Neutral Citation Number: [2022] EWHC 1174 (QB)

Case No: QB-2020-000698

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2022

Before :

MASTER SULLIVAN

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Between :

AL NASSER & AL MASRI TRADING COMPANY WLL LIMITED LIABILITY COMPANY (a company registered in Abu Dhabi)	**Claimant**
- and -	
SHAHZAD MUNIR	**Defendant**

- -
- -

Mr Jon Colclough (instructed by **Crookeslaw Solicitors**) for the **Claimant**
Mr Dirk van Heck (instructed on **direct access**) for the **Defendant**

Hearing dates: 21 February 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER SULLIVAN

Master Sullivan :

1. This is the defendant's application to set aside a judgment in default of acknowledgment of service under CPR13.3(1). The Defendant's case is that he has a real prosect of successfully defending the claim. The judgment is to enforce a judgment of the Abu Dhabi Court of First Instance. The Defendant's case is that Abu Dhabi judgment was obtained by fraud or in breach of natural justice.

The present proceedings

2. The claimant company issued a claim form in February 2020 to enforce a judgment it had obtained against the defendant in Abu Dhabi in February 2014. The judgment was in respect of 6 dishonoured cheques signed by the defendant on behalf of an Abu Dhabi registered company. The defendant did not take part in the proceedings in Abu Dhabi.

3. The claim form and particulars of claim in this claim were served on the defendant at his address in England on 18 June 2020 by first class post.

4. No acknowledgement of service or defence having been filed, default judgment was ordered on 14 September 2020. The judgment in default required the defendant to pay the claimant £493,200.48 inclusive of costs. It was served on the defendant at the same address in England by letter dated 21 September 2020.

5. On 25 September 2020, the defendant contacted the court to ask for access to e-filing. On 29 September 2020, the defendant sent to the court an application notice to set aside judgment in default. The court fee for the application was paid on 1 October 2020. The filing was rejected by the court and the defendant made another attempt on 8th October 2020. This too seems not to have been accepted by the court. The applications were not served on the claimant.

6. Nothing then appears to have happened until May 2021 when the claimant issued an application for three charging orders in respect of the judgment. Interim charging orders were made on 20 September 2021 and the matter listed to consider whether the charging orders should be made final on 2 November 2021. The order of 20 September 2021 required any objections by the defendant to be sent 7 days prior to the hearing on 2 November 2021.

7. The defendant wrote to the court by letter dated 2 November 2021 attaching a hard copy of what was said to be the application notice which was e-filed in September 2020 and for unknown reasons never processed. The letter says in September and October 2020 he made several attempts to e-file his application. The letter lists 4 enclosures, the application notice, a witness statement, default judgment and QB e-file history 25 September to 19 October 2020.

8. The application notice on the court file is the application notice dated 29 September 2020 which I am now considering. Attached to the letter is a witness statement of the defendant entitled "witness statement" with no address specified, signed and dated 29th September 2020. Also on the court file in the same filing there is another witness statement of the defendant, with an address in West Drayton which is said to be a witness statement in support of his application to set aside default judgment dated 18

September 2020. It is also signed and dated 29th September 2020. The content of those statements is different.

9. The claimant had not properly served all relevant creditors with the sealed order listing the 2 November 2021 hearing and the application was adjourned for proper service to take place to the first available date after 7 December 2021.

10. On 16 December 2021 I heard the claimant's application to make the charging orders final and the Defendant's application to set aside the judgment. The latter application was adjourned as it became clear during the hearing that the defendant had made a number of different witness statements with different names and dates, and the explanation for those differences given did not take into account the witness statement on the court file with the West Drayton address. The Defendant's application was adjourned until a hearing on 21 February 2022 where I heard full argument.

11. A number of witness statements have been produced by the defendant which I will identify here. A number are clearly the same witness statement but the name of which has later been changed. This has not made it easy to follow what has been produced and filed and when. These are the various statements that have been filed with titles and their dates:

(i)	Witness statement (West Drayton address)	29 September 2020
(ii)	Witness Statement (no address)	29 September 2020
(iii)	Defendant's First Witness Statement	29 September 2020
(iv)	First Witness statement of Shahzad Munir	27 October 2021
(v)	Defendant's Second Witness Statement	27 October 2021
(vi)	Witness Statement A	19 November 2021
(vii)	Defendant's First Witness statement [amended]	19 November 2021
(viii)	Defendant's Third Witness statement	10 December 2021
(ix)	Defendant's Fourth Witness statement	20 January 2022

12. The content of the statements at (ii) and (iii) is the same as each other as is the content of the two statements at (vi) and (vii). Witness statements at (iv) and (v) concern the equity in the defendant's properties for the charging order application and have some differences of detail. I accept the defendant's explanation that he changed the title of some witness statements due to some confusion about what they should be called.

13. The witness statement with a West Drayton address says that the cheques were given to the claimant as "guarantee cheques not against any payment" and were issued on behalf of Rinmus General Contracting LLC (the defendant's company). The Defendant says "It appears that the claimant conspired with my local business partner and added my name in the Abu Dhabi court Judgment" and "I was not aware of the Abu Dhabi judgment as by that I was no longer in the Country. I learned Abu Dhabi Judgment in February 2020 when I received a letter from the Claimant Solicitors".

14. The February 2020 letter is the letter before action sent by the claimant's solicitor dated 17 February 2020 to the defendant's address in England warning that proceedings would be issued and inviting contact. The defendant did not reply.

15. The other witness statement entitled "witness statement" and that titled "Defendant First witness statement" and dated 29 September 2020 says the six cheques were undated and only given as a security. The defendant says he had two joint developments in progress with the claimant and the claimant decided to rescind the first project. The defendant says "the claimant also deliberately stalled multiple requests to return security cheques, by saying do not worry I would not do anything with your cheques and will return, which it never did". The defendant goes on to say it transpired the claimant kept the security cheques as bargaining chips to recover his own financial loss and deprive the respondent of its rightful 10 years rental income.

16. In witness statement A dated in November 2019, the defendant says his company bought some scaffolding items from the claimant in 2010 and later they started to buy more scaffolding items from the claimant. The defendant then says that the claimant was a scaffolding hire company not a building material merchant. In paragraph 7 of Witness Statement A, it is expressly stated for the first time that the cheques were given as security for scaffolding hire. It also states for the first time that four of the cheques were given by the defendant's accountant, in 2011, and 2 of those were in error. That witness statement also gives the explanation that it was customary in the UAE to give security cheques when hiring scaffolding and when you return it the hiring company would return the cheques.

17. I note that copies of the cheques appear in the bundle and are dated between February and April 2012.

The test under CPR 13.3

18. CPR 13.3 provides as follows:

> "(1) In any other case [than a case where the court must set aside a judgment entered under Part 12 because it was wrongly entered], the court may set aside or vary a judgment entered under Part 12 if-
>
> (a) The defendant has a real prospect of successfully defending the claim; or
>
> (b) It appears to the court that there is some other good reason why-
>
> (i) The judgment should be set aside or varied; or
>
> (ii) The defendant should be allowed to defend the claim.
>
> (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."

19. CPR13.3(1)(a) is essentially the same test as applies to summary judgment applications under CPR 24. In order to for there to be a real prospect of successfully defending the

claim, the defendant must show a real as opposed to fanciful prospect of success. The claim must in other words carry some degree of conviction. I must not conduct a mini trial and must take into account the evidence available before me but also evidence that can realistically be expected to be available by trial.

20. The discretionary power to set aside is unconditional. In considering my discretion I must in particular have regard to whether the application was made promptly. The purpose of the power is to avoid injustice. Setting aside a judgment of the court which has been regularly obtained is something the court will not do lightly.

Real Prospect of successfully defending the claim

21. It is of course for the defendant on its application to show that there is a real prospect of successfully defending the claim. By the time of the hearing, the defendant relied on two arguments that he had a real prospect of successfully defending the claim. The first is that the Abu Dhabi procedure followed in this case was contrary to natural or substantive justice and second that the Abu Dhabi judgment was obtained by fraud.

22. This is not a case where there is a system of recognition or registration of foreign judgments. The judgment of the Abu Dhabi courts has no direct force here but is enforced by way of a claim. It can be enforced if the foreign court had jurisdiction against the defendant and the judgment is for a definite sum of money and if final and conclusive. Those thresholds are met in this case.

23. That being so, the foreign judgment cannot be impeached for any error of fact or law and it will be enforced unless an exception applies. Exceptions include the two grounds relied upon by the defendant. In this application therefore the defendant has to show a real as opposed to fanciful case that at least one of those exceptions will apply.

Judgment contrary to natural justice

24. The defendant did not take part in the proceedings in Abu Dhabi. I have seen witness evidence from Mr Al Rafi, the Abu Dhabi lawyer with conduct of those proceedings as to the steps taken for the equivalent of service of the claim on the defendant and the Abu Dhabi court decisions. In summary, service at an address of the defendant was unsuccessfully attempted, there was then a notification in a local newspaper in Arabic on two occasions. There was no response to the claim and it was then heard in the absence of the defendant and determined in the claimant's favour. There was then also notice of the judgment in the same widely circulated local newspaper.

25. The defendant argues that he was not in fact served with the claim and had no knowledge of it and therefore by that fact, it is contrary to natural justice. He also relies on the right to a fair trial under the European Convention of Human Rights. He says his convention right was breached due to the lack of actual service or by an inadequate notification method. This court can refuse to enforce a judgment which is flagrantly in breach of the article 6 right.

26. The particular breaches relied upon were that notice of proceedings were not successfully served at any address, and the newspaper notice was posted in a local rather than national newspaper and in a language he doesn't speak.

27. I was referred to the case of *Nunes Dias v Portugal* in which it was held that service in a national newspaper was in compliance with article 6 rights. The principles of legal certainly and the proper administration of justice do allow for such publication to count as good service. That is a principle which would be familiar in these courts where the steps for good service do not rely on actual service. The courts have a system for applications to set aside once the judgment is known about in such cases.

28. A significant process for notification of the claim was clearly followed in the Abu Dhabi proceedings. I do not accept that there is a real prospect of arguing that the failure to give actual notice is contrary to natural justice. I also do not accept that the notice of proceedings being in a "widely circulated local newspaper" as opposed to a national one gives rise to a realistic claim for breach of natural justice. The Defendant has provided no information about the newspaper to indicate why it would be a breach. It seems to me that is not a flagrant abuse of natural justice or contrary to the article 6 right.

29. In respect of it being published in Arabic, I was invited by Mr van Heck to take judicial notice that there is a large expat non-Arabic speaking community and that publication in Arabic was a breach of natural justice and in breach of article 6. Arabic is the official language of Abu Dhabi. I do not accept, without more, that there is a real prospect of success in arguing that a publication in the official language of a country can amount to a breach of natural justice. The Defendant relied on commentary in Briggs on Civil Jurisdiction and Judgments to say it may be contrary to natural justice if a writ was served in a language a party could not read or recognise. The basis of that is in relation to an arbitration notice which seems to me is a very different context to a notice from a national court, and the footnote points out that it may depend on whether the defendant knew or should have known what the document was.

30. I reject that the defendant has a real prospect of successfully arguing that the judgment was obtained in breach of natural justice or his convention rights.

Abu Dhabi Judgment obtained by fraud

31. As can be seen from the summary of the accounts given in the defendant's various witness statements, he initially alleged numerous grounds of fraud, including that the claimant conspired with the defendant's business partner to add the defendant's name to the judgment and that the Abu Dhabi proceedings were deliberately kept away from the defendant.

32. By the time of the hearing, the argument on fraud was that the claimant presented a case that the cheques were to be paid to it, whereas they were in fact undated security cheques. Mr van Heck also argued, on instructions, that the claimant knew the defendant's residential address and did not tell the court and that was another aspect of fraud.

33. I have been referred to passages from both Briggs on Civil Jurisdiction and Judgments and Dicey, Morris & Collins on the Conflict of Laws. The Defendant has to show that there is a real as opposed to fanciful prospect of success in a claim that the claimant has fraudulently induced the foreign court to come to the wrong conclusion.

34. The Defendant's argument is that the judgment was obtained fraudulently because in fact the cheques were handed over by way of security only and were undated but this was not notified by the claimant to the Abu Dhabi Court. The defendant has alleged that the Claimant stalled multiple attempts to return the security cheques. The claimant however put forward the case that these were cheques presented to the claimant as a payment transaction and were dishonoured due to insufficiency of funds. That is sufficient for the fraud exception.

35. The Claimant submits that this is an attempt to dress up an argument about alleged errors of fact. The defendant appears to be suggesting that although the parties agreed the cheques constituted security, they would in fact never be called upon and that makes no logical sense.

36. It seems to me that in principle, if party A was to present a case based on cheques given to them by party B as security for the hire of goods which had in fact been retuned and the hire paid for at the time the cheques were presented, and that party A knew the goods had been retuned and the hire paid for, that could amount to circumstances which would fall within the fraud exception.

37. The question in this case is whether the defendant has a real prospect of successfully arguing that the fraud exception applies. That of course does not determine the issue of fraud. If I was to set aside default judgment there would have to be direction to a trial of the issue of fraud in order to determine whether the judgment should be enforceable in this jurisdiction.

38. In his first two witness statements the defendant refers to the cheques being "guarantee cheques not against payment"/"security cheques", that the claimant was in the business of renting out scaffolding and also that the defendant's company had two joint development projects with the claimant. It was said that the claimant decided to rescind the first project leaving the defendant out of pocket and also that the claimant deliberately stalled multiple requests to return security cheques. The defendant "did not know he [the claimant] was simply hedging his investments".

39. The defendant's case as now articulated that this was a security cheque for the hire of scaffolding was not articulated. That is first expressly mentioned in paragraph 7 of Witness Statement A dated 19 November 2021. That witness statement also gives the explanation that it was customary in the UAE to give security cheques when hiring scaffolding and when you return it the hiring company would return the cheques. It was argued by Mr van Heck that the defedant's statement going on to say, "which the claimant never did despite my repeated request" should be taken to imply that the hire had come to an end.

40. The claimant sought to rely on the translation of the judgment of criminal proceedings taken against the defendant in Abu Dhabi for the offence of issuing a cheque with insufficient funds to cover it. Mr Colclough argued that nowhere in that transcript was the claim that it was security of scaffold hire mentioned. I have had the opportunity to read that transcript. There is no reference to security for scaffolding. However, the judgment does say that the reason, or motive, that prompted the issue of the cheque, such as releasing it as a guarantee, is irrelevant to the establishment of criminal responsibility. So it appears that the cheque being a guarantee may have been raised. I cannot accept the submission that it was not.

41. The question I have to determine is whether the defendant's case has a real prospect of success or is fanciful. It seems to me that I should take into account when looking at the test, that the evidence required in order to establish fraud has to be cogent.

42. The defendant has not provided any evidence or any detail of when he says the scaffolding was hired, when the hire ceased, the cost of the hire or when it was paid for and when and by what method did he ask for the cheques to be returned. There is in fact no express assertion that the scaffolding was returned before the cheques were presented, although I am asked to infer that from what is said, and there is no reference to the payment having been made for the hire of scaffolding prior to any requests for the return of the cheques. Without payment for the hire, the claimant's submission that the defendant's case has to be that the cheques would never in fact be called on, and that makes no logical sense, must be right.

43. The claim that these were undated cheques given as security against scaffold hire which should have been returned which the claimant knowingly misinformed the court about appears to be a fanciful one put in the context of what is required in order to successfully plead fraud. Whilst it is correct that further evidence would be provided for if I was to set aside judgment, these are matters which would be expected to be within the defendant's knowledge in order to be able to plead a fraud claim. They do not appear or appear consistently in the numerous witness statements thus far. Some required elements are not referred to at all. Without those details there is no real prospect of the defendant succeeding in the face of signed, dated cheques.

44. On that basis I do not accept that there is a real as opposed to fanciful prospect of success.

45. There was also an argument set out in Mr van Heck's skeleton argument that the claimant knew the defendant's residential address at the time of the issue of the claim in Abu Dhabi, and failing to inform the court of that was also fraud. That argument was on instructions. There is no evidence of the address referred to or any witness evidence in support.

Discretion

46. Even if I was to have found the fraud or natural justice exceptions applied, the court has to consider whether, in its discretion, the judgment should be set aside in any event. In this case the default judgment was sealed on 18th September 2020 and whilst the defendant contacted the court promptly in September and early October 2020, the application was not successfully filed. The defendant then did nothing until the charging order applications in October /November 2021.

47. He did not serve a copy of the application on the claimant in September 2020, or until over a year later, or notify the claimant he was making an application.

48. The Defendant's position is that the claimant did act promptly once he knew about the default judgment by sending his application to the court and paying the court fee. The test requires the defendant to make an application promptly. He sent the application to court 3 times in short succession. He was a litigant in person and there is no reason for him to think it had been rejected. He therefore acted promptly.

49. In the first witness statement of Shahzad Munir dated October 2021, I note that he says he still did not know if his application had been accepted. The last email he exhibits was dated 19th October 2020. There was no follow up.

50. In exercising my discretion, I do take into account the failure to follow up on the application to ensure it had been issued. I am not confined to considering whether the defendant has sent an application to the court promptly. This was an application where the defendant knew there was some difficulty in the court accepting it. In my judgment, there was an onus on the defendant to ensure both that the application had been issued, and to notify the claimant of the application. The Defendant did neither for a year.

51. In the circumstances, the application is dismissed and I would be grateful if counsel could agree the appropriate consequential orders. If agreement cannot be reached any outstanding issues will be addressed on the handing down of this judgment.