



ADGM COURTS

محاكم سوق أبوظبي العالمي

In the name of

His Highness Sheikh Khalifa 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

ABU DHABI COMMERCIAL BANK PJSC

CLAIMANT

and

KBBOBRS INVESTMENTS HOLDINGS LIMITED

FIRST DEFENDANT

and

BRSKBBO INVESTMENTS HOLDINGS LIMITED

SECOND DEFENDANT

JUDGMENT OF JUSTICE STONE SBS QC

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| Neutral Citation: | [2021] ADGMCFI 0002 |
| Before: | Justice Stone SBS QC |
| Decision Date: | 28 March 2021 |
| Decision: | <ol style="list-style-type: none"> 1. The minimum sale price in this Court-ordered sale of the Property is the figure appearing in the Confidential Annex attached to this Judgment. 2. The Claimant is granted leave to bid on the basis that no sale to the Claimant be concluded without approval of the Court. |
| Hearing Date: | 16 March 2021 |
| Catchwords: | Court-ordered sale of real property; minimum sale price to be fixed; analysis of valuation reports; whether Claimant should be permitted to bid during the sale process; judicial approval of sale |
| Legislation Cited: | Real Property Regulations 2015 ADGM Court Procedure Rules 2016 |
| Case Number: | ADGMCFI-2019-019 |
| Parties and representation: | <p>Mr William Edwards of Counsel, instructed by Al Tamimi & Company for the Claimant</p> <p>Mr Harris Bor of Counsel, instructed by Hadef & Partners for the First Defendant</p> |

JUDGMENT

This action

1. In this action, the Claimant (the “**Bank**”) seeks a Court Order for the possession and sale of a commercial property, Al Maryah Tower on Al Maryah Island (the “**Property**”), which is subject to a mortgage entered into between the Claimant and the Defendants on 28 March 2019. The Bank also seeks leave from the Court to bid for the Property.
2. The Defendants are incorporated in Abu Dhabi Global Market (“**ADGM**”) for the purpose of investing in land: the First Defendant is registered as owner of the Property, and the Second Defendant as lessee of the plot on which the Property stands. The Second Defendant has taken no part in this action.

The Mortgage

3. By a facility letter dated 26 March 2019 (the “**Facility**”) the Bank advanced AED 500 million to the initial purchasers, Mr Almuhairi and Dr Shetty, to fund the acquisition of the Property; the Facility was to be read in conjunction with a Master Murabaha Agreement of the same date, which was stated to apply *mutatis mutandis*.

4. The acquisition vehicles for the Property were the Defendants herein (“**KIHL**” and “**BIHL**”) respectively: on completion of the purchase on 28 March 2019 KIHL was registered as freehold owner of the Property, and on 16 October 2019 BIHL was registered as lessee of the plot on which the building stood and the building itself.
5. KIHL and BIHL both guaranteed the liabilities of Mr Almuhairi and Dr Shetty to the Bank and charged their respective interests in the Property to the Bank by a Mortgage dated 28 March 2019 (the “**Mortgage**”); the Mortgage is registered, which constitutes conclusive evidence that the respective interests of KIHL and BIHL are charged to the Bank: see *Real Property Regulations 2015*, ss. 19-23.
6. In the present circumstances, Clause 10.1 of the Mortgage is relevant: this provides that on the “occurrence of an Enforcement Event” the Mortgagee is entitled to enforce its security, whilst an “Enforcement Event” is defined at Clause 1.1 as “an Event of Default under Clause 20 of the Master Murabaha Agreement”, that is, the initial Islamic loan facility entered into between the Bank and Mr Almuhairi and Dr Shetty to enable purchase of the Property.
7. Clause 10.1 also envisages that on the occurrence of an Event of Default, the Mortgagee has the power to sell the Mortgaged Property in part or whole, and that it can apply “to the courts of ADGM... for permission or authority to do so or for a court appointed representative to do so”. It is pursuant to this provision that the Bank now acts.
8. The Facility required a first instalment of AED 42 million to be repaid to the Bank on 30 March 2020. However, this payment was not made, and it is accepted on the part of the First Defendant that this amounts to an Event of Default under Clause 20.1 of the Master Murabaha Agreement and an “Enforcement Event” under Clause 10.1 of the Mortgage.
9. As at 7 September 2020, the amount due under the Facility stood at AED 552,506,953.47; this sum includes funds disbursed for operating expenses of the building, which remains vacant, and is accumulating.

The Procedural Background

10. On 13 September 2020, the Bank issued these proceedings under Rule 30 seeking an Order for sale of the Property. The Claim as initially filed required amendment, and the Amended Claim was filed on 18 October 2020, with Amended Particulars of Claim being served on the Defendants on 20 October 2020.
11. By Order of the Court, the Acknowledgment of Service was to be served within 7 days, but no Acknowledgment was served until 25 November 2020, by which time the matter had continued on an *ex parte* basis, and a hearing had been fixed for 9 December 2020.
12. On 30 November 2020, the First Defendant applied for an extension of time in which formally to file its Acknowledgment of Service, and further requested that the hearing as then listed be adjourned, and for directions for disclosure: this application was backed by the first witness statement of Mr Almuhairi and responded to by the third witness statement of Mr Khaleq.
13. On the same date, this Court acceded to the First Defendant’s request, and gave leave for the First Defendant to file evidence and for the Bank to submit responsive evidence; two subsequent Orders dealing with directions for trial were made.

14. Although leave was granted well out of time for the First Defendant to participate in this case, this indulgence was not without qualification. By letter to the Court from the Solicitors for the First Defendant, Hadef & Partners, dated 15 December 2020, the First Defendant accepted that "*at the hearing of these proceedings the First Defendant will not oppose an Order for the sale of the Property, and that "the First Defendant's interest in participation in the hearing is solely to object to, and make submissions upon, the terms of the sale of the Property and any matters related thereto.*"
15. Thus were the parameters of this hearing set. These background matters are undisputed by the First Defendant, whose interest lies solely in the mode of disposal of the Property on an Order for sale made by this Court. Although witness statements have been filed, by Mr Khaleq of the Bank and by Mr Almuhairi, no *viva voce* evidence has been called, and the hearing has been conducted solely on the basis of counsels' submissions.

Jurisdiction

16. The jurisdiction of this Court to make an Order for sale attracts no contention.
17. Several jurisdictional principles have been canvassed, but there is agreement that Rule 184 of the ADGM Court Procedure Rules 2016 is the operative provision; this provides:

"Sale of Real Property

- (1) *In any proceedings relating to real property, the Court may order the real property, or part of it, to be sold, mortgaged, charged, exchanged or partitioned.*
- (2) *Where the Court has made an order under paragraph (1), it may order any party to deliver up to the purchaser or any other person possession of the real property, receipt of rents or profits relating to it or both."*

18. Given acceptance on behalf of the parties that this legislative provision suffices to found jurisdiction, the Court is content to take this as the operative enactment, and there is no necessity to embark on the interesting issues of whether there is inherent jurisdiction, or whether Clause 10.1.d of the Mortgage read in conjunction with s 56(2) of the Real Property Regulations 2015 empowers the Court to order a sale as opposed merely to permit the Bank to exercise its own power of sale.

The Issues for Decision

19. There is no dispute between the parties that the mortgagee Bank should have conduct of the sale, the basic principle being that "where the proceeds of sale are likely to be insufficient to discharge the mortgage debt, the mortgagee should be given conduct of the sale": see *Fisher & Lightwood's Law of Mortgage*, para 31.13.
20. That the proceeds of sale in this case are likely to be insufficient is plain: even on the most optimistic of current valuations, a very substantial shortfall between the putative sale proceeds and the burgeoning mortgage debt, presently well over AED 553 million and rising, appears inevitable.
21. Nor in this application need the Court become involved in specific directions as to the actual form of sale. The Bank has made clear that it has no intention itself of deciding upon a marketing strategy, and that in this matter it wishes to follow the advice of JLL, nor has doubt been cast upon the ability or competence of JLL to effect an appropriate sale strategy for the Property which will provide the best chance to achieve the best price reasonably obtainable. The Court accepts this position.

22. Accordingly, the debate in this hearing, wherein the First Defendant accepts that the Property should be sold, has focused upon two distinct issues: *first*, the minimum sale price to be fixed for the Property; and *second*, whether the mortgagee Bank itself should be permitted to bid during the sale process.

A. *Minimum Sale Price*

23. The Property, Al Maryah Tower, is located at Plot C1, Sector M13, on Al Maryah Island. It was built approximately 5 years ago on a rectangular site extending to 4,850.21 square metres (52,207.20 square feet) as per the Abu Dhabi site affection plan, and was developed to provide 9 floors of parking space, a podium, 25 floors of office space, plus roof tower. It is currently dedicated to office use, with retail elements situated on the ground floor and 1st floor. The office tower comprises 34,310 square metres (367,372 square feet) of leasable Grade A office space, to be leased in shell and core condition. The Property is complete but remains 100% vacant.
24. The building is said to provide high quality, efficient office space fitting international grade A criteria, including in situ floor boxes and good levels of natural light. Communal WC facilities are located on each floor, which are serviced by 5 passenger lifts, and the views comprise a mix of city, Al Maryah Island, Al Reem Island, sea and canal views. The two ground floor retail units and a further 1st floor retail unit adjacent to the escalators (comprising a net internal area of 1,259.90 sq m (13,561 sq ft) can be accessed by the public, but none of these areas currently are fitted out. There are said to be future plans to build a bridge connecting the Property with the Galleria Mall. The 9 floors of Podium parking provide 1,046 parking spaces, monitored by security on a 24-hour basis.
25. The various photographs available in the papers assembled for the purpose of this hearing provide an impression of a handsome, modern building, albeit valuations of the Property differ markedly.
26. It is a matter of record that the purchase price of the Property in March 2019 was AED 500 million, which sum was considerably below an earlier March 2017 Cluttons valuation, which had produced a figure of AED 620 million: perhaps it was this market disparity which had attracted Mr Almuhairi and Dr Shetty to purchase at the outset.
27. The relevant figures then diminish significantly: an ADCE valuation of October 2019 produced a figure of AED X¹, whilst a Savills valuation as of 3 September 2020 posited a figure of AED X, this figure being repeated in an amended Savills Valuation Report of January 2021 (**"Amended Savills Report"**) which continued to use a valuation date close to the start of September 2020. This however was the low valuation, and in January 2021 a Chestertons valuation dated 7 January 2021 produced a figure of AED X.
28. The point is made that since the Property has at all times been vacant, the valuations are not based on actual rental income, but rather result from an assessment of what rents ought to be achieved, which in current market conditions must be a more than usually speculative exercise; as the Chestertons valuation observed (at section 5.1 of their report):

"Covid-19's economic impact continued to affect Abu Dhabi's office sector over Q3, with limited occupier demand placing downward pressure on rents.

The pandemic has added further strain on a sector already affected by a subdued economy, with the temporary cessation of demand from new entrants, couple with limited established occupier activity, likely to affect the overall 2020 performance."

¹ Certain figures stated in this Judgment will not be placed in the public domain as they may or may not remain commercially sensitive as the sale process unfolds.

29. Mr Edwards, for the Bank, suggested that the difference between the Savills and Chestertons figures – which are the ‘bookend’ valuations if the far earlier Cluttons figure is regarded as an outlier – are largely accounted for by differences in projected rental income and discount rate, Chestertons assuming a high level of rental income and applying a discount rate of 8.5% rather than 11%.
30. He submitted that in asking the Court to fix a minimum sale price the Bank naturally accepts that it is bound to take reasonable care to achieve the best price possible, so that there can be no question of the Bank wishing to engage in a ‘fire sale’ exercise, and in any event the Bank has made it entirely clear that in selling the Property it intends to follow the advice of JLL, so that there can be no basis for thinking that the Bank will act other than properly.
31. Mr Edwards further observed that fixing too high a minimum price risks setting a target that cannot be achieved, with the inevitable result that there will need to be a further application to the Court requesting a reduction in this figure at a cost of money and time, and with the potential for further delay to prejudice a sale, which in turn would risk occasioning prejudice to the Bank. He says that the risk of fixing a minimum which is too high outweighs the risk of fixing one too low, and thus submits that the Court should fix the minimum at the low point of the assembled opinions, that is, in the amount of the Savills valuation of AED X.
32. Mr Bor for the First Defendant disagreed. There were real concerns about the Property being sold at an undervalue, he asserted, which clearly would redound to the detriment of his client; thus instead of the reports proposed by the Bank, the First Defendant relied primarily on the Chestertons valuation dated 7 January 2021, which had taken the valuation date as at 4 January 2021 and was the most up to date, in contrast to the valuation date of the Amended Savills Report, namely 3 September 2020, which was four months earlier. He pointed out that the first Savills Report acknowledged that due to Covid the valuation is “less certain” and had recommended that valuation be kept under frequent review, a theme repeated in the Amended Savills Report which referred to “material valuation uncertainty” caused by the pandemic.
33. In his submissions Mr Bor also made reference to a CBRE UAE Market Report for 2020, which sought to demonstrate that as a general proposition rents offshore are higher than those onshore, and thus that the First Defendant did not consider that onshore CBD properties are an appropriate comparator with properties registered in the ADGM. He also noted that a JLL 2020 Report on the UAE Real Estate Market (which recorded an average rental figure of AED 1575/sq m for Grade A office space) did not focus on ADGM and was produced at the height of the Covid pandemic when the market was clearly depressed.
34. In the event, on behalf of his client Mr Bor asked the Court to base its conclusion on the Chestertons Report, which was the most up to date, and assessed rent for the Property at AED X per sq/ft, which thus produced the overall valuation figure as approximately AED X.
35. In this inevitable task, the Court is faced with a significant amount of paper generated by property consultants on both sides of the creditor mortgagee/ debtor mortgagor divide. It is also notable that in this case directions pointedly have not been sought for expert evidence, which may have assisted: the Court appreciates that this litigation was commenced on a Rule 30 basis, but whilst this may have been appropriate on the issue of liability, which entertained no substantial dispute of fact, it is clear that more complex and multi-layered valuation issues are unsuitable for like treatment, the result now being that valuation is required to be determined on the face of various reports whose content, on the present state of play, cannot properly be tested.
36. Be that as it may. The position now, as Mr Edwards observed, is that on the evidence there is “a band of reasonable opinion” as to the value of the Property, ranging from AED X to AED X, and that the size of this band demonstrates that there is considerable scope for uncertainty and doubt.

37. Absent use of a convenient crystal ball, the Court has reflected on the contentions of counsel seeking to persuade as to the intrinsic merit of the respective low-ball and high-ball figures. It is difficult to accept that in arriving at a minimum price that the Court necessarily should err on the bottom end of this particular spectrum, and thus accept that the market for ADGM Grade A office space has collapsed to the alarming extent anticipated by Savills. The probabilities are that the Covid pandemic will abate as the vaccination process takes hold in the UAE, and the Court also notes the observation in the Amended Savills Report to the effect that “across the ADGM, leasing activity was observed due to the growing demand from start-ups and companies from the financial services and consulting sector”, referring in particular to transactions undertaken by BNY Mellon, Gank Lombard Odier and ADNOC.
38. Absence of appropriate comparators also does not assist this process. Mr Bor noted the difference between the Chestertons Report and that of Savills in terms of the capitalisation rate, namely 8% against 9%, and argued that the Chestertons rate was to be preferred on the basis that of the three properties relied upon by Savills, the only appropriate comparator was that situated in Abu Dhabi, International Office, which was stated to have a net yield of 7.88%, closer to the Chestertons figure. Additionally, the First Defendant pointed to recent advertisements for the letting of Grade A office space in the ADGM which suggest an average rent of AED 348 sq ft, substantially higher than even the Chestertons report which, he concluded, might even be regarded as conservative.
39. At the end of the day, these matters are but straws in a fickle commercial wind, and it is an unfortunate fact that financial predictions generally, whether of the property market or the stock market, are often redolent with error. However, doing the best that one can on the available materiel, the Court is inclined to be more upbeat on future prospects than the Bank, and on the available evidence is firmly disinclined to accept as a minimum price the lower figure of AED X persuasively suggested by Mr Edwards.

40. Accordingly, the Court has decided that the minimum sale price in this Court-ordered sale should be AED X, which figure, unlike this Judgment, will not be placed in the public domain. This figure may or may not remain commercially sensitive as the sale process unfolds, but *ex abundante cautela* the Court sees no reason for this figure to be advertised prior to commencement of the marketing process.

B. Should the Bank have leave to bid?

41. This is the second issue of principle on which the parties sharply diverge.
42. The First Defendant resists the possibility of the Bank being able to bid for the Property on its own account. The view is taken that the Bank has a duty to obtain the best price reasonably obtainable and to act fairly towards the borrower, and it is argued that the Bank being allowed to bid risks undermining these duties, and creates conflict between the wish to secure the best deal for itself and the obligation to secure the best deal for the borrower.
43. The First Defendant urges that with what currently is hoped to be imminent emergence from the Covid pandemic, there now was a real possibility of a sale to a third party at a proper price within a reasonable time frame, and that the Court should ensure that this should be permitted to occur, untrammelled in the first instance by Bank participation.
44. Mr Bor submitted that in seeking to set the minimum price at the low level recommended by Savills, and then seeking permission itself to bid, the Bank clearly had its eye on securing a property initially sold for AED 500 million at a significant discount, and that obviously this would redound to the detriment of the debtor-mortgagors. Further, and in any event, he said that permitting the Bank to bid will have the de facto effect of ‘anchoring’ the price at which the Property is likely to be sold: if as a sophisticated entity, the Bank had wished to retain a right to bid for the Property, it could have made express provision for such right in the Mortgage itself, but had chosen not to do so.

45. Mr Edwards dismissed the concern of the First Defendant that if the Bank was given leave to bid that the Bank might be motivated to sell to itself at an undervalue: there could be no justification for such imputation, he maintained, not least because of the professional involvement of JLL in the sale process, and the large shortfall likely to result on any sale necessarily meant that there would be no economically rational reason for the Bank to prefer to purchase rather than to sell to a third party for a higher price.
46. He submitted that it was in the interests of the Bank as much as the mortgagors, and also of Mr Almuhairi and Dr Shetty, that the maximum sale price be achieved, and that permitting the Bank to bid was the more likely to enhance, rather than to reduce, the ultimate sale price.
47. In the view of the Court this is not an issue which should generate an undue degree of practical concern, and after reflecting on the arguments advanced on each side the Court is minded to grant the Bank leave to bid, if ultimately the decision is taken to do so, since Mr Khaleq has said that currently the Bank is uncertain whether, if given leave, this actually will occur.
48. In permitting the Bank to bid, the Court places significant weight on the involvement of JLL in the marketing process, and has had sight of the detailed JLL Technical and Commercial Proposals in the papers; in this connection the Bank has made it clear that it intends to take the advice of JLL with a view to obtaining the best price reasonably obtainable, including in the instance of any offer by the Bank.
49. Accordingly, while the sale formally remains in the hands of the Bank, the reality on the ground is that JLL would be assessing offers and advising on the appropriate marketing approach, so that in thus granting leave, it does not follow that this will enure to the detriment of the mortgagors. The Court also bears in mind that this is a small property market, in which no doubt there is little that escapes the attention of the market players, so that formally excluding the Bank from the sale process is likely to prove an artificial exercise at best.
50. Although the Court declines to preclude the Bank from bidding, nevertheless there is force in putting in place some form of judicial overview, if in fact during the sale process the Bank bids for and secures the Property.
51. In this regard Mr Edwards submitted that if and in so far as the Court had residual concerns, a middle ground might be to give the Bank leave to bid but on terms that no sale to the Bank should be concluded without the approbation of this Court, thus providing to the First Defendant the opportunity to make whatever submissions it wishes as to whether a better price could have been achieved other than that offered by the Bank.
52. The Court considers this to be a sensible and practical safeguard, and in the circumstances preferable to the alternative mooted by Mr Bor, who had suggested, on the basis that should leave to bid not be granted at the outset, that the Court should order the property to be marketed and sold, with liberty to the Bank to apply to bid should the Property not be sold within a period of 12 months.
53. It follows from the foregoing that the Bank is granted leave to bid on the basis that no sale to the Bank be concluded without approval of the Court.

Mechanics of Sale

54. Finally, given that this is a Court-ordered sale and not an instance of the mortgagee seeking an order for possession with a view to exercising its own power of sale, the issue of the mechanics of conveyancing requires to be addressed. Mr Edwards submitted that in these circumstances the most convenient course would not be to make a vesting order in favour of a purchaser, once identified, but rather to appoint the Claimant to convey, pursuant to the powers conferred by section 47 of the Trustee Act 1925 (UK), as applied by the Schedule to the Application of English Law Regulations 2015.

55. This aspect does not appear to be likely to generate disagreement between the parties – nor indeed does the Court hold any contrary view – and in their respective written submissions counsel had included possible draft Orders which appear to have adopted a like approach in principle.
56. However, during the course of this hearing counsel agreed that prior to drawing any Order for the approval of this Court, they wished to see the Judgment herein and the decisions reached on the twin points of principle at issue in this case.
57. The Court is content to adopt this course, and will issue this Judgment to enable counsel to agree a draft Order for engrossment.



Issued by:



Linda Fitz-Alan
Registrar, ADGM Courts
28 March 2021