

On behalf of: DIFCA (Applicant)
Witness: Jacques Visser
1st Statement
Exhibit: JJV1
10 February 2020

Appeal No: CA-002-2020

**IN THE COURTS OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE
COURT OF APPEAL**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 5(B)(1)(B) OF *DUBAI
LAW 12 OF 2004 IN RESPECT OF THE JUDICIAL AUTHORITY AT DUBAI
INTERNATIONAL FINANCIAL CENTRE (AS AMENDED)***

THE DUBAI INTERNATIONAL FINANCIAL CENTRE AUTHORITY

Applicant

WITNESS STATEMENT OF JACQUES JOHN VISSER

I, Jacques John Visser, of the Dubai International Financial Centre Authority (the DIFCA) located at Level 14, The East Wing, The Gate Building, Dubai International Financial Centre (the DIFC), Dubai, United Arab Emirates, state:

Witness particulars and authority

1. I am the Chief Legal Officer of the Dubai International Financial Centre Authority (“the Authority”).
2. I am authorized to make this Witness Statement in support of the Application of the Authority in these proceedings.
3. The Authority is a DIFC Body within the meaning of Article 5(B)(1)(b) of *Dubai Law 12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre* (as amended) (“the *Judicial Authority Law*”).

Background to the Application

4. On 21 August 2016, His Excellency the Governor of the Dubai International Financial Centre (“DIFC”) pursuant to Article (5) bis (3)(b) of *Dubai Law 9 of 2004* appointed a Working Group entitled the Wealth Management Working Group (“the Working Group”) to, amongst other things, consider the (then) present status of the Wealth Management Industry and to propose strategies and policies relevant to the Wealth Management industry going forward for consideration by the DIFC Strategy and Policy Committee.
5. Pages 2 to 3 of Exhibit JJV1 are a copy of the Terms of Reference.
6. On 4 December 2016 the Working Group submitted its Report (“the Report”) to His Excellency the Governor.
7. Pages 4 to 79 of Exhibit JJV1 are a copy of the Report.
8. Amongst the matters considered by the Working Group was the absence of precedents from the DIFC Courts as to the application and operation of the *Trust Law DIFC Law No. 11 of 2005* (as it then was, “*DIFC Trust Law 2005*”). The Report dealt with those matters on page 29 of Exhibit JJV1.
9. The Report was considered by the DIFC Higher Board on 20 December 2016 which endorsed the findings and recommendations of the Working Group and tasked the Authority to implement, where feasible, such recommendations.
10. Since receipt of the Report, the Authority has proceeded to implement its recommendations. That implementation includes the reenactment (with amendments) of the *DIFC Trust Law 2005* as the *Trust Law DIFC Law No. 4 of 2018* (“the *Trust Law*”) and the enactment of the *Foundations Law DIFC Law No. 3 of 2018* (“the *Foundations Law*”), as well as the proposal to replace the existing *DIFC Single Family*

Office Regulations with new *DIFC Family Office Regulations* (which is currently in progress), as well as implementing many changes to the DIFC's administrative arrangements that were recommended in the Report.

11. As a result of the enactment of the *Foundations Law*, the problems arising from absence of precedent decisions from the DIFC Courts that were noted in the Report in the context of the *Trust Law*, necessarily also apply in the context of the *Foundations Law*.
12. Following receipt of the Report, the Authority has entrusted me with the task of implementing Recommendations 23 and 24 of the Report.
13. Recommendation 24 of the Report has been addressed by the Court through the issue of Registrar's Direction No.3 of 2017.
14. In considering how Recommendation 23 might be implemented, I have given consideration to the questions –
 - a. Whether the release of the Report might itself ameliorate some of the concerns which led to the making of the Recommendation;
 - b. Which of the alternative procedures suggested in that Recommendation would more satisfactorily address those concerns, to the extent they remained; and
 - c. Whether in addition to seeking clarification of issues associated with the *Trust Law*, the objectives sought by Recommendation 23 would be more satisfactorily advanced by seeking clarification in relation to corresponding issues arising in relation to the *Foundations Law*.
15. I have consulted widely, both formally and informally, in relation to those matters. As part of the formal consultation process I convened a meeting of senior legal practitioners in the DIFC to obtain their views as to the need for further clarification of the law, and the preferable process to be adopted.
16. Page 80 of Exhibit JJV1 is a copy of the invitation to that meeting.
17. The meeting held on 13 May 2019 was attended by Grant Folland from Bryan Cave Leighton Paisner, Alastair Glover from Trowers & Hamlins, Diana Hamadé from Diana Hamade Attorney at Law, Fadi Hammadeh Group General Counsel of Al Futtaim, Murray North from Bryan Cave Leighton Paisner, Tanuja Paramasivam from the Authority, David Russell from Outer Temple Chambers, Cynthia Trench from Trench & Associates and myself.
18. At the meeting, it was the unanimous view of the attendees that the resolution of the issues listed in paragraph 21 of this Witness Statement would be greatly assisted by an authoritative statement of the position by the Court.
19. In considering the alternative procedures in Recommendation 23, the following considerations have led me to the conclusion that it would be preferable that the

Authority should make this present Application rather than seek to procure the making of an application for Opinion Advice and Direction under Article 20(1) of the *Trust Law*:

- a. An application for Opinion Advice and Direction could only be made by a trustee and only address specific issues which concerned the trustee in connection with the performance of the trustee's duties;
 - b. To the extent that issues arose under other legislation such as the *Foundations Law* it might not be possible to obtain the Opinion;
 - c. The range of potential problems which arose in connection with the *Trust Law* and the *Foundations Law* could not conveniently be dealt with in the one application because they were unlikely to arise in the course of administration of a single trust; and
 - d. As the purpose of the Recommendations was to obtain an authoritative statement of the position under those Laws to give greater confidence to the DIFC community, and its legal profession in particular, a decision of the Court of Appeal pursuant to Article 5(B)(1)(b) of the *Judicial Authority Law* would be more effective in that regard.
20. Following reaching that conclusion I advised the Authority accordingly and the Authority has resolved to make the present application. Page 81 of Exhibit JJV1 is a copy of the resolution of the Authority in this regard.

Issues proposed for determination

21. The issues which the Authority seeks to have determined by the Court of Appeal, and the answers which the Authority proposes should be given to the questions raised in respect of those issues, are as follows:
- a. Whether the property referred to in Article 34(1)(d) of the *Trust Law* can include property located in a jurisdiction which does not recognise trusts?
Proposed answer: Yes
 - b. Whether having regard to the terms of Articles 10(2) and 10(3) of the *Foundations Law*, a DIFC Foundation may hold property (other than property of the Foundation as defined in the *Foundations Law*) in trust under the *Trust Law*?
Proposed answer: Yes
 - c. Whether the reference in Article 10 of the *Trust Law* to the common law of trusts and principles of equity –

- i. includes the common law of trusts and principles of equity as understood under the law of England and Wales;

Proposed answer: Yes

- ii. is limited to the common law of trusts and principles of equity as understood under the law of England and Wales?

Proposed answer: No. Whilst the Court will place great weight on the jurisprudence of the Courts of England and Wales in determining the content of the common law of trusts and principles of equity, its approach to those issues will follow its approach to the application of common law generally, which permits the Court to also have regard to the jurisprudence of other significant common law jurisdictions.

- d. Whether, if a trust instrument or foundation charter contains an irrevocable provision of the type referred to in Article 40(11) of the *Trust Law* or Article 19(10) of the *Foundations Law*, it is possible for a person other than a national of the jurisdictions specified in the provision to have an interest in the trust or foundation property or derive any benefit under the trust or foundation?

Proposed answer: No

- e. Whether, if one or more suitably qualified expert(s) in Shari'a law has or have been appointed an advisory trustee or trustees pursuant to Article 57 of the *Trust Law*, the responsible trustee may subject to Article 57(3)(c) rely and act upon the advice of the advisory trustee(s) in respect of any matter related to Shari'a compliance which is relevant to the administration of the trust or the exercise of any discretion vested in the responsible trustee?

Proposed answer: Yes

- f. Can a waqf which has been validly constituted according to the law of the place of its establishment, subject to compliance with the formalities of the *Trust Law* or *Foundations Law* as applicable -

- i. be recognised as a trust under Article 17 of the *Law Relating to the Application of DIFC Laws, DIFC Law No. 10 of 2005 (Amended and Restated)*;

Proposed answer: If the waqf has legal personality in its place of establishment, no. In all other cases, yes;

- ii. be recognised as a foundation under Article 62 of the *Foundations Law*;

Proposed answer: If the waqf has legal personality in its place of establishment, yes. In all other cases, no;

iii. be continued as a foundation under Article 56 of the *Foundations Law*?

Proposed answer: If the waqf has legal personality in its place of establishment and is permitted by the law of that place to change its corporate domicile to the DIFC, yes. In all other cases, no.

g. Can a foundation if approved by another jurisdiction for continuance as a waqf, transfer to that other jurisdiction from the DIFC under Articles 59, 60 and 61 of the *Foundations Law*?

Proposed answer: Yes

h. Does any provision of the *Trust Law* prevent recognition of a DIFC trust under the laws of another jurisdiction for the purposes of those laws?

Proposed answer: No

i. Will the transfer of property by a Muslim to a trust or foundation necessarily attract the operation of Article 361 of the *Law of Personal Status* of the United Arab Emirates?

Proposed answer: Nothing in the Trust Law or Foundations Law has the effect that such a transfer will necessarily attract the operation of that Article.

j. Whether an Order made in proceeding in the Court under the *Trust Law* or the *Foundations Law* can be the subject of execution pursuant to Article 7 of the *Judicial Authority Law*?

Proposed answer: There is no distinction between Orders of the Court pursuant to the Trust Law or the Foundations Law and any other Orders of the Court for the purposes of Article 7 of the Judicial Authority Law and the Court will follow the procedures set out in that Article in respect of any such Orders.

k. Whether a settlor of a trust may be a shareholder or a director of a company which is trustee of the trust?

Proposed answer: There is no legal reason why a settlor of a trust may not be a shareholder or a director of a company which is trustee of the trust.

l. Whether, if a Muslim settlor expressly desires to establish a trust which is Shari'a compliant, but inadvertently includes in the trust instrument a provision which is not Shari'a compliant, the Court can:

i. pursuant to Articles 24(2)(c) and 25(2)(a) of the *Trust Law* determine that the disposition shall have effect on terms which are Shari'a compliant?

- ii. pursuant to Article 40(8)(a) of the *Trust Law* vary the terms of the trust so that they are Shari'a compliant?

Proposed answer: The Court has power in appropriate circumstances to make such Orders.

- m. Whether anything in public policy in the DIFC referred to in Article 9(2)(c) of the *Trust Law* precludes the establishment of a trust by a person who is not and has never been a Muslim notwithstanding that it may contain terms which would not, if the trust were established by a Muslim, be Shari'a compliant?

Proposed answer: No.

Progress of matter to date

22. On 2 January 2020, the DIFC Authority submitted to the Honourable The Chief Justice a request that he make a request to the Court of Appeal in terms of Article 5B(1)(b) of the Judicial Authority Law, Dubai Law No. 12 of 2004 for the interpretation of the laws referred to in the preceding paragraph.
23. Pages 82 to 94 of Exhibit JJV1 are a copy of that letter with the attachments omitted.
24. On 8 January 2020 the DIFC Authority received a response from the DIFC Courts Registry to the request made by the DIFC Authority to the Honourable The Chief Justice.
25. Page 95 of Exhibit JJV1 is a copy of that reply.
26. On 27 January 2020 the DIFC Authority filed the Part 8 Claim Form in this matter.
27. On the same day, the Honourable The Chief Justice requested the Court of Appeal to consider the application made by the DIFC Authority.
28. Pages 96 to 98 of Exhibit JJV1 is the letter from the Chief Justice to the Court of Appeal.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

Signed: 

Jacques John Visser

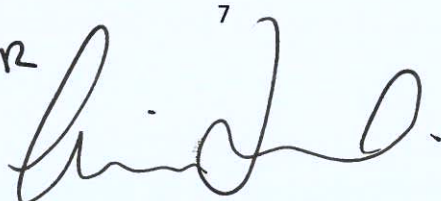
10 February 2020

WITNESSED BY:

AMESHA BIN KAUBAN

ASSISTANT REGISTRAR

- DIFC COURTS

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