THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

PASSPORT SPECIAL OPPORTUNITIES MASTER FUND L.P

Claimant

and

(1) ARY COMMUNICATIONS LTD

(2) MOHAMMAD SALMAN IQBAL

Defendants

ORDER WITH REASONS OF JUSTICE TUN ZAKI AZMI

UPON the Fourth Defendant's Application CFI-039-2016/5 dated 28 June 2018 seeking to set aside the Order with Reasons of H.E. Justice Omar Al Muhairi dated 6 June 2018 (the "Application")

AND UPON reading the Witness Statements filed in relation to the Application

AND UPON hearing Counsel for the Claimant and Counsel for the Fourth Defendant at a Hearing held on 5 September 2018

IT IS HEREBY ORDERED THAT:

1. The Application is dismissed.

2. The Fourth Defendant shall pay the Claimant's costs of the Application to be assessed by the Registrar if not agreed.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of Issue: 29 October 2018

At: 11am

SCHEDULE OF REASONS

1. The dispute in this case arose between the Claimant (Respondent in this application), (Passport Special Opportunities Fund, L.P, a British Virgin Islands company with its principal place of business in Tortola, BVI) in this judgment referred to as the Claimant and the six Defendants including Ary Communications Ltd and Mohammad Salman Iqbal (the 1st and 2nd Applicants respectively in this application), in this judgment referred to as the 1st and 4th Defendants respectively. They are the parties in this application to set aside the Immediate Judgment given in favour of the Claimant against the Defendants by this Court on 6 June 2018.

2. The Order of this Court dated 6 June 2018 basically recognised as binding and enforceable within the DIFC, the High Court judgment of Singapore dated 6 July 2015 which enforced the award of the arbitrator made on 20 February 2012 in favour of the Claimant against all the six Defendants. This Immediate Order dated 6 June 2018 made by this Court is one which the Fourth Defendant now seeks to set aside.

BACKGROUND FACTS

3. It all started in Pakistan in 2008 when the Claimant entered into with the six Defendants an Investment Funding Agreement (the "IFA") where the Claimant agreed to provide to the First Defendant in Pakistani rupees an amount equal to US$5,000,000 as working capital to develop and build a bouquet of cable television channels to be marketed and shown in the United States. The subscription amount was to be allocated as an advanced payment by the Claimant against the purchase of shares in the Initial Public Offering of the shares of the company ("IFA"). Pursuant to

the IFA, the individual Defendants i.e. 2nd to the 6th Defendants agreed to fully indemnify and keep the Claimant indemnified against any losses, cost or consequences resulting from the First Defendant failing to fulfill any of its undertakings under the IFA. The Second to the Sixth Defendants also executed an "Undertaking of Sponsors" in favour of the Claimant in which each of the Second to the Sixth Defendants gave a joint, several, and personal undertaking to the Claimant guaranteeing the First Defendant's performance of its obligations under the IFA. As we will see the First Defendant failed to keep to its promises.It is on this basis that claims were also made against the Second to the Sixth Defendants, in addition to the claim against the First Defendant.

4. As agreed in the IFA, the Claimant paid the subscription amount to the First Defendant in or about 19June 2008. The Agreement also provided the subscription amount would be allocated towards the purchase of shares if the First Defendant fulfill certain steps towards completing its IPO. Should the First Defendant fail to do so within 3 months of the date of IFA the subcription amount would begin to accrue interest and the Claimant would have the option to demand a refund of the subscription amount including interest if the conditions were not met within 60 days. The IFA further provided that if conditions were not met within one year of the IFA, First Defendant must refund the subscription amount to the Claimant together with interest. The First Defendant failed to comply with the conditions in the IFA which resulted in the Claimant giving notice for a refund of the subscription amout unless conditions were met within 60 days. The conditions were never met and on the 8th May 2009 the Claimant demanded that the First Defendant refund the subscription amount which to date has not been made. It is to be noted that there were civil unrest in Pakistan during the relevant period when the IPO was supposed to be made and although this civil unrest was claimed to be *force majuer* by the Defendants at the arbitration this did not become an issue in this application to set aside the Immediate Judgment.

5. It is common ground that according to the IFA, any dispute relating to the IFA will be adjudicated in accordance with the ICC International Court of Arbitration acting as the appointing authority with a sole arbitrator. The dispute was referred to a Singaporean arbitrator.The sole arbitrator conducted the arbitration in Singapore. In accordance with the UNCITRAL Arbitration Rules of 1976 as provided under Article 7 of the IFA, the sole arbitrator determined that the seat of arbitration was Singapore under Article 16(1) of the UNCITRAL Rules and an award in favour of the Claimant was issued on 20 February 2012. It is also to be noted this was about 3 years after the dispute first arose.

6. The wording of Article 8.7 of the IFA reads:

> "This Agreement shall be governed by the laws of the country of Pakistan, without regard to principles of conflict of laws. Any dispute, controversy, or claim arising out of or relating to this Agreement, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of this Agreement. The appointing authority shall be the International Chamber of Commerce. The number of arbitratiors shall be one. The language to be used in the arbitration proceedings shall be English."

7.The arbitrator ordered the Defendants to pay the Claimant :

> a) US $ 5,000,000 plus interest at the rate of 15.51% per annum from 15th September 2008 until it is fully paid;
>
> b) Cost, expenses and disbursement in the amount of US$ 401,182.08;and
>
> c) US$ 74,887.50 representing Claimant's share of the sole arbitrator fees and disbursements.

8. The wording of Article 8.7 is to some extent relevant because the seat of arbitration was not mentioned in Article and this became a contentious issue . The seat had to be decided by the arbitrator. The Defendants disputed the decision of the arbitrator as regards his decision on Singapore being the seat. While the Claimant would accept any place to be the seat of arbitration, other than in Pakistan, the Defendants wanted the seat to be only in Pakistan. The arbitrator decided the Singapore to be seat of arbitration (see Para 34 of Arbitration Award).

9. At the arbitration in Singapore all the Defendants were represented by Mr. Feisal Hussain Naqvi of Messrs. Bhandari, Naqvi and Riaz of Lahore, Pakistan. One of the issues raised by the 1st and 4th Defendants was whether the Singapore High Court was made aware of the injunction issued by the Pakistani Court. At paragraph 3 of the arbitrators award the arbitrator noted that the Respondents have obtained an *ex parte* injuction from a Pakistani Court preventing the Claimant and the arbitral tribunal from taking further steps in the arbitration. This was confirmed by the Claimant. See paragraph 33 of the arbitrator's award which reads:

> "On 25 May 2010, the Claimant informed the Tribunal that the Respondents have obtained an *ex parte* injunction from a Pakistani Court enjoining the Claimant and the Tribunal from taking further steps in this arbitration. The Respondents confirmed this by their email dated 26 May 2010. By email dated 27 May 2010, the Respondents sent to the Tribunal a copy of the *ex parte* injunction Order made by the High Court of Sindh at Karachi in J. M. No. 28 of 2010."

10. Reading through the arbitrator's award I notice that the Respondent was allowed to and had in fact put in a forceful argument in support of their defence including defence of *force majeure*, i.e. the unrest in Pakistan.The arbitrator however ruled against the Defendants.

11. The Claimant after receiving the award sought enforcement order of arbitrator's awards from the High Court of Singapore, which the High Court granted. Since according to the Arbitrator's Award filed in supporting the application for enforcement order in the Singapore High Court, there was mention of the injunction issued by the High Court of Sindh at Karachi, Pakistan dated 26th May 2010, there is therefore no question of the Singapore not being aware of the injunction. The relevant order of Pakistani court injunction reads:

> "It is hereby ordered that you the Respondents *(i.e.the Claimant and one other)* be and are hereby directed that further proceedings of the arbitration are suspended until the next date, as per above court's order."(Italicised words added)

12. Amongst the terms of the order of 21 April 2015 the Singapore Court granted a right on the Defendants to apply to the Singapore Court to set aside the order of the Court within 21 days of the service of the High Court order.It also provided that the order

> "...be served out of jurisdiction on the 1st Defendant and/or 4th Defendant on behalf of the Defendants and such service be deemed as sufficient service under Order 69A Rule 6 of the Singapore Rules of Courts".

13. Although the Defendants were aware of the award granted by the arbitrator against them, they did not challenge it before the High Court in Singapore.

14. The Claimant served the enforcement order issued by the High Court of Singapore on the Defendants in Karachi Pakistan on 5 May 2015 and re-served it on the 25 May 2015 following the Defendants' claim that the enforcement order has not been properly served. No action was taken by the Defendants to even attempt to set aside the enforcement order of the High Court of Singapore within the 21 days as provided under the Singapore law. This right was also mentioned in the Singapore High Court order. So on 6 July 2015 the High Court entered final judgment of enforcement on the award as ordered by the arbitrator.

15. On 27 July 2015, the Claimant also filed a claim in the Supreme Court of New York, Nassau County seeking enforcement of the Singapore judgment in respect of which the New York Court issued an order of attachment on 17 November 2015 ordering the attachment of the property of the Respondents amounting to US$ 10,770,195.04. Full judgment on the judgment debt was entered by the New York Court on 22 November 2016.

16. The order issued by the New York Court was served on the Fourth Defendant by a Californian Private Investigator who was authorised to conduct legal service process in California. It was served on the Fourth Defendant on 8 August 2018 (see Affidavit). From the wording of the affidavit I am satisfied that the person upon whom the documents were served was the Fourth Defendant.

17. The Defendants were therefore fully aware of what was going on. In particular, the First and Fourth Defendants cannot plead ignorance of what was going on.

THE DIFC COURTS PROCEEDINGS

19. We now come to the DIFC Courts proceedings where the claim form under RDC Part 8 Proceedings in the DIFC Courts of the First Instance was issued on 24 October 2016. Note that eight years have since lapsed from the time the dispute arose in 2008 and three years from the enforcement order by the Singapore High Court.

20. Application to enforce the Singapore High Court ordering enforcement of the arbitral award was filed in DIFC. According to the Claimant, 20 attempts were made to serve the Claim Form on the defendants through their solicitor and courier service by hand, at their home addresses or by registered post. The Fourth Defendant's solicitors in Pakistan and Singapore confirmed that they were not authorised to accept service on behalf of the Defendants. However, on the 8 August 2017 the Claimant finally managed to serve on the Fourth Defendant by way of a process server the Claim Form and particulars of claim. The Fourth Defendant is the director of the First Defendant and it was submitted that such service on the Fourth Defendant is an effective service on the First Defendant. This service was confirmed by the DIFC Courts certificate of service issued one month later on 4 September 2017. The Fourth Defendant however alleged that this service was "pathological". As far as I am concerned if the DIFC process server said he has done so, I accept that as good service.

21. It was submitted that neither the First nor the Fourth Defendant took any action to acknowledge the service or filed a defence within the requisite 28 day period. The Claimant then filed an action to seek Immediate Judgement against the First and Fourth Defendants. Together with it was an application to dispense with the requirement to serve immediate application notice on the First and Fourth Defendants. It also sought an order for alternative service of the application notice.

22. On 15 January 2018, this Court made an order to dispense the Claimant from serving Immediate Judgment application notice on both the First and Fourth Defendant with a provision that the notice may also be served by fax. Attempts to file by fax failed. The Claimant is therefore relying on this Courts' order that service on the First and Fourth Defendant be dispensed with. The relevant wordings of this order are as follows:

> "...
>
> UPON the Claimaint's Application dated 17 October 2017, for permission to apply for immediate judgment on Defendants (1) and (4) on the grounds that the time for Defendants (1) and (4) to file the acknowledgement of service has expired and the Defendants have failed to file any acknowledgment of service or defence to the Claim,whether jurisdictional or substantive ("Application 1");
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> ....
>
> ...
>
> IT IS HEREBY ORDERED THAT:
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> In respect of Application 1
>
> 1.Service of the Claim Form and Particulars has been effected by personal service.
>
> 2. The Claimant is granted permission to apply for immediate judgment against Defendant (1) and Defendant (4).
>
> 3. Service of the Application Notice is dispensed with pursuant to Rule 23.5 of the Rules of the DIFC Courts; or in the alternative.
>
> 4. The Application Notice may be served by the Claimant on the Defendants by faxing to +922135657314, being the fax number for Defendant (1) as listed on its website.
>
> ..."

22. I read the order of this Court dated 15 January 2018 quoted above as an order dispensing with service of the application for immediate service and allowing the the Claimant to seek an order for enforcing the Singapore High Court Order, and thereby the arbitration award. I do not agree with the Fourth Defendants' counsel that it means otherwise. In this case the Court has specifically granted permission to dispense with

service of the application notice on the Respondent. See the following RDC 23.4 and 23.5 below. See also judgment of Justice Baker in *FBN Bank (UK) Ltd v Leaf Tobacco A Michailides SA* [2017] EWHC 3017 (Comm).

23. RDC 23.4 and 23.5 read as follows:

> "Notice of Application
>
> 23.4
>
> The general rule is that a copy of the application notice must be served by the applicant on each respondent even if such service is on short notice.
>
> 23.5
>
> An application may be made without serving a copy of the application notice if this is permitted by:
>
> (1) a Rule; or
>
> (2) a Court order."
>
> ××× (emphasis added)

THE LAW ON SETTING ASIDE ORDER

24. I now discuss the law on setting aside the order of immediate judgment.

25. This application to set aside the Immediate Judgement was made pursuant to RDC 24.22 which reads:

> "If an order of immediate judgement is made against the respondent who does not appear at the hearing of the application, the respondent may apply for the order to be set aside or varied."

26. RDC 24.23 reads:

> "On the hearing of the application under 24.22 the court may make such order as it thinks just."

27. The critical words are `it (court) thinks just'.

28. The Fourth Defendant also asked me to refer to RDC 35.16 which gives the court a discretion to make an order to set aside the judgement in a case where the party fails to attend a trial under RDC 35.14.

29. RDC 35.16 reads:

> "Where a party does not attend and the Court gives judgment or makes an order against him, the party who failed to attend may apply in accordance with Part 23 for the judgment or order to be set aside."

30. RDC 35.18 goes on to provide that where an application under Rule 35.15 or Rule 35.16 by a party who fails to attend trial ×the court will only grant the application to set aside a judgment entered by the court in the absence of a party if the applicant to set side:

> a) acted promptly when he found out the court had exercised its power to strike out or enter judgement or make an order against him;
>
> b) had good reason for not attending trial;and
>
> c) has a reasonable prospect of success at a trial.
>
> Counsel for the Fourth Defendant submitted that the court should not read 35.18 too strictly but to determine whether it is fair to set aside the judgement or not. The final matter is for the court to consider what is just. He cited× *Nelson and another v Clearsprings (Management) Ltd* [2006] EWCA Civ 1252.

31. I remind myself that the matter before me actually is an application to set aside the Immediate Judgment entered against the Defendants on 6th June 2018. It is not a case where it has been fixed for trial and the Defendants failed to appear at the trial. Nevertheless, I shall consider the points raised by the counsel in deciding whether the immediate judgement should be set aside or not. I quite agree that what is important is whether justice would be delivered by setting aside the order as provided for in RDC 24.23 and to make the order sought by the Fourth Defendant. But justice in this context must necessarily mean justice for all parties concerned and not justice only for the Fourth Defendant. I must also consider whether it would be just to the Claimant for me to grant the orders sought by the Fourth Defendant, in other words justice to all concerned. As a judge we have on many occassions heard counsel arguing that it would not be just for the Court to make a certain order for his client. He forgets that it is the judges' duty to also consider what is just for the other party or parties. It is the duty of the Court to look at all surrounding circumstances before arriving at a conclusion which in its opinion is just.

32. Parties agreed that the Fourth Defendant acted promptly in filing the necessary application before this court upon discovery that an Immediate Judgement had been entered against him. This particular requirement is therefore not in issue.

33. The second consideration is whether there were good reasons why the First and Fourth Defendants failed to attend court on the day judgement was entered against them. Counsel for the First and Fourth Defendants referred to the Court the situation occuring immediately before the Immediate Judgment was entered into. In my opinion however, it is my duty not only to look at immediate circumstances occurring as to why

the Fourth Defendant did not appear in court but I should also look at the way all the Defendants, in particular the First and Fourth Defendants had been acting since the FIA was defaulted by the Defendants. Circumstances show they cannot plead ignorance that the Claimant was looking for them and more important they were aware of court proceedings were pending against them. After all the Singapore High Court order was served on them. (See para 14 above). This question may not be relevant since this court had made an order for application notice to be dispensed with.

34. I have to also consider the likelihood of success in favour of the Fourth Defendant at the trial should the order sought be granted. In so doing, I have to decide whether:

a) the award by the arbitrator was rightly enforced by the Singapore courts and

b) whether that Singapore judgement can be enforced in the DIFC against the 1st and 4th Defendants.

35. As I have said earlier I do not disagree with the Counsel for the Fourth Defendant that it is the duty of the court to determine in this case whether it is just to make an order sought.

36. In order to determine what order I should make, let us revert to the facts that I had elucidated from the beginning of this judgement. All the six Defendants appeared and defended the case before the arbitrator but after that, although they were served with the application to enforce the judgement at the Singapore court, they failed to appear and defend their case before the High Court of Singapore. Neither was there any attempt to challenge the order of the Singapore High Court which was served on the First Defendant in Pakistan as well as on the Fourth Defendant in California.

37. If one were to read the affidavit filed by the Claimant, one can only arrive at one conclusion; and that is that all the Defendants were avoiding service of any document on them. I am also made to understand the arbitration hearing was put in suspense pending the Defendants enforcing the Pakistan court injunction. Again, no action was taken to enforce this injunction. The dispute had arisen as early as about 2008 or 2009. Today about nine years have lapsed since the dispute arose. Award by the arbitrator was made in 2012 now six years from the time the arbitrator made his award. The question is "is it just?" to the Claimant for his Immediate Judgement to be set aside after considering the way the Defendants, in particular the First and Fourth Defendants acted all these time.

38. I have also considered the likelihood of success of the Fourth Defendant in preventing the judgement of the Singapore High Court from being enforced in the DIFC. There was no mention at all that the judgment of the Singapore court cannot be enforced in the DIFC. In fact applying the Memorandum of Guidance entered into between the DIFC Courts and the Singapore Courts on 21st January 2015. The Memorandum specifically provides at paragrapah 18:

> "The DIFC Courts will not re-examine the merits of a judgment of the Supreme Court of Singapore. The judgment may not be challenged on the grounds that it contains an error of fact or law. A judgment of the Supreme Court of Singapore will be enforced on the basis that the defendant has a legal obligation, recognised by the DIFC Courts, to satisfy a judgment of the Supreme Court of Singapore."

39. The judgment entered by the Singapore High Court is a money judgement.

40. In order to succeed, the Fourth Defendant would have to go and challenge the order of the High Court of Singapore, prove that it was wrong in making the order to enforce the arbitrators award. Obviously it is too late. It is most unlikely that they will succeed in Singapore considering the lapse of time, as well as their failure to appear in the Singapore High Court. They could have appeared before the Singapore High Court and at least attempted to prevent the court from making the order by producing the injunction given by the Pakistan court.

41. On the question of whether they were aware that there was an application to enter Immediate Judgement against them, the Fourth Defendant was aware of the application made for alternative service since it was served on the Fourth Defendant.There was a DIFC courts certificate of service (see paragraph 19 above).The fact that they were unaware of the application for Immediate Judgment therefore becomes irrelevant.

42. Taking into consideration the facts before me as well as the law as I understand it to be, I am satisfied that if the Fourth Defendant was to be allowed to challenge the application to set aside the Immediate Judgment,&#65533; it is extremely unlikely that he will succeed. He must prove that he will be more than just likely to succeed. There must be a `realistic' as opposed to `fanciful' prospect of success. (see GFH Capital Limited&#65533; v David Lawrence Haigh [2014] DIFC CFI 020 quoting JSC VTB Bank v Skurikhin [2014] EWHC 271. In the Skurikhin case the judge had analysed all the principles relating to setting aside a default judgment.

43. On the question of whether the Claimant had properly invoked Part 7 instead of Part 45 of the RDC, in my opinion it is up to the Applicant to choose which provision of the Rules he wishes to invoke. His motive for doing so is irrelevant.

ORDER

44. Having considered the facts of this case, I arrive at the decision that it is not just to set aside the Immediate Judgement given by this Court on 6 June 2018. I therefore dismiss this application with costs. Costs to be taxed.