Claim No: CFI 025/2020

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 FIRST INSTANCE
BEFORE H.E JUSTICE OMAR AL MUHAIRI

BETWEEN

UNION BANK OF INDIA (DIFC BRANCH)

Claimant

and

(1) VELOCITY VENTURES LIMITED
(2) UMAKU VENTURES LIMITED
(3) VIJEY KAPOOR
(4) RAVI KUCHIMANCHI
(5) RAJINDER MAKHIJANI
(6) PARAG GUPTA
(7) DEVIKA [SWATT] MAKHIJANI

Defendants

JUDGMENT

Hearing : **9 February 2021**

Counsel : Nikhat Khan instructed by Kochar & Co for the Claimant
Santanu Ghosh instructed by Ibrahim Al Banna Advocates and Legal Consultants for the Fourth Defendant
Bushra Ahmed instructed by KBH Kanuun for the Sixth, Seventh and Eighth Defendants

Judgment : **[–] March 2021**

AND UPON considering the evidence and written submissions in relation to the Sixth, Seventh and Eighth Defendants application to set aside default judgment

[No spaces are supposed to be in the Orders or Judgemnts]

IT IS HEREBY ORDERED THAT:

1. The Fourth, Sixth, Seventh and Eighth Defendants' application to set aside default judgment is allowed.

2. The default judgment entered against the Fourth, Sixth, Seventh and Eighth Defendants on 17 September 2020 by Judicial Officer Nassir al Nasser be set aside.

[again no spaces are supposed to be in the Orders or Judgments-this applies throughout the whole Judgment]

3. The Fourth, Sixth, Seventh and Eighth Defendants' application to strike out the Claim against them is dismissed.

4. Service of the Claim Form and Particulars of Claim on the Fourth, Sixth, Seventh and Eighth Defendants is dispensed with.

5. The Fourth, Sixth, Seventh and Eighth Defendants do file a Defence by 4pm on April 2021.

6. The Claimant do pay the Fourth, Sixth, Seventh and Eighth Defendants costs of the application.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 18 March 2021
Time: 3pm

SCHEDULE OF REASONS

1. The Sixth, Seventh and Eighth Defendants have each made an application to set aside judgment entered in default in relation to the above claim, as well as applications for striking the parts of the Claim against them. The full details of the claim are not necessary for me to repeat here for the purposes of this judgment.

2. The claim relates to a facility agreement between the Claimant and First Defendant made in around April 2014, (the **"Facility Agreement"**) The Sixth, Seventh and Eighth Defendants were, at the time, directors and shareholders of the First Defendant. In June 2017 the Facility

Agreement was enhanced and the Sixth, Seventh and Eighth Defendants were required to provide personal guarantees, the **"Guarantees."**

3. The Seventh Defendant signed his Guarantee at the First Defendant's offices in Dubai on 25 November 2017. The Sixth and Eighth Defendants had moved from Dubai to India. The Claimant arranged for the Sixth and Eighth Defendants to attend their New Delhi branch in India in order to sign the personal guarantees. These were provided on 5 December 2017. The Sixth and Eighth Defendants were not provided with copies of the documents and did not read them thoroughly.

4. The Sixth, Seventh and Eighth Defendants later sold their shares in the First Defendant to the Third Defendant, through their friend and trusted advisor Mr Kapoor, the Fourth Defendant. They had known Mr Kapoor for years and trusted him completely. They believed and understood at the time of the sale of the shares, that Mr Kapoor had arranged for new guarantees to be put in place and for the Guarantees to be withdrawn or discharged.

5. Sometime after the sale of shares, the First Defendant defaulted on the Facility Agreement and the Claimant issued a claim for the outstanding sums in relation to it on 17th March 2020. The Claimant sought to serve the Sixth and Eighth Defendants at their previous address in Dubai. The Claimant served the Seventh Defendant with the Claim Form at his Dubai address but not the Particulars of Claim, which it purported to have served via email on 3 May 2020.

6. The Claimant alleged to have properly served the Sixth, Seventh and Eighth Defendants with the relevant documents by filing a certificate of service on 10th June 2020. However, on 7 June 2020 the Claimant had applied for service via email, which was later unsuccessful.

7. The Seventh Defendant picked up the documents sent to the Sixth and Eighth Defendants previous Dubai address, at the request of the Sixth and Eighth Defendants as they had been called by a courier who had attempted service. The Seventh Defendant contacted the Court for guidance as all three Defendants were unsure what to do and were told to file an acknowledgment of service, while acting in person.

8. On 28 June 2020 the Sixth, Seventh and Eighth Defendants, through the Seventh Defendant filed an acknowledgment of service out of panic. The Claimant applied for and was granted default judgment against the Sixth, Seventh and Eighth Defendants on 17 September 2020 by Judicial Officer Nassir al Nasser, the "**Judgment(s).**" The Claimant sent a copy of the Judgment via email to the Sixth, Seventh and Eighth Defendants on 5 October 2020.

9. The Sixth, Seventh and Eighth Defendants filed an application dated 18 October 2020 to set aside the Judgment, the **"Application."** The Application also contained a further application for strike out the Claim as against the Sixth, Seventh and Eighth Defendants on the grounds that the Claim Form had not been validly served within the time required in relation to the Sixth and Eighth Defendants and that the Particulars of Claim had not been validly served in the time required in relation to the Seventh Defendant.

10. At the time of filing the Application and supporting evidence, there had been no response from the Fourth Defendant. Since, the Fourth Defendant has now appointed his own legal representatives and provided witness statements in response to the Application. I, therefore, do not need to deal with the requested directions in relation to him.

11. There is a clear difference between a party receiving a document and a party being served with a document. Simply receiving a document is not enough to satisfy the Court and the strict rules on service, as set out at Part 9 of the RDC, must be followed. As provided under RDC 14.1, if the requirements for default judgment are not met, that judgment must be set aside. Service is one of those requirements.

12. The Claimant submitted in their evidence that the Sixth Defendant had confirmed to them via email that he was representing the Seventh and Eighth Defendant. Even if this were the case that the Seventh Defendant sent an email in those terms, this would not affect the address for service, which would remain the Sixth, Seventh and Eighth Defendants' last known address, not the Sixth Defendant's email address. At the time, the Sixth, Seventh and Eighth Defendants were acting in person, there was nothing from the Seventh and Eighth Defendants themselves to state that service could be affected on the Sixth Defendant's email address. Having reviewed the email, I do not consider that the Sixth Defendant purports to act on behalf of the Seventh and Eighth Defendants and there is certainly nothing within the email about the service address for documents.

13. Furthermore, the Claimant states that they served the Claim form on the Sixth, Seventh and Eighth Defendants via email on 24th March 2020 and the Particulars of Claim on 3rd May 2020. In breach of RDC 7.31, the Claim Form does not state that if an acknowledgment of service is filed that indicates the Defendants wish to defend the claim the Particulars of Claim will follow. Furthermore, the email sending the various documents does not comply with RDC 7.35, setting out that the Defendants could obtain the various forms to respond to the Claim on the Court's e-filing system.

14. Nevertheless, the Claimant applied for alternative service via email and was unsuccessful. The Claimant specifically draws my attention to RDC 9.3(2)(b). RDC 9.3(1) allows for service via electronic means where a party has indicated that they are willing to accept service via this means, in writing. A party is deemed to have given a sufficient indication of this where they have provided an email address on a statement of case or a response to a claim filed with the Court. RDC 9.3 further requires that a party clarify with the receiving party whether there are any limitations to the acceptance of service via electronic means. Finally, RDC 9.3 (4) requires that the address provided must be within the DIFC or Dubai. If the address for service, given alongside the email address, is within the DIFC or Dubai, that email address is taken to be located within the same.

15. I do not find that the Sixth, Seventh and Eighth Defendants accepted service via email. The email addresses provided for Sixth, Seventh and Eighth Defendants are all the same, there is no differentiation between the emails provided. One of those emails is a work email for the Seventh Defendant, which he has not used for some years. The Sixth and Seventh Defendants' service address was not located within the DIFC or Dubai, and therefore RDC 9.3 does not apply. In relation to the Seventh Defendant, I find that an acknowledgment of service is not a response to a claim per se but is formal acknowledgment of receipt and an indication as to the intended response to a Claim. For example, a statement of case, such as a defence, or an admission is response to a Claim. Furthermore, the Claimant did not seek to clarify the extent of acceptance of service with the Sixth, Seventh and Eighth Defendants, in accordance with RDC 9.3(3). I, therefore, do not find that the Sixth, Seventh and Eighth Defendants did not accept service via email, and service of the Claim Form and the Particulars of Claim were not duly served in accordance with the RDC via email.

16. In my judgment, the last known address was that of the Sixth and Eighth Defendants' Indian address. The Claimant would have been made aware that signing at a Dubai branch would not be possible as they no longer lived there and that the documents would need to be signed in India, where the Sixth and Eighth Defendants lived. As confirmed in the Claimant's evidence, the attempted service of the Sixth and Eighth Defendants at their previous Dubai address was unsuccessful, and the courier confirmed that the Defendants had moved. Despite this, the Claimant filed a certificate of service on 10 June 2020.

17. Furthermore, as the Sixth and Eighth Defendants were required to be served outside of the jurisdiction, pursuant to RDC 9.59, 9.60 and 9.61, the Claimant was obliged to provide an official translation of the Claim Form to the official language of the place in which it was to be served. No such translation was provided to the Sixth and Eighth Defendants, only an Arabic translation.

18. As a result, the Sixth and Eighth Defendants were not properly served in according to the RDC. The Judgment was therefore irregular as the time for filing a Defence had not begun to run and the conditions of RDC 13.5 had not been met.

19. As to the Seventh Defendant, I also find that he was not correctly served in accordance with the RDC and, therefore, the Judgment against him is irregular and must be set aside. Although the Seventh Defendant was served with the Claim Form at his residential address in Dubai, he was only sent the Particulars of Claim via email. Emailing the Particulars of Claim was not service under the RDC, permission had not been granted for service via email and, as set out above, the Seventh Defendant had not agreed to accept service via email. The Seventh Defendant filed an acknowledgment of service on 28 June 2020. At the time of the Claimant's application for Default Judgment, an acknowledgment of service had already been filed and the period for serving the Particulars of Claim had already expired. As such, the period for filing the Defence had not begun to run as the triggering event had not yet occurred. Therefore, at the time of obtaining the Judgment the period for filing the Defence has not yet lapsed and the Judgment against the Seventh Defendant is also irregular. I, therefore, set aside the Judgment against the Seventh Defendant under the mandatory provision in RDC 14.1.

20. Even if I were not able to set aside the Judgments under RDC 14.1, there are sufficient grounds to set aside the Judgments under RDC 14.2. Having read the Sixth, Seventh and Eighth Defendants' Defence and the evidence contained within their witness statement, I do consider that they have a real prospect of successfully defending the Claim and that their Defence is not more than merely fanciful. In addition, I consider that this case meets the applicable requirements set out in English authority of Denton v White [2014] EWCA Civ 906. Although the breach is serious and significant, there was a good reason for the breach as the Defendants had not been properly served, had not been provided with a covering letter in accordance with RDC 7.35 or the required translation. Simply being a litigant in person and having a lack of understanding of the law and the RDC is not a good reason. However, in the circumstances where a sufficient explanatory letter in accordance with RDC 7.35 was not served upon the Sixth, Seventh and Eighth Defendants, I consider that their lack of knowledge is a significant contributing factor to the cause of the breach.

21. Further, having regard to the circumstances as a whole, in particular the various failures on the part of the Claimant to comply with the strict requirements under the RDC, I consider that it is just to set aside the Judgments.

22. I also accept that the Sixth, Seventh and Eighth Defendants acted promptly in making the Application. They instructed representative and received advice as soon as they were aware of the Judgment. I also consider their timing with the background of the global health crisis. I consider that they acted reasonably and promptly and I am grateful that they have been able to put together a draft defence in the time available, allowing me to consider the issues and merits of their Defence.

23. I, therefore, grant the Sixth, Seventh and Eighth Defendants applications to set aside the Judgment in accordance with RDC 14.1.

24. I do not find that there is merit in the applications for strike out on the basis of a failure on the part of the Claimant to serve relevant documents. When default judgment is set aside, the clock starts again, and the claim starts a fresh. Furthermore, in accordance with the overriding objective I do not consider that justice would be done at this early stage in the proceedings if I were to allow the applications for strike out. I appreciate that the point the Sixth, Seventh and Eighth Defendants seek to rely upon is a technical one, however, as a matter of practice the Court will grant directions for management of the case going forward. The Claim is now defended, and the matter should proceed to case management and trial. I, therefore, dismiss the applications for strike out.

25. Moving now to the Fourth Defendant Application, I understand that this application meets the applicable requirements set out in RDC 14.2. I, therefore, grant the Fourth Defendant application to set aside the Default Judgment.

26. Given that the Fourth, Sixth, Seventh and Eighth Defendants are now fully aware of the proceedings, have seen the relevant documents and been advised on the same, I consider that it would be reasonable to dispense with service. TheFourth, Sixth, Seventh and Eighth Defendants are to file and serve their finalised defence within 28 days of the date of this judgment and the matter shall be listed for a case management hearing to give further directions.

Costs

27. I have had regard to the circumstances as a whole when coming to my decision on costs. I remind myself of the general rule and the provisions set out at RDC 38.8. Under the general rule, costs follow the event and as the Fourth, Sixth, Seventh and Eighth Defendants have been successful in their substantive application, they should be awarded costs.

28. While the Sixth, Seventh and Eighth Defendants have not been successful in their application to strike out have not been successful I consider that is application was an aside issue. The substantive application was the application to set aside default judgment. The judgments were entered incorrectly due to the Claimant's failure to serve the necessary documents at the correct address and at the required times. The Claimant has been fully represented throughout the entirety of these proceedings and service of the required documents should have been carried out correctly. Although the Sixth, Seventh and Eighth Defendants would have been required to apply to set aside the Judgment in any event, they only were required to do so due to the conduct of the Claimant.

29. There was no agreement as to whether the Judgment should have been set aside and the matter went to a full contested hearing. Having regard

to the success of the Fourth, Sixth, Seventh and Eighth Defendants and the conduct of the parties, I consider that the Claimant should pay the costs of the application. Such costs shall be assessed by the Registrar, if not agreed.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 18 March 2021
Time: 3pm