Claim No: CFI 086/2019

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

LAPIS

Claimant

and

LARAMIE

First Defendant

LASH

Second Defendant

JUDGMENT OF H.E JUSTICE SHAMLAN AL SAWALEHI

UPON the Claimant's Claim form filed on 5 December 2019 (the "Claim")

AND UPON considering the evidence and submissions submitted by the Claimant

AND UPON considering the UAE Law No. 19/1993 on Commercial Transactions (the "Commercial Code")

AND UPON the Court being satisfied that the Claim is suitable to be determined in accordance with the Part 8 Procedure since it does not appear to involve any substantial dispute of facts

IT IS HEREBY ORDERED THAT:

1. The Claimant is entitled to money judgment against the First and the Second Defendants.

2. The First and Second Defendants shall, within 14 days of being served with this Judgment, pay to the Claimant the sum of USD 10,550,000.

3. The First and the Second Defendants shall, in addition, pay simple interest on that sum of USD 10,550,000 at a rate of 5% per annum, which will incur from the date of the first instalment of the debt that became due on 1 February 2018, to the date on which the unpaid balance is paid by the Defendant, at a rate of 9%.

4. The First and the Second Defendants shall pay the Claimant's cost of the Claim to be assessed by the Registrar on the indemnity basis, if not agreed.

Issued by:
Ayesha Bin Kalban
Acting Registrar
Date of Issue: 6 October 2022
At: 10am

SCHEDULE OF REASONS

Introduction

1. This is the Claimant's Part 8 application (the "Application") for permission to grant the Claimant a money judgment order ("Order") against the First Defendant ("D1") and the Second Defendant ("D2"). It should be noted that this Application has not been opposed by D1 or D2. The Claimant applied to have the Application to be considered at an oral hearing, therefore a hearing was scheduled before me on 16 August 2022 (the "Hearing").

2. The Claim arises out of a settlement agreement (the "Settlement Agreement") entered between the Claimant, D1 and D2 (the "Parties") on 5 December 2019 as a means of settling debts arising from the Parties distribution agreement. The Claimant stopped supplying further products to D1 unless a guarantee was in place. On that basis, D2 agreed to act as a guarantor to the debt of D1 to restart the supply of products from the Claimant. I am satisfied that the substituted service of the Claim Form had been effected on D1 and D2 in accordance with the Rules of the DIFC Courts ("RDC") RDC 9 in light of the recent development of *Lahela v Lameez [2020]*.

3. I should make it clear that in addition to the Claimant's oral submissions which were argued in the Hearing, I have read carefully through the evidence submitted by the Claimant. In this short schedule of reasons, I do not propose to refer to each point made by the Claimant. The fact that I may omit some reference to some arguments or authorities relied on by the Claimant does not mean that I have overlooked it. Further, I do not anticipate in repeating the facts of the dispute or the background of the case.

4. My reasons for granting the Claimant a money judgment order arising from its debt Claim under the Settlement Agreement are set out below.

5. It should be noted that the Defendant was not present at the Hearing and has not responded to the Claim Form or any documents that had been served on them, to date. I am satisfied that D1 and D2 had full and proper notice of the proceedings and was served with the Court's directions and all the trial documents. However, D1 and D2 chose not to reply or appear at the Hearing and chose not to produce any evidence which could properly support their case. D1 and D2 had every opportunity to present their case and elected not to do so. By virtue of the powers granted to me under RDC 23.85 where the respondents fails to attend the hearing of an application, the Court may proceed in their absence.

6. During the Hearing, the Claimant's legal representative, Mr Lraft of Lenil, requested that I issue a short concise, reasoned judgment in the anticipation that a successful judgment in favour of the Claimant can be enforced against D1 and D2 in Morocco.

7. The pertinent questions before me are twofold (a) whether the Claimant is entitled to the money judgment in relation to a debt Claim arising under the Settlement Agreement, and if so (b) should this Order include the D2.

Reasons

8. As part of the Settlement Agreement, the parties have clearly submitted to the exclusive jurisdiction of the DIFC Courts, however the governing law of the Settlement Agreement is the law of the United Arab Emirates. I am satisfied that the DIFC Courts have jurisdiction over this Claim by virtue of the opt-in clause expressly stating that *"any dispute arising out of or in connection with this [Settlement] Agreement, including any questions regarding its existence, validity or termination, shall be subject to the exclusive jurisdiction of the Courts of the Dubai International Financial Centre"*.

9. Part 8 proceedings were commenced by the Claimant based on the unequivocal and unambiguous liability of D1 and D2 and the limited disputed issues of fact on the central issue in the case. Further, the Claimant acknowledged that pursuing this Claim under Part 8 proceedings precluded them from entering into a default judgment by virtue of RDC 8.6(2) in contrast to the applicable procedure under Part 7 proceedings. I am satisfied that the use of the Part 8 procedure has been adopted appropriately and I concede that there are no significant factual issues that needed to be dealt with in this case.

10. Six provisions of the Settlement Agreement should be carefully noted: Clause 1, Clause 5 (D2 providing a cheque as a security), Clause 6 (D2 acting in his capacity as a guarantor), Clause 8 (the triggering clause), Clause 9 and Clause 10 (the Claimant's right to issue legal proceedings).

11. Clause 1 and 2 of the Settlement Agreement, required D1 to make the first payment of USD 50,000 on 1 February 2018 (the "First Tranche of Consideration") however the Claimant received no sum, to date. Even after attempts of engaging D1 and D2 on or around late 2018 requesting payment of the First Tranche of Consideration, with no success.

12. The consequences of D1's failure in paying the First Tranche of Consideration amounted to a clear breach, D1 has never taken any action or had the intention to make any payments towards its debt. D1's contractual and legal obligation required him to perform, by virtue of article 257 of the of Federal Law No.5 on the Civil Transaction Law of the United Arab Emirates (the "UAE Civil Code"). D1's failure to perform has prejudiced the Claimant's financial position leading them to issue proceedings before the DIFC Courts. This failure meant that the full amount of the USD 10,550,000 (the "Full Amount Outstanding") became due and payable as a result of the wording cited under clause 8, which read as follows:

> *"should the [D1] fail to make the payment as mentioned [in clause 7 of the Settlement agreement], this Agreement will be cancelled and the full outstanding amount in the sum of USD 10,550,000 (Ten Million Five Hundred and Fifty Thousand Dollars) will become due and payable to the [Claimant] immediately without set-off."*

13. In the event D1 fails to fulfil its payment obligations under Clause 1 of the Settlement Agreement, D1 ought to notify the Claimant of this matter and will have a period of ninety (90) days from the date of notice to pay all outstanding sums due, as cited under clause 7 of the Settlement Agreement. If after ninety days, payments have not been forthcoming, the triggering events outlined under Clause 8 will be applicable to the Claimant. In the absence of any evidence being submitted by D1 and D2, I agree with the Claimant that D1 breached clause 7 of the Settlement Agreement and failed to notify the Claimant during the ninety days period of their inability in paying the First Tranche of Consideration. There is nothing in the documents lodged with the Court which raises any possibility of a defence to the claim. D1 and D2 have had opportunity of indicating a defence to the Claim for payment if there was any defence. Not having acknowledged service, in the Hearing on the claim, D1 and D2 would be entitled to be present but would not be entitled to take part in the Hearing without the permission of the Court, in accordance with RDC 8.16.

14. Additionally, the triggering events set out in clause 8 are (i) the terms of the Settlement Agreement become null, (ii) the Full Amount Outstanding becomes due and payable to the Claimant, and (iii) the Claimant will be prompted to present the cheque provided by D2 as a guarantee to the debt owed by D1 to encash the sums of USD 250,000.

On 17 July 2019, the Claimant wrote to D2 notifying him that the cheque that had returned, however the Claimant did not immediately take any civil or criminal proceedings against D2. The Claimant was hopeful to maintain a professional relationship with D1 and D2 and believed that due to a longstanding relationship between the parties, D1 and D2 would eventually pay the outstanding sums.

Issues Pertaining to D2 Being a Guarantor

15. As part of the Claimant's submissions, they argued that any order issued from this Court should include D2, albeit D2's role in the Settlement Agreement was only limited to being a guarantor to the indebtedness of D1, taken into account D2 was not a signatory to the Settlement Agreement. However, the Claimant relies on the fact that D2 was physically present and participated during the course of the negotiations of the Settlement Agreement, and when the Claimant corresponded with D1 citing their failure to pay the amount due under the Settlement Agreement, D2 did not deny any liability nor objected to his involvement to these proceedings.

16. Further, the Claimant relied on the witness statement of Mr Lactin, the legal manager of the Claimant, illustrating in paragraph 5 the connection

between D1 and D2 and the involvement of D2 in the Settlement Agreement which consequently led to his liability in these proceedings jointly and severally with D1 for the outstanding debt. The Claimant further argues that in order to be a party to a contract, the concerned party does not have to be a signatory to that contract. A valid contract can be formed in a number of ways either orally, written or by conduct.

17. I was not entirely persuaded by the Claimant's arguments advanced during the Hearing, that D2 should be a party to these proceeding primarily because D2 took part in the negotiations of the Settlement Agreement and acted as a guarantor to the indebtedness of D1.

18. On 24 August 2022, the Claimant submitted further written submission in accordance with my directions that were circulated shortly after the Hearing. The evidence included: (a) written submissions dealing with the applicable law upon which D2 is a guarantor to the Settlement Agreement under the UAE Law, relying particularly on Articles 135, 1056 and 1057 of the UAE Civil Code; (b) a witness statement of Mr Laint describing the circumstances in which the cheque was provided by D2 to the Claimant; and (c) a commercial license of D1 conferring that Mr Luteis the sole owner of D1.

19. Upon further review of the documents lodged with the Court, I am of the view that the Order should include D2, his liability arises as a jointly with the liability of D1 who had the obligation to perform his contractual and commercial obligations and I agree that it is sufficient for the guarantor to make an expressed offer and in the absence of any rejection by the guaranteed debtor, being the Claimant, it is well established that such consent between the debtor [the Claimant] and the guarantor [D2] to form a commercial guarantee.

Quantum and Interest

20. I concede that the Claimant should be awarded interest on the commercial obligation owed by D1 and D2 to the Claimant, by virtue of Article 88 of the Federal Law No.18 of 1993, the Commercial Transaction Law (the "Commercial Code"), the rate of interest is not dealt with in the Settlement Agreement, therefore I am guided by Article 76 of the Commercial Code which stipulates that interest shall be calculated in accordance with the current rate of interest in the market, provided that it does not exceed 12% until full settlement. I note that the General Assembly of Dubai Court of Cassation dealt with this matter and set the market interest rate in Petition No.1/2021 at 5%.

21. Based on the above, interest at the rate of 5% will be awarded per annum, running from the date the first instalment of the commercial debt became due, being 1 February 2018, until the date when judgment was entered.

22. In addition, the Claimant will be awarded interest on this judgment in accordance with the DIFC Courts' Practice Direction No. 4 of 2017 which is simple interest from the date of the judgment is entered at a rate of 9%.