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 CFI 036/2015 Philippe Yves Moser v ES Bankers (Dubai) Limited (in Liquidation)

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JUNE 30, 2016 COURT OF FIRST INSTANCE - ORDERS,ORDERS

Claim No: CFI-036-2015

THE DUBAI INTERNATIONAL FINANCIAL CENTRE [COURTS \(/glossary/court/\)](#)

IN THE [COURT \(/glossary/court/\)](#) OF FIRST INSTANCE

BETWEEN

PHILIPPE YVES MOSER

[Claimant \(/glossary/claimant/\)](#)

and

ES BANKERS (DUBAI) LIMITED (IN LIQUIDATION)

[Defendant \(/glossary/defendant/\)](#)

ORDER OF H.E. JUSTICE SHAMLAN AL SAWALEHI

UPON reviewing the Claimant's Request for Default Judgment, dated 2 June 2016, seeking a default judgment and interest resulting from misrepresentation and/or fraud and/or breaches of contract and positive duties as the Defendant failed to file an acknowledgment of service, admission or defence to the Claimant's Claim and the time for doing so has expired

AND UPON reviewing the Certificate of [Service \(/glossary/service/\)](#) submitted by the Claimant on 30 March 2016

AND UPON reading the Order of Judicial Officer Maha Al Mehairi dated 2 June 2016, denying the Claimant's request for default judgment

AND UPON reading the Claimant's request for a *de novo* review dated 7 June 2016, requesting a review of the Order dated 2 June 2016

IT IS HEREBY ORDERED THAT:

- 1.The Order of Judicial Officer Maha Al Mehairi dated 2 June 2016 be upheld.
2. The Claimant's request for Default Judgment be denied.

Issued by:

Natasha Bakirci

Assistant [Registrar \(/glossary/registrar/\)](#)

Date of issue: 30 June 2016

At: 2pm

REASONS

1. The current application arises out of the winding up of ES Bankers (Dubai) Limited (the “Defendant”), following the decision of Mr Phil Bowers in his capacity as joint liquidator on 9 November 2015, whereby he rejected Mr Philippe Moser’s (the “Claimant”) deposit claim / Proof for USD 76,399.86 against the Defendant.

2. The Claimant made a request to this [Court \(/glossary/court/\)](#) for Default Judgment against the Defendant, which was denied by Judicial Officer Maha Al Mehairi’s Order dated 2 June 2016 (the “Order”), as the Court was not satisfied that the Claim Form had been served by the Claimant in accordance with Part 9 of the Rules of the [DIFC Courts \(/glossary/difc-courts/\)](#) (“RDC”); furthermore, that pursuant to Article 56 of the [DIFC \(/glossary/difc/\)](#) Insolvency Law, leave of the Court should have been sought before the commencement of proceedings against the Defendant. The Claimant now seeks a review of that decision, which I consider below.

3. With respect to service of the Claim Form, the Claimant submits that it was served upon the Defendant by fax and by email on 24 March 2014. RDC 9.3 states:

“9.3 Where a document is to be served by electronic means:

(1) the party who is to be served or his [legal representative \(/glossary/legal-representative/\)](#) must previously have expressly indicated in writing to the party serving:

(a) that he is willing to accept service by electronic means; and

(b) the fax number, e-mail address or electronic identification to which it should be sent;”

4. The Claimant failed to provide evidence pertaining to the Defendant’s accepted methods of service or confirmation of the Defendant’s email and fax details. Therefore, in the absence of such evidence being provided to satisfy Rule 9.3, I am inclined to find that service has not been shown to have been effected in accordance with the RDC.

5. Moreover, the issue of whether the correct procedure has been adopted by the Claimant comes into question. Article 56 of the DIFC Insolvency Law states:

“Consequences of winding-up order

When a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the Company or its property, except by leave of the Court and subject to such terms as the Court may impose.”

6. The liquidator emailed the Court on 6 April 2016 requesting clarification over whether the Claimant had successfully sought the leave of the Court before the commencement of his proceedings against the Defendant. I confirm that in relation to Claim No. CFI-036-2015 the Claimant has not sought the leave of this Court to date.

7. Pursuant to Article 5.19.2 of the DIFC Insolvency Regulations (“DIFC IR”):

“5.19.2 If the liquidator rejects a Proof in whole or in part, he shall prepare a written statement of his reasons for doing so, and send it forthwith to the creditor.”

8. The Claimant’s case is that his Proof for USD 76,399.86 was rejected in full by the liquidator. If a statement of reasons has not been provided to the Claimant or he is dissatisfied with the liquidator’s decision, it would be open to him to make an application against the liquidator in that regard. The procedure to be followed is set out in Article 5.20 of DIFC IR:

“5.20 Appeal against decision on Proof

5.20.1 If a creditor is dissatisfied with the liquidator’s decision with respect to his Proof (including any decision on the question of preference), he may apply to the Court for the decision to be reversed or varied.

5.20.2 The application must be made within twenty-one (21) days of his receiving the statement sent under Regulation 5.19.2.”

9. The terms of Article 56 of the DIFC Insolvency Law are clear, leave of the Court is required in circumstances where proceedings are commenced directly against a company that has been wound-up, and therefore, the leave of the Court is a prerequisite for any proceedings against the Defendant.

10. Accordingly, I find that a request for Default Judgment, without the permission of the Court is certainly premature and must be denied.

CONCLUSION

11. In light of the aforementioned, the Order of Judicial Officer Maha Al Mehairi dated 2 June 2016 is upheld.

12. T Claimant’s request for a Default Judgment is denied.

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