

CFI 017/2009 - Order

Claim No: CFI 017/2009

**THE JUDICIAL AUTHORITY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE
IN THE COURT OF APPEAL**

BETWEEN

SHIHAB KHALIL Appellant
and SHUAA CAPITAL psc Respondent

ORDER OF CHIEF JUSTICE SIR ANTHONY EVANS

1. The Applicant is the Claimant in these proceedings. He applies for permission to appeal against the judgment and order of Justice Sir Anthony Colman dated 21 October 2009.
2. Justice Colman held in favour of the Defendant that the entire claim should be “dismissed/struck out” and judgment entered for the Defendant.
3. His reasons are set out in his Reasons for Judgment dated 7 December 2009.
4. I have determined this Application on the papers after consideration of the Applicant’s letter dated 5 November 2009 and his Appeal Notice (undated), as well as the Reasons for Judgment. The Defendant responded by letter dated 30 December 2009.
5. My decision is that the Application be REFUSED for the following reasons:
 - (a) The Claimant is the holder of a 2% shareholding in the DIFC registered company Orion Holding Overseas Ltd. (“OHO”). He acquired the shares in consideration of the transfer to OHO of his shares in Orion Soft Trade FZC valued at US\$5.24 million.
 - (b) The Defendant owns 20% (or marginally less) of OHO shares and, what is more significant for present purposes, they have exercised effective management control of OHO’s business pursuant to agreements in writing dated 7 February 2008.
 - (c) The Claimant alleges that the Defendant has misconducted the affairs of OHO so as to cause him loss and damage by reason of the reduced value of his shareholding.
 - (d) The Defendant contends that the claim should be dismissed/struck out (as stated in the Order of Justice Colman) on various grounds, including that the claims or some of them are not within the jurisdiction of the DIFC Courts as set out in Dubai Laws Nos. 9 and 12 of 2004.
 - (e) Justice Colman did not dismiss or strike out any of the claims on the ground that they were not within the jurisdiction of the DIFC Courts. Therefore, the extent of the Courts’ jurisdiction would not be in issue in the proposed appeal.
 - (f) Rather, Justice Colman considered each of the claims separately, as follows:
 - (1) breach of contract
 - (2) damages for negligence (damage caused by breach of a duty of care)
 - (3) damages or other relief for breach of a fiduciary duty owed by the Defendant to the Claimant.
 - (g) As regards (1) (breach of contract), he held that the Claimant was not a party to the contract(s) that he alleges the Defendant had broken. Therefore, as a matter of law, he cannot claim damages for any such breach.
 - (h) As regards (2) (damages for negligence), he held, again as a matter of law, that any duty of care resting on the Defendant, as shareholders or managers of the affairs of OHO, was owed to OHO, the company, and not to the Claimant personally as another shareholder.
 - (i) As regards (3) (breach of fiduciary duty), he held that there are no grounds on which it could be held that the necessary relationship of trust and confidence, without which no fiduciary duty can arise as a matter of law, exists or has existed between the Claimant and the Defendant. In other words, theirs was a commercial relationship, without more.
 - (j) In my judgment, Justice Colman’s holdings (as above) were undoubtedly correct. I cannot see any ground on which it could be argued that they were wrong as a matter of law.

6. It follows from this that the Applicant, as a shareholder, must seek his remedy in respect of the loss and damage he alleges he has been caused by the alleged wrongdoing, under the DIFC Laws governing OHO as a DIFC registered company, rather than pursue a private action against the Defendant.

7. I have taken into account the facts that the Applicant makes this application as a litigant in person, and that he contends that his legal representative at the hearing before Justice Colman did not adequately present his case. For this reason alone, I have decided not to make a further order which would have prevented him from seeking an oral hearing of the Application which I have refused.

8. The Applicant, therefore, is entitled to renew his application at an oral hearing but, if he were minded to do so, I would strongly advise him first to consult the Registrar regarding the possible costs consequences of doing so.

9. I make NO ORDER as to the costs of the present Application.

Mark Beer

Registrar

Date of Issue: 2 March 2010

At 4pm