Claim No: xxxx

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL

BEFORE SCT JUDGE NATASHA BAKIRCI

BETWEEN

GJURD

Claimant

and

GIZELLA (DIFC) LIMITED

Defendant

Hearing: **26 July 2016**

Judgment: **29 August 2016**

JUDGMENT OF SCT JUDGE NATASHA BAKIRCI

UPON hearing the Claimant and the Defendant's representative

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1. The Defendant shall pay the Claimant AED 211,710.14 as restitution for the Claim.

2. Additionally, the Defendant shall pay the Claimant AED 13,220.26 in reimbursement of the DIFC Courts' fee.

THE REASONS

Parties

3. The Claimant is Gjurd (hereafter "the Claimant"), an individual who invested funds on the advice of and with the assistance of the Defendant.

4. The Defendant is Gizella (DIFC) Limited (hereafter "the Defendant"), a DIFC registered company offering investment advice and assistance to professional clients. Relationship Manager at the Defendant company (hereafter "Relationship Manager") and Chief Executive Officer of the Defendant company (hereafter "CEO").

Background and the Preceding History

5. It is common ground that the Claimant and Defendant had an existing and long lasting professional relationship whereby the Defendant provided the Claimant with investment advice and assistance. The Claimant was personally close with some members of the Defendant's team and indicated that this personal relationship combined with the professional relationship caused the Claimant to hold the Defendant in high regard and trust when it came to financial advice.

6. In late 2015, the Claimant decided, on advice from Relationship Manager, to look into a specific investment structure called a Reverse Convertible Product (hereafter the "Product"). This was the first time the Claimant had considered such a Product.

7. The Product consisted of the purchase of three specific stocks over a fixed period of time. The Claimant would receive fixed coupons during the term of investment and would receive a profit at the end equivalent to 12.5% of the investment so long as none of the three stock prices fell below a specific percentage threshold (hereafter "Barrier Event" or "Barrier"). If, on the conclusion of the Product term (hereafter the "Occurrence Date"), any one of the three stocks had breached the Barrier, all three stocks would be sold at the lower price, resulting in a loss on the Product (hereafter known as the "Three Stock Rule"). While the general terms of the Product are now in agreement, the Claimant maintains that he was not aware of the Three Stock Rule at the time of purchase.

8. On 10 December 2015, Relationship Manager sent the Claimant an email attaching a term sheet (hereafter the "Indicative Terms") for "the structured note idea which I had discussed with you." These Indicative Terms do not list the stock prices or specify that the Product will be

structured on the secondary market. The Claimant also admits that he did not read these Indicative Terms. On the same day, the Claimant sent Relationship Manager a WhatsApp message saying "Pls send me the term sheet info" and Relationship Manager confirms "I have sent you the email."

9. On 10 December 2015, the Claimant signed the provided Subscription Form (hereafter the "Subscription Form") and returned it to Relationship Manager. The Claimant understood this form to be required to obtain funding from a bank to finance half of the investment. The Defendant understood this form to incorporate the Indicative Terms previously sent to the Claimant.

10. On 11 December 2015, Relationship Manager asked the Claimant via WhatsApp "Have you wired the funds to Gizella. (DIFC) Limited" On 13 December 2015, the Claimant sent Relationship Manager a WhatsApp message confirming that the USD $ 80,000 had been debited from his account on 13 December 2015. On 14 December 2015 Relationship Manager confirmed to the Claimant via WhatsApp that the Defendant had received USD $ 79,987.

11. On 16 December 2015 the Claimant sent Relationship Manager a WhatsApp message checking on the status of the purchase. Relationship Manager said he would let him know as "I had called up my trader... He will update me." On 18 December 2015 the Claimant asked Relationship Manager via WhatsApp what the prices for each stock would be. Relationship Manager responded that he would send the term sheet and that "It will be today's prices."

12. On 18 December 2015, Relationship Manager sent the Claimant a message detailing some of the specifics of the Product and asking the Claimant to confirm so Relationship Manager could make the trade. The email states the "Reverse convertible structure for Facebook, Linkedin and Twitter on a best effort basis on Friday 18th December 2015." It also states that "The following are the indicative terms for the reverse convertible structure: -

1)Guaranteed/Unconditional coupon: 12.50% Per annum

2) Coupon Payment frequency: monthly

3)Total Notional Amount: USD 160,000 (USD 80,000 Client Equity and USD 80,000 Leverage).

4)Tenor: 6 Months

5) Auto call level: 100% of initial fix at ever observation date

6) European Barrier: 40% Of initial fix

Request you to please send confirm if I can go ahead with the trade."

13.The Claimant responded by email to Relationship Manager on 18 December 2015 stating "Yes please go ahead . .. Thanks for your efforts."

14. On 21 December 2015, Relationship Manager emailed the Claimant summarising the Product, stating it was purchased on the secondary market, listing the prices and the coupon dates. The email states that the final term sheet would be ready on 25 December 2015. That same day, the Claimant WhatsApp messaged Relationship Manager saying "Pls send me the prices as I think you've made a mistake."

15. On 22 December 2015, Relationship Manager again emailed the Claimant stating that he had attached the "final term sheet for the reverse convertible purchased from secondary market on Friday the 18th of December 2015." Relationship Manager requested that the Claimant sign the sheet and return it. The attached term sheet is dated 18 December 2015 but lists the stock prices as of 9 December 2015.

16. On 23 December 2015 the Claimant asked Relationship Manager via WhatsApp to "Pls send me the date you sent me term sheet as I couldn't find it." The Claimant later states "I'm sure I didn't read it . . . " Relationship Manager responded asking "Honestly what is your concern," and "Do you feel you have been told something Else and sold something else." The Claimant responded that "u said it would be pricing of 18tg [sic]" and "If twitter falls another 30% I'm done for." Relationship Manager responded that "This trade is done after a lot of hard work and sweat." The Claimant then reiterated about the prices and said "Let's forget this" and "See something else." Relationship Manager responded that "your yield on this structure has considerably improved" and "You are making more than 25%." Relationship Manager continued "if you believe in me and Gizella. (DIFC) Limited please don't worry." The Claimant responded "I didn't know I would have to sell all three stocks at the 40% lower barrier" and stated again "Let's drop this" and "Just not comfortable." Relationship Manager responded that the Product had already been traded. The Claimant again reiterated that the prices should be of 18 December 2015 and that he could not find the term sheet sent on 10 December. Relationship Manager responded saying "You will give me a pat on the back for this trade" and "I had been very transparent and honest in my dealing." Relationship Manager asked "Where is the issue coming from" and "This trade was done on an exceptional basis despite that you are doubting my intention [sic]." Relationship Manager then re-sent the Indicative Terms sent on 10 December to the Claimant and the parties ended their WhatsApp conversation.

17. On 4 January 2016, the Claimant emailed Relationship Manager asking him to transfer the USD $ 80,000 to his Standard Chartered Account and to let him know once the transfer was complete. Relationship Manager replied the same day, copying CEO, stating that "The trade has already been executed. We certainly cannot reverse the trade."

18. On 5 January 2016, Relationship Manager emailed the Claimant a revised term sheet. This term sheet is dated 18 December 2015 but does not properly change the prices to those of 18 December 2015. This revised term sheet does mention that the Product was purchased on the secondary market. Relationship Manager also suggested an in-person meeting to discuss the same but did not provide any direction to sign and return the revised term sheet.

19. On 9 January 2016, the Claimant WhatsApp messaged CEO saying "when we last spoke you said you would speak to [Relationship Manager] and get back to me. [Relationship Manager] was here on Thursday but I made it very clear to him that I didn't like the way he didn't

reveal to me all the facts. He told me it would be a new structure and didn't say that he would be buying the product from the secondary market. Anyways, I'm sure he has spoken to u. I've told him that I need my $80,000 to be sent to me by Monday latest. Please confirm that it'll be done." CEO responded that he was unable to message as there was a problem with his phone and did not otherwise respond to this message.

20. The Claimant and CEO then had a series of back and forth WhatsApp messages about CEO's health. Then, on 14 January 2016 the Claimant again messaged "Please make sure the $80000 is wired today as I've got to pay by Sunday . . . . . I was waiting for your call yesterday." CEO replied "The money can't be wired as unwinding not possible [sic]." The Claimant responded "[Relationship Manager] has to come up with the money . . . . . He's the one who has messed it up." The Claimant continued "As we discussed, I'm not willing to take any loss from this unauthorised trade. He seems to think he can lie his way out of this. Anyways, please find a way to get my money out today as I've committed the funds and they are waiting for the payment since Monday." CEO responded "The trade is an authorised trade as per the terms n u agreeing . . . However I appreciate ure thoughts [sic]."

21. On 16 January 2016 the Claimant again WhatsApped CEO asking about when the funds would be transferred back with him with no response from CEO. The Claimant and CEO had some back and forth about Relationship Manager and when the matter would be resolved. Then on 18 January 2016, CEO stated "[Relationship Manager] is trying his level best but these are market difficult conditions n u have been long enough to understand that no point panicking [sic]." The Claimant responded that he had not authorised the transaction and that he has been protesting since he saw the term sheet. CEO then responded "I will ask compliance to step in for investigation."

22. On 26 January 2016, Relationship Manager again emailed the Claimant a new term sheet (hereafter the "New Indicative Terms") "which has the prices of 18th December 2015." Relationship Manager requested that the Claimant sign and return the New Indicative Terms. The attached New Indicative Terms are dated 20 January 2016 and list the stock prices as of 18 December 2015.

23. On 28 January 2016, the Claimant responded reiterating his many requests that his funds be transferred back to his account. The Claimant also expressed frustration that the attempt to remedy the problem by providing the prices of the 18 December 2015 in the New Indicative Terms only came 40 days after the Claimant first voiced his dissatisfaction. The Claimant demanded reimbursement of his USD $ 80,000 investment within 5 working days.

24. On 31 January 2016, Relationship Manager emailed the Claimant, referring to a telephonic conversation of 28 January 2016. Relationship Manager stated that as the investment was traded based on the Claimant's instructions, the only way to "remit the funds is to liquidate the security at the current price in the secondary market." Relationship Manager then asked the Claimant to direct him on his chosen course of action.

25. On 1 February 2016, Relationship Manager again emailed the Claimant sending a "Soft reminder" regarding the New Indicative Terms.

26. On 3 February 2016, Relationship Manager emailed the Claimant, copying CEO, stating that the coupon of USD $ 1,667.20 had been transferred to his account on 17 January 2016. He went on to state that he "Trust[s] your previous queries have been addressed." The Claimant replied on the same date stating that "I'm not authorising you to send me any money other than my $80000 that was sent to you around the 14th of December 2015."

27. On 9 February 2016, the Claimant sent CEO a long WhatsApp message detailing his dissatisfaction with the Product and the delay in resolving his concerns. The Claimant further stated that he would lodge a complaint against the Defendant company. CEO responded stating that he had instructed Relationship Manager to take care of the issue, stating that "No one would have borne the loss which we have n despite of that u r saying this . . . despite bearing loss on your behalf [sic]."

28. On 10 February 2016, Relationship Manager emailed the Claimant stating that CEO was away and that they would get back to the Claimant later. The Claimant replied to Relationship Manager by email demanding that his "securities" be "moved right away."

29. On 11 February 2016, Relationship Manager again emailed the Claimant stating that "with regards to the tailed email for the transfer of securities, I have to get the inter office memo signed by CEO. I am working on the approval on email, I shall keep you posted." The Claimant responded on the same day, copying CEO, asking when his USD $ 80,000 would be transferred back into his account.

30. On 14 February 2016, Relationship Manager emailed the Claimant stating that the "trade was an [sic] authorized by yourself after providing all the full disclaimers (terms and conditions)." Relationship Manager stated that only due to the Claimant's "objection/concern that the prices of securities on the term sheet were not of 18th Dec 2015" was a solution offered "on the expenses [sic] of Gizella. (DIFC) Limited." Relationship Manager asserted that the offered New Indicative Terms should have remedied any issues. Relationship Manager informed the Claimant that the Product could be liquidated on the secondary market at a loss.

31. On 17 February 2016, Relationship Manager emailed the Claimant noting that the Claimant, Relationship Manager and CEO had met the previous day and detailing that the Claimant could change his product to the prices of 18 December 2015 upon signing the New Indicative Terms provided to him. Relationship Manager stated that if the Claimant did not sign the New Indicative Terms by 21 February 2016, the Defendant would consider the Claimant content to continue with the prices of 9 December 2015. The parties agreed that the Claimant never sent the signed New Indicative Terms.

32. On 22 February 2016, Relationship Manager emailed the Claimant stating that the trade had been made with the Claimant's approval after "full knowledge of all the terms of the trade." He reiterated that the request to change the prices to those of 18 December 2015 had also been accommodated. Relationship Manager stated that since the New Indicative Terms with 18 December 2015 prices was not signed by the Claimant, the Defendant would take that as confirmation to keep the Product as is.

33. On 22 February 2016, the Claimant replied stating that he was not satisfied with the Product. He stated that the Defendant had failed to address his two additional concerns, beyond the pricing issue. First, the Claimant claimed that he was not aware of the Three Stock Rule requiring that all the stocks be "sold at the discounted price matching the worst performing one." Second, the Claimant objected to the Product being bought on the secondary market without him being informed of this fact.

34. On 24 February 2016, Relationship Manager replied stating that the Three Stock Rule was clearly detailed in the Indicative Terms and at meetings, the price issue had been addressed, and the trade had only been done upon the Claimant's approval. Relationship Manager stated "I would appreciate that we conclude this matter and not enter into any circular mails."

35. On 25 February 2016, the Claimant responded stating that he would not respond further and instead would take the matter to court.

36. On 10 July 2016, the Claimant received an email from the Defendant detailing his redemption amount of USD $ 14,420.33 out of the total investment.

37. The Claimant then filed a claim with the DIFC Courts Small Claims Tribunal (hereafter the "SCT") on 14 June 2016 seeking full reimbursement of his investment.

38. The parties attended a Consultation before SCT Registrar Amna Al Owais on 12 July 2016 but were unable to reach a settlement. Thus, a Hearing was scheduled before SCT Judge Natasha Bakirci on 26 July 2016. I heard the submissions of both parties and directed them to make any further submissions after the Hearing. Both parties submitted supplemental submissions after the Hearing and before 31 July 2016.

39. As the parties were unable to settle the dispute, I render the following judgment as to the issues in the case based on the Court File and the parties' arguments at the Hearing.

Particulars and Defence

40.The Claimant argued initially in his Claim Form on 14 June 2016 that the Defendant had misrepresented the investment product which caused him to refuse to sign the contract relevant to the investment product. The Claimant sought USD $ 71,947.00 as reimbursement of his initial investment of USD $ 80,000, less the amounts received by him through coupons.

41. On 12 July 2016 the Defendant submitted an Acknowledgement of Service form indicating its intention to defend the Claim. In email correspondence of 18 June 2016, the Defendant conveyed the defence that the Claimant had authorised all investments.

42. The Defendant provided a further defence in an email of 13 July 2016 in which the Defendant highlighted that the Claimant was knowledgeable about the relevant financial markets and understood the risks inherent in the Product. Further, the Defendant stated that they had addressed the Claimant's concerns as to price and that the purchase from the secondary markets had not affected the Product. The Defendant emphasised that they had acted properly in the circumstances. Thus, the Defendant argued, the Claim was not tenable and should be dismissed.

43. The Claimant submitted a lengthy submission on 17 July 2016. The Claimant argued that on 10 December 2015, he only signed the Subscription Form and not the Indicative Terms and thus was not aware of the contents of the Indicative Terms, although he admitted that those terms were sent to him prior to his signing the Subscription Form. Instead, he stated, he had relied on Relationship Manager's description of the Product and understood that he would have an additional chance to review and sign the Indicative Terms at a later date. He understood that the Subscription Form was necessary to organise the loan of another USD $ 80,000 from the bank. Furthermore, the Subscription Form does not mention the full terms of the Product.

44. The Claimant alleges that from 14 December 2015 to 16 December 2015, he and Relationship Manager were finalising the details of the Product, with Relationship Manager offering a Barrier of 35% and then 36%, both of which the Claimant objected to in favour of the 40% previously offered. Thus, the terms were still unconfirmed even after the Claimant sent the funds to the Defendant on 13 December 2015.

45. The Claimant states that even when he gave approval on 18 December 2015 to go forward with the trade, he was of the understanding that the prices would be as of 18 December 2015, the purchase would be on the primary market and that he would not have to sell all three stocks at a lower price even if one stock was below the Barrier.

46. On 21 December 2015, the Claimant alleges he was finally told the full details of the Product and immediately protested, especially as to the prices being of 9 December instead of 18 December. The Claimant highlights that he WhatsApp messaged Relationship Manager saying he was not interested in the Product. The Claimant then details a back and forth exchange between himself, Relationship Manager and CEO in an attempt to remedy the issues, during which time he frequently demanded that his investment be returned to him.

47. The Claimant states that around 26 January 2016, CEO and Relationship Manager came to him with the New Indicative Terms reflecting the prices of 18 December 2015 instead of 9 December 2015. He states that this remedy did not address all of his concerns and therefore he did not sign the New Indicative Terms.

48. The Claimant states that in February 2016 he made a complaint against the Defendant to the DIFC Financial Services Authority (DFSA). Upon learning that he could not receive a remedy through his DFSA complaint, the Claimant brought his Claim in the DIFC Courts Small Claims Tribunal.

49. The Claimant also informed the SCT that he had received a total of USD $ 22,391.80 back on the investment and he claims a balance of USD $ 67,608.20 as reimbursement of the remainder of the amount invested and the USD $ 10,000 that he would have received as a return on the correctly structured product. He also claims back his court fees of USD $ 3,597.35

50. The Defendant responded on 24 July 2016 with their submission in response. First, the Defendant claimed that the Claimant's expansive investment portfolio proves he was a knowledgeable investor who should have been aware of the risks of the Product.

51. The Defendant highlights that the sample Indicative Terms were shared with the Claimant on 10 December 2015 and these terms outlined the risks and terms of the Product. Furthermore, after receiving these sample terms, the Claimant still authorised the trade via email on 18 December 2015.

52. The Defendant goes on to state that the Claimant's ensuing concerns about the prices were addressed via the New Indicative Terms offered, but the Claimant refused to sign off on the change. Furthermore, the Defendant claims they participated in continuous follow-up on the issue and behaved properly at all times.

53. In sum, the Defendant claims that all the terms of the Product were shared with the Claimant, a knowledgeable investor, well in advance of making the trade and the Claimant explicitly authorised purchase of the Product including all of its terms. The Defendant goes on to state that they addressed the Claimant's concern about the price by offering the New Indicative Terms but the Claimant refused to sign. The Defendant acknowledges no wrong doing, highlights their clear and fair dealing and seeks dismissal of all claims.

54. After the Hearing, the Claimant made an additional submission on 26 July 2016. He states that while he has an expansive investment portfolio, he was not familiar with this particular Product and was relying on Relationship Manager to properly advise him.

55. The Claimant reiterated that he had signed the Subscription Form without knowing the full terms and with the expectation that he would be informed of such terms when the Product became more definitive. The Claimant goes on to state that his authorisation email of 18 December 2015 was specifically of the Product as explained in Relationship Manager's email of that same day, and did not, to his understanding, incorporate the Indicative Terms he had been sent on 9 December 2015.

56. The Claimant states that he immediately protested as of 21 December 2015 when it became clear that the Product purchased was different from his expectations. The Claimant argues that he did not authorise the Defendant to buy the Product on his behalf because he was not informed of the specific details of such Product and was, in fact, misled as to the terms. He reiterates that he only signed the Subscription Form to ensure bank financing and that he never signed an Indicative Terms document.

57. On 28 July 2016, the Defendant made its post-Hearing submission responding to the Claimant's submission of 26 July 2016 and reiterating many of its main arguments. In sum, the Defendant assert that their behaviour was fully in compliance with all contractual obligations.

58. On 31 July 2016, the Claimant made another submission in reply to the Defendant's submission of 28 July 2016. The Claimant mainly reiterated his previous arguments. The Claimant also drew the SCT's attention to a supposed DFSA rule requiring financial services providers to return investment funds after 96 hours if no purchase is made. The Claimant alleges that because the 96-hour time period was due to expire on 18 December 2015, Relationship Manager sought to make the investment hastily in order to avoid returning the funds to the Claimant.

Finding

59. It is clear and undisputed that the DIFC Courts have jurisdiction to decide this matter as the Defendant is a DIFC registered, licensed and regulated company. As the claim value is less than AED 500,000, this claim is properly before the Small Claims Tribunal of the DIFC Courts. This dispute will also be governed by DIFC law, in particular the DIFC Contract Law, Law No. 6 of 2004 (hereafter the "DIFC Contract Law").

60. As to the substance of the dispute, the Claimant raises three main objections to the Product. First, he emphasises that the prices agreed upon between himself and Relationship Manager were to be of 18 December 2015, not 9 December 2015. The Claimant points out that this price difference substantially changed his interest in the Product. Second, the Claimant points out that he was not aware that the Product would be purchased on the secondary market. Third, the Claimant states he was not aware of the Three Stock Rule requiring him to sell all three stocks at a loss in the event that any single stock fell below the Barrier on the Occurrence Date.

61. Ultimately, these three complaints are aspects of one issue: did the parties enter into a valid contract and if so, what were the terms of that contract. Based on the outcome of those two questions, second level questions become relevant: what Product did the Defendant provide and did it comply with the terms of the agreement between the parties. If the Product did not comply with terms of the agreement made, there is further question as to the correct remedy.

62. Before addressing the above mentioned issues point by point, there are certain relevant matters which are not in dispute between the parties and should be mentioned. First and foremost, it is agreed between the parties that Relationship Manager worked for the Defendant and was acting for and on behalf of the Defendant when communicating with the Claimant regarding purchase of and complaints about the Product.

63. Second, although the parties argue over the investment knowledge or sophistication of the Claimant, it is clear from the submissions, especially the WhatsApp conversations back and forth with Relationship Manager over the course of several months, that the Claimant had enough investment savvy to be a professional client and to fully inform himself of the workings of the Product upon reviewing the terms and advice provided by the Defendant.

64. Additionally, there is no question as to the authenticity and accuracy of the documentation submitted by the parties. The Defendant did object to the use of WhatsApp messages as evidence during the Hearing, but did not allege that the WhatsApp messages submitted by the Claimant were in any way inaccurate. The Claimant also suggested that it was suspicious that the Subscription Form signed by him on 10 December 2015 was later hand dated by the Defendant as 14 December 2015, although there is no question that the Claimant did sign the document on 10 December 2015 as supported by email and WhatsApp evidence.

A. Was there a valid contract between the parties?

65.A valid contract is formed "by the acceptance of an offer" (DIFC Contract Law, Article 14). Thus, the task is to determine whether a valid offer was given and whether it was duly accepted as allowed under the DIFC Contract Law. An "offer" to conclude a contract must be "sufficiently definite and indicate the intention of the offeror to be bound in case of acceptance" (DIFC Contract Law, Article 15).

66. The Defendant argues that they formed a valid contract by offering the Claimant the Indicative Terms sent on 10 December 2015 in conjunction with the Subscription Form signed by the Claimant on 10 December 2015, which incorporates "INDICATIVE TERMS" in the body of the form. The Claimant would argue that he formed a contract under the terms of Relationship Manager's email of 18 December 2015 to which he responded "Yes please go ahead."

67. It remains undisputed that the Indicative Terms sent to the Claimant to review on 10 December 2015 were not complete and "sufficiently definite" as they did not include the prices of the stocks. Furthermore, the Claimant alleges that he and Relationship Manager were still determining the exact level of the Barrier Event, a claim supported by Relationship Manager's WhatsApp message of 16 December 2015 where he indicates he is waiting for information from his trader. Thus, the exact terms in the Indicative Terms sent on 10 December 2015 were not yet fully agreed by the parties, nor where they meant to represent a final agreement. This is further evidenced by the fact that the Claimant, an investor seemingly very interested in the specific details of the Product, had not even read the Indicative Terms sent on 10 December 2015. He did not think the Indicative Terms final.

68. The Subscription Form that the Claimant did, in fact, sign on 10 December 2015, states under "Remarks" only the phrase "INDICATIVE TERMS." The Defendant argues that this indicates that signing the Subscription Form will also include consent to the previously shared Indicative Terms sent to the Claimant on the same day. The Claimant argues that he did not understand this to be the case and only signed the Subscription Form in order to ensure third party financing from a bank. He did not believe the terms of the Product to be finalised at the time of his signing the Subscription Form and thus expected to receive finalised terms for signing at a later time.

69. In my view the Claimant's understanding of the circumstances is more plausible, considering that he and Relationship Manager were still negotiating the percentage applicable to the Barrier Event (evidenced by the WhatsApp exchange of 16 December 2015 and by the Claimant's submission) and considering that the prices of the stocks had yet to be determined. The Subscription Form, even with mention of the "INDICATIVE TERMS" was not "sufficiently definite" and did not indicate the Defendant's intent to be bound for the entire Product upon acceptance. This is evidenced by Relationship Manager explicitly seeking further approval by the Claimant before purchasing the Product. Thus, the Subscription Form was not a valid offer for the entirety of the Product.

70. It is agreed between the parties that no further documentation was signed by the Claimant setting out the terms of the Product. Instead, it seems that Relationship Manager's email of 18 December 2015, detailing the overarching terms of the Product and seeking the Claimant's written approval to purchase the same, acts as an explicit offer from the Defendant. The 18 December 2015 email is sufficiently definite and indicates that if the Claimant approves, the parties will be under contract regarding the Product. The Claimant explicitly agrees and approves the Product on 18 December 2015 via email. Therefore, the parties did create a valid contract as of 18 December 2015 with both offer and acceptance. The terms of such contract are outlined in Relationship Manager's email of 18 December 2015.

B. What were the terms of the contract? What did the Defendant provide?

71. Relationship Manager's email of 18 December 2015 is quite specific in outlining the terms of the agreement. It states that the Defendant "shall be able to trade" the Product "on a best effort basis on Friday 18th of December 2015." It then states the "Tenor: 6 Months." This indicates that the prices would be of 18 December 2015, further supported by the WhatsApp messages between the Claimant and Relationship Manager confirming the same and the actions of the Defendant when they realised the mistake in price. Relationship Manager's email also indicates that the Product would conclude 6 months from 18 December 2015.

72. As for the issue regarding purchase of the Product on the secondary market and the claim by the Claimant that he did not fully understand the Barrier Event and Three Stock Rule, these issues are not relevant to the dispute at hand. Had those been the Claimant's only complaints, this would be a very different case. Instead, it is the dispute about price and timing that materially effects the outcome of this case.

73. In sum, it is clear that the parties agreed to a Product with prices of 18 December 2015 to come to term 6 months later. Neither party materially contests this statement, the disagreement lies with how and when this agreement was made. There is also little dispute that the Defendant provided the Claimant with a Product different from what he had agreed to on 18 December 2015.

74. While the Defendant did argue that the price did not really matter, as the success of the Product did not depend on the start price, but instead on the movement of the market during the term of the Product, this statement undervalues the importance of the price to the Claimant. The Claimant was concerned that by 18 December 2015, the stock prices had already moved significantly towards the Barrier Event, meaning that if the Product was structured on 9 December 2015 the movement of the market from 9 December to 18 December would count against him. He preferred to structure the Product from 18 December 2015 at the already lower prices in order that the Barrier Event, although the same percentage, would fall at a lower price point than had the Product been structured on 9 December 2015. Further, the fact that the Product would have made money if priced on 18 December 2015 while it lost significantly when priced on 9 December 2015 further shows that price and date are material to the Product.

75. The Claimant protested the mistake as to price almost immediately after the Product was purchased. The Claimant confirmed with Relationship Manager via WhatsApp on 18 December 2015 that "It will be today's prices." Then, on 21 December 2015, after the Claimant received Relationship Manager's email of 21 December 2015 listing the exact prices for the stocks, the Claimant messaged Relationship Manager saying "Pls send me the prices as I think you've made a mistake."

76. The Claimant is then quite adamant about what he feels was a misrepresentation: Relationship Manager saying the prices will be of 18 December 2015 and then purchasing as of 9 December 2015. He asked multiple times for his money back, to drop the transaction, to forget about it. He was always met with resistance from Relationship Manager and CEO, saying the Product had already been traded.

77. Thus, it is clear that the Product purchased by the Defendant did not match the Product as agreed by the parties in the emails of 18 December 2015. Instead, the stock prices listed were incorrect, materially changing the Product.

C. Is the Contract void for mistake?

78. The DIFC Contract Law provides that "[a] party may only avoid a contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party would not have concluded it at all if the true state of affairs had been know, and (a) the other party made the same mistake, or was also mistaken, or caused the mistake . . ." (DIFC Contract Law, Article 37(1)).

79. The DIFC Contract Law goes on to state that "a party may not avoid the contract if: (a) it was grossly negligent in committing the mistake; or (b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party" (DIFC Contract Law, Article 37(2)).

80. Furthermore, Article 43 of the DIFC Contract Law regarding the loss of a right to avoid a contract, states "[i]f a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has acted in reliance on a notice of avoidance."

81. Additionally, the DIFC Contract Law at Article 44 states that "[t]he right of a party to avoid the contract is exercised by notice to the other party." The DIFC Contract Law also states at Article 47(2) that "[o]n avoidance either party may claim restitution of whatever is supplied under the contract or the part of it avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received."

82. Based on the above provisions of the DIFC Contract Law, there is a strong argument that the contract between the parties on 18 December 2015 is void due to mistake. The mistake was that the contract stated the prices would be of 18 December 2015 but the actual Product was purchased with prices of 9 December 2015. This mistake "was of such importance that a reasonable person in the same situation . . . would not have concluded" the contract, evidenced by the fact that the Claimant did not want to conclude the Product if prices were as of 9 December 2015. The Claimant indicated that his reluctance was due to the fact that prices had already dropped from 9 December 2015 to 18 December 2015 and thus the stocks were already closer to the Barrier Event. Furthermore, the mistake made was caused by the Defendant by failing to purchase the Product in accordance with the contract made between the parties. Thus, the circumstances fall squarely under Article 37(1) of the DIFC Contract Law regarding mistake.

83. The Defendant might argue, under Article 37(2)(a) of the DIFC Contract Law, that the Claimant was "grossly negligent" in not reading the Indicative Terms sent to him by the Defendant, but those terms were not relevant to the price of the stocks. The material mistake was as to price, not to any other terms of the agreement. Therefore, this argument fails. The Defendant might also argue, under Article 37(2)(b) of the DIFC Contract Law, that in an investment contract there is significant risk assumed to be borne by the Claimant. This is true in many regards, but the Claimant was not expected to bear the risk of the Defendant purchasing a product materially different to the one he agreed to purchase. Thus, this argument too fails.

84. A more tenable argument for the Defendant lies in Article 43 of the DIFC Contract Law. The Defendant could argue that it offered the Claimant a remedy to the mistake on 26 January 2016 by providing the New Indicative Terms, changing the prices to 18 December 2015 at the Defendant's own loss. But, Article 43 requires that the Defendant make their declaration to remedy the mistake "promptly after having been informed" of the mistake and before the Claimant relied on avoidance of the contract.

85. Instead of admitting this error and remedying it when the Claimant asked for his money back on multiple occasions, the Defendant tried to convince the Claimant that the Product could not be liquidated and that if it was, it would be at the Claimant's loss. But, as it was the Defendant's mistake that caused the Claimant to seek reimbursement of his investment, it should have been at the Defendant's loss.

86. In fact, the Defendant's mistake as to the date and price of the Product is made quite obvious as the Defendant eventually offered to change the Product to the correct date and price at a loss to themselves. The Defendant only offered this remedy on 26 January 2016, over a month from when the Claimant initially protested and asked for his money back. During this one month period, the Claimant repeatedly followed up on the problem and was repeatedly told that he had agreed to the Product, that he could not liquidate without a loss, that the trade had already been made. The Claimant stated during the Hearing that he lost trust of the Defendant company and their personnel and did not wish to do further business with them.

87. An offer as of 26 January 2016 does not represent prompt remedy, especially after the considerable exchanges between the parties on whether a mistake was made or not. The Claimant had repeatedly asked for his money back and seems to have committed his funds elsewhere in reliance on receiving a full reimbursement as evidenced by his WhatsApp messages. Thus, the Defendant cannot rely on Article 43 of the DIFC Contract law.

88. The Defendant could make another iteration of this same argument, assuming the contract was valid and not void for mistake. The Defendant could argue that the Claimant had the chance to mitigate his losses by accepting the New Indicative Terms as of 26 January 2016. The parties know now that had the Claimant agreed to this change, he would have made money on the Product instead of substantial losses. But, neither party knew this at the time of offering the New Indicative Terms. What is clear is that the Claimant had been through enough exchanges that he had already lost all trust in the Defendant's investment advice and wanted to drop the investment regardless of what was being offered in remedy. This further speaks to the fact that the Defendant did not offer the remedy promptly but waited for relations between the parties to sour and therefore, when they offered the new terms, the Claimant was under no obligation to accept them.

89. The Defendant might also argue that the Claimant never gave notice of his right to avoid the contract. But, the Claimant on a number of occasions told the Defendant that a mistake had been made as to price and he therefore wanted to forget the transaction and get his money back. This was plenty of notice as to his right to avoid the contract and the Defendant should have either reimbursed the Claimant immediately or provided the corrected terms much sooner than 26 January 2016, even if that meant taking a loss.

90. Therefore, under Article 37 of the DIFC Contract Law, the contract made between the parties via email on 18 December 2015 is void as for a mistake made by the Defendant. The parties agreed on a Product materially different than the one actually purchased and the Defendant failed to provide a prompt remedy. Therefore, the contract is deemed void.

D. What is the remedy?

91. Thus, having established that a mistake was made in contracting and that the Defendant was responsible for that mistake, the ultimate question remains: what is the appropriate remedy? Article 47 of the DIFC Contract Law makes quite clear that the remedy for voiding a contract for mistake is restitution.

92. Restitution is a legal principle requiring that the wronged party be put in the place in which he would have been had the contract or transaction not been concluded. Thus, in this case, it would require the Claimant to be put in the place in which he would have been had he not invested USD $ 80,000 with the Defendant in order to purchase the Product. As Article 47(2) of the DIFC Contract Law makes clear, such restitution should take into account any sums received by the Claimant.

93. Thus, the Claimant is entitled to receive his full USD $ 80,000 investment back from the Defendant in restitution of the Defendant's mistake, but such restitution must be adjusted for the coupon amounts and redemption amount already received by the Claimant.

94.The Claimant submits that he has received USD $ 22,391.80 as return on his investment through coupons and redemption. This amount has not been contested by the Defendant. The Claimant further claims that he should receive an additional sum of USD $ 10,000 which he would have received in profits had the Product been purchased correctly in the first place. Traditionally, this lost profit would not be included as part of a restitution calculation as the Claimant would not have received this amount had the contract never been concluded. Therefore, the Claimant's claim for an additional USD $ 10,000 as lost profits is dismissed.

95. Instead, the Claimant is entitled to receive his USD $ 80,000 investment, less the USD $ 22,391.80 return already received, amounting to a total of USD $ 57,608.20 due from the Defendant to the Claimant. This comes out to a total of AED 211,710.14 payable to the Claimant.

96. The Defendant shall also pay the Claimant USD $ 3,597.35 (AED 13,220.26) as reimbursement of the Claimant's court fee.

Issued by:

Natasha Bakirci

SCT Judge

Date of issue: 29 August 2016

At: 4 pm