support of its claim that its debt from Healthcare is secured, ADIB relies upon a document called the "*Insurance Proceedings Assignment*" ("**IPA**"), apparently signed on behalf of Healthcare and dated 24 February 2016, which is said by ADIB to provide security in rights in respect of contracts with six insurance companies. In the Proceedings, Healthcare disputes that ADIB's debt is so secured, and seeks declarations accordingly. The issues raised on the pleadings include the following:

    a. First, Healthcare contends that the IPA is invalid or unenforceable as a matter of UAE law, and so it provides no security at all (the "**Validity/Enforceability Argument**"). This contention includes allegations that the IPA is internally inconsistent and unspecified in scope; that Healthcare had no rights to or interest in the benefits purportedly assigned; that Healthcare had no authority to assign rights of other NMC Group companies; and that ADIB has waived its rights. I do not need to refer to all ADIB's responses to these allegations: they include a counterclaim for rectification of the IPA if otherwise Healthcare is right about its meaning and effect.

    b. Secondly, Healthcare argues that, if ADIB has any security under the IPA, it is by way of a floating charge (the "**Floating Charge Argument**"). ADIB contends that it created a fixed charge.

    c. Thirdly, Healthcare pleads an argument (the "**Healthcare DOCA Argument**") under the heading "*Alternative case on ADIB's secured claim against [Healthcare] and its value …*", asserting that, under the provisions of the IR, "*a DOCA can compromise or otherwise vary the debt held by a secured creditor that is secured by the secured asset with the effect that that debt cannot be enforced against the secured assets, provided that the secured creditor is permitted to retain and exercise its rights as a secured creditor against secured assets, if and to the extent that such assets existed as at the date of the compromise or variation of the debt*". On this basis, it is said that ADIB's security (if any) is to be determined as at 27 September 2020 (when Healthcare went into administration), and is limited to the value of the security then held by ADIB over the relevant assets of Healthcare.

    d. Fourthly, Healthcare's re-re-amended pleading of 8 October 2022 introduced an argument (reflecting Healthcare's Reply) about the Related DOCA's: that, on their proper construction and giving proper effect to the IR, they limit ADIB's security over property of the Related DOCA Companies to what was "*in existence as at*" 25 March 2022, the RED; and that accordingly "*pursuant to [specified terms of the Related DOCA's] and their effect in law, the Related DOCA's released the Secured Claims of Secured Creditors, as defined in the Related DOCA's, including such claims that ADIB has against the Related DOCA Companies save in respect of property in the Related DOCA Companies subject to a Security Interest in existence as at the date of the releases thereunder, being the RED on 25 March 2022*". It seeks relief by way of declarations.

13. Because the fourth argument has only recently been pleaded in the particulars of claim, ADIB has not yet pleaded its defence to it. However, on 13 October 2022 ADIB served a "*position paper*" about the PI, which makes clear that in response to it:

    a. ADIB will rely, inter alia, on its contention that, as it pleads in its defence, "*the right to the future receipt of sums that will become due is itself an asset that exists (and which could be valued)*", and so was "*in existence as at*" 25 March 2022.

    b. If Healthcare's fourth argument is upheld, then ADIB will contend that the result is unjust. Accordingly, ADIB has said that the Healthcare DOCA and the Related DOCA's should be terminated under IR s.88, which allows the Court to terminate a DOCA in some circumstances (the **"Section 88 Argument"**).

14. The trial of the Proceedings is fixed for hearing from 17 July 2023, and case management directions have been given accordingly. There has already been some slippage in the timetable,

which Mr Morris described as "*tight but workable*". He observed that there is "*little slack*" in it: I agree.

The Timing of the Applications and the Case for their Early Determination

15. Why have these applications for an early decision about Related DOCA's Issue been made at a relatively late stage of the Proceedings? On 4 March 2020, ADIB gave notice of its claim to have security rights over receivables from the insurance companies. It submitted its claim to the JA's on 11 November 2020. The JA's challenged it in correspondence of 25 May, 21 June, 5 August and 21 August 2021. The Proceedings were issued on 20 October 2021, and they included a claim for a declaration that "*ADIB holds no valid security in the form of Receivables due from the Insurance Companies …*". On 25 May 2022, there was a case management conference, and the trial was fixed for July 2023: no preliminary issue was then proposed.

16. On 1 August 2022, ADIB applied in the Proceedings for disclosure of documents relating to receivables from the six insurance companies "*from 24 February 2016 to date*".

17. By a letter dated 11 August 2022 and addressed to the JA's, ADCB, as the Global Facility Agent for Opco's facilities, requested the JA's to seek declarations "*from the ADGM Courts … with respect to the Related DOCA Companies*" about the Related DOCA's Issue. It observed that ADIB's claim to security over receivables arising after the RED caused concern to those financing Opco's facilities about whether the Related DOCA Companies could continue trading, and so whether the DOCA's would achieve their purpose of rehabilitating the NMC Group. Moreover, ADCB expressed concern that, because payments (so called "*Affected Receivables*") from insurance providers were not being paid to Related DOCA Companies or were being delayed, "*rather than being cash generative, the Group has a monthly net outflow due to the Affected Receivables, resulting in a deteriorating liquidity position month on month. Certain of the Related DOCA Companies are potentially insolvent, absent continued Group support*".

18. It was first proposed that there should be an early decision about the Related DOCA's Issue when the Directions Application was issued on 19 August 2022. According to Mr Fleming's evidence, ADIB's disclosure application and ADCB's letter alerted the JA's that secured creditors were claiming rights to security which the JA's considered inconsistent with the terms of the Related DOCA's, and contrary to the interests of the new Holdco Group. I accept Mr Fleming's evidence about when the point was first appreciated by the JA's, but ADIB had never given any reasons to suppose that it limited its claim to receivables that had fallen due before the RED.

19. The JA's and Healthcare contend that it is important that the Court make an early determination about the Related DOCA's Issue either through the Directions Application, or by deciding the PI, which was their primary submission. They put forward two main arguments. Their first argument is that they need to know whether the DOCA's have achieved their purpose of the restructuring because otherwise (as Mr East put it in his witness statement) "*the objective of the DOCA Reorganisation would need to be pursued by some other means, including potentially by a business and asset transfer*", and so it would be "*necessary to evaluate options in relation to some or all Related DOCA Companies, now in the Holdco Group, which may have to re-enter an insolvency process in order to complete a business and asset transfer*". They also say that, in order to manage the distribution of DOCA Creditor Entitlements and to operate the Holdback Arrangements, the JA's need to know whether the claims of ADIB and other comparable creditors are wholly secured or whether they are to be treated as partly unsecured. Meanwhile, instruments have been retained on a large scale under the Holdback Arrangements, and, if and to the extent that claims are secured, they are to be distributed to unsecured creditors.

20. I should add that, in their written submissions, the JA's and Healthcare also submitted that the JA's needed to know the meaning and effect of the Related DOCA's in order that they may continue "*to pursue their strategy for recognition of the Related DOCA's throughout the UAE*".

There is no evidence of such a strategy, and in oral submissions Mr Smith abandoned this point.

The PI Application

21. The PI Application is for early determination of the Related DOCA Issue, the fourth argument pleaded by Healthcare. The JA's sought to have it heard by no later than 11 November 2022. It is formulated by reference to paragraphs of Heathcare's pleading as follows:

    a. *"whether the Claimant is correct in the construction of the Related DOCAs pleaded at paragraph 25J to 25L and 26.4B(2) of the Re-Amended Particulars of Claim (and paragraph 28I.2 of the Amended Reply and Defence to Counterclaim); and*

    b. *if the Claimant is not correct, what is the effect of clauses 10.1, 10.2 and 13.1 of the Related DOCA's and IR 15 s76 on pre-administration security in respect of receivables which come into existence as property of the Related DOCA companies after the [RED]".*

22. I set out paragraph 25J and 25L of the Particulars of Claim as follows:

    a. "*25J Pursuant to clauses 10.1, 10.2 and 13.1 of the Related DOCA's and IR15, s.76:*

        (1) *the Related DOCAs require any Secured Claim of a DOCA Creditor against the Related DOCA Companies to be ascertained as to its validity and value as at the [RED] and, correspondingly, any Unsecured Claim of a DOCA Creditor (including any under-secured part of a Secured Claim) to be ascertained as at the same date;*

        (2) *the Related DOCA's assigned the unsecured claims of Related DOCA Creditors against the Related DOCA Companies as at the RED to Holdco and subsequently released the same; and*

        (3) *any Secured Claim and any Security Interest of a DOCA Creditor is limited to Property of the Related DOCA Companies in existence as at the RED with the effect in law that (a) any receivables which came into existence as debts owed to the Related DOCA Companies by healthcare insurance providers (pursuant to any healthcare insurance contracts between such parties) after the RED or (b) the proceeds thereof are not subject to any Secured Claim or any Security Interest of any DOCA Creditor even if expressed to be subject to such a Secured Claim or Security Interest, whether as future receivables or otherwise, in any pre-administration or pre-DOCA security documentation between any DOCA Creditor and the Related DOCA Companies or any other Group DOCA Company".*

    "25L Accordingly, pursuant to the above terms and their effect in law, the Related DOCAs released the Secured Claims of Secured Creditors, as defined in the Related DOCAs, including any such claims that ADIB has against the Related DOCA Companies save in respect of property of the Related DOCA Companies subject to a Security Interest in existence as at the date of the releases thereunder, being the RED on 25 March 2022".

23. In the course of his submissions, Mr Smith told me that in paragraph 25J (3) (and, I would infer, the corresponding wording in the Reply), the word "*Property*" should not have been given a capital P, and the pleading did not adopt a definition of the word. I shall return to this point.

24. It is not disputed that, after the amendment of the Particulars of Claim, the PI Application identifies for early trial an issue in the proceedings, and the Court has jurisdiction in an appropriate case to order an early trial of a particular issue. Under rule 8(1) of the Court Procedure Rules ("**CPR**"): "*The Court may make any order, give any direction or take any step*

it considers appropriate for the purpose of managing the proceedings and furthering the overriding objective of these Rules". It is a jurisdiction which the Court exercises with caution; experience warns that, "[*p]reliminary points of law are too often treacherous short cuts*": per Lord Scarman in *Tilling v Whiteman, [1980] AC 1, 25C*. I was referred to authorities about the considerations that are relevant to whether to order a preliminary trial, including the list of factors identified by Neuberger J in *Steele v Steele, [2001] CP Rep 106*, but I do not need to cite them at length.

The Directions Application

25. By the Directions Application, the JA's seek a direction that they should act "*on the basis*" of propositions pleaded in sub-paragraphs (1), (2) and (3) of paragraph 25J of the pleading, and of a fourth proposition, which was reformulated by Mr Smith in the course of his submissions at the hearing as follows:

> "*accordingly, (i) receivables owed to the Related DOCA Companies by healthcare insurance providers (pursuant to any healthcare insurance contracts between such parties) which come into existence after the Restructuring Effective Date and, (ii) the proceeds thereof ((i) to (ii) together, "**the Receivables**") stated to be subject to the security held by Abu Dhabi Commercial Bank PJSC as Security Agent (the "Security Agent") in the form of security agreements (covering all the present and future assets of the security provider which are subject to a security interest pursuant to the Movables Assets Security Law of the UAE (as defined in the agreements) except any Excluded Assets (as identified in the agreements)) dated 25 March 2022 (a) among NMC, Opco Ltd as Security Provider and Abu Dhabi Commercial Bank PJSC as Security Agent and Account Bank; and (b) among the Related DOCA Companies as Security Provider (respectively) and Abu Dhabi Commercial Bank PJSC as Security Agent and Account Bank … are not encumbered in any way by any Security Interest that any DOCA Creditor had in respect of the Receivables in respect of any Secured Claim of that DOCA Credit*or".

The Documents and Evidence Admissible on the Interpretation of the Related DOCA's

26. The proposed PI is a question of law that turns upon the proper interpretation of the Related DOCA's, and their effect under the provisions of the IR. Healthcare argued that is suitable for early determination because, while they have to be interpreted in their context, the inquiry about the background of the Related DOCA's would be limited and manageable. ADIB disputed this: Mr Morris gave evidence that the background factual matrix is extensive, and, in order fairly to dispose of the PI, significant disclosure would be required, and there would have to be a trial with factual evidence and potentially expert evidence. I am not persuaded of this: in my judgment, Mr Morris overstates the relevant background material. As Mr Smith submitted, the material admissible upon questions of interpretation of a multi-party arrangement such as the DOCA's is limited to what all parties to it knew or are to be taken to have known at the time when it was entered into: see *Re Sigma Finance Corp, [2009] UKSC 2* at para 37 per Lord Collins. Here, therefore, it is limited to what the relevant Related DOCA company and all its creditors knew or are taken to have known.

27. Healthcare accepts that, in principle, ADIB would be entitled to rely on any documents to which the Related DOCA's refer or which are recited in them, but these documents constitute an easily identified and readily available category. Otherwise, as Healthcare submits, the only factual material that would be relevant and admissible is by way of documents provided by the JA's to creditors in connection with the resolutions pursuant to which the DOCA proposals were approved, including in particular the Revised Administrators' Proposals circulated to creditors on 9 August 2021. Mr East exhibited to his witness statement (and so made available to ADIB) the documents that were so provided. However, ADIB contends that other documents that would have to be disclosed for a fair disposal of the PI, including all documents sent by Healthcare or its subsidiaries to creditors, any correspondence placed on a website or notice board or otherwise made public, and any other document "*which was made public or provided by any other person having a material role in the restructuring*".

28. Under the CPR, the rules about standard disclosure require a party to disclose "*all the documents on which he will rely at trial, except for documents that have already been submitted by a party*": rule 86(3). For practical purposes, Healthcare has identified that material, and it seems likely that it is already available to ADIB. ADIB would be entitled to apply for the Court to order specific disclosure of further documents "*if it is satisfied that it is appropriate that it should do so*" (rule 86(5)), but ADIB has given no convincing indication as to how it might persuade the Court that specific discourse is appropriate. It also says the part of the relevant context, known or taken to be known to all relevant parties, is that the fundamental business of the operating companies was sound, and that "*there was no reason to suppose that the underlying business would not be able to meet the payments of all secured creditors*"; but this contention is based on "*the totality of documents in the public domain*", and specific disclosure of documents in the public domain would seldom be required or appropriate. Finally, Mr Morris said that the purpose of the DOCA's was to achieve a result that did not have an adverse or unfair effect on any creditor or class of creditors, and that disclosure and evidence would be required to determine whether an interpretation of the DOCA had such an impact. This fails to recognise that the DOCA's are to be interpreted objectively in light of what was known or is taken to be known to all parties.

29. ADIB's arguments about factual and expert evidence were too vague to convince.

30. I therefore reject ADIB's arguments that, because of the disclosure and the amount of admissible evidence required for its proper determination, the PI Application should be refused.

The PI might not need to be decided, and it would not be decisive of the Proceedings

31. ADIB has more powerful arguments. First, it might prove unnecessary to decide the PI at all, for example if Healthcare succeeds in its Validity/Enforceability Argument.

32. Further, the PI, however decided, would not dispose of the Validity/Enforceability Argument, Floating Charge Argument or the Healthcare DOCA Argument, and so it would not decide whether ADIB is entitled to security by way of a fixed charge over receivables in existence at the RED or over receivables payable to operating companies that did not enter into a DOCA. Moreover, ADIB has pleaded two counterclaims (in addition to the claims for rectification, to which I have referred): its "*Additional Security Counterclaim*" and its "*Litigation Counterclaim*", neither of which would be determined by the PI. By the first, ADIB seeks a declaration that, if it does not have valid security over insurance receivables, then Healthcare is obliged under the terms of the IPA to provide further security. By the Litigation Counterclaim, ADIB contends that Healthcare is obliged under the General Terms and Conditions applicable to the facilities to indemnify ADIB for its legal fees and expenses connected with the litigation.

33. There is another point, the Section 88 Argument: if the PI is decided in Healthcare's favour and the Related DOCA's are held to be effective to restrict ADIB's security, ADIB plans, it has said, to apply under IR section 88(1)(f) for them to be terminated: section 88(1)(f) provides that the Court may make an order terminating a DOCA if it, or a provision of it, or an act or omission made or done under it, was or would be "*oppressive or unfairly prejudicial to, or unfairly discriminatory against*" one or more of the company's creditors. I observe that it could not be determined whether the Related DOCA's were oppressive, unfairly prejudicial or unfairly discriminatory against ADIB without determining whether its security would otherwise be valid and its nature.

34. Healthcare responds that no such order can be made because the Related DOCA's have already terminated, but I did not hear argument about this response, and express no opinion on it. Healthcare also responded that an application under section 88 cannot be made by way of counterclaim in the Proceedings, but this does not answer the point. Whether ADIB can bring a counterclaim or must make a separate application under the insolvency regime, the fact remains that the PI will not, by itself, resolve the question whether Healthcare can rely on the Related DOCA's as limiting the security available to ADIB. ADIB's challenge under section 88 would still need to be resolved.

35. In *McLoughlin v Grovers, [2001] EWCA Civ 1743*, David Steel J said that the right approach to preliminary issues was that "*Only issues which are decisive or potentially decisive should be identified*" (at para 66). The PI proposed by Healthcare would not be decisive, but it argued that, if it succeeded on it, the prospects of a settlement would be improved because the financial significance of the Proceedings would be reduced. ADIB disputes this, and, while there is evidence that by far the greater part of the NMC Group's value was in the Related DOCA Companies, Healthcare has not sought to estimate the value of the other operating companies or their receivables. Mr Morris' evidence is that that, even if ADIB lost the preliminary issue, the remaining issues would "*on any view be very valuable*". I cannot resolve this difference. I consider that, while it is not in itself fatal to the PI Application that a decision on the PI will not dispose of the dispute, it is an important consideration against it.

The Impact of the PI on the Trial

36. As I have said, the Court has laid down a demanding timetable to manage the Proceedings, leading to a trial in July 2023. Let it be supposed that the PI were argued in November 2022 (as Healthcare proposed), and that judgment were given in December 2022. Given the importance of the issue, the losing party would very likely seek and be given permission to bring an appeal, which could, at best, be heard in the early months of 2023.

37. The parties' representatives therefore would have to deal with the PI at a time when they will be heavily engaged with disclosure and preparing witness statements. This in itself means that there would not be the saving of time and costs that typically makes a preliminary issue attractive. But there is a more important point: as Mr Morris observes, the distraction or disruption inevitably resulting from a PI would make the already tight timetable simply unrealistic. I agree with Mr Morris that *"[t]he determination of the PIs as preliminary issues would almost inevitably result in the loss of the trial date*".

The Formulation of the PI

38. ADIB raises telling questions about the scope to the proposed PI. For obvious reasons, it is important that a preliminary issue be precisely and clearly defined: see, for example, *TAQA Bratani Ltd and ors v Rockrose UKCSS Ltd, [2019] EWHC 2382* at para 14. The questions formulated in the PI Application are open-ended: they ask whether an interpretation of the Related DOCA's set out in five paragraphs of Healthcare's pleadings is correct, and if not, what is the effect of three clauses of the Related DOCA's.

39. As Mr Smith said in oral submissions, paragraph 25J(3) of the Particular of Claim (set out in para 22 above) goes to the heart of the Related DOCA's Issue. At the start of the hearing, because it referred to "*Property*" (capitalised, as other defined terms are), it was apparently directed to "*Property*" as defined at clause 1.1 of the Related DOCA's as follows: "… *any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property (or immovable or movable property) of any description and includes things in action (or other intangible property)*". During the hearing, it was explained that the word was given a capital letter in error, and it was not used in a sense defined in the Related DOCA's or at all.

40. The change is important, and the need for it casts doubt upon whether the PI is sufficiently clear and precise. But there are other problems. First, paragraph 25J(3) is apparently directed to pleading that ADIB's security does not include "*receivables that came into existence as debts owed … after the RED*". This leads to a question about what is meant by a "*receivable*". At paragraph 6 of the pleading, it is said that an issued invoice "*gives rise to an 'insurance receivable' being due from the insurance company and* ***payable*** *to the relevant NMC Group company* …" (emphasis added); hence, the question whether the pleading in paragraph 25J (3) is intended to aver that ADIB's security is confined to debts from insurance providers that were owed on the RED, or whether it avers that they also had to have become payable; and so to uncertainty as to whether the PI requires this to be decided, or whether it would be for determination at the trial of the remaining issues.

41. There is a further point about paragraph 25J(3): it does not plead simply that, on the proper interpretation of the Related DOCA's, ADIB's security does not include "any receivables which came into existence as debts owed … after the RED". By the words ""*with the effect in law that*", it specifically pleads that this is so because, under the Related DOCA's, a "*Secured Claim*" and a "*Security Interest*" of a DOCA Creditor is limited to "*property*" of the Related DOCA companies in existence as at the RED. I did not hear argument about that reasoning: I keep an open mind about it, and express no view about it. What matters for present purposes is that, on its literal reading, the pleading sets out a narrowly restricted argument, and, if I ordered the PI, it is not obvious what lines of reasoning are open to Healthcare in support of its interpretation of the Related DOCA's. Specifically, one of ADIB's arguments is that, at the time of the RED, it had security over property then in existence by way of choses in action against the insurance providers for receivables that later became due. Does Healthcare's narrowly pleaded argument that the security was "*limited to property …. in existence*", include the question whether such choses in action were property "*in existence*", as no doubt Healthcare intended that it should do?

Healthcare's Arguments about the Urgency of a Decision on the Related DOCA's Issue

42. For these reasons, I have concluded that the PI would not assist the orderly and efficient disposal of the litigation between Healthcare and ADIB, and the PI Application should be refused. What of Healthcare's argument that the PI should be decided urgently because of the importance of the Related DOCA's Issue to the reorganisation of the NMC Group more generally? As I shall explain when I come to ADIB's application, I am not convinced by the evidence of Healthcare about this, but here I make two observations in the context of the PI Application.

43. Under CPR Rule 8(1), the jurisdiction to order a PI is to be exercised "*for the purpose of managing the proceedings and furthering the overriding objective of these Rules…*". The wider considerations raised by Healthcare are not concerned with efficiently and fairly "*managing the proceedings*", nor are they obviously concerned with the overriding objective, which is stated in CPR rule 2(2) to be "*to secure that the system of civil justice in the ADGM Courts is accessible, fair and efficient*".

44. However that might be, the resolution of the PI would not provide the certainty that Healthcare seeks, in order for the JA's to know whether the restructuring by way of the DOCA's has achieved its objective and to decide about the distribution of the DOCA Creditor Entitlements. This would also require consideration probably of ADIB's claim that, if Healthcare is otherwise successful, it is entitled to have further security provided, and certainly of ADIB's Section 88 Argument.

ADIB's Application: would Directions be binding on ADIB?

45. I come to ADIB's Application, and here the first question to consider is whether a direction under section 95(7) of the IR would be binding upon third parties, and in particular be binding on ADIB in the Proceedings. Section 95(7) of the IR, under which it is made, provides as follows:

> *"The administrator of a Company or a Deed of Company Arrangement may apply to the Court for directions in connection with his functions. The administrator of a deed of Company Arrangement may also apply to the Court for directions about a matter arising in connection with the operation of, or giving effect to, the Deed of Company Arrangement"*

46. It is clear that prima facie a direction under this provision does not directly affect third parties: it provides guidance or advice to an administrator, and, if (s)he complies with it, it provides protection against criticism of unreasonable or improper conduct of the administration. If authority be needed for this, it is found in Australian decisions in which the courts were asked to give directions under s.447D of the *Corporations Law 2001*, which was in comparable terms. In *Re Ansett Australia Ltd, (2001) 39 ACSR 355*, Goldberg J distinguished (at para 60) orders that bind third parties and directions that were "*essentially advisory and only have effect in*

relation to the administrators … and the companies under administration". He said that directions of this kind were commonly sought by liquidators under a comparable section of the Law under which they might apply to the Court, and that essentially what the court is doing when giving directions "*to provide the administrator with protection against claims that he or she acted inappropriately or unreasonably ...*" (at para 62). This was endorsed by Mansfield J in *Re Stockport (Nq) Pty Ltd (subject to deed of company arrangement) (Carter and Lewis as joint admins), (2003) 44 ACSR 324*.

47. The JA's position is that, when they issued the Directions Application, its purpose was to obtain the Court's guidance on the Related DOCA's Issue. Although it is worded in terms of a direction that the JA's "*should act on the basis*" of the meaning and effect for which they argued, it is clearly designed to determine that question of law. However, the JA's also submit that, in the events which have happened and because of ADIB's response to the Directions Application, a decision or direction would be binding upon ADIB: specifically, this is said to result from ADIB applying to strike out the Directions Application, and so choosing to become a party to it. In *Re G B Nathan and Pty Ltd, (1994) 24 NSWLR 674*, 479, McLellan J explained the importance of the distinction between proceedings that determine the rights of third parties and proceedings by way of direction applications of this kind, and that proceedings could not be transformed from one to the other, but he added the qualification "*unless the court is satisfied that those affected either consent to that course … or will not suffer injustice in consequence of the alteration of the status of the proceedings*". The JA's argument is that, by applying to strike out the Directions Application and thereby participating in it, ADIB is to be taken to have consented to its rights to be determined thereby.

48. I certainly see difficulties in this argument: ADIB's conduct does not, on the face of it, amount to consent to have anything determined by the Directions Application: on the contrary, it has consistently maintained that everything in dispute between it and Healthcare should be decided in the Proceedings at the trial next July. But I did not hear full argument whether a direction would be in any way binding on ADIB, and I do not need to determine it because it emerged during oral argument that the JA's do not contend that a direction would determine as between Healthcare and ADIB how, if at all, the Related DOCA's limited the receivables available to ADIB as security, but only whether the JA's would be acting properly and appropriately if they acted on the basis of their understanding of the meaning and effect of the Relate DOCA's. That is not an issue in the Proceedings, and it now appears to be common ground that the Directions Application would decide nothing in issue in the Proceedings: the Related DOCA's Issue would clearly be the focus of the Directions Application, but that same question would remain in issue to be determined at the trial on the basis of the evidence and submissions then before the Court.

ADIB's Application: Jurisdiction

49. Against this background, I come to the submissions on ADIB's Application, and first ADIB's argument that the Court does not have jurisdiction to give the directions for which the JA's apply. The JA's submit that the Court has jurisdiction under the second sentence of section 95(7) of the IR, under which the administrator of a DOCA may apply for directions "*arising in connection with the operation of, or giving effect to*," the DOCA: they do not rely on the first sentence. The directions sought most directly and most obviously concern the effect of the Related DOCA's: in their skeleton argument, the JA's said: "*the Directions Application asks about the meaning of the Related DOCA's, which are post administration releases and other variations of pre-administration rights that are effective as consequence of the post-administration statutory regime under*" the IR. However, section 95(7) contemplates that the administrator of a DOCA may apply for directions connected with the DOCA of which (s)he is the administrator: it does not allow the administrator of one DOCA to seek directions about the operation of a different (possibly unconnected) DOCA. When this point was put to Mr Smith in oral argument, he rightly accepted it. The JA's then argued that the Court has jurisdiction to make the directions sought, because they concern a matter arising in connection with the operation of the Healthcare DOCA.

50. I have referred to the two purposes of the Direction Application that Mr Fleming identifies in his witness statement at para 19 above. In the JAs' skeleton argument, it is said that "*… if the Court were not prepared to make the direction applied for, the JA's would have to reassess the DOCA's and in particular, what steps might have to be taken in relation to the Related DOCA Companies*". This realistically reflects the first purpose of the Directions Application, and it is concerned with the Related DOCA's and whether they have achieved their purpose, rather than the Healthcare DOCA. However, I accept the JAs' argument that the directions sought concern the operation of the Healthcare DOCA because of the second purpose identified by Mr Fleming: that directions would assist the JA's to distribute the DOCA Creditor Entitlements in accordance with it. That is sufficient for the purposes of deciding whether the Directions Application is covered by this requirement of section 95(7).

51. I considered the Court's jurisdiction to give directions under s.95(7) of the IR in my judgment in *NMC Healthcare Ltd v Dubai Islamic Bank PJSC, [2021] ADGMCFI 0006* (the "**DIB case**"). ADIB relied upon my judgment, and in particular the view that I expressed that "*the word 'directions' cannot include determination of the rights of third parties*" (at para 66). The question there before the Court differed from this case in three respects. First, the application in the DIB case was made under the first sentence of section 95(7) of the IR, and here the JA's rely on the second sentence. There is nothing in this point: the word "*directions*" has the same meaning in both sentences. Secondly, it was contended in the DIB case that the directions would result in a binding decision about DIB's rights, and, as I have said, the JA's and Healthcare do not (or no longer) so contend. Thirdly, and most importantly, the DIB case was about whether an application under section 95(7) was a proper vehicle to determine the rights that DIB had before Healthcare went into administration; here the question is whether rights of ADIB have been affected by the administration process. The sentence in my judgment on which ADIB relies are part of a discussion in my judgment about whether the reasoning of McLellan J in the Australian case of *Re GB Nathan and Co Pty Ltd* (cit sup) about a statutory provision whereby a liquidator could apply to the court for directions are persuasive about the scope of section 95(7). McLellan J said that the function of an application under the Australian legislation was *"not to determine the rights and liabilities arising from the company's transactions before liquidation*", and he said that the terms of the relevant subsection, which referred to applying for "*directions*", supported that view. In the DIB case, I endorsed that. The sentence in my judgment upon which ADIB relies is not applicable to this case.

52. In the Directions Application, the JA's seek directions about how they should act. In his judgment in *Re Ansett Australia Ltd* (cit sup at para 62), Goldberg J explained that the Court will give directions in an appropriate case as to whether "*an administrator or liquidator should enter into or whether an administrator or liquidator should give effect to an agreement*", including where guidance is required because of a question of law. Similarly, in the *Re Stockport (Nq) Pty Ltd* case (cit sup), Mansfield J observed (at para 3) that the directions that he was asked to give, "*do not seek commercial advice, nor the imprimatur of the court upon commercial action purposed to be taken by the administrators. They concern the proper construction and operation of the deed, in circumstances where there is some uncertainty as to the range of its application and as to the mode of its operation*". As I see it, the position here is similar: the Court has jurisdiction to give such directions under section 95(7).

Strike-Out Application: Abuse of Process

53. In his statement, Mr East stressed that the JA's had no intention to abuse the process of the Court when they issued and pursued the Directions Application. There is no reason to doubt that evidence, and I reject the suggestion that the purpose was in some way to assist Healthcare in the Proceedings. However, the question whether the Directions Application should be struck out as an abuse of process is to be assessed objectively.

54. The doctrine of abuse of process is a flexible one, and the Court's power to strike out proceedings on this basis is not "*circumscribed by unnecessarily restrictive rules*", per Sir Thomas Bingham MR in *Barrow v Bankside Agency Ltd, [1996] 1 WLR 257, 263B*. As I have explained, I shall consider the arguments on the basis that the application will not provide the

JA's and Healthcare with a determination of their rights as against ADIB (or any other secured creditor who makes similar claims).

55. First, ADIB argued that the Court should not permit duplicate litigation about the same issue in the Proceedings and through the Directions Application. Clearly, the Directions Application mirrors the Related DOCA's Issue in the Proceedings. As the JA's argued, it is a matter for ADIB whether it chooses to be involved (or further involved) with the Directions Application: it could ignore it, as other creditors have done, leaving the Related DOCA's Issue in the Proceedings and declining to argue the same question twice. However, there is a public interest to be considered, as Nicklin J said in his judgment in *Tinkler v Ferguson, [2020] EWHC 1467* (whose judgment was upheld by the Court of Appeal, [2021] EWCA 18): "*Duplicative litigation not only causes prejudice to the defendant, in terms of wasted time, costs or effort and the risk of dispersal of evidence, it is also contrary to the public interest generally to allow the risk of inconsistent findings which arise when different courts at different times are required to examine essentially the same factual dispute*" (at para 37). Moreover, while I cannot say whether, if the Directions Hearing went ahead, ADIB would make submissions, there is a distinct possibility that it would not do so, and it would aggravate the risk of inconsistent determinations if the Court did not hear adversarial argument. I add that it would be the more unsatisfactory to determine the Directions Application in these circumstances because, in my judgment, the Court could not reasonably direct the JA's to "*act on the basis*" of their understanding of the Related DOCA's Issue without also considering ADIB's Section 88 Argument, and whether, while that is moot, the Related DOCA's are a sufficiently robust basis for the JA's to take any decisive action.

56. Next, ADIB submitted that, if the Directions Application will not result in a determination that is binding upon itself and other creditors, it would serve no real purpose. I see force in this argument: to my mind, the essential question is not whether the Directions Application would have sufficient purpose disrgarding the Proceedings, but whether there would be any point in the Court giving advice about the Related DOCA's Issue, given that it is to be re-argued in the Proceedings within a relatively short time. The Court has jurisdiction to entertain the Directions Application because of the JAs' argument that Directions will enable them, or assist them, to decide whether to distribute the DOCA Creditor Entitlements under the Holdback Arrangements. No doubt, it would be desirable that they be distributed as soon as they properly can be, and no doubt uncertainty about the Related DOCA's Issue hampers this. However, I have seen no evidence that persuades me either that the determination of the Directions Application would in itself enable the distribution to be made or that it is important that the Entitlements be distributed before the Proceedings are heard next year.

57. As I have explained, the other reasons that the JA's advanced in justification of the Directions Application are not, in my judgment, within the purpose of section 95(7) of the IR and are not a proper basis for pursuing it. In any case, while it is said in general terms that the JA's "*need to know whether the restructuring …. has achieved its objective as a restructuring*", they do not identify any specific course that they would or would not take in light of Court directions. I do not say that the Court invariably will require a more specific proposal before giving directions under section 95(7), but this is generally a more satisfactory basis for such applications. What matters in this case is that there is no indication of a specific decision that needs to be taken within a time-frame, and demands guidance before the trial of the Proceedings. It appears from ADCB's letter of 11 August 2022 and Mr Sarther's evidence that the concern for an early determination because of cash-flow pressures on the Holdco Group resulting from insurance providers withholding receivables, but it is not clear to me how Court directions to the JA's will resolve or alleviate those.

58. The Court will not readily refuse to entertain an application from office-holders for directions, and I have considered whether the proper course would be to hear the Directions Application despite the difficulties that I have explained. However, I concluded that it is inevitable that I would decline to give the JA's the guidance that they seek, and that the only sensible course is to dispose of it on ADIB's application.

Conclusions

59. ADIB's application is, in the alternative, for the Directions Application to be struck out or for it to be stayed pending the determination of the Proceedings. In view of my conclusions, I consider that it should be struck out: the JA's may, in due course and if so advised, renew their application for directions, but it is better that they do so by way of a new application tailored to the circumstances as they develop.

60. I therefore refused the Preliminary Issue Application and ordered that the Directions Application be struck out.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
11 November 2022