THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

LARMAG HOLDING B.V.

Claimant

and

(1) FIRST ABU DHABI BANK PJSC
(2) FAB SECURITIES LLC
(3) MR ABDULLAH SAEED BAKHEET OBAID ALJABERI
(4) MR ALI MOHAMMED
(5) ELITE HOLDING GROUP LIMITED

Defendants

ORDER WITH REASONS OF JUSTICE SIR RICHARD FIELD

UPON considering the Third Defendant's (**"D3"**) Application No. CFI-054-2019/16 dated 9 September 2021 for an extension of time in which to apply for permission to appeal the judgment dated 15 August 2021 (that was followed under the "slip rule" by a corrected version dated 30 August 2021) (the **"EOT Application"**)

AND UPON considering D3's permission to application dated 6 September 2021 filed out of time seeking permission to appeal the said judgment dated 15 August 2021 on the ground that the Court lacked jurisdiction to hear and determine the claim made by the Claimant against D3

AND UPON considering the Claimant's objections to the EOT Application set out in the 5th witness statement of Mr Keith Lyall Hutchison (**"Mr Hutchison"**) served on behalf of the Claimant

AND UPON considering the said judgment dated 15 August 2021

AND UPON Rule 44.19 of the Rules of the DIFC Courts (**"RDC"**)

IT IS HEREBY ORDERED THAT:

1. The EOT Application is refused.

2. The Third Defendant must pay the Claimant's costs incurred in the said EOT Application to be assessed on the standard basis by a Registrar, if not agreed.

Issued by:
Maitha AlShehhi
Judicial Officer
Date of Issue: 19 August 2022
At: 4pm

SCHEDULE OF REASONS

1. Following a trial that lasted several days, the claims brought by the Claimant against D3 were upheld. The Court held that: (i) D3 had fraudulently procured the transfer by the Claimant of 70,000 EUR 1 million Reditum SA bonds free of charge into an account he held with the Second Defendant; (ii) in the course of achieving this transfer, D3 forged, or authorised the forging of documents purportedly issued by a reputable bank stating that a prepayment for the Reditum bonds in the sum of Euros 20 million had been sent to the Claimant's bank account in Holland; (iii) D3 had given false evidence dishonestly knowing that it was false; (iv) the Claimant was and remained the true owner of the Reditum bonds; (v) D3 must forthwith give all necessary instructions and make all necessary arrangements for the transfer to the Claimant of the Reditum Bonds held in his account 47502 with the Second Defendant; and (vi) the deceit practised by D3 involved such grave dishonesty that he and those alleged to have been party to his fraud (the 4th and 5th Defendants) must pay the costs of the action on the indemnity basis.

2. The pleaded grounds in support of the EOT application are as follows:

(a) The Appeal Notice was prepared and ready to file prior to the deadline of 4pm, Sunday 5 September 2021, but an intervening factor was the requirement that the law firm BSA Ahmad Bin Hezeem & Associates (**"BSA"**) first complete the Form P37/01 and the Form P37/01 was unable to be loaded on the day of filing, with the consequence that the Appeal Notice was unable to be filed on the eRegistry Portal;

(b) Because Form P37/01 was not able to be loaded prior to the filing deadline of 4pm, the decision was taken to file the Appeal Notice with the Registry and serve it upon the Claimant by email (which resulted in the Purported Appeal Notice);

(c) D3 took prompt steps to rectify the problem which had arisen (with the Form P37/01) and made contact with the Registry on 6 September 2021. It is presently unclear what the issue was that prevented the uploading of the P37/01 Form, but it could not have been reasonably anticipated by an informed user of the eRegistry portal system;

(d) The issue was resolved within 24 hours and the filing fee (for the Appeal Notice) was paid and proper service was effected promptly;

(e) A direction that D3 file the EOT Application was made on 7 September 2021 at 16:01 and the application was thereafter made promptly, taking into account other important filings, the workload of counsel and the need to assemble, collate and present the documentary evidence filed in support of the EOT Application;

(f) Because the Claimant received the Purported Appeal Notice (attached to BSA's email to the Registry dated 5 September 2021) at 16:01, the actual prejudice to the Claimant was 2 minutes, which is de minimis;

(g) The breach was neither serious nor significant; and

(h) The Appeal Notice has a real prospect of success.

3. It is submitted on behalf of the Claimant in Mr Hutchison's 5th witness statement that the EOT Application should be refused on either or both of the following grounds:

(1) The proposed appeal, based as it is on the ground that the Court lacked jurisdiction to hear and determine the claims against D3, is hopeless and abusive since D3 filed an Acknowledgement of Service on 4 December 2019 and by RDC 12.5, having failed to make any application disputing the jurisdiction of the Court prior to the attempt to apply for permission to appeal the judgment on 6 September 2021, he is to be treated as having accepted that the Court has jurisdiction to try the claim.

(2) The alleged difficulties that BSA allege with filing the P37/01 Form on the eRegistry portal system on 5 September 2021 is not an adequate explanation or excuse for the failure to comply with the RDC 44.10 deadline in circumstances where:

(i) D3 had instructed BSA to act for him in these proceedings by 26 August 2021 at the latest, given he had sent an email to the Registry on that date which stated "I would like to inform you that I have assigned BSA Ahmad Bin Hezeem and Associates to follow up on the above mention case";

(ii) Despite BSA's assertions to the contrary, it is clear that BSA was instructed to act for D3 in these proceedings from 26 August 2021, given the email from D3 to the Registry on 26 August 2021 (set out immediately above) and the email from D3 to Clyde & Co dated 31 August 2021 which stated "Please contact the lawyer's office on the emails below roger.bowden@bsaph.com; jonathan.brown@bsaph.com";

(iii) D3 was instructed by the Registry to file the P37/01 Form on the eRegistry portal on 26 August 2021;

(iv) Clyde & Co informed BSA on 31 August and 2 September 2021 that it would need to file the P37/01 Form on the eRegistry portal before D3 would be able to file an application for permission to appeal the judgment;

(v) Despite a clear direction from the Registry and the unequivocal position of the Claimant regarding the P37/01 Form, BSA inexplicably and without any explanation failed to attempt to file the P37/01 Form during the period 26 August 2021 to 4 September 2021 (a period of 9 calendar days), but instead waited until the last day of the period within which any Appellant's Notice was required to be filed, i.e. 5 September 2021, before bothering to try to file the P37/01 Form.

(vi) Had BSA acted with proper dispatch, it would have filed the P37/01 Form well in advance of the 5 September 2021 deadline, and shortly after instruction by the Registry to do so on 26 August 2021.

(vii) The EOT Application failed to include the Appeal Notice as required by RDC 44.13;

(viii) D3's breach of the Rules was serious and significant, and the Claimant had suffered prejudice in excess of the "2 minutes" asserted by BSA, when D3's failure to file the Appeal Notice within time is considered against the abusive nature of the intended ground of appeal.

4. D3 has served no submissions in reply to the Claimant's contentions.

5. I turn to the first ground advanced by the Claimant in support of its case that the EOT Application should be refused - the application is abusive by reason of the effect of RDC 12.5. This is a powerful ground but, in my view, the proposed appeal founded on lack of jurisdiction has no real prospect of success and for that reason too this EOT Application should be dismissed.

6. D3 was joined into the proceedings as a Defendant on 21 November 2019 pursuant to RDC 20.7, which provides:

"The Court may order a person to be added as a new party if:

(a) it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the Court can resolve that issue."

7. A joinder order under RDC 20.7 can only be made if the Court already has jurisdiction over the existing parties and this requirement was met in that the Court had ruled on 4 August 2019 that it had jurisdiction over the First and Second Defendants because they were "Licensed DIFC

Establishments" for the purpose of Article 5(A)(1)(a) of the Judicial Authority Law, and this ruling was upheld by the DIFC Court of Appeal on 23 March 2020.[1]

8. Previously, on 13 March 2019, the DIFC Court of Appeal held in *Nest Investments Holding Lebanon Lebanon SAL v Deloitte & Touche (ME)* [2018] DIFC CA 011 that RDC 20.7 is a "DIFC Regulation" that confers jurisdiction for the purposes of Article 5(A)(1) ? of the Judicial Authority Law (the **"JAL"**). Thus, if a party is joined into existing proceedings pursuant to RDC 20.7, that party comes within the jurisdiction of the CFI by virtue of Article 5(A)(1) (e) of the JAL.

9. RDC 44.19 states:

> *"Permission to appeal may only be given where the lower Court or the appeal Court considers that:*
>
> *(1) the appeal would have a real prospect of success; or*
>
> *(2) there is some other compelling reason why the appeal*
>
> *should be heard."*

10. In my judgment, the Court's conclusion that it was desirable under RDC 20.7 to add D3 as a Defendant so that the Court could resolve all the matters in dispute in the proceedings and/or because there was an issue involving D3 and the First and/or the Second Defendants which was connected to the matters in dispute in the proceedings, is beyond any challenge required to have a real prospect of success. Nor is there some other compelling reason for the proposed appeal to be heard. It follows that it is inconceivable that permission would be granted for the proposed appeal and for this reason this EOT Application must be and is dismissed.

11. The conclusion expressed in the last paragraph renders it unnecessary to deal at any length with the Claimant's alternative argument for dismissing the EOT Application. Suffice it to say, that if the appeal had had a real prospect of success and RDC 12.5 was not engaged, I would have granted the application.