Claim No. CFI-014-2018

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

NATIONAL CONTRACTING CO. LTD.

Claimant

and

DODSAL ENGINEERING & CONSTRUCTION PTE. LIMITED

Defendant

ORDER WITH REASONS OF H.E. JUSTICE ALI AL MADHANI

UPON the Claimant's Application No. CFI-014-2018/2 dated 16 May 2018 seeking the de novo consideration of the Order of Judicial Officer Nassir Al Nasser dated 15 May 2018 that denied the Claimant's Request for Default Judgment dated 23 April 2018 (the "De Novo Application")

AND UPON reviewing the submissions filed by both parties

IT IS HEREBY ORDERED THAT:

1.The Claimant's De Novo Application is denied.

2. The Claimant shall pay the Defendant's costs of the De Novo Application on the standard basis, to be assessed if not agreed by the Registrar.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date: 6 June 2018

At: 11am

SCHEDULE OF REASONS

1.This Order relates to Application No. CFI-014-2018/2 filed by the Claimant on 16 May 2018, seeking the de novo reconsideration of the Order issued by Judicial Officer Nassir Al Nasser on 15 May 2018 denying the Claimant's Request for Default Judgment filed on 23 April 2018 (the "De Novo Application), pursuant to Practice Direction 3 of 2015 - Review of DIFC Courts Officer and Registrar Decisions ("PD 3/2015").

2. In the De Novo Application, the Claimant raised issues related to its Request for Judgment on Admission, Notice and Application for Immediate Judgment on 15 May 2018. The Claimant said that the Order issued by Judicial Officer Nassir Al Nasser on 15 May 2018 incorrectly states that the notice was a Request for Default Judgment only made pursuant to Rule 13.1(1) and (2) of the Rules of the DIFC Courts (the "RDC") and appears to have been decided on that basis.

3. The Claimant considers review of all these issues by a judge of the DIFC Courts to be appropriate.

4. However, what is before me today is the de novo application to review the Order of the Judicial Officer Nassir Al Nasser on 15 May 2018 denying the Claimant's Request for Default Judgment filed on 23 April 2018. Any application or submission of Request for Judgment on Admission and Notice or Application for Immediate Judgment has not been put before me, therefore this Order will be only dealing with the De Novo Application itself.

THE DE NOVO APPLICATION

5. In the De Novo Application, the Claimant submits that Rule 13.5(1) of the RDC provides that judgment in default of a defence may be obtained only where an acknowledgement of service has been filed, but a defence has not been filed and the relevant time limit for doing so has expired. The Claimant then refers to the agreed extension between the parties, and the relevant time for filing the Defence expired on 23 April 2018. As stated in the Order, Judicial Officer Nassir Al Nasser determined that the Defence was filed on 24 April 2018.

6. The Claimant contends that pursuant to the parties' correspondence and RDC 16.11, which provides that parties' may agree that the period for filing a Defence be extended up to 28 days, the Defendant's extended period of time for filing a Defence ended on 23 April 2018. Pursuant to RDC 2.17, the Defendant was required to file its Defence by 4pm on 23 April 2018 to comply with that deadline. The Defendant did not do so.

7. The Claimant's case is that no defence was filed before the expiration of the relevant time limit for filing and the Claimant is entitled to default judgment. On 23 April 2018, at about 4:15pm, the Claimant filed a Request for Default Judgment.

8. On 23 April 2018 at 8:22pm, the Defendant transmitted an unsigned copy of its Defence to the Claimant. On 24 April 2018, the Defendant served a signed copy of its Defence on the Claimant.

9. The Claimant argues that it is not clear whether the Judicial Officer Nassir Al Nasser made this finding based on the unsigned copy of the Defence that was transmitted after 4pm on 23 April 2018 (thus deeming the document to be filed the next day) or the signed copy of the Defence served on 24 April 2018. In either case, the result is the same.

10. The Claimant further argues that in applying Rule 12.3(2) of the Civil Procedure Rules (the "CPR") of England and Wales, which is virtually identical to RDC 13.22(2), English courts have expressly rejected the argument put forward by the Defendant. The Claimant referred to paragraph 12 of Billington v. Davies [2016] EWHC 1919 (Ch), the English court stated:

> "In my judgment, the reference to "a defence" in CPR 12.3(2)(a) must be a reference to a Defence which has either been served within the time permitted by the Rules or in respect of which an extension of time has been granted. Where a Defence is served late, unless and until an extension has been granted, a document purporting to be a Defence is not in fact a Defence for the purposes of CPR 12.3(2)(a)."

11. Another reference made by the Claimant is set out in *Almond v Medgolf Ltd* et al. [2015] EWHC 3280:

> "Contrary to that submission, I entirely agree with Popplewell J's first ground for rejecting the contention, namely, that the position must be viewed as of the date of the application for default judgment is made."

THE DEFENDANT'S POSITION

12. On the other hand, the Defendant takes the position that the correspondence from the Claimant agreeing to extend the deadline for the submission of the Defence to 23 April 2018 did not indicate a time by which the Defence was to be served, and submits that therefore, there was no 4pm deadline. The deadline of 4pm imposed by RDC 2.17 is only applicable to an act required by a Rule, Practice Direction, Judgment or Order. The extension of time to 23 April 2018 was an agreement between the parties, and not pursuant to a Rule, Practice Direction, Judgment or Order.

13. The Defendant therefore submits that the Defence was filed by email on 23 April 2018 at around 8:22pm, due to the fact that the Defendant's general counsel was not available to sign the Statement of Truth on 23 April 2018, and therefore the Defence was served unsigned.

14. Its further argued that RDC 22.3 provides that a statement of truth may be contained in the document it verifies or it may be in a separate document served subsequently. The Defendant submits that the Statement of Truth was subsequently signed by the Defendant's general counsel and a further copy of the Defence was filed and served.

15. The Defendant further submits that in accordance with RDC 22.30 until the Statement of Truth is signed, the Defence remains effective unless struck out. Therefore, the Defence filed and served on the evening of 23 April 2018 was effective as a statement of case.

16. The Defendant's alternative case is that even if the Court considers the Defence to have been served late, it is open to the Judge to permit an extension of time pursuant to the Court's case management powers. The entering of a default judgment against a Defendant, even where an acknowledgement of service or a defence has not been filed, is not an automatic entitlement, but is at the discretion of the Court, which is apparent from the RDC's use of the word "may", for example in RDC 13.4, 13.5 and 13.7, and the requirement that the Court satisfy itself of the evidence before entering a default judgment.

17. The Defendant invites the Court to take into consideration RDC 13.6, which provides the circumstances in which a claimant may not obtain default judgment, specifically RDC 13.6 (2) which provides that a claimant may not obtain default judgment if the defendant has satisfied the whole claim on which the claimant is seeking judgment. The Defendant's Defence as to part of the Claimant's claims is that the amount of KWD 60,643.77 has been satisfied by payment through a line of credit. The balance of the Claimant's claim (KWD 18,840.770) is admitted by the Defendant, who has made a proposal for time to pay. Accordingly, as the Claimant is seeking default judgment on the amount of KWD 60,643.77 (the balance of KWD 18,840.770 being subject to a separate application for judgment on an admission), the Court must have regard to the Defendant's case that it has satisfied the whole of the claim for which default judgment is sought.

18. Another argument put forward by the Defendant is that if default judgment is entered, it will be open to the Defendant to file an application to set aside default judgment in accordance with RDC 14. The wasted time and costs of an application to set aside can be avoided by simply allowing the parties to continue with the dispute.

19. The Defendant finally submits that the facts of the case *Billington v. Davies* differ from those of this case. The defendant in the *Billington v Davies* case was due to file a defence on 4 January 2016, but instead filed its defence on 17 May 2016, more than 4 months after the date for filing and service of its defence. In this instance, the defendant has filed and served its defence on the date agreed by the parties.

DECISION

20. It is the parties' common agreement that the deadline for the Defendant to file its Defense was extended by the Claimant's consent to be 23 April 2018, in application of RDC 16.11, which provides that parties may agree that the period for filing a Defence be extended up to 28 days.

21. It's also agreed between the parties that the Defendant has submitted its Defence through email on that last date 23 April 2018, but at 8:22pm.

22. The Claimant has lodged an Application for Default Judgment on 23 April 2018 at about 4:15pm with the belief that the Defendant was required to file its Defence by 4pm on 23 April 2018 to comply with that deadline, but failed to do so.

23. The issue in this case as far as this Order deals with is that whether the deadline for the agreed extension to file defence is 4pm or extends to include the entire day up to 12am.

24. The Claimant sets 4pm as a deadline with reference to RDC 2.17 which reads "where a party required by a Rule, Practice Direction, Judgment or Order to do on or before a particular date, the act must be done by 4pm on that date". The Claimant `s email to the Defendant of the agreement to extend time for filing Defence which sets 23 April 2018 as the deadline did not made any reference to certain hour.

25. In my judgment, the agreement between parties cannot stand to be "Rule, Practice Direction, Judgment or Order" as in RDC 2.17 and I have not heard any argument from the Claimant to advance such position therefore.

26. Based on the facts that neither the agreement between parties sets 4pm as a deadline nor RDC 2.17 applies to the parties' agreement as a deadline guidance, I dismiss the Claimant's argument that sets 4pm as a deadline for parties. Therefore, the Defendant had the entire day of 23 April to submits its Defence in which it did at 8:22pm.

27. The Claimant cannot complain that the Defence submitted at 8:22pm was not verified with Statement of Truth just because RDC 22.3 provides that a Statement of Truth may be contained in the document it verifies or it may be in a separate document served subsequently.

28. Having said that, there is now no point of dealing with the case of *Billington v. Davies* as it is completely distinguished.

29. In conclusion, I found that the agreed deadline for the Defendant to file a Defence is 23 April 2018 and is not limited to 4pm, and can include the entire date of 23 April 2018, and that therefore the Defence filed at 8:22pm meets the deadline, which means that the Claimant was not entitled to apply for Default Judgment.

30. For the reasons above the Claimant's de novo application to review the Order of the Judicial Officer Nassir Al Nasser on 15 May 2018 denying the Claimant's Request for Default Judgment filed on 23 April 2018 is without merit and must be dismissed.

31. The Claimant is liable for the costs of this Application on the standard basis, to be assessed by the Registrar if not agreed.