THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

MUZOON HOLDING LLC

Claimant

and

ARIF NAQVI

Defendant

ORDER OF JUSTICE ROGER GILES

UPON the Default Judgment made by Judicial Officer Maha Al Mehairi on 26 June 2019 (the **"Default Judgment"**)

AND UPON the Claimant's Application Notice CFI-080-2018/3 dated 16 June 2021 seeking permission to cross-examine the Defendant at the hearing listed for 28 June 2021 (the **"Cross-examination Application"**)

AND UPON the Order issued on 27 June 2021 dismissing the Cross-examination Application

AND UPON reviewing the Defendant's Application Notice CFI-080-2018/2 dated 21 April 2021 to set aside the Default Judgment and allow the defendant to file an acknowledgement of service (the **"Application"**)

AND UPON hearing counsel for the Claimant and counsel for the Defendant at a hearing on 28 June 2021

AND UPON reading the relevant material on the case file

IT IS HEREBY ORDERED THAT:

1. The Default Judgment is set aside.

2. The Defendant shall file and serve his acknowledgment of service within 14 days from this order.

3. The Claimant shall pay the Defendant's costs of the Application, including of the Cross-examination Application, to be assessed by a Registrar if not agreed.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 1 July 2021
At: 2pm

SCHEDULE OF REASONS

Introduction

1. This is an application to set aside a default judgment and allow the defendant to file an acknowledgement of service. For the reasons which follow, the application should be granted.

The Default Judgment

2. On 10 December 2018, the Claimant filed a Claim Form under Part 7, claiming that one Rafiqe Lakhani had misappropriated AED 20 million from the Claimant. The relief claimed was a declaration that the sums he had received were held on constructive trust for the Claimant, damages, and some consequential matters. On 23 December 2018, the Claim Form was amended to substitute the Defendant for Mr Lakhani.

3. The Defendant was not in the UAE, and was known by the Claimant's lawyers not to be in the UAE. They sent the Claim Form to the lawyers known to be representing the Defendant in other litigation, asking whether the lawyers would receive it on his behalf. This request went unanswered.

4. On 18 February 2019, the Claimant applied for an order permitting service of the Claim Form on the Defendant by sending it to an email address (the **"Address"**). On 9 April 2019, an order was made to that effect. On 10 April 2019, the Claim Form was emailed to the Address. There was no "bounce back".

5. The due date for filing an acknowledgement of service was 24 April 2019. No acknowledgement of service was filed. On 9 June 2019, the Claimant filed a request for judgment in default of an acknowledgement of service.

6. On 26 June 2019, a judgment was issued that the Defendant "is liable to settle the total Outstanding Liability of USD 6,191,304" plus interest from the date of judgment, together with an order for costs in the amount of USD 69,246.27. The materials in this application did not explain the arrival at a money sum or the amount, or the translation to USD, but the Defendant did not submit that the judgment was irregularly obtained.

This Application

7. On 22 March 2021, the Defendant, then residing in the United Kingdom, received a letter from the Claimant's solicitors in London, enclosing a statutory demand based on the default judgment. According to the Defendant, he had not previously been aware of the proceedings in the DIFC or of any claim against him by the Claimant.

8. On 21 April 2021, the Defendant filed this application. In brief, in the application he contended that the default judgment should be set aside because he had not known of the proceedings until March 2021, and he challenged the jurisdiction of the DIFC Courts in respect of the claim and in any event had a good defence on the merits of the claim.

Setting Aside A Default Judgment

9. By RDC 14.2, the Court:

> ". may, on such conditions as it thinks fit, set aside or vary [a default judgment] 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 a varied; or
>
> (b) the defendant should be allowed to defend the claim".

10. In the terms of the Rule, the primary consideration is whether the defendant has a real prospect of successfully defending the claim, so that even if the defendant was duly served and on notice of the proceedings the judgment may be set aside upon a real prospect of a successful defence being made out. However, the "may" indicates a discretion, as is well established, and it will generally be necessary for the defendant to provide a satisfactory explanation of the failure to file an acknowledgement of service or a defence. "A real prospect" means a realistic rather than a fanciful prospect of success, as with the like words in RDC 24.1 for which the explanations in *Swain v Hillman* [2001] All ER 91 and *E D &F Man Liquid Products v Patel* [2003] EWCA Civ 472 have been adopted (see *GFH Capital Ltd v Haigh* [2014] DIFC CFI 020 (10 November 2016) and a number of subsequent cases). By those explanations, a claim is fanciful if it is entirely without substance, and has a realistic prospect of success if it carries some degree of conviction and is more than merely arguable.

11. As well as providing an explanation of failure to file an acknowledgement of service, a failure in service, or a failure of the mode of service in fact bringing the proceedings to the defendant's notice, can provide some other good reason for setting the judgment aside. So can a realistic question of the Court's jurisdiction. The failure brings into play the fundamental principle that judgment should not be given against a party unless the party has had an opportunity to be heard, giving rise to what is sometimes called the ex debito justitiae rule, although if on the application it is found that the defendant is bound to lose, the judgment can stand. The Court must always be satisfied that it has jurisdiction.

12. Depending on the circumstances, a judgment may be set aside on condition that the defendant can only contest jurisdiction, or conversely on condition that no jurisdictional objection is taken. Whether the defendant had notice of the proceedings may also be relevant to whether the defendant applied to set aside the judgment promptly, to which the Court is directed by RDC 14.3 to have regard.

A Real Prospect of A Successful Defence

13. The Claim Form gave the "brief details" that the Defendant:

> ". misappropriated funds from the Claimant in a sum of AED 20,000,000 by causing the Claimant to transfer the funds for the purpose of investing in a private placement in the transport company `Careem'. The Defendant then failed to return the invested sums and the profit and interest incurred to the Claimant."

14. There are no Particulars of Claim, and the claim must be discerned from the witness statements of Farida Safwat and Logaina Omer of the Claimant's lawyers. From the witness statements, its basis is as follows.

15. The Defendant was the CEO of the Abraaj Group. The Claimant was the investment manager on behalf of HE Mohammed Abdullah Al Gergawi (**"Mr Al Gergawi"**). The Defendant encouraged Mr Al Gergawi to invest through the Abraaj Group. In each of 2015 and 2017 a sum of AED 10 million was paid by Mr Al Gergawi (directly and not through the Claimant) to Abraaj Investment Management Ltd "(**"AIML"**), a member of the Abraaj Group, for discretionary investment. The Claimant was informed that the funds were invested in a private placement in the transport company Careem, managed by another Abraaj company. The Abraaj Group fell into financial difficulty, and in early 2018 a number of its entities were placed into liquidation or under administration (the evidence was mixed, but it appears to have been provisional liquidation). On inquiry after the investment, the Claimant was told by the administrator "that they were not aware of any cash holdings in the name of the Claimant" but would investigate and revert. The administrator had not further responded. Thus, according to Ms Safwat:

> "The Claimant therefore believes that the Defendant has misappropriated these funds in a manner that lead [leaves] no record of the funds being available within the Abraaj entities".

16. From the reference to misappropriation, this appears to be a case that the Defendant took the funds himself, into his own pocket. That is also what appears from the brief details in the Claim Form, and from the relief claimed that the Defendant held the funds on a constructive trust for the Claimant. However, in the course of submissions it was said also that the Claimant contended that the funds had been used for the purposes of the

Abraaj Group, instead of being invested, and that the Defendant was liable because of that misuse. The Claimant said in submissions, in substance, that it did not know what had happened to the funds, and so its case was misappropriation or alternatively misuse; however, it did not explain in submissions how misuse, if that were established, resulted in liability in the Defendant.

17. The Defendant in his two witness statements proffered a defence (apart from the question of jurisdiction) with the elements:

(a) the funds were invested by Mr Al Gergawi, not by the Claimant, and the Claimant is not the proper claimant;

(b) he "unequivocally" denies misappropriation of the funds; they were paid to AIML, and any claim in relation to their loss should be made against AIML.

18. In my view, the standing of the Claimant to bring the claim is open to argument. On the substance of the claim, in my view also the step from disappearance of the funds (which is itself a little up in the air) to misappropriation by the Defendant is clearly contestable, as are each of the two steps from disappearance of the funds to misuse by an Abraaj company and thence to liability of the Defendant to the Claimant for the misuse. This is so notwithstanding the Claimant's assertion that the Defendant is facing many other allegations of misappropriation of funds invested in the Abraaj Group, and its submission that the Defendant has not proffered any explanation of where the investment was recorded and how it can be located. That the Defendant is facing other claims, if it be so, does not bridge the gap of the steps above mentioned. It is for the Claimant to bridge the gap and not for the Defendant to relieve it of that evidentiary and persuasive task: a defence can include saying that, on the materials on which the claimant relies, liability has not been made out. There being the arguable question of standing and the contestability, the Defendant has a real prospect of success, in the sense indicated earlier, in opposing the claim.

Jurisdiction

19. The Defendant submitted that none of the gateways in Article 5(A) (1) of the Judicial Authority Law, DIFC Law No 12 of 2004, applied to the claim. It is not clear on what basis the Claimant said at the time of obtaining the default judgment that the Court had jurisdiction, but as I have said the Defendant did not submit that it was irregularly obtained. In this application, the Claimant said that the claim is one "arising out of or relating to any incident or transaction which is wholly or partly performed within the DIFC and is related to DIFC activities", within the gateway in Article 5(A) (1) (c).

20. In the Claimant's submission, the incident or transaction was the Defendant's encouragement of Mr Al Gergawi to invest through the Abraaj Group, which it said was done from the offices of Abraaj Capital DIFC Ltd (**"Abraaj Capital"**), one of the members of the Group, located in the DIFC. It said also that the transaction was partly performed in the DIFC because the funds were paid into the Royal Bank of Scotland, a bank operating in Dubai. And it said that the incident or transaction was related to DIFC activities because the investment in Careem was managed by Abraaj Capital.

21. For a combination of reasons, I consider that there is also jurisdictional reason to set the judgment aside. First, jurisdiction as submitted by the Claimant is not stark. What was done to encourage investment is not detailed, and whether if it was done from the offices of Abraaj Capital (which is not clear) that is sufficient for the claim to arise out of or relate to the encouragement deserves consideration. Whether management of the investment by Abraaj Capital (if it happened - on the Claimant's case it can not have happened) is sufficient for relationship to DIFC activities also deserves careful consideration, and while the Royal Bank of Scotland may have been operating in Dubai, it is not clear that it was operating in the DIFC as distinct from being registered therein. The Claimant may prevail, but more detailed analysis and assessment of the jurisdictional basis is necessary than is appropriate in this application. Secondly and together with this, for the reasons to which I next come the Defendant did not have the opportunity to contest jurisdiction and engage in that analysis and assessment, because I am not satisfied that he was on notice of the proceedings. He should have that opportunity.

Service

22. The Address was the email address used by the Defendant as CEO of the Abraaj Group. It is common ground that he was not in the UAE when the Claim Form was issued. On the Defendant's evidence, from June 2018 when the Abraaj Group entities were placed in provisional liquidation, he was "no longer the effective CEO". He said that he did not use the Address "except sporadically until August 2018 when the London office of Abraaj was dismantled by the joint provisional liquidators whereupon I no longer had access to an office or desktop computer connected to the Abraaj computer servers." The Defendant said that he arrived in the United Kingdom on 10 April 2019, the day the Claim Form was sent by email to the Address, and upon arrival was detained by the authorities. He was released on 28 May 2019, and in the interim had no communications at all.

23. The Defendant did not say in terms that he did not have or take access to the Address prior to or after his detention, but did say expressly that he was not aware of the email and that he only received the Claim Form by accessing the Registry following service of the statutory demand; and as I have earlier indicated, that he was not aware of the proceedings in the DIFC or of any claim against him by the Claimant until March 2021.

24. The Claimant's submissions included that it was not necessary that the Defendant in fact saw the email sent to the Address, and that the service was effective because the email was sent to the Address in accordance with the order made on 18 February 2019. The Defendant did not dispute that it was so sent. But that is not to the point, and the submission was misdirected. It can be any "other good reason" to set a judgment aside if, despite fulfilment of an order designed to bring the proceedings to the defendant's notice, the design fails and the defendant in fact does not become aware of the proceedings.

25. The Claimant submitted that the Defendant's evidence was vague and unclear and provided no direct evidence "as to the real question of whether the email was delivered to his inbox at a time when the email was still accessible by him". However, that is not the real question. The real question is whether he did access the email. As to that, the Claimant said that even though the London office had been dismantled, even though the Defendant was no longer CEO, and even though he did not have access to an office or desktop computer connected to the Abraaj servers, the Defendant could have accessed the email from a personal device, wherever he was, including prior to his detention (the timing of which on 10 April 2019 was not stated) or after his released from detention.

26. However, the Defendant said, and this is not vague or unclear, that he was not aware of the email, did not receive the Claim Form, and was not aware of the proceedings, which entails that he did not take access to the Address. On this application, I cannot disbelieve the Defendant unless his evidence is wholly incredible, which it is not. I am not satisfied that he accessed the email.

27. The Claimant also submitted that, from the Defendant's evidence that he had not instructed the UAE lawyers to accept service on his behalf, it should be inferred that he was told by them of the request to accept service and gave instructions not to answer it; therefore, he did know of the proceedings. It is sufficient that I do not think the inference is there.

28. I add that shortly before the hearing of the application, the Claimant applied for permission to cross-examine the Defendant. The reason given was that the Defendant had denied knowledge of the proceedings and the Claimant "would like an opportunity to question the Defendant to prove his credibility and the truth of his statement ". Not unexpectedly, the application was opposed by the Defendant. I refused permission, and should explain why.

29. The permission application was supported and opposed through witness statements mostly in the nature of submissions, in the case of the Claimant by misplaced reliance on the rule in *Browne v Dunn* which is for a quite different situation. Cross-examination on an application to set aside a default judgment is rare, as with interlocutory applications generally, because the Court is concerned with prospects and other reasons and it is not appropriate to make findings involving credibility. It was evident from the materials filed for the set aside application that the principal issue would be a real prospect of successfully defending the claim, and that service, or more correctly, the Defendant's knowledge of the proceedings, would be ancillary thereto. As to his knowledge, it was also evident that the prospect of destruction of the Defendant's express denial, by sudden confession or matters persuasive of incredibility put to him, was remote in the extreme. The witness statements of Ms Omer through which the Claimant supported the permission application did not suggest any particular matter to be put to the Defendant, let alone a "smoking gun": they indicated no more than a wish to test the Defendant on his evidence. I did not think that cross-examination of the Defendant would be of material assistance in determining the set aside application, or that departure from the normal rule was necessary in order to deal justly with the case within the overriding objective in RDC 1.6.

30. The Claimant put an alternative argument, submitting that it does not matter that the Defendant did not know of the proceedings, because he ought to have known of them. It relied on *SBM Bank (Mauritius) Ltd v Renish Petroleum FZE* [2018] DIFC CFI 054 (31 May 2021). Immediate judgment had been granted for a bank against the defendants in their absence. They applied to set the judgment aside on the ground, amongst others, that they had not been present at the hearing of the application for immediate judgment. The Claimant took from the reasons of Justice Lord Angus Glennie that deliberately avoiding access to communications when there were many creditors likely to commence legal proceedings against them was not a justifiable reason to claim lack of knowledge of the proceedings, and that it was sufficient that in those circumstances the defendants ought to have known of but deliberately avoided taking part in the proceedings knowing that it would lead to judgment against them. That, it said, was also the Defendant's position.

31. I do not think this case assists the Claimant. What the Claimant took from it was the bank's argument. While the Judge said that there was force in it, he did not adopt the argument; indeed, he declined to do so because the bank's claim included a claim in fraud which the defendants would not be expected to have anticipated, and it could not be assumed that the defendants would have ignored the proceedings and shut themselves away if they had known of it. And whatever the force of the argument, the facts in that case were quite different and the argument has no application in this case. There, it was said that the defendants must have known that their bank would be chasing them for payment of sums due under a facility agreement and guarantee, and must have expected it to commence legal proceedings. Here, unless liability in the Defendant to the Claimant be assumed, which it cannot be, the same expectation is not warranted; the Claimant's sweeping assertion that it was public knowledge that the Defendant was accused of misappropriating large sums of money is very different from the particular claim by the bank against the defendants. Nor did the Claimant attempt personal service on the Defendant, or explain difficulty in personal service, so as to be able to suggest avoidance of service: it went straight from the lack of response to its request of the UAE lawyers to the application for an order permitting service by email to the Address.

Conclusion

32. The Claimant said nothing of it, but I add that in the light of what I have said concerning service, I do not think that there was failure to apply to set aside the default judgment promptly. The default judgment should be set aside, because the Defendant has a real prospect of successfully defending the claim and I am not satisfied that he had notice of the proceedings. It is open to him to object to jurisdiction.

33. In proper fulfilment of his duty to the Court, counsel for the Defendant drew attention to the judgment of the Court of Appeal in *Ibrahim Saif Hormodi v Bankmed* (SAL) [2019] DIFC CA 006 (11 February 2020), in which the Chief Justice said (at [37]) that "the case law of England and Wales indicates that the discretionary power to set aside under the `reasonable prospect of success' section of the setting-aside limb is seldom used and sometimes not even exercised in the most exceptional cases". I do not think that the Chief Justice intended to suggest that setting aside a default judgment should be regarded as exceptional, and the Claimant did not suggest that that was the case. Respectfully, I would not agree that the power is seldom used, and it appears that these remarks were made without the assistance of submissions. Necessarily, each case depends on its own facts and the assessment of the proper result in accordance with RDC 14.2.

Costs

34. Submissions on costs were made at the hearing, against either outcome in this application. It was common ground that costs should follow the event, and the Defendant is entitled to costs. The Defendant submitted that costs in his favour should be on the indemnity basis, saying that the Claimant was invited to consent to this application but peremptorily declined and acted unreasonably in opposing it. I do not think the opposition or the Claimant's conduct were "out of the norm" in the manner described in PD 5/2014 and in the cases for which that phrase is used as a summation; in particular, the Claimant did not in my view act unreasonably to a high degree as so explained. Cost should be on the ordinary basis.

35. Statements of Costs were provided. The Defendant's Statement of Costs is for a large amount, more than twice that of the Claimant, and appears to be wholly excessive for this application. In order that the Defendant should have the opportunity to justify reasonable costs towards the amount claimed, I will not make an immediate assessment on the Statement of Costs, and costs should go to detailed assessment if not agreed.

36. The Defendant submitted that, in that event, an order should be made for payment of costs on account, in accordance with PD 5/2014, and also an order pursuant to RDC 40.1 that the cost be assessed by the detailed procedure immediately notwithstanding that the proceedings have not concluded. I consider, however, that neither order should be made. The proceedings are in relative infancy, and the Defendant's ultimate success, including success in the likely further interlocutory skirmishes, remains to be seen. It is not suggested that he needs reimbursement in order to continue with his defence of the claim, and the costs should remain as orders only in accordance with RDC 40.1.

Orders

37. I make the following orders:

1. The Default Judgment is set aside.

2. The Defendant shall file and serve his acknowledgment of service within 14 days from this order.

3. The Claimant shall pay the Defendant's costs of the Application, including of the Cross-examination Application, to be assessed by a Registrar if not agreed.