Claim No. CFI-024-2016

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 JUSTICE ROGER GILES

BETWEEN

(1) EBI SA, FRANCE

(2) ECOBANK NIGERIA LIMITED

(3) ECOBANK SENEGAL

Claimants

and

(1) LAL MAHAL DMCC

(2) LITTLE ROSE GENERAL TRADING LLC

(3) PREM CHAND GARG

Defendants

[illegible]

Hearing: **20 October 2016**

Counsel: Hisham ElSheikh (Adel Mohamed Al Qasemi Advocates & Legal Consultants) for the Claimants

Jayakrishnan Parvthik (Al Nassar Advocates & Legal Consultants) for the Defendants

Judgment: **[illegible]14 November 2016**

JUDGMENT OF JUSTICE ROGER GILES

Transcribed from the oral judgment delivered on 20 October 2016, revised and approved by the judge.

ORDER

UPON reviewing the Default Judgment of the Registrar dated 16 August 2016 (the "Default Judgment")

AND UPON reviewing the Defendants' applications dated 6 September 2016 to set aside the Default Judgment

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant on 20 October 2016

IT IS HEREBY ORDERED THAT:

1. The Default Judgment dated 16 August 2016 be varied by:

(a) substituting for the figure of USD 2,000,000 in legal fees the figure of AED 627,750, which includes the sum of USD 130,000 as the Court fee;

(b) setting aside the judgment so far as the Second and Third Defendants were ordered to pay USD 111,650,189.44 to the Second Claimant;

(c) deleting order 3, namely the Order that the Defendants' obligations are joint and several.

2. Subject to paragraph 3 below, the Default Judgment be set aside so far as the Third Defendant was ordered to pay the sums in paragraph 2 thereof.

3. Paragraph 2 is made on the condition that the Third Defendant may challenge the jurisdiction of this Court but may not otherwise file a defence to the claims against him.

4. Costs of the applications to set aside the Default Judgment are to be paid by the Defendants to the Claimants, to be assessed by the Registrar if not agreed.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 14 November 2016

At: 3pm

JUDGMENT

1.This is an application to set aside a default judgment. The Claim Form was filed on 22 June 2016. There are three Claimants and three Defendants. The claims are for money due from a borrower and from guarantors. The claims are rather confusingly set out in the Claim Form, and amount to the following seven claims:

> (1) by the First Claimant, described as EBI SA, France ("EBI"), against the Second Defendant, Little Rose General Trading LLC ("Little Rose"), as borrower, for USD 9,512,400;
>
> (2) by EBI against the Third Defendant, Prem Chand Garg ("Prem") as guarantor, amount not specified;
>
> (3)by EBI against the First Defendant, Lal Mahal DMCC ("Lal Mahal") as guarantor, for USD 9,512,400;
>
> (4) by the Second Claimant Ecobank Nigeria Ltd ("Ecobank Nigeria") against Lal Mahal as guarantor, for USD 111,650,189.44;
>
> (5) by the Third Claimant, described as Ecobank Senegal, against Little Rose as guarantor, for USD 13,717,801;
>
> (6) by Ecobank Senegal against Lal Mahal as guarantor, for USD 13,717,801; and
>
> (7) by Ecobank Senegal against Prem as guarantor, amount not specified.

2. Adding the missing amounts, the claims may be otherwise expressed as claims:

> (a)by EBI against each of Little Rose, Lal Mahal and Prem, for USD 9,512,400;
>
> (b) by Ecobank Nigeria against Lal Mahal for USD 111,650,189.44; and
>
> (c) by Ecobank Senegal against Little Rose, Lal Mahal and Prem, for USD 13,717,801.

3. The Particulars of Claim ended -

> "The Plaintiffs are claiming the repayment of the total amount of $134,295,390.44 in Default plus 15% Default Interest per Annum plus USD 2,000,000 (Legal Fees)".

4. According to the certificate of service in the court file, the Claim Form was served on 23 June 2016. No acknowledgement of service was filed within the relevant time.

5. The default judgment was issued on 16 August 2016. It was relevantly stated that -

"2. The Defendants are ordered to pay, within 14 days of the date of this Order:

(a) USD 9,512,400 to the First Claimant;

(b) USD 111,065,189.44 to the Second Claimant;

(c) USD 13,717,801 to the Third Claimant;

(d) USD 2,000,000 in legal fees to the Claimants; and

(e) Interest at the rate of 15% annually on USD 134,295,390.44, being the sum of the amounts listed in paragraphs 2(a) to 2(c) above, compounded monthly as follows:

> (i) USD 1,655,696.59 for the month of June 2016
>
> (ii) USD 1,731,979.60 for the month of July 2016
>
> (iii) USD 56,582.08 as a daily rate for the month of August 2016.

3. The Defendants' obligations are joint and several."

6. It will be seen that the claims against Prem were quantified, and that the judgment included USD 2 million for legal fees being the amount stated in the Particulars of Claim. It will be seen also that, although the claim for USD 111,650,189.44 was by Ecobank Nigeria against Lal Mahal alone, the judgment for Ecobank Nigeria for that amount was against all three of Little Rose, Lal Mahal and Prem. I will return to these two matters, neither of which was raised by the Defendants.

7. Applications by each Defendant to set aside the default judgment were filed in early September 2016. They stated as the grounds -

> "(1) The Defendant could not appear in time and submit the defense [sic] since the investor was out of the country due to some personal, unavoidable reasons.
>
> (2) In addition to that, we would like to enlighten the Honourable Court that we are challenging the jurisdiction of this DIFC Courts to entertain the said litigation, especially considering the fact that the parties have categorically surrendered to the jurisdiction of Nigerian Courts, as per Article 22 of the Loan Agreement which is the base document.
>
> (3) Further, we have also raised contentions of non-joinder of necessary parties, and mis-joinder of unnecessary parties to the proceedings.
>
> (4) It is also highly pertinent to note that the Claimant No.2 has already moved a litigation for the same relief in the agreed court of jurisdiction and the matter is still pending before that court, and Claimant No.2 has wilfully concealed this important aspect".

8. The applications were accompanied by a "Sworn Affidavit/Defendants' statement of Defense", a strange document with some resemblance to a pleaded Defence in the form of an affidavit of Mr Saurabh Rastogi. Mr Rastogi said that he was an employee and Power of Attorney holder of all the Defendants, and "an individual very close to Mr Prem Garg and his businesses for the past six (6) years [and] conversant with the facts of the case".

General

9. Under Rule 14.2 of the Rules of the DIFC Courts ("RDC"), the default judgment may be set aside on such conditions as the Court sees fit, or may be varied, if -

> "(1) the defendant has a real prospect of successfully defending the claim; or
>
> (2) it appears to the Court that there is some other good reason why;
>
> (a) the judgment should be set aside or varied; or
>
> (b) the defendant should be allowed to defend the claim."
>
> The Court must have regard to whether the person seeking to set aside the judgment made an application to do so promptly (RDC 14.3). An application must be supported by evidence (RDC 14.4).

10. The affidavit of Mr Rastogi gave no explanation for the Defendant's failure to file an acknowledgement of service, and there was no evidence through it or otherwise to support the reason asserted in the applications, namely that the investor was out of the country due to some personal unavoidable circumstances.

11. The defences as appearing from the application and the affidavit may be summarised under the following heads -

> (1) lack of jurisdiction;
>
> (2) non-joinder and mis-joinder of parties;
>
> (3) although not enunciated in this way, abuse of process by duplication of existing litigation or some form of *lis alibi pendens*;
>
> (4) the documents on which the Claimants relied were not binding on the Defendants;
>
> (5) perhaps, breach of a facility letter by Ecobank Nigeria.

 I will take each in turn.

Lack of jurisdiction

12. The Defendants submitted that the "basic documents" were a loan facility dated 23 May 2014 and a loan agreement dated 29 May 2014; that the latter provided that it should be "subject to the jurisdiction of the Nigerian Courts"; and therefore the Nigerian courts alone had jurisdiction over the claims. At one point in the affidavit, it was said that by entering into the loan agreement Ecobank Nigeria had "wilfully surrendered to the jurisdiction of the Nigerian Courts".

13. There are two difficulties with this submission. The first pervaded the other defences.

14. The loan agreement was between Ecobank Nigeria and Agrico AGB Ltd ("Agrico"), and provided for the loan to Agrico of money which was the subject of the facility letter. But the Claimants sued on quite different documents. The claim against Little Rose as borrower was founded on a document described as a "Facility Schedule" dated 20 March 2015 in which it accepted the position of borrower, and the claims against it as guarantor on one or more of three letters of guarantee. The claim against Lal Mahal was founded on a deed of guarantee and indemnity dated 14 May 2014. The claim against Prem was founded on a guarantee and indemnity dated 7 April 2015. The jurisdiction clause in the loan agreement in no way governed suing those Defendants on those documents, and any surrendering to the jurisdiction of the Nigerian courts was only in relation to the loan agreement. In any event, the agreement to the jurisdiction of the Nigerian courts did not exclude the jurisdiction of another court if that jurisdiction otherwise existed.

15. That is not the end of the matter. The Court must be satisfied of its jurisdiction if there is not submission to it by participation in the proceedings. Jurisdiction having been questioned, although on misconceived grounds, I enquired of Mr ElSheikh for the Claimants in order to ascertain the source of jurisdiction. When the Defendants did not challenge jurisdiction beyond the submission to which I have referred, if there

is an apparent basis for jurisdiction I should accept that the default judgment was given within jurisdiction. Save in one respect, I see no occasion to conclude that it was not.

16. Mr ElSheikh informed me, no doubt on instructions, that the Facility Schedule was executed by Little Rose in and to be carried out within the DIFC. The letters of guarantee stated that any dispute will be "subject to the jurisdiction of the Court [sic] of Dubai, UAE", a phrase which can readily extend to this Court as a Dubai court and the Defendants did not raise a deficiency in that respect. The deed of indemnity and guarantee provided specifically in cl 19.1 that the courts of the Dubai International Financial Centre should have exclusive jurisdiction over any dispute or claim arising out of or in connection with it. There is, however, a difficulty in the guarantee and indemnity executed by Prem.

17. That guarantee and indemnity provided in cl 21 that it was governed by French law and for submission to the jurisdiction and competence of the French courts and tribunals. It added, "But with full liberty for you to resort to the courts of any other country where jurisdiction may exist or be established". That left it necessary that the jurisdiction of this Court exist or be established; that is, that the claim against Prem fall within Article 5 (A) (1) or (2) of the judicial authority law, DIFC Law No 12 of 2004.

18. Mr ElSheikh submitted that it fell within sub-Article (2), which provides that the Court may hear and determine a claim "where the parties agree in writing to file such claim or action with it.provided that such agreement is made pursuant to specific, clear and express provisions". It was submitted that cl 21 of the guarantee and indemnity was such an agreement in writing, and it was said in support of that submission that there was a nexus with Dubai in a number of respects.

19. I am unable to see that the matters said to provide a nexus assist. It does not seem to me that cl 21 is an agreement to file a claim or action with this Court, certainly not a specific, clear and express provision to that end. In my view there is a real doubt whether this Court had jurisdiction in relation to the claim against Prem, and that is not something which can be overlooked because the Court should not allow a judgment to stand if it did not have jurisdiction to order the judgment. I consider that Prem should be able to mount a challenge to jurisdiction.

Mis-joinder and non-joinder of parties

20. The Defendants submitted that EBI and Ecobank Senegal had "never been a party to any of the agreements and so could not sue", and that Ecobank Nigeria had failed to join the principal debtor, so the claim was bad. The first of these submissions appears to have been founded on the loan agreement as the document on which Claimants sued. As explained above, it was not, and there was no mis-joinder. It is not necessary to join the principal debtor in a claim against a guarantor. There is nothing in this defence.

Abuse of process and/or *lis alibi pendens*

21. The Defendants submitted that Ecobank Nigeria had sued "for the same relief" in Nigeria, and that Agrico, Lal Mahal and Prem had brought proceedings in Nigeria, and obtained *ex parte* an interlocutory order to maintain the status quo pending a hearing on notice.

22. The evidence was scanty. Ecobank Nigeria applied in Nigeria for a freezing order against Prem and for leave to serve process on him out of the jurisdiction. The application for a freezing order was withdrawn and the leave was granted. However, the claim against Prem in the proceedings was not disclosed in the evidence. The interlocutory order was in proceedings brought against a different party, Ecobank Plc. It was obtained in June 2015, and the current position was not disclosed.

23. There is nothing in this submission, which in any event would not provide a defence but, if anything, found an application for a stay of proceedings. The other Claimants did not sue at all in Nigeria. Whatever Ecobank Nigeria was doing, it was not shown that the relief it sought had anything to do with the relief it obtained in this Court. Ecobank Plc is not a Claimant. Any wider disputes linking the Claimant's claims in these proceedings with the Nigerian proceedings was not explained.

Documents not binding

24. This was explained in the affidavit of Mr Rastogi -

> "The Defendants being separate corporate, legal entities, they express their will through resolutions, and these resolutions are to be attested by the concerned authorities, as to my knowledge as on date there exists not even a single document which has been attested by the appropriate authorities, and thereby there exists no documents to Bind Defendant No.1 and 3. Further, the alleged personal guarantee alleged to be executed by the Defendant No.3 is not seen attested by a notary public, and it is pertinent to note that it undated [sic]. It is highly important to note that neither the Loan Agreement Facility Letter was signed by any of these alleged guarantors".

25. The need for attestation by concerned authorities, in order that the documents on which the Claimants sued be binding, was not explained. The fact that the loan agreement and the facility letter were not signed by the guarantors is of no consequence. As put in the affidavit, this is of no substance.

26. In submissions, Mr Jayakrishnan for the Defendants put the matter slightly differently. The facility letter provided that Ecobank Nigeria would make available up to USD 140 million to Agrico. It stated a number of conditions precedent to drawdown, including that the bank should have received a notarised corporate guarantee of Lal Mahal and a notarised board resolution also of Lal Mahal. There was no evidence, but implicit in the submission was that no such documents had been received.

27. Apart from the lack of evidence, how deficiency in this respect negated the documents on which the Claimants sued was not explained. The fact, if it be the fact, that the Lal Mahal deed of guarantee and indemnity was not notarised and no notarised board resolution of Lal Mahal was provided to the bank before drawdown was not shown to affect the validity of the deed of guarantee and indemnity.

Breach of facility letter

28. It is not clear to me that this was proposed as a defence, or that Mr Jayakrishnan took it up. It may be an earlier expression of the submission

last mentioned.

29. Mr Rastogi said in the affidavit -

> "Certain parameters and requirements were highlighted in the loan facility letter. which was considered as mandatory requirements to be fulfilled as a condition precedent to disperse the loan.&#65533; Bit [sic] but is highly surprising and suspicious to note that these mandatory requirements were waived by the concerned official of the Claimant No.2, and the amount was dispersed without fulfilling any of the mandatory requirements".

30. So far as this was intended to go further than the submission last mentioned, any breach of the facility letter does not diminish the claim upon Little Rose as borrower. It was not explained how the asserted waiver affected the claims against the guarantors, specifically the claim against Lal Mahal.

Conclusion

31. I do not think that the Defendants have a real prospect of successfully defending the claims. The jurisdictional doubt as to the claim against Prem, as a matter going to jurisdiction, appears to me to provide a good reason why the judgment against Prem should be set aside and he should be allowed to defend, but only by a challenge to jurisdiction.

32. I return to the matters of USD 2 million for legal fees and the judgment for Ecobank Nigeria against all three of Little Rose, Lal Mahal and Prem.

33. The claimable costs are those of bringing the claims and prosecuting than to the point of obtaining judgment. They could not conceivably be USD 2 million.&#65533; Mr ElSheikh was either unable or unwilling to suggest an appropriate figure; he suggested USD 1 million, which is scarcely more acceptable.&#65533; I propose to set aside the judgment in so far as it included USD 2 million for legal fees, and to substitute it in that respect with AED 150,000.

34. The Claimants properly accepted that there had been error in the default judgment in favour of Ecobank Nigeria, and that the error should be corrected by setting aside that judgment and substituting a judgment only against Lal Mahal.

Addendum

35. When giving the preceding reasons *ex tempore*, I omitted to explain why I did not accept a further submission made by the Defendants. I do so by this addendum when correcting the transcript of my reasons.

36. The submission was an apparent afterthought, made in submissions in reply. It went only to the claims against Little Rose as guarantor, and was that the letters of guarantee were limited in time.

37. The last of the letters, dated 27 July 2015, included a paragraph -

> "This Guarantee is valid until 31st December 2015 and automatically and fully extinguished if this date [sic] no request for payment has reached us.&#65533; After which it will no longer be called for any reason what so ever."

38. The earlier letters had like paragraphs, in one case adding "by swift authenticated message" after "reached us", and gave dates of 31 May 2015 and 31 July 2015.

39. There was no evidence of requests for payment made to Little Rose. Without evidence that payment was requested only after 31 December 2015, an available defence was not demonstrated.

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Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 14 November 2016

At: 3pm