



ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

COURT OF FIRST INSTANCE
SMALL CLAIMS DIVISION
BETWEEN

LAKTINEH & CO. LTD
CLAIMANT

and

AHMED AL HATTI
FIRST DEFENDANT

and

CAYAN REAL ESTATE AND DEVELOPMENT LLC
SECOND DEFENDANT

JUDGMENT ON APPLICATION TO SET ASIDE DEFAULT JUDGMENT



Neutral Citation:	[2020] ADGMCFI 0001
Before:	The Honourable Lord McGhie
Decision Date:	30 January 2020
Decision:	<ol style="list-style-type: none">1. Application to set aside default judgment is refused.2. Costs reserved.3. Claimant to file and serve its costs submissions by 4.00 pm on 13 February 2020.4. First Defendant to file and serve any costs submissions in reply to the claimant's costs submissions by 4.00 pm on 27 February 2020.
Hearing Date(s):	No hearing
Date of Orders:	30 January 2020
Catchwords:	Default judgment; application to set aside; knowledge of proceedings and judgment; res judicata; promptness of application to set aside
Legislation Cited:	ADGM Court Procedure Rules 2016
Cases Cited:	Redburn Group Ltd v Fairgate Development Ltd [2017] EWHC 1223 Regency Rolls Ltd v Murat Carnall [2000] EWCA (Civ) 379
Case Number:	ADGMCFI-2018-013
Parties and representation:	Laktineh & Co Ltd. for the Claimant Al Tamimi & Company for the First Defendant

Introduction

1. This is an application ("Application") brought by Mr Ahmed Al Hatti ("first defendant") under Rule 41 of the ADGM Court Procedure Rules 2016 to set aside a default judgment made on 28 February 2019 as against him. He requested that the application be dealt with without a hearing. The claim was for a joint and several judgment against the first defendant and a company, Cayan Real Estate and Development LLC ("second defendant"), for legal services said to have been provided by the claimant in respect of his work in connection with an arbitration in Dubai. The judgment was made in the absence of any appearance by the defendants and, accordingly, in circumstances where the Court was not required to take any view of the merits of the claim. The second defendant has not made an application to set aside the default judgment as against it and has taken no part in this Application.



2. The power of the Court to set aside a default judgment under Rule 41(2) arises: (a) if the applicant has a real prospect of successfully defending the claim, or (b) it appears to the Court that there is some other good reason why the judgment should be set aside or varied or the defendant should be allowed to defend the claim; and (c) the application to set aside has been made promptly. In summary, I am satisfied that the first defendant has such a prospect for the purposes of Rule 41(2)(a) but I am not satisfied that the Application was made promptly for the purposes of Rule 41(2)(c). In these circumstances, I find that the discretion provided for under Rule 41 does not arise and I therefore must refuse the Application.
3. Before turning to the detail, I have read the various authorities cited by the parties in their full and careful submissions. However, I do not think that there is any significant dispute about the legal issues that are relevant to the Application.

Rule 41 (2)(a) and (b)

Merits of claim of personal liability

4. For the purposes of Rule 41(2)(a) it is unnecessary to say much more than that I am satisfied that the first defendant has a real prospect of success on the question of his personal liability for legal services provided in connection with the second defendant company of which he was a director. It need hardly be added that this is not to express any view as to the likely outcome of a rehearing. For present purposes, I have adopted an approach which allows me to be satisfied by finding that the first defendant has a line of defence which is real, in the sense of being realistic or far from fanciful. The parties have set out their respective contentions in considerable detail but having reached such view on a broad approach to all the material before me, I consider it unnecessary and inappropriate to undertake a detailed analysis of the evidence at this stage. If the default judgment was to be set aside, such analysis would, of course, be necessary. But it would then follow a full hearing of the case.
5. It is sufficient to say that the essence of incorporation is to limit the personal liability of persons involved in the running of the company. Active involvement of a director in proceedings concerning the company does not, itself, allow an inference of acceptance of personal liability even if that person stands to benefit personally from a successful outcome. The first defendant's position is that all of his dealings with the claimant were on behalf of the company. On the other hand, the claimant is able to point to a number of circumstances which could well justify an inference of personal liability. He asserts that in the arbitration claims were directed against the first defendant personally. If so, that might be a powerful point. I might add that although much is said in submissions about the terms of a supposed engagement letter, which I deal with further below, I accept that the claim does not turn on the validity of that letter.

Res judicata and estoppel

6. The first defendant's proposed defence based on res judicata or issue estoppel arises from proceedings in the DIFC Courts in respect of an earlier claim brought by the claimant against the defendants regarding the same legal work. That claim is set out in an attachment to the



Application. It appears that, essentially, the DIFC Courts claim turned on the terms of an engagement letter then said (by the claimant) to have been the basis of the claimant's instructions. That letter purported to refer any dispute arising out of or in connection with the engagement letter to the DIFC Courts. However, in its judgment of 4 November 2018 the DIFC Courts (on appeal) determined that the jurisdiction clause contained in the engagement letter was not effective because the letter had not been signed. Accordingly, the DIFC Courts found that it did not have jurisdiction to determine the claimant's claim. The DIFC Courts appeared to accept that there was some form of agreement between the parties. However, it concluded that the exchange of email correspondence relating to the engagement letter did not constitute an intention to sign and accept the terms of the letter specifically – although the court appeared to leave open the possibility of a contract being entered into by conduct.

7. Both the claimant and first defendant have made submissions in relation to the DIFC Courts' proceedings (and the impact of the DIFC Courts' judgments in these proceedings). These submissions would have been able to be explored in any rehearing if the default judgment was to be set aside. However, it is unnecessary for present purposes to say much more about this issue save that the relevance of any submissions depends upon a proper understanding of the basis of the claim before this Court.
8. The claimant's claim (as presently framed) certainly can be read as placing some reliance on the engagement letter but I accept that the claim does not turn on the validity of that letter. The claim is essentially based on the following assertion contained in the claim form of 13 January 2019: "B. On instruction by the First and Second Defendants, claimant performed legal services through March 2017 and regularly updated and sought direction from the First Defendant". However, it is likely that if the case had been defended, the claimant's position would have been revised to make it clear that the claim "is not confined to a case based on the Engagement Letter" and was also being advanced along the lines set out at paragraph 58 of the claimant's submission dated 31 December 2019. While any submissions made by the parties in relation to the engagement letter plainly are of relevance, I am not persuaded that they have a determinative bearing on the broader claim.

Jurisdiction

9. On the issue of jurisdiction, I have no doubt that it is only in an exceptional case that the Court would decline to set aside a judgment made without jurisdiction. It is for that reason that, although a court considering the granting of a default judgment will not normally attempt to make any assessment of the merits, it will wish to be satisfied, at least on a prima facie basis, that it does have jurisdiction.
10. That question was raised in the present case and the claimant placed reliance on the provisions of Article 13(6) of Abu Dhabi Law No.4 of 2013. The first defendant does not dispute that the claimant is a Global Market Establishment in terms of the definition. On the face of it, the case plainly falls within the scope of the Article and this Court has jurisdiction to try the claim. I am not persuaded by the first defendant's submission that this Court does not have jurisdiction because of the jurisdiction clause contained in the engagement letter (which was never signed).



11. I should add for completeness that I see no substance in the claimant's contention that the first defendant should have taken certain procedural steps - such as acknowledging service - pending disposal of this application. The claimant refers to the decision in *Redburn Group Ltd v Fairgate Development Ltd* [2017] EWHC 1223, but he does not attempt to rely on any provision in the ADGM Court Procedure Rules similar to CPR 3.9. I do not consider dicta in the context of such provisions to have any bearing in the present case. Unless and until the default judgment is set aside no purpose would be served by such procedures.

Rule 41(2)(c)

Concept of promptness

12. The requirement of promptness as an essential element is plainly a recognition of the importance of finality in litigation. It is equally clear that there is a risk of injustice if too strict an approach is taken to the word "promptly". I have no doubt that the Court should not apply any very rigorous approach when considering the conduct of a party who has found out for the first time that there have been court proceedings and that a judgment has been made against him.

13. A party learning of such a judgment would be entitled to make enquiries of the court or the judgment creditor as to what the claim was about and how judgment on the claim was delivered without his notice. He might require some time to consider the possibilities of making an application to set aside the judgment and successfully defending the claim and the evidence he might need to support such application. He would be entitled to take legal advice. The legal advice might be expected to include a reference to the need to act promptly and that any action taken thereafter would be scrutinised more closely. Plainly each case would depend on its own circumstances and, for example, it is clear that the comment of Simon Brown LJ (as he then was) in *Regency Rolls Ltd v Murat Carnall* [2000] EWCA (Civ) 379 that "30 days was altogether too long" can in no sense be treated as a touchstone. It was an observation made in the context of failure to appear at a hearing where the parties had been involved in lengthy litigation.

14. In approaching Rule 41(2) it is important not to overlook the provisions in Rule 41(3). An application must be supported by evidence. It is clear that for the effective working of the Rule it is not sufficient that there be some material in the evidence which bears to support the application. There must be evidence which will stand up to scrutiny by the Court. As it was put in *ED & F Man Liquid Products Ltd v Patel and another* [2003] EWCA Civ 472 at paragraph 10 a court is not "to accept without analysis everything said by a party in his statements before the court". In the present case, I have to consider the weight of the evidence as a whole and decide whether I can make a finding on the facts that the application was made promptly.

Relevant dates

15. At the outset, it can be said that I am satisfied that, if the first defendant did not learn of the judgment until 31 October 2019, the Application can be taken to have been made promptly for the purposes of Rule 41(2)(c). Faced with this claim for the first time, it is clear that a fair amount of investigation would have been required to identify and assess the prospects of success. I do not consider it appropriate to embark on a rigorous analysis of precisely what was done or whether some delay might have been avoided.



16. Equally, I am satisfied that if the first defendant must be taken to have been aware of the default judgment at latest by the end of May 2019, or early June (when Mr Siyam had access to the court documents) he cannot be said to have acted promptly.
17. The first defendant's position is that he did not know of the ADGM Courts proceedings (and resultant default judgment) until the end of October. If this is correct, it is understandable that he makes no attempt to deal with the period from June 2019 to the end of October 2019 or to suggest that failure to do anything in this period was reasonable. Indeed, it would have been hard to justify such a delay if he did have knowledge of the ADGM Courts proceedings and default judgment as early as May or June 2019.
18. The question is whether I am satisfied by the first defendant's bald assertion that he did not know of the judgment until 31 October 2019. The claimant contends that the first defendant was well aware of the claim and the default judgment before then. Put shortly, the claimant suggests that the first defendant's failure to do anything about it was due to a view that any judgment of ADGM Courts could not be effectively enforced against him, rather than to his unawareness of the court proceedings.

Relevance of material prior to the judgment

19. The period to be considered in the assessment of promptness in the context of Rule 41(2)(c) is the period between the time when the first defendant can be taken to have had knowledge of the judgment he seeks to set aside (being the order of 28 February 2019) and the date of the Application (which was made on 10 December 2019). Assertions that an applicant had knowledge of legal proceedings before the judgment might be relevant, in some cases, in assessing the promptness of response but, as set out above, the issue of promptness in this case does not turn on any fine analysis. The claimant refers to evidence of an awareness of the claim as showing that the first defendant should not be granted any "indulgence". However, I consider that if an applicant succeeds under heads (a) or (b) and (c) of Rule 41 there will rarely be any requirement for any true exercise of discretion. What is required under head (c) is a finding in fact and no question of indulgence arises.
20. Rule 41 does not appear to me to require the Court to consider the reasons for the default which lead to the default judgment being granted. It provides a remedy broad enough to cover even a situation where the failure to file and serve an acknowledgment of service has arisen in circumstances which imply no actual default by the defendant. For example, it is not doubted that service by newspaper may be a valid method of service. A defendant who has never seen the paper, and in respect of whom there is no reason to think he might have seen notification of the claim against him, cannot be said to be in any way at fault. But failure to respond to such service will permit a judgment by default. In some jurisdictions this would go under the separate label of a "decree in absence".
21. Although satisfied that the validity or otherwise of service is not directly relevant to the issue before me, it is necessary for me to say a little about the service attempted on the first defendant by intimation to the solicitor who was then acting for him in other proceedings in relation to the same financial claim.



22. I have no doubt that service by email on a solicitor known to be currently working on the instructions of a party would normally be an effective form of service. However, it now transpires, from the claimant's witness statement dated 31 December 2019 at [48] that, prior to that attempt at service the solicitor (Mr Mitchley) had advised the claimant in express terms that he was not acting for the defendants in the ADGM Courts proceedings and had stated: "Please do not attempt to serve any process on our offices as we have no instructions to act in this new matter". Service attempted in such circumstances cannot be regarded as effective. Mr Mitchley would be well aware of the significance of his statement. Having made his position clear it would have been entirely proper for him to make no attempt to advise the first defendant of the purported service or send any of the documents to him.

Events following the default judgment

23. After the order of 28 February 2019 was made, steps were taken by the claimant for the order to be enforced through Abu Dhabi Judicial Department. Their file was opened on 17 April 2019. On 1 July 2019, the Execution Judge made a finding that service had been made in full: (Exhibit JL-40 to witness statement of Jade Laktineh dated 31 December 2019). The certificate of service is date stamped 18 April 2019 and service was said to have been effected on 22 April 2019: (Exhibit JL-39 to that witness statement).

24. Plainly this was a critical issue in the present case. But the first defendant's evidence does not attempt to deal with this except by way of a bald denial. He complains of the claimant eliding service on Cayan (the second defendant) and service on him when, as he says, they are two very distinct issues. But the question of knowledge of what was going on is, in turn, quite a different issue from the requirements of service. The first defendant was chairman of the Cayan companies. He appears to have held 99% of the shares in the second defendant: (Exhibit JL-2 to the witness statement). His emphasis on the distinction between himself and the company in the context of service of court documents does not deal with his knowledge of the affairs of the company. Awareness of the claim against the second defendant cannot be divorced from awareness that that claim was also made against him.

25. His evidence does not deal with that issue. In paragraphs 25 to 28 and 58 to 60 of the first defendant's witness statement dated 10 December 2019, he sets out his assertions in relation to promptness. The essential contentions are that he did not know of the action until notified by his bank on 31 October 2019. He asserts that he was not served with any documents by the Abu Dhabi Courts. His residence was in Saudi Arabia and his expectation was that any service would have to be there. He believed that the claim had been dealt with because the DIFC Courts had dismissed the claim and because he had "absolutely nothing to do with the ADGM." He asserts that he had no reason to think that any litigation in the ADGM Courts had been brought by the claimant, given the first defendant's complete lack of connection with the ADGM. The claimant and Mr Latkineh were well-aware that he lived in Saudi Arabia and he had no evidence that they drew this to the attention of the court (save for the statement from Mr Elayadath dated 21 November 2018).

26. When making the application, the first defendant may have thought that his assertion of lack of knowledge until 31 October 2019 would simply have been accepted. But the claimant's response



of 31 December 2019 makes it very clear that this is challenged. In the circumstances, the first defendant was required to respond to the detail of that challenge. However, while his response of 15 January 2020 comments on the initial attempts at service and the role of Mr Mitchley it does not make any attempt to address the finding of the Execution Judge that service of the judgment had been effected. I see no good reason not to rely on that finding.

27. In paragraph 58 of his witness statement dated 10 December 2019, the first defendant refers to his reliance on the judgment of the DIFC Courts and a belief that the matter had absolutely nothing to do with the ADGM. He goes on to say at [27] that he supposed the claimant would be obliged to serve him personally in Saudi Arabia. The first defendant may well have thought that if no formal service of the action had been made, he did not need to respond in any way. But his evidence does not cast any light on how he could have failed to be aware of the default judgment when plainly the Execution Judge had certified that it had been served upon him. Further, there is no dispute that Mr Siyam who was general counsel for his companies was well aware of that service. If there was adequate service of the default judgment on the second defendant, the reasonable inference is that the first defendant must also have been aware of the default judgment and, if so, he cannot have failed to be aware that the judgment was made against him personally as well as against the second defendant company. His material provides no basis for failing to draw that inference.
28. The first defendant does not attempt to explain how there could have been an apparently effective service of the judgment without his awareness. Some evidence of his awareness of that service comes in the application to the court for access to court records made by Mr Tariq Siyam in May 2019. Mr Siyam was a lawyer acting as general counsel for the Cayan Group of companies in which the first defendant was chairman: (Exhibit JL-1 to the witness statement of Jade Laktineh). Even if it may be accepted for present purposes that Mr Siyam was never instructed to act on behalf of the first defendant as an individual in relation to proceedings in the ADGM Courts, that is to be distinguished from the critical issue of the first defendant's awareness of the judgment.
29. For completeness, although it is not before me in evidence, I record that Mr Siyam contacted ADGM Courts Registry by email on 1 May 2019 in the following terms:
- "I am General Counsel to Cayan Real Estate & Development LLC. We recently became aware of the above-referenced matter when a representative of the ADGM Courts came to our offices to serve a judgment.
- It is our position that this is a frivolous action and hereby request details of the judgment so that we can formally file our defense."
30. There is no reason to think that the first defendant was aware of this particular email but it is of relevance in explaining why Mr Siyam was making enquiries of this Court in May 2019. Mr Siyam applied to the court on 27 May 2019 in the name of both the first and second defendants for access to the relevant court records.
31. The first defendant does not in his witness statements attempt to provide any explanation of Mr Siyam's dealings with this Court in May 2019 or how it came about that they took place without his knowledge. The only relevant material bearing directly on this is an assertion made by the first



defendant's solicitors in their letter of 17 December 2019 where, in response to the suggestion that the first defendant had knowledge of the proceedings before 27 May 2019, it was said:

"This is incorrect. Mr Tariq F. Siyam does not have authority to act for the First Defendant in these Proceedings and that, when he completed the Application for Access to Court Records document, he was acting solely on behalf of the Second Defendant (as its Authorised Representative and General Counsel) and not on behalf of the First Defendant as the Application for Access to Court Records wrongly suggests."

32. In his submissions, the first defendant simply relies on this explanation though he does not address his knowledge of Mr Siyam's application. Faced with the written record of Mr Siyam's application to the Court it might reasonably have been expected that a full explanation of Mr Siyam's activities at that time would have been provided, preferably in a sworn statement from Mr Siyam. He could have explained why he asserted he was acting for the first defendant when he made the application; what he did with the material he saw; and why, if it be the case, he did not advise the first defendant of the judgment against him. Even if evidence from Mr Siyam was not available, the first defendant might reasonably have been expected to give his own understanding of what had happened both in relation to (a) when a court official had arrived to serve notice on him and (b) the 27 May 2019 application for access to court records, and thereafter. If he truly did not know about the judgment before 31 October 2019, he would surely have been keen to find out what had happened. He would have wanted an explanation for the failure of his staff to bring the matter to his attention and having found that explanation should have recognised the need to put it before the court in support of his application.
33. The factual issue is one of awareness. The default judgment of 28 February 2019 was for joint and several liability against the two defendants. The second defendant appears to be insolvent and no attempt has been made to set-aside the judgment against that company. The only defendant with a real interest in the proceedings was the first defendant. In the circumstances, when Mr Siyam was seeking to take steps in respect of which the first defendant was the only likely beneficiary, I am satisfied that the only inference to be drawn is that the first defendant must have been aware of the judgment at that stage (i.e. at least by May 2019, if not beforehand). In the absence of any cogent explanation, the evidence of Mr Siyam's application to the court cannot be disregarded simply on the basis that the first defendant had not given formal instruction for Mr Siyam to act on his behalf.
34. Although I am satisfied that this issue can be determined on the basis that that the first defendant must have been aware of the judgment following service effected by the Abu Dhabi court official in April 2019 or at least by the end of May 2019 when Mr Siyam was taking active steps to see what could be done about it, I must add that there is other material which casts doubt on the first defendant's denial of knowledge.

Knowledge of ADGM Courts proceedings

35. Although I have discussed the role of the attempts at service in 2018 and do not consider this of direct relevance, the assertions by the first defendant in that regard have a potential bearing on his denial of knowledge until 31 October 2019 and whether the first defendant is to be believed where his own evidence is not supported. by any other evidence.



36. On 6 November 2018, an attempt at service of the claim in the ADGM Courts proceedings was made to the address of one of the first defendant's businesses. It was accepted by the receptionist at that address. The first defendant explains in his witness statement of 10 December 2019 that the receptionist did not have authority to sign for documents on his behalf [at 31]. He does not positively assert in his signed witness statement that the material addressed to him was not in fact passed on to him or drawn to his attention but he does say that the address was not his customary place of business [at 34]. In his written submission of 15 January 2020, the first defendant gives suggestions as to how it might come about that formal documents addressed to him at that address were not passed on [at 11(d)]. I note that his submission shows that he did intend to deny that they were ever passed to him.
37. Of more significance are the attempts made to notify the first defendant at the following email address "ahmed@cayan.net". There is no dispute that this was one of his email addresses. He had been using that address to contact the claimant in 2017 (Exhibit JL-12 to witness statement of Jade Laktineh dated 31 December 2019). Mr Siyam was using that address for the first defendant in September 2018: (Exhibit JL-32). The DIFC Courts used that address to communicate its decision on 4 November 2018 (Exhibit JL-34). If the first defendant had opened that address at any time after 13 November 2018 the claimant's email of that date (Exhibit JL-36), attaching the claim, would have been there to be read. The first defendant simply asserts in his witness statement of 10 December 2019: "I have not used this email for a considerable period of time and I do not check it" [at 34]. However, that same address "ahmed@cayan.net" was the email address to which his bank sent an email on 31 October 2019 in relation to the freezing of the first defendant's bank account by Abu Dhabi Judicial Department. It seems clear that he had access to that email address and opened that email without delay [at 25].
38. It is a matter of everyday experience that a change of business address is not made lightly and, if made, is not changed without at least some form of notification or arrangements being put in place so that emails are directed to the new address. One obvious step when a user changes a business email address is to arrange an automatic reply saying this and perhaps explaining alternative arrangements. I take the view that the bald assertion that he had simply stopped using a business address cannot be accepted when there has been no attempt to explain why it was done or why it was done without warning potential senders that their messages would not be read.
39. It is not suggested that Mr Siyam changed his email address and he plainly was continuing in May 2019 to use the address he used in the DIFC Courts proceedings. It was the same style of business address, "@cayan.net", as the first defendant's address. The claimant has asserted that the claim form in the ADGM Courts proceedings was delivered to the first and second defendants on 13 November 2018 by email addressed to the first defendant at "ahmed@cayan.net" and Mr Siyam at "tariq@cayan.net". Plainly this gave Mr Siyam notice of a claim against the first defendant and as the general counsel acting in connection with the original claim in the DIFC Courts it is hard to accept that he did not consider it necessary to discuss it with the first defendant. In short, I cannot accept the first defendant's denial of knowledge of the claim. This colours the assessment of his denial of knowledge of the default judgment.



Conclusion

40. In summary, I am satisfied that the first defendant would have had a real prospect of successfully defending the claim but I find it probable that the first defendant was made aware of the default judgment by service of notice of that judgment by an officer of the Abu Dhabi Judicial Department in April 2019 and, in any event, that the first defendant had knowledge of the judgment by the end of May 2019 at the latest when the application for access to court records was submitted to this Court. This means that I am unable to find that the application to set aside was made promptly. The Court's discretion under Rule 41(2) only arises if an application is made promptly. Accordingly, the application to set aside the judgment of 28 February 2019 must fail.
41. The claimant has applied for costs: its 31 December 2019 submission at [62]. Costs can normally be expected to follow success. However, I shall reserve the issue of costs and direct that the claimant file and serve its costs submissions by 4.00 pm on 13 February 2020 and the first defendant file and serve any costs submissions in reply to the claimant's costs submissions by 4.00 pm on 27 February 2020, following which the Court will consider whether it is possible to make a summary assessment of costs in accordance with Rule 200(1).



Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
30 January 2020