THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

LARMAG HOLDING BV

Claimant

and

(1) FIRST ABU DHABI BANK PJSC
(2) FAB SECURITIES LLC
(3) ABDULLA SAEED BAKHEET OBAID ALJABERI
(4) ALI MOHAMED
(5) ELITE HOLDING GROUP

Defendants

JUDGMENT OF JUSTICE SIR RICHARD FIELD ON CLAIMANT'S APPLICATION FOR A DE NOVO REVIEW OF THE REGISTRAR'S DECISION GIVEN ON 23 SEPTEMBER 2021

Introduction

1. Proceedings were brought against the Third Defendant (**"D3"**) in November 2019 alleging that, acting alone, or in conjunction with others, he fraudulently misappropriated 70,000 Reditum bonds (the **"Reditum bonds"**) with a nominal value of Euros 70 million that were in the ownership of the Claimant.

2. The Claimant obtained numerous orders of the Court against D3 prior to the judgment given on the claim on 15 August 2021. Those orders included: freezing orders coupled with an obligation to disclose assets over a certain value; an order that D3 inform the Claimant's legal representatives of the whereabouts of all of his passports and deliver the same to the Registry of the DIFC courts; orders that D3 must inform the Claimant's legal representatives (and continue to disclose to the Claimant on an ongoing basis) in writing the source of the funds for his spending on his ordinary living expenses and his legal advice and representation since the date of the freezing order made on 24 November 2019; an order that D3 provide an updated list of all his assets worldwide exceeding USD 10,000 in value, whether in his own name or not, and whether solely or jointly owned, giving the value, location and details of such assets; an order that D3 provide particulars and a comprehensive explanation of the current debts owed to him by third parties; and an order that he provide a current valuation of Orxy Capital LLC.

3. In the judgment given on 15 August 2021, the Court upheld the Claimant's claim. The Court found that D3 had fraudulently procured the transfer of the Reditum bonds into an account he held with the Second Defendant free of charge. The Court further held, inter alia, that in the course of achieving this transfer, D3 forged, or authorised the forging of, documents purportedly issued by a reputable bank stating that a pre-payment for the Reditum bonds in the sum of Euros 20 million had been sent to the Claimant's bank account in Holland. It was also stated in the judgment that the deceits practised by D3 involved such grave dishonesty that there could be no question but that he and those alleged to have been party to his fraud must pay the costs of the action on the indemnity basis.

4. The Court awarded the Claimant, inter alia, damages in the sum of EUR 57,711,500, in respect of the deceit practised by D3 that induced the Claimant to transfer the bonds into D3's account with the Second Defendant. The Court also ordered that D3 must: (i) forthwith give all necessary instructions and make all necessary arrangements for the transfer to the Claimant by free delivery of the 65,000 Reditum bonds held in his account with the Second Defendant; (ii) within 14 days of the date he must serve an affidavit exhibiting all relevant documents accounting for: (a) the 5,000 Reditum bonds transferred from his said account to Zoya Holding Limited (**"Zoya"**) and the sale by Zoya of 4,000 of the said 5,000 Reditum bonds it received from D3 and/or the Fifth Defendant, disclosing the consideration received for the transfer to Zoya and the name of the transferee who received the said 4,000 Reditum Bonds from Zoya; the consideration received by Zoya for that latter transfer; and the identity of who controls Zoya; (iii) D3 must procure the transfer by free delivery to the Claimant of all of the Reditum bonds that are found on the taking of the said account to remain within the disposition of Zoya.

5. On 5 September 2021, at one minute past the 4 pm deadline for filing documents with the Court, a firm of lawyers who had not previously been instructed by D3 in these proceedings, BSA Ahmad Bin Hezeem & Associates LLP (**"BSA"**), purported to file on behalf of D3 an application for permission to appeal the judgment together with an Appeal Notice. In addition, the necessary court fee for filing the permission to appeal application was not paid until the following day.

6. On 9 September 2021, BSA filed purportedly on behalf of D3 an application for the necessary extension of time in which to file the permission to appeal application and the Appeal Notice.

7. D3's former solicitors had come off the record on 17 June 2021 and in an email addressed to the Registry and "cc'd" to BSA dated 6 September 2021, the Claimant's solicitors, Clyde & Co (**"Clydes"**), stated that BSA were not on the record because they had not served a notice of Change of Legal Representative. On the same day (6 September 2021), the Registry informed Mr Bowden by email that D3 had to file a Notice of Change form after which BSA would be added to the record. In reply to Clydes' email, Mr Bowden stated, inter alia, that his firm's instructions were limited to filing a Notice of Appeal.

8. On 13 September 2021, the Claimant filed an application for an order (the **"Unless Order Application"**) that unless D3 complied forthwith with the orders described in paragraph 2 above and paragraph 4 above, and in any event within 7 days, D3's permission to appeal application, his Appeal Notice and his application for an extension of time should be struck out and he should be debarred from taking any further steps in the proceedings and any appeal in relation thereto.

9. On 15 September 2021, a Senior Case Progression Officer in the Registry emailed Mr Bowden stating that the Registrar directed him to clarify the position with respect to his representation of D3 in these proceedings by 4pm that day. The email stated that D3 had sent an email to the Registry dated 26 August 2021 formally appointing BSA on the record of the case, but no formal Court of Appeal (CA) case had yet been opened and, even it had been, it could not follow that BSA acts for D3 in the intended CA proceedings and not the CFI proceedings. The cases were not mutually exclusive. In the event that the Registry did not receive a response by the given deadline, D3 would be considered to be a litigant in person and BSA would be deleted from all correspondence. In addition, the Registry had issued directions in relation to the Unless Order Application that: (i) D3 had to serve his evidence in answer to the application by 4pm on Tuesday 21 September 2012; (ii) the Claimant had to file its evidence in reply (if any) by 4pm on Thursday, 23 September 2021; (iii) the application would be determined by the Judge with conduct of this matter.

10. The following day (16 September 2021) at 12:21pm, Mr Bowden emailed the Registry as follows. BSA did not have, and never had had, instructions from D3 to act in the CFI proceedings and did not accept the proposition that in filing an appeal "that we are a fortiori (sic) acting in the CFI". The Rules did not support such a contention and it was only the fact that the Case Management System (the **"CMS**) requires the filing of a P37/01 form that enabled the argument to be made. The reasons why BSA did not wish to appear in the CFI proceedings were the resources of the firm; the severe financial restraints that D3 was under; and the volume and aggressive tone of the correspondence on the file. However, the Senior Partner had now directed that the firm approach D3 with a view to entering into a further retainer with him. Further, the time directions made in respect of the Unless Order Application would not allow for this approach to be made and it was requested that these be revisited.

11. By an email dated 20 September 2021, the Registry informed Mr Bowden that the Unless Order Application had been referred to myself for decision and that I had directed that the Unless Order Application would be determined without a hearing and D3 must serve his submissions in response by 10am on 26 September 2021.

12. By email dated 22 September 2021, Mr Bowden informed the Registry, inter alia, that: (i) BSA was in the process of getting instructed in the CFI proceedings but that was yet to be completed; (ii) BSA was working on: (a) filing a Reply "to the CFI-054-2019/16 application" by 4pm on Tuesday 28 September 2021; (b) filing the Skeleton Argument for the application for Leave to Appeal; (c) responding, if a retainer had been entered into, to the information request made in the fresh freezing order dated 16 September 2021 (the **"16 September Order"**); and (iii) that morning, BSA had gone through the 16 September Order with D3.

13. By email dated 23 September 2021 addressed to Mr Bowden, the Registrar directed: (i) "In light of the fact that your firm has failed to provide unequivocal confirmation that it acts for [D3], the Registry since 21 September 2021 has updated its record to reflect [D3] as a litigant in person". (ii) "Given that BSA is no longer on the record, the Registry will no longer be entertaining any applications or communications put forward by BSA on behalf of [D3] and you will be removed from all correspondences in relation to this matter. All future correspondences will be sent directly to [D3]". (iii) Any submissions in this case, which you or BSA have circulated on this matter since the date of the Registrar's Direction [dated 15 September 2021] are deemed `not received.'" (iv) Should BSA wish to act on this matter going forward, BSA must make a clear unequivocal statement to this effect supported by a sworn affidavit by the partner at BSA with carriage of the matter. Hereinafter, this direction by the Registrar is referred to as the **"Challenged Decision"**).

14. Also on 23 September 2021, the Registry sent an email to D3 stating that "further to the Registrar's directions dated 23 September 2021 you are now deemed to be a litigant in person". D3 was also informed that the Registrar had extended the date by which he could file evidence in response to the Claimant's Unless Order Application to 26 September 2021 and that this had been referred to the judge who would issue his decision in due course. A copy of the Claimant's Unless Order Application would be forwarded by WeTransfer due to the large file size.

15. On 26 September 2021, Mr Bowden sent to the Registry the skeleton argument in support of D3's application for permission to appeal and requested that this be forwarded to the judge considering the matter. Also on this date, D3 sent an email to the Registry in Arabic stating that Mr Bowden and BSA were to be treated as his attorneys.

BSA/D3'S application for a de novo review of the Challenged Decision

16. The application for a de novo review of the Challenged Decision is made on the basis that the Registrar's decision was irrational, involved errors of law and was unreasonable. The principal contentions advanced are: (i) the Registrar erred in law in proceeding on the basis that if a new law firm is to be instructed to represent a client in an appeal it must be instructed in the whole of proceedings and therefore act in such non-appellate post trial issues that might arise; (ii) whilst there may be an obligation to accept instructions which the law firm has the ability to handle (the cab rank rule), the capacity to handle this matter at short notice when key staff were engaged in other heavy litigation (CFI-029-2018 and CFI-063-2020), was a relevant factor that ought to have been taken into account; (ii) the Registrar failed to take into account: (a) a law firm's entitlement to be paid before accepting instructions in a complex case; (b) the aggressive style of litigation adopted by the solicitors for the Claimant; and (c) the need for KYC and AML procedures to be completed in respect of any third party who would fund the ongoing CFI litigation.

17. The Claimant responded to the *de novo* application by email dated 29 September 2021 to the Registry, cc'd to Mr Bowden. The Claimant's principal submission is that it was clear from paragraphs (1) and (2) of Practice Direction No.3 of 2015[1] (the **"PD3/15"**) that it was only decisions of a judicial nature that could be the subject of a *de novo* review. None of the directions made in the Challenged Decision were of that nature. Rather, they were a direct result of BSA's failure to follow the earlier directions issued by the Registrar (which included for BSA to file an affidavit by a senior partner of the firm) for the proper management and administration of the proceedings. The PD3/15 reconsideration procedure is not applicable to the Challenged Decision, principally because the directions made therein are not a `decision' that is *"judicial in nature in respect of applications lodged before the Courts"* per paragraphs (1) and (2) of PD3/15. The directions ordered are not a decision in respect

of an application by any party; rather they relate to the administrative and procedural matter of the representation of D3 on the Court's record in the circumstances recorded in the correspondence between the Registry and BSA preceding the issuance of the directions. Rather, the directions are a direct result of BSA's failure to follow the earlier directions issued by the Registrar (which included for BSA to file an affidavit by a senior partner of the firm) for the proper management and administration of the proceedings and are administrative in nature.

Discussion and decision

18. There is no doubt that BSA/Mr Bowden were in breach of the Registrar's direction made on 15 September 2021 that Mr Bowden had to clarify the position with respect to his representation of D3 in these proceedings by 4pm that day. It is also understandable that the Registrar acted on the basis that a lawyer replacing one who had come off the record should have instructions that allowed for use of CMS which is the required way in which parties' legal representatives have to file applications, documents and evidence etc with the Registry. That said, I have come to the view that given: (i) the importance of D3's declared intention to seek to appeal the stringent orders made consequent on the highly critical judgment entered against him; and (ii) the legal significance of some of the issues involved as described in paragraph 21 below, the Court should give D3 the opportunity of being legally represented at this stage in respect solely of the Unless Order Application without the need for the appointed legal practitioner to be instructed in respect of the CFI proceedings as a whole.

19. I therefore order that if:

(a) within 8 days D3 instructs a legal representative qualified to appear in the DIFC Courts to act solely in the Unless Order Application proceedings; and

(b) the chosen representative serves on the Registry and the Claimant an affidavit sworn by him or her confirming D3's instructions, the legal representative will be entitled to represent D3 in the aforesaid proceedings filing and serving documents, applications, skeleton arguments and evidence by sending the same by email to the Registry and the Claimant rather than using CMS.

20. I should add that I have consulted Chief Registrar and have been informed that if D3 and his appointed legal representative comply with the aforesaid conditions it will be feasible for the Registry to receive by email those documents that otherwise would have had to be served or issued using CMS.

21. A principal issue arising in the Unless Order Application proceedings upon which the Court will require assistance is the approach the Court should take in light of D3's failure to comply with a large number of orders of the Court. This topic is discussed in the following authorities, none of which, so far as I can see, has been addressed by either party: *Hadkinson v Hadkinson* [1952] P 285 (especially the judgment of Denning LJ); *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1; *Grupo Torras SA v Sabah (No.4)* [1999] C.L.C 885; *The Messinaki Tolmi* [1981] 2 Ll Rep 593. See also the recent Supreme Court decision R (*on the application of Majera v Secretary of State for the Home Department* [2021] UKSC 46.

Further procedural directions

22. If a legal representative is appointed to represent D3 in compliance with the aforesaid conditions, the following procedural directions shall apply:

(a) The Claimant should serve an updated skeleton argument within 7 days of such appointment dealing inter alia with the application of the authorities identified in paragraph 21 above to the Unless Order Application;

(b) D3's evidence and skeleton argument must be served within the following 10 days;

(c) The Claimant's submissions and evidence (if any) in reply must be served within the following 9 days; and

(d) There will be a remote hearing of the Unless Order Application on 13 December 2021 or on a date to be fixed which is as close to the former date as may be arranged.

23. If the Claimant does not appoint a legal representative in accordance with the aforesaid conditions, the following directions shall apply:

(a) Within 7 days of the date of this judgment, the Claimant should serve an updated skeleton argument dealing inter alia with the authorities identified in paragraph 21 above to the Unless Order Application;

(b) D3's evidence and skeleton argument must be served within the following 10 days;

(c) The Claimant's submissions and evidence (if any) in reply must be served within the following 9 days; and

(d) There will be a remote hearing of the Unless Order Application on 13 December 2021 or on a date to be fixed which is as close to the former date as may be arranged.

Costs

24. In light of the fact that BSA failed to comply with the Registrar's Order dated 15 September 2021 and the importance of the outcome of the Unless Order Application, I propose to order that the costs of this de novo review application should be costs in the Unless Order Application.

Issued by:
Amna Al Owais
Chief Registrar
Date of Issue: 28 October 2021
At: 9am