THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL
BEFORE JUSTICE ROGER GILES, JUSTICE WAYNE MARTIN AND H.E JUSTICE ALI AL MADHANI

BETWEEN

LAKHAN

Appellant/Defendant

and

LAMIA

Respondent/Claimant

COSTS JUDGMENT OF THE COURT OF APPEAL

UPON the judgment of the Court of Appeal in CA-001-2021 dated 8 April 2021

AND UPON reviewing the Claimant's application no. CA-001-2021/1 dated 26 April 2021 (the **"Application"**)

AND UPON the Defendant's evidence in answer to the Application dated 10 May 2021

AND UPON the Claimant's evidence in reply dated 17 May 2021

AND UPON the Defendant's supplementary reply to the Application dated 30 May 2021

AND UPON the Claimant's submissions to the Defendant's reply dated 7 June 2021

IT IS HEREBY ORDERED THAT:

1. The Application is dismissed.

2. No order with respect to the costs of the Application.

Issued by:
Nour Hineidi
Registrar
Date of issue: 24 June 2021
At: 2pm

JUDGMENT

Introduction - disposition of the appeal

1. On 8 April 2021 this Court ordered that the Defendant's appeal be allowed, the order staying the proceedings instituted by the Claimant be set aside, and that the proceedings be remitted to the Court of First Instance for the determination of the Defendant's challenge to the jurisdiction of the Court.[1]

2. The Court published its reasons for those orders.[2] Those reasons provide the context for the application which is the subject of these reasons, and should be read for a full understanding of these reasons. For present purposes it is sufficient to provide a very general summary of the substantive decision on appeal.

3. In October 2019 the Defendant brought proceedings in the Dubai Courts seeking an order for payment of monies said to be due under a building sub-contract with the Claimant (the **"Dubai proceedings"**). It seems that the Claimant asserted in the Dubai proceedings that the dispute was the subject of an Arbitration Agreement, although that assertion did not prevent the proceedings moving to the point at which an independent engineering expert was appointed, who reported to the Dubai Courts to the effect that an amount in excess of AED 6 million was due to the Defendant.

4. However, no judgment had been entered in the Dubai courts when, on 1 July 2020, the Claimant commenced proceedings in the DIFC Courts (the **"DIFC proceedings"**) claiming a declaration that the Arbitration Agreement covered the dispute the subject of the Dubai proceedings.

5. On 9 August 2020 the Claimant filed a petition to the Joint Judicial Committee (the **"JJC"**)[3] in which the Claimant asserted that there was a conflict in the jurisdiction of the Dubai Courts and the DIFC Courts and sought an immediate stay of the two conflicted proceedings until its petition to the JJC was adjudicated.

6. However, the Claimant gave no notice to the Defendant of the presentation of its position to the JJC, and on 19 August 2020 the Defendant filed an acknowledgement of service in the DIFC proceedings, indicating its intention to contest the jurisdiction of the DIFC Courts and to dispute the existence of a binding Arbitration Agreement.

7. On 15 September 2020 the Dubai Courts ordered a stay of the Dubai proceedings until the JJC had made its decision on the Claimant's petition. However, it seems that no notice of that order was given to the Defendant, who did not become aware of the petition to the JJC until the first hearing of the DIFC proceedings on 19 October 2020. The purpose of that hearing was to determine the Defendant's challenge to the jurisdiction of the DIFC Courts. When the Court and the Defendant were advised of the Claimant's petition to the JJC, the hearing was adjourned, and on 21 October 2020, the Judge ordered that the proceedings be stayed.

8. The Defendant appealed against that order. That appeal was allowed on the ground that there was no conflict of jurisdiction giving rise to the obligation to grant a stay pending determination of the petition to the JJC unless and until the DIFC Courts had asserted jurisdiction or taken some steps to exercise jurisdiction over the dispute. At the time the stay order was granted, the DIFC Courts had not asserted jurisdiction over the dispute or taken any step in the exercise of that jurisdiction. Rather, the DIFC Courts were proposing to determine whether they had jurisdiction in respect of the DIFC proceedings brought by the Claimant in order to determine the Defendant's objection to jurisdiction. Accordingly, the order staying the DIFC proceedings was premature.

9. As we have noted, this Court remitted the proceedings to the Court of First Instance for the determination of the Defendant's objection to jurisdiction. This Court further ordered that the costs of the proceedings at First Instance be determined by the Court determining the objection to jurisdiction.

10. In relation to the costs of the appeal, the Court made an order in the following terms:

5. The claimant shall pay the defendant's costs of the appeal, to be assessed by a Registrar if not agreed, with liberty to apply by application filed within 14 days should either party seek a different or additional order in relation to costs.

The Claimant's application

11. As we have noted, the orders disposing of the appeal were made on 8 April 2021. Accordingly, any application for a different or additional order in relation to the costs of the appeal had to be made by 22 April 2021.

12. By letter dated 25 April 2021, apparently sent on 26 April 2021, the legal representatives of the Defendant wrote to the Claimant noting that no application had been made to vary the order of the Court relating to the costs of the appeal within the time specified by the Court and inviting the Claimant to agree the costs claimed by the Defendant in the Statement of Costs which had been filed in advance of the appeal hearing.

13. However, a few hours later on 26 April 2021, the Claimant filed an application seeking:

> 1. An extension of time pursuant to RDC 4.2(1) and a relief from sanction under RDC 4.49 to file and serve the Application to vary the Judgment as to costs;
>
> 2. Paragraph 5 of the judgment to be varied as follows "no order as to costs of the appeal".[4]

14. The Claimant sought an oral hearing of its application. The Defendant contended that such a hearing was unnecessary and invited the Court to exercise the power conferred by RDC 23.69 to determine the application without a hearing. The Court did not consider that an oral hearing of the application would be appropriate. The Court advised the parties of that determination and put in place a process for the exchange of written materials relating to the Claimant's Application.

The Claimant's contentions

15. The Claimant's contentions in support of its application are contained in two witness statements made by Mr Raj Kumar and a document entitled "Rejoinder to the defendant's Supplementary Reply". Of course, the provision of submissions in the form of witness statements is irregular and contrary to proper practice. It can be inferred that this course was followed because the documents filed by the Claimant in support of its application do not bear the name of any legal representatives, although their form and content suggests that there has been at least some legal input into their preparation.

16. In the first witness statement of Mr Kumar it is contended, correctly, that until the decision in this appeal it has been the practice of the DIFC Courts to suspend DIFC Court proceedings upon the filing of a reference to the JJC, and the Judge at first instance acted in accordance with this practice. The Claimant contends that the existence of this practice meant that it was "entitled to oppose the Defendant's appeal", and that it was "highly regular for the claimant . to have opposed the appeal and should not be penalized in costs for doing so".[5]

17. In relation to the extension of time, the Claimant asserted that there was one working day of delay in the bringing of the Application. That assertion is not correct. The Application was made four days and two working days after the time specified by the Court had expired on 22 April 2021. It was further asserted that the delay was slight and occasioned no prejudice to the Defendant.

18. In the second witness statement of Mr Kumar the Claimant repeated its erroneous assertion that its Application was out of time by only one working day, and its reliance upon the established practice of the Court in relation to the grant of stays following an application to the JJC. The Claimant also objected to the Defendant filing exhibits in support of its opposition to the Application without providing any witness statement. The Claimant further refuted the Defendant's proposition that RDC 4.2(1) did not empower the Court to extend times specified in judgments.

19. In its rejoinder, the Claimant refuted the Defendant's contention that its application was, in effect, an appeal against a judgment on the question of costs, and also responded to arguments advanced by the Defendant in relation to the proceedings at first instance, observing that the costs of those proceedings had been remitted to the Court of First Instance. The Claimant reiterated its substantive proposition that it was not unreasonable

for it to have opposed the appeal having regard to previous practice in the Court.

The Defendant's contentions

20. The Defendant's contentions are contained in two sets of submissions filed in opposition to the claimant's application. At the time the first submission was filed,[6] two exhibits were also filed, although neither exhibit was the subject of any witness statement. The first exhibit was the judgment of this Court, and the second was the letter from the legal representatives of the Defendant to the Claimant dated 25 April 2021 to which we have referred above.[7]

21. In its first submissions the Defendant asserts that there is a connection between the transmission of the letter requesting the Claimant to agree costs and the Claimant's application which was filed later that same day.

22. The Defendant also submits that RDC 4.2(1) does not apply to orders made as part of a judgment.[8] The Defendant further submits that RDC 4.49 has no application to the current circumstances.

23. The Defendant further asserts that the claimant has not provided any justification for an extension of time within which to bring its application, and also asserts that the application causes prejudice to the Defendant by imposing additional time and cost burdens upon it, and by denying the Defendant costs ordered in its favour.[9]

24. The Defendant further submits that the Claimant has presented no grounds in support of its application to vary the order made with respect to costs.[10] The Defendant further submits that the Claimant's application has been brought "in an attempt to circumvent" the order made with respect to costs and to "avoid engaging in discussion with the defendant to agree costs".

25. In its second submissions the Defendant asserts that the issue of costs has already been decided by this Court, in a final and binding judgment.[11] In that context the Defendant submits that "the Claimant is reverse engineering an appeal to the judgment on the matter of costs",[12] and relies upon provisions in the RDC with respect to the finality of judgments.[13]

26. In its second submissions the Defendant also presents an argument based upon observations made by the judge at First Instance in the course of the hearing before him.[14]

27. In its second submissions the Defendant also repeats a number of propositions advanced in its first submissions.

28. Curiously, at no point in either of its written submissions does the Defendant address or respond to the substantive argument advanced by the Claimant in support of its application - namely, the proposition that the Claimant should not be ordered to pay costs because it was justified in opposing the appeal having regard to the previous practice of the Court.

Analysis

29. The Claimant's application raised two, and only two, issues for determination, namely:

(a) should the Court exercise its power to extend time to enable the application to be brought; and

(b) should the Court depart from the normal rule to the effect that costs follow the event on the ground that the Claimant was justified in opposing the appeal because of the previous practice of the Court.

However, as the preceding summary shows, the parties have contrived to present a number of issues which are nothing more than a distraction from the only substantive issues raised by the Claimant's application.

30. It is convenient to deal with those distractions briefly, before returning to the substantive issues in the application.

The tender of exhibits by the Defendant

31. The Claimant objects to the Defendant's tender of the judgment of this Court and the letter of 25 April 2021 on the ground that they are not the subject of any witness statement. The objection to the tender of the judgment is pointless because, of course, the judgment forms part of the Court record. The objection to the tender of the letter of 25 April 2021 is pedantic in the extreme, as there is no doubt that the letter was sent, and it speaks for itself. In any event, for reasons given below, we do not think anything turns on the letter or its terms.

32. There is no substance in the Claimant's objection to the exhibits tendered by the Defendant.

The power of the Court to extend time

33. The Defendant contends that the Court has no power to extend time under RDC 4.2(1) because that provision should be read as being restricted to case management orders made by the Court, and as not extending to orders made in the course of a judgment.

34. RDC 4.2 provides (relevantly):

4.2 Except where these Rules provide otherwise the Court may:

(1) extend or shorten the time for compliance with any Rule, Practice Direction or Court order (even if an application for extension is made after the time for compliance has expired) .

35. It is clear from the words of the Rule that its object is to provide the Court with a broad power to extend or shorten time in all circumstances

other than the circumstance in which the Rules expressly provide otherwise. There is nothing in the language of the Rule, or to be derived from its apparent object or purpose, which would enable a distinction to be drawn between time limits imposed in different types of court orders, as the Defendant contends. The fact that the order of this Court which imposed a time limit within which any application for a costs order had to be made formed part of the orders made with respect to the disposition of the appeal has no bearing upon the application of RDC 4.2(1). There is no doubt that the Court has the power to extend the time which it set in its earlier order, should it decide to do so.

36. It follows that it is unnecessary for the Claimant to rely upon the alternative source of power which it invoked - namely RDC 4.49. However, it should be observed that this is another case in which that provision of the Rules has been relied upon in inapposite circumstances. The rule applies to "an application for relief from any sanction imposed for a failure to comply with any . Court order". In the current circumstances no sanction has been imposed upon the Claimant for failure to comply with any order of the Court. Rather, the Court granted a liberty to each party to apply within the time stipulated by the Court. The order of the Court did not require either party to do anything but granted the parties a liberty which was subject to conditions. Accordingly, it is not correct to characterise the inability of a party to exercise the liberty granted after the expiry of the time specified without an extension of that time by the Court as a sanction imposed by reason of a failure to comply with a previous Court order. Nor is it correct to characterise the present application as an application for relief from such a sanction. Rather, as we have observed, it is a conventional application for an extension of time.

The proceedings at first instance

37. The Defendant's submissions in reliance upon statements made by the Judge in the course of the First Instance proceedings are misconceived. This Court has made no order with respect to the costs of those proceedings. Rather, the question of the cost of those proceedings has been remitted by this Court to the Judge who will hear and determine the Defendant's objection to the jurisdiction of the Court. The statements made by the Judge at First Instance are entirely irrelevant to the issues currently before the Court and which are concerned only with the costs of the appeal.

The Claimant's Application is, in effect, an appeal from the judgment of the Court

38. The Defendant's submissions to the effect that the Claimant's application is, in effect, an attempt to bring an appeal from the earlier decision of this Court with respect to costs are equally misconceived. It is clear from the reasons given by this Court, and from the terms of the order made, that the order of the Court with respect to costs was made provisionally, and expressly on the basis that either party had liberty to apply to vary or add to that order. It is simply wrong to characterise the exercise of that liberty as an appeal.

The Claimant's motives, viewed in the context of the letter of 25 April 2021

39. The Defendant contends that the Claimant's application is motivated by a desire to avoid engaging with its letter of 25 April 2021 relating to the quantum of the Claimant's costs. We do not accept that proposition for a number of reasons. First, the Claimant's application is not concerned with the quantum of the costs to be paid pursuant to the order of the Court - rather, it seeks the substantive variation of that order.

40. Second, the Claimant's application was brought within hours of the transmission of the letter from the Defendant's legal representatives, Clearly the documents which were filed in support of the application must have taken much longer to prepare than the few hours following the transmission of the Defendant's letter.

41. Having disposed of the various issues unnecessarily raised by the parties, it is appropriate to return to the two substantive issues raised by the Claimant's application.

Should time be extended to enable the Application to be brought?

42. When any application is made for an extension of time the matters to be assessed in the exercise of the court's discretion will usually include:

(a) the length of the extension sought;

(b) the justification given for the delay; and

(c) whether any, and if so what prejudice has been suffered by the other party by reason of the delay.[15]

43. Dealing with these matters in turn, the extension of time sought in this case is very brief, being four days or two working days. No real justification for the delay has been provided, apart from a vague and unsubstantiated assertion to the effect that legal advice was required, in a context in which the application hasn't been made through any legal representatives.

44. The Defendant asserts that grant of an extension of time will occasion prejudice by reason of the cost it will incur responding to the application and the time which will be taken to determine the application. This submission misses the point, because those matters are the consequence of the Claimant's application being brought, rather than the consequence of the short delay in bringing the application. The Defendant has not identified any prejudice which has been suffered because the application was brought four days later than it should have been brought, and it is difficult to conceive that there would be any prejudice flowing from such a short period of delay.

45. Weighing these various considerations, although no valid justification for the delay has been provided by the Claimant, as the period of delay was very short and no prejudice flowing from the delay has been identified, the Court will exercise the power conferred by RDC 4.2(1) to extend the time for bringing the Claimant's application until 26 April 2021.

The costs of the appeal

46. The Claimant contends that the Court should depart from the usual practice under which costs follow the event because it was justified in opposing the appeal by reason of the previous practices of the Court. We do not accept that submission for the following reasons.

47. While we do not doubt that prior to this decision the practice of the Court was as the Claimant asserts, there was no reasoned decision of the Court with respect to that practice. Rather, it appears the practice evolved over time without contest or contention.

48. In fact, such decisions as there were prior to this case provided no justification for the Claimant's opposition to the appeal. The decision in *Standard Chartered Bank v Investment Group Private Ltd*,[16] made in analogous circumstances, is consistent with the decision of this Court. Further, although the decisions of the JJC on this topic are, as we observed, not entirely consistent, the decision in the circumstances closest to the present circumstances - namely, the decision in *Essar Projects Ltd v McConnell Dowell South East Asia Pte Ltd*[17] is entirely consistent with the decision of this Court. Accordingly, such authority as there was prior to this decision provided no justification for the Claimant's stance.

49. But in any event, it is commonplace for an appellate court to overturn a decision made at first instance by a court acting in reliance upon other decisions at First Instance. That circumstance is not generally regarded as a circumstance justifying departure from the normal rule to the effect that costs follow the event, and no case has been cited which would suggest otherwise.

50. We would also observe that the Claimant was not obliged to contest the appeal. It could either have conceded the appeal or filed a notice agreeing to be bound by the ruling of the Court. However, the Claimant did not take either course. Rather, it elected to oppose the appeal, unsuccessfully as it transpired. In those circumstances there is no reason why the normal rule as to costs should not apply.

51. It follows that although we would extend the time to enable the Claimant's application to be brought, we would dismiss the application and make no amendment to the orders pronounced on 8 April 2021.

The costs of the application

52. Although the Claimant's application has failed, it has not failed for any reason advanced by the Defendant in argument. As we have noted, it is a curious and inexplicable feature of the Defendant's submissions that they fail to engage in any way with the substantive argument advanced by the Claimant in support of its application. Further, the Defendant's opposition to the application for an extension of time failed, as did all but one of the arguments raised in support of the propositions advanced by the Defendant which we have described as distractions from the real issues in the case.

53. We do not think it appropriate for the Defendant to be compensated for the preparation of submissions which did not engage at all with the substantive issue in the case but instead advanced propositions which were all, with one exception[18] rejected by the Court. The appropriate order is that there be no order with respect to the costs of the Application.