



ABU DHABI GLOBAL MARKET 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
CIVIL DIVISION

BETWEEN

ROSEWOOD HOTEL ABU DHABI LLC
CLAIMANT

AND

SKELMORE HOSPITALITY GROUP LTD.
DEFENDANT

**JUDGMENT ON CLAIMANT'S APPLICATION FOR FINAL THIRD PARTY DEBT
ORDER**



Neutral Citation:	[2020] ADGMCFI 0004
Before:	His Honour Justice Stone SBS QC
Decision Date:	4 June 2020
Decision:	<ol style="list-style-type: none">1. The Claimant's application for a final Third Party Debt Order is dismissed.2. The ex parte Interim Third Party Debt Order dated 16 March 2020 granted in favour of the Claimant is discharged forthwith.3. Submissions from both parties as to costs are to be filed within 14 days of the date of this judgment.
Date of Orders:	4 June 2020
Catchwords:	Final third party debt order; procedures for making an interim third party debt order final; objections by third party to the making of a final order; whether there is a debt due or accruing due from the third party to the judgment debtor; insolvency of judgment debtor and third party; judgment creditor not to be placed in a better position than other creditors of the judgment debtor
Legislation cited:	ADGM Court Civil Procedure Rules 2016; rules 260-267
Cases cited:	Taurus Petroleum Ltd v State Oil Marketing Co [2018] ACC 690 Merchant International Company Limited v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy v The Bank of New York Mellon [2014] EWCA Civ 1603 Hardy Exploration & Production (India) Inc v Government of India [2019] QB 544 Ayerst v C & K (Construction) Ltd [1976] AC 167 Roberts Petroleum Ltd v Bernard Kenny Ltd [1982] 1 WLR 307; [1983] 2 AC 192
Case Number:	ADGMCFI-2019-003
Parties and representation:	Freshfields Bruckhaus Deringer for the Claimant Bird & Bird (MEA) LLP for the Defendant

JUDGMENT:

This Application

1. This is the judgment of the Court upon the Claimant's application for a final Third Party Debt Order ("TPDO") to be made against Roberto's Restaurant & Club Ltd ("Roberto's"), the Third Party against which the Claimant, in its capacity as judgment creditor, had obtained an ex parte interim TPDO from this Court on 16 March 2020.
2. Roberto's and its sister company, Skelmore Hospitality Group Ltd. ("Skelmore"), are members of the Skelmore Group of companies, and it was Skelmore which, after trial of the Claimant's action



before this Court, had been ordered to pay to the Claimant a sum in excess of AED6.5 million, together with interest thereon.

3. The basis of the Claimant's application, filed on 12 March 2020, was that as at 31 December 2019 Roberto's owed Skelmore the amount of AED3,219,763, and the Claimant now seeks to utilise the provisions of Rules 260 – 267 of the ADGM Court Procedure Rules 2016 ("the Rules") to obtain a final Order against Roberto's, and thus to obtain the sum allegedly owed to Skelmore in order to defray a portion of the unpaid judgment debt.
4. Rule 261(1) provides that an application for a TPDO may be made without notice, and the initial application, which sought an interim TPDO pending issuance of a final TPDO, was entertained ex parte on the basis of the assertion within the witness statement of Mr Tannous, leading the application, that the Claimant had reason to believe that, if put on notice of this application, steps would be taken "to ensure that the debt owed by the Third Party to the Defendant is either paid or is otherwise extinguished."
5. The procedures laid down in the Rules provide that, upon service of the interim TPDO, the third party or judgment debtor which objects to the Court making a final TPDO "must file and serve written evidence stating the grounds for his objections" (Rule 266 (1)(a)), and thereafter, if the judgment creditor wishes to dispute such objections, the judgment creditor "must file and serve written evidence setting out the grounds on which he disputes the third party's case" (Rule 266(2)(c)).
6. These procedures have informed this case.
7. On 24 March 2020 Bird & Bird, representing Skelmore and Roberto's, wrote stating that the debt underpinning the interim TPDO had been incorrectly characterised as a debt, and denied that a debt was owed to Skelmore by Roberto's (Rule 264 (3)).
8. The same letter indicated that the current coronavirus pandemic had resulted in the near impossibility of collating and providing the requisite evidence to support an objection to the granting of a final TPDO by 31 March 2020 (that is, within 14 days of service of the interim Order) and had requested an extension of one month to 30 April to file and serve such evidence. In the event, a further extension was requested, and granted, until 10 May 2020, this further extension being accompanied by an email from the Registrar indicating that another extension was unlikely to be forthcoming.
9. Accordingly, on 10 May, Roberto's and Skelmore jointly filed a witness statement in reply pursuant to Rule 266(1)(a), this being the statement, plus exhibits, of Mr Justin Mostert, Chief Finance and Investment Officer of the Skelmore Group, who made his statement objecting to the TPDO on behalf of, Skelmore, and on behalf of Roberto's, the named third party.
10. Contained within the exhibits attached to Mr Mostert's witness statement was a further letter of 10 May 2020 from Bird & Bird which took the form of legal submissions made on behalf both of Skelmore and Roberto's, with the request that these submissions be treated together.
11. Lastly, pursuant to the provisions of Rule 266(2)(c), the Claimant's legal representatives, Freshfields Bruckhaus Deringer, filed a response on 21 May 2020, wherein the judgment creditor set out its basis for disputing Skelmore and Roberto's case.
12. This latter submission completed the evidence filed before the Court. At the Court's request, on 28 May 2020 the Registrar wrote to the parties inquiring if an oral hearing was required: in response, the parties confirmed that no hearing was necessary and agreed that this application was to be dealt with on the papers.



The Argument

13. The application for an interim TPDO was founded on Skelmore's 2019 Draft Accounts for the year ending 31 December 2019 wherein a line item stated 'Related Party Balances – Receivable' from Roberto's Restaurant & Club Ltd in the amount of AED3,219,763.
14. In his witness statement leading the application, Mr Tannous emphasised that this information was correct because it was based on financial accounts actually produced by Skelmore, a member of the same corporate group as Roberto's, and referred to the evidence of Mr Kadrie, majority shareholder and director of both Skelmore and Roberto's, at the hearing of the Claimant's Rule 253 application; the Claimant also stated that it was not aware of any persons otherwise having a claim to the money in question.
15. In reply, Mr Mostert took issue with the contention that there was any debt at all owing to Skelmore from Roberto's.
16. Mr Mostert asserted that the Claimant had failed to grasp the "holistic" nature of the cross-funding between the various entities in the Skelmore Group, of which Skelmore and Roberto's were members, and of which Mr Kadrie was ultimate beneficial owner, and that the preponderance of transactions underpinning inter-company loan account entries between Skelmore and Roberto's (the last two years' of which were exhibited to his statement), demonstrated a regular and fluctuating movement of funds both ways between these two companies, such that the Receivable Party Balance upon which the Claimant had relied to obtain the interim TPDO "is effectively just an accounting entry" and was liable to regular change.
17. As to the characterisation of the specific sum of AED3,219,763 being a debt due and payable from Roberto's to Skelmore, this was a fundamental misunderstanding of the position, said Mr Mostert, and historically related to the initial capitalisation of Roberto's in December 2015 in the sum of AED5 million, when Skelmore, then 100% shareholder of Roberto's, had made payments on behalf of Roberto's; whilst such payments in the sum of AED3,219,763 remain reflected on the debit side of the account, when this payable is netted off against a total receivable from Skelmore of AED5 million, the net figure becomes a receivable from Skelmore amounting to AED1,780,237.
18. Mr Mostert suggested that confusion may have arisen from the fact that in the 2019 Draft accounts the AED5 million liability payable to Roberto's is wrongly included within the "Related Party Balances – Payables" under the account of Skelmore Consulting Group. However this error within the preliminary accounts now had been corrected, and the list of assets and liabilities of Roberto's as of 31 December 2019, which had been disclosed to the Claimant along with the Draft 2019 Accounts on 18 February 2020, had contained a true picture, so that closer inspection of these documents "would have allowed the Claimant to ascertain the true debt/credit relationship between Skelmore and Roberto's".
19. He said that the position further had changed since the presentation of the preliminary accounts, so that the sum payable by Skelmore to Roberto's had increased as the result of further movements within the Group accounts, and thus the current net receivable from Skelmore to Roberto's now stood not at AED1,780,237 but in the sum of AED3,791,777.
20. Accordingly, Mr Mostert concluded, no debt was owed by Roberto's to Skelmore, and thus there was no basis for the grant of a final TPDO against Roberto's "for the very simple reason that Roberto's is Skelmore's creditor, not its debtor".



21. A second objection made by Mr Mostert was that of “the impending insolvency of Skelmore and Roberto’s”, both of whom are heavily indebted, Skelmore’s liabilities exceeding assets by AED61,993,566, and Roberto’s by AED74,486,092. He stated that in light of the current environment facing the hospitality industry, there was to be no cash injection from Mr Kadrie into either Skelmore or Roberto’s, and in fact both these companies faced the imminent possibility of liquidation, Skelmore from the Claimant judgment creditor, and both Skelmore and Roberto’s from their unpaid auditors, Youssry & Co, in respect of unpaid audit fees related to audit reports prepared by this firm for 2017 and 2018.
22. The legal submissions of Bird & Bird substantially mirror the contentions advanced by Mr Mostert.
23. Three points are taken: first, that no debt is owed by Roberto’s to Skelmore, so that in order to ascertain if truly there is a debt, the liabilities owed by Skelmore to Roberto’s, and vice versa, must be off-set before it can be concluded that a final TPDO is appropriate, and that Roberto’s listed liability of AED3,219,763 must be viewed in context of the Shareholder Loan Account asset of AED5,000,000, thus rendering Skelmore a net debtor of Roberto’s; second, that this is not a debt “due or accruing due” to the judgment debtor from the third party within the wording of Rule 265(1), in this context citing the speech of Lord Mance in *Taurus Petroleum Ltd v State Oil Marketing Co* [2018] ACC 690, the judgment of the Court of Appeal in *Merchant International Company Limited v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy v The Bank of New York Mellon* [2014] EWCA Civ 1603, and the English High Court in *Hardy Exploration & Production (India) Inc v Government of India* [2019] QB 544; and third, that a TPDO should not be granted where the judgment debtor is insolvent, here highlighting Mr Mostert’s evidence that the total indebtedness of Skelmore amounts to AED61,993,566, and the established principle that where a judgment debtor is insolvent, the Court should refrain from making an interim TPDO final, as the effect of this would be to give the judgment creditor or preference over other creditors of the judgment debtor, citing *Ayerst v C & K (Construction) Ltd* [1976] AC 167.
24. The Claimant’s detailed reply submission sought to meet each of these points.
25. As to the Roberto’s ‘payable’ as a debt that is due and accruing, the Claimant says that the amount reflected in the draft accounts clearly represents a debt, and indeed that Mr Mostert had acknowledged that this figure “reflects payments made by Skelmore on behalf of Roberto’s”; in addition the cases cited on the “due or accruing due” point, namely *Taurus*, op cit., *Merchant International*, op cit., and *Hardy*, op cit., clearly were distinguishable on the facts. The Claimant maintained that the argument which had not been successfully established, and an aspect of the analysis of Skelmore and Roberto’s that was “ill conceived”, was that setting off sums purportedly owed by Skelmore to Roberto’s, and thus rendering Roberto’s a creditor and not a debtor, represented an evidential burden which Roberto’s had failed to meet given the “inadequate evidence” relied upon to support the set-off claimed.
26. In terms of the argument that Skelmore is insolvent and that the Court should refrain from making final the interim TPDO on this basis, and that in any event making the interim TPDO final would be “fruitless” given that Roberto’s also is said to be facing imminent insolvency, the present position was that no steps had been taken to put either Skelmore or Roberto’s into liquidation, and thus that this issue did not arise. Nor was there any credence in the suggestion made that the timing of the Claimant’s statutory demand on 4 May 2020 was a “tactical ploy” designed to enhance its interests: that which had occurred was that the Claimant simply had waited to consolidate all of the orders in its favour into one letter of demand.
27. Finally, the contention is made that the circumstances of this case plainly do not justify discharging the interim TPDO, that throughout this litigation there had been nothing but obfuscation, delay and delinquency from Skelmore, which has chosen not only not to honour its debts to the Claimant, but that in seeking to discharge the interim TPDO, had had the gall to rely upon a claimed debt to a sister company and former subsidiary which it had disposed of but one week before the final hearing.



Decision

28. The one matter upon which both parties agree is that when considering the issue of whether to make final the existing interim TPDO, that the Court should be guided by the principles summarised in the speech of Lord Brandon in the Court of Appeal in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1982] 1 WLR 307, principles which were subsequently approved by the House of Lords in the same case, reported at [1983] 2 AC 192.
29. In this case, involving consideration of whether a charging order should be made absolute, Lord Brandon stated that this question was one for the discretion of the court, and noted that for the purpose of the exercise of the court's discretion there was no material difference between a charging order on the one hand and a garnishee order on the other. His Lordship emphasised that in exercising its discretion the court has "both the right and the duty to take into account all the circumstances of any particular case, whether such circumstances arose before or after the making of the order nisi" and that in principle the court "should so exercise its discretion to do equity, so far as possible, to all the various parties involved, that is to say, the judgment creditor, the judgment debtor and all other unsecured creditors."
30. The source of contention in this case, of course, is where the equities lie, and on this aspect the parties are at opposite ends of the spectrum.
31. The Court has not found this a straightforward evaluation.
32. The Claimant has described the current state of the evidence as "deeply unsatisfactory", pointing to the relative paucity of documentation available, a lack of explanation as to why the 2019 accounts have not been audited, and that the inclusion within the draft accounts of both Skelmore and Roberto's of a Commercial Bank of Dubai guarantee in the sum of AED38.125 million, which is listed as a 'contingent liability' and therefore, asserts the Claimant, distorts the true financial position of these two companies such that the true amount of the liabilities of Skelmore and Roberto's had been artificially inflated by that amount.
33. A further evidential difficulty of which the Claimant complained lay in the absence of independent expert evidence which may have assisted in determining the true situation. Criticism here focused on the absence of the extensive documentation listed in Mr Mostert's witness statement, provision of which would have been relevant in the adducing of expert evidence; the necessity to consult such material had been the specific basis of the request for two extensions of time, but in the event Mr Mostert had said that recourse to such documentation had proved unnecessary.
34. Such difficulties notwithstanding, the Court has to do its best with the material the parties have chosen to place before it, and on the basis of that evidence to come to a view on what are the two 'live' issues in this case.

Is there a debt due or accruing due?

35. The question of whether there is a debt due or accruing due from Roberto's to Skelmore which is susceptible to the making of a final TPDO lies at the heart of this application.
36. Consequent upon the filing of evidence, no hearing of this issue has been requested in this case, and despite the criticisms leveled at his evidence, the Claimant pointedly has not sought to cross-examine Mr Mostert, the deponent on behalf of Skelmore and Roberto's.



37. The Court bears in mind the Claimant's complaint that there has not been appropriate disclosure in response to the requests for documents, including in this regard the documentation promised by Mr Kadrie in the Rule 253 hearing, although this is not a situation of no disclosure whatever, as evidenced by the seven exhibits dealing with the assets of Roberto's and Skelmore sent to the Claimant under cover of the Bird & Bird letter of 18 February 2020, and thereafter contained within the exhibits to the Mostert witness statement.
38. Putting aside the Claimant's adverse comment as to the circumstances of this case and its criticism of Skelmore's conduct of this litigation, the fact remains that the Claimant's evidence as to the existence of a debt due or accruing due against which a final TPDO may be issued consists of but a single line item within Skelmore's draft (not audited) 2019 accounts, coupled with the assertion that it is Skelmore's burden to establish that the existing interim TPDO should not be made final, and that Skelmore has not succeeded in discharging that burden.
39. No doubt there was an evidential burden upon Skelmore and Roberto's to provide evidence disputing the existence of a debt sufficient to found a TPDO, but it is not accepted that grant of an ex parte order in the circumstances of this case has had the effect of reversing the ultimate legal burden, which as a matter of law must remain throughout upon the Claimant as applicant for a final TPDO.
40. The grant of a TPDO has, or may well have, serious repercussions for a third party. Rule 267 states that "A final third party debt order shall be enforceable as an order to pay money", and once granted such final Order, if unsatisfied, can be used to underpin liquidation proceedings. Should a final TPDO be granted against Roberto's, and remain unsatisfied, no doubt it would be open to the Claimant to institute winding up proceedings on this basis, and since the grant of a final TPDO imports a judicial finding of the existence of a debt due or accruing due, Roberto's thus would be estopped from disputing the debt, in contrast to the situation prevailing in instances wherein non-payment of a debt founds a winding up petition, but where a dispute as to the existence of such debt attracts trial of that specific issue.
41. That which the Claimant now wishes the Court to do, absent cross-examination of Mr Mostert and the holding of a hearing of the issue of whether there is indeed a debt due or accruing due to Skelmore from Roberto's, is effectively to ignore the evidence of Mr Mostert and to treat his evidence as untruthful and of no consequence, and thus to proceed to grant a final TPDO, a course which potentially would put the Claimant in a more advantageous position in relation to Roberto's than would have been available to Skelmore were there to be an inter-company dispute as to the existence of such a debt.
42. This is not an attractive position. There may be difficulties with the evidence thus far filed, and questions which arise during the testing of such evidence, but the Court is disinclined simply to ignore the evidence as filed or to accord it no credence by reason of alleged disclosure shortcomings or other circumstances within this litigation such as have occasioned criticism from the Claimant.
43. In short, without further inquiry, which has not been requested, the Court is unprepared to regard the evidence filed by Mr Mostert as demurrable on its face, and without more to proceed to a final TPDO. Any such inquiry, preferably buttressed by independent expert accounting evidence, may lead the Court to conclude that the Claimant's suspicions as to the contrived nature of this response are justified, or it may not. But further inquiry there should be, and the Court does not consider that it is its function to institute such course when both parties have indicated that they are content that this application be adjudged on the papers alone.
44. Accordingly, the Court does not accede to the Claimant's submission that there is nothing within the evidence that serves to impede making final the Interim TPDO as initially granted.



45. Focusing solely upon the Roberto's receivable in the draft accounts as a debt – “the only question for the Court is whether there is a “debt” and whether that debt is due and accruing” – at the same time as dismissing the set-off argument as “ill-conceived” and “convenient”, lends some justification to the third party observation that for the purpose of obtaining a final TPDO the Claimant is seeking to “cherry pick” accounting entries in isolation without taking stock of inter-company financial reality.
46. It follows that on the current state of the evidence the Court is not minded to accept the Claimant's submission that the equities of this case are “unarguably in favour” of making the existing interim TPDO final, and in the exercise of its discretion declines to grant the Claimant the final TPDO it seeks on the basis that on the key issue in this case it has not been demonstrated to the satisfaction of the Court that there is in fact a debt due or accruing due by Roberto's to Skelmore sufficient to found the grant of a final TPDO.

Insolvency of judgment debtor and third party

47. The foregoing conclusion is sufficient in itself to decide this application, but in so far as this may be incorrect, reference also is made to the second issue raised in objection on behalf of Skelmore and Roberto's.
48. The submission is that Skelmore has been issued with two statutory demands under section 82(1)(a) of DIFC Law No 1 of 2019: one from its auditor, Youssry & Co, and one from the Claimant itself. And that since Skelmore's liabilities greatly exceed its assets, Mr Mostert stating that the total indebtedness standing at AED61,993,566, Skelmore clearly is insolvent, and thus the Court should refrain from making final an interim TPDO as this would give the judgment creditor preference over other creditors of the judgment debtor, the established principle being that a TPDO should not permit a judgment creditor to be placed in a better position than other creditors of the judgment debtor.
49. This argument is supplemented by the submission that Roberto's itself also is facing insolvency, having very considerable debt on its own part and recently having been served with a like payment demand from Youssry & Co, so that in the event any final order, if granted, would be practically “fruitless” and would not achieve the Claimant's desired outcome of avoiding an insolvent judgment debtor.
50. The short answer to this is that as a matter of fact no winding up petition against either Skelmore or Roberto's yet has been lodged by any creditor, nor has Skelmore placed itself in voluntary liquidation nor indicated an intention so to do, and until this eventuality occurs the Court takes the view that the insolvency issue does not ‘bite’ upon the current situation: in this regard the Court accepts the basic principle adumbrated by Lord Brightman in the House of Lords in *Roberts*, op cit., at 206-207 that “a judgment creditor is in general entitled to enforce a money judgment which he has lawfully obtained against a judgment debtor by all or any of the means of execution prescribed by the relevant rules of court.”
51. Accordingly, this secondary line of argument advanced on behalf of Roberto's and Skelmore is rejected.



Order

52. It follows from the foregoing that after considering all the circumstances of this case and the evidence as currently filed on this application, in the exercise of its discretion the Court orders that:

- (a) the Claimant's application for a final TPDO is dismissed;
- (b) the ex parte interim TPDO dated 16 March 2020 granted in favour of the Claimant is discharged forthwith; and
- (c) submissions from both parties as to costs are to be filed within 14 days of the date of this judgment.



Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
4 June 2020