IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE?COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

NANCY

Claimant

and

NARCISSA

Defendant

ORDER WITH REASONS OF JUSTICE MICHAEL BLACK KC

UPON the Defendant's Application CFI-089-2023/1 dated 12 March 2024 (the "Application")

AND UPON the Order with Reasons of Justice Michael Black KC dated 8 July 2024

AND UPON the parties filing written costs submissions on 16 July 2024

IT IS HEREBY ORDERED THAT the costs of the Application shall be the Defendant's costs in the case assessed in the sum of USD 41,069.86.

Issued by:
Hayley Norton
Assistant Registrar
Date: 19 July 2024
At: 11am

SCHEDULE OF REASONS

1. On 8 July 2024 I gave judgment on the Defendant's application and in particular I directed that the parties shall file and serve written submissions on costs within 7 days of the date of the Order.

2. The Defendant's application was in the following terms:

> "1. The Claimant's claim is dismissed in its entirety. 2. The Claimant must pay the Defendant's costs of the action. [ALTERNATIVELY] 4. The Defendant's strike out application is granted in respect of the following issues: [IN EITHER CASE] 5. The Claimant must pay the Defendant' costs of the application because the statement of case and further particulars of claim of the Claimant discloses no reasonable grounds for bringing or defending the claim."

3. The elements of the Claimant's claim were as follows:

(1) That his employment continued after the "purported" termination on 11 August 2020;

(2) Alternatively, there was a new express contract of employment after 11 August 2020;

(3) In the further alternative, there was an implied contract of employment after 11 August 2020;

(4) The Defendant acted in breach of a duty of care to the Claimant by failing to cancel the Claimant's DIFC employment visa until 21 September 2023;

(5) The Defendant acted in breach of a duty of care to the Claimant by terminating the Claimant's employment while the legal cases were pending;

(6) The Claimant was entitled to an indemnity against legal proceedings in relation to his role at Neil pursuant to an express indemnity;

(7) The Claimant was entitled to an indemnity against legal proceedings in relation to his role at Neil pursuant to an implied indemnity;

(8) The Claimant was entitled to the payments under a Carry Agreement; and

(9) The Claimant was entitled to judgment in default of defence.

4. I gave immediate judgment declaring that the Claimant's employment under the contract dated 5 February 2014 was validly terminated on 11 August 2022 under Clause 16 of that contract (Claim 3(1) above). I struck out the allegation that there was an express contract of employment following the 11 August 2022 termination of the Claimant's employment (Claim 3(2) above).

5. I struck out both limbs of the Visa Claim (Claims 3(4) and (5) above).

6. I struck out the claim that the Claimant had the benefit of an express indemnity relating to the period after 11 August 2022 (Claim 3(6) above).

7. The Claimant's application for judgment in default of defence was dismissed (Claim 3(9) above).

8. I allowed the following claims to proceed to trial, namely whether or not:

(a) There was an implied contract of employment after 11 August 2020 (Claim 3(3) above);

(b) The Claimant was entitled to an indemnity against legal proceedings in relation to his role at Neil pursuant to an implied indemnity (Claim 3(7) above); and

(c) The Claimant was entitled to the payments under a Carry Agreement (Claim 3(8) above).

9. Both parties agree the criteria I should apply when making a decision on costs. RDC 38.6 provides that the Court has a discretion as to: (1) whether costs are payable by one party to another; (2) the amount of those costs; and (3) when they are to be paid. RDC 38.7 stipulates that if the Court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the Court may make a different order. RDC 38.8 further provides that the Court must have regard to all the circumstances including:

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into Court or admissible offer to settle made by a party which is drawn to the Court's attention and which is not a Part 32 offer.

10. The Claimant notes that in *Al Khorafi v. Bank Sarasin-Alpen (ME) Ltd.* [2009] DIFC CFI 026 (16 January 2017) the Court was referred to certain principles derived from decisions of the courts of England and Wales, for awarding costs:

(a) The starting point is that, if there is a clear winner of the litigation, the winner is awarded;

(b) The aim of the Court is always when making a costs order to make an order that reflects the overall justice of the case;

(c) In applying the general rule, the Court must determine the question of who is the successful party by reference to the litigation as a whole;

(d) There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation, any winning party is likely to fail on one or more issues in the case;

(e) The simple fact that a successful party has failed on certain issues does not justify making a separate costs order on those issues.

11. The Claimant suggests that where each party is successful on part of their case, the DIFC Courts have ordered costs in favour of a party notwithstanding the fact that it is not successful on all heads of claim, but because it was "dominantly successful" in the proceedings: *Adil v. Frontline Development Partners Ltd*., [2014] DIFC CFI 015 (3 April 2016) at paragraph [343] per Justice Roger Giles. In the same case the learned judge, when giving the reasons for his cost order, stated that the monetary outcome is not a sound guide to disposal of costs: [2014] DIFC CFI 015 (24 July 2016) at paragraph [13].

12. I would comment on above that in both *Khorafi* and *Adil* the Court was addressing costs after protracted proceedings. In contrast, the present case was an interlocutory hearing that was heard in less than a day. It is not possible at a stage before service of a defence to determine the question of who is the dominantly successful party by reference to the litigation as a whole or to know the monetary outcome. Nor is the observation applicable that in any litigation, especially complex litigation, any winning party is likely to fail on one or more issues in the case. The present application is not analogous to a trial where some claims, albeit arguable, have not succeeded. Here the Court has decided whether certain claims should have been brought at all.

13. The Defendant suggests that in exercising its discretion about costs, the Court may make orders which are "issues-based" in appropriate cases: see RDC 38.10 and *IGPL General Trading LLC v (1) Hortin Holdings Limited (2) Lodge Hill Limited (3) Westdene Investment Limited* [2021] DIFC CFI 023 (6 October 2021). Any order should reflect a realistic assessment of success or failure, and the overall justice of the proceedings (see IGPL at [5]).

14. The citation from IGPL is apposite as it was a case of a costs order after a successful application for immediate judgment where judgment was given on one ground but not another. The unsuccessful claimant sought an issue-based order but Justice Giles followed himself in *Adil* and awarded the defendant all of its costs on the basis it was dominantly successful. He noted that the costs in question were the costs of the proceedings in their entirety, not just the costs of the application for immediate judgment.

15. That is a crucial difference from the present case. Here there are still issues to go to trial. It is not possible to apportion costs to specific heads of claim allowed or disallowed. It is not possible to attribute any likely financial outcome to the heads of claim allowed. In my judgment it is neither appropriate to adopt the dominantly successful approach nor possible to adopt an issue-based approach. The Court should adopt the approach in RDC 38.10 of ordering payment of a proportion of the costs of the party who has, in the judgment of the Court, prevailed. This is predominantly an exercise of discretion.

16. The Defendant refers to the English judgement of Mr Justice Nugee in *Sharp & Ors v Blank & Ors* [2016] EWHC 776 (Ch) in support of the proposition that the costs of dealing with the remaining issues should be either: (i) "costs in the case": or (ii) "costs in the issue". I do not regard that as a practical solution as it merely postpones the decision, ties the hands of the trial judge and complicates the ultimate assessment costs. I am

not persuaded to depart from a simple proportional approach to the costs solely attributable to this application.

17. Both parties claim to have been predominantly successful. The Claimant asserts that all of his principal claims, i.e., the Wage Claim, the Indemnity Claim, and the Carry Claim, have survived the Strike-Out Application. Consequently, the quantum of the Claimant's claims also remains unaffected. I do not see that follows - quantum under the implied contracts (if they succeed) may be very different from what the Claimant tried to assert was his entitlement under the alleged express agreements.

18. The Claimant suggests that the only claim that has been struck out by the 8 July Order is the Visa Claim. This is misleading and untrue as is clear from the face of the order. I will not censure the Claimant in costs for this as it is not his personal responsibility. This is not the first inaccurate submission to be made on behalf of the Claimant (see paragraph 77 of the reasons of the order of 8 July 2024) - I therefore do require a written explanation from the Senior Partner of the Claimant's legal representatives explaining how this misleading submission came to be made. I will then consider whether and if so what further action is to be taken.

19. The Claimant goes on to suggest that he is the overall winner of the Strike-Out Application. This is, to say the least, a surprising submission.

20. The Claimant suggests that the Defendant acted unreasonably in refusing to participate in the SCT proceedings following the consent order on 19 September 2023. While I noted that the Defendant's refusal to agree to an increase in the monetary limit of claims in SCT meant that the SCT hearing scheduled November 2023 was vacated thereby delaying matters and adding considerably to the costs, there was no obligation on the Defendant to agree to an increase of the monetary limit. When the consent order was made it was against the background of the Particulars of Claim dated 21 August 2023 which did not value the claim. It was only on 30 October 2023 (after the consent order) that the Claimant valued his claim in excess of the jurisdiction of the SCT.

21. The Claimant criticises the Defendant for not filing a defence and for filing a strike out application. I find the criticism hard to understand especially since the application has enjoyed some success.

22. On the other hand, the Defendant submits:

(a) That I did remark the Claimant's pleadings were "ambiguous", not "easy to follow", not properly particularized and it was necessary to try to make sense of them;

(b) That I found some of the Claimant's arguments "unhelpful", "self-defeating", "simply wrong", "overblown", "incomprehensible" and "impossible to understand";

(c) The application successfully excised a number of substantial issues from the proceedings, not least consideration of whether there was an express contract entered into between the parties, and the even broader questions that would have arisen in a claim for negligence, concerning the Defendant's duty of care, the scope of that duty, whether it breached that duty, whether such breach was causative of loss, and whether the losses claimed were reasonably foreseeable.

23. The Defendant submits that a proportionate award of 75-85% of its costs would be appropriate.

24. I am of the firm view that the Defendant has prevailed. Of the 9 heads of claim identified at paragraph 3 above, I have permitted only 3 to proceed to trial. On the other hand, it is theoretically possible that the Claimant could recover all, or substantially all, of his pleaded claim under those 3 heads. In the exercise of my discretion I therefore consider that 75-85% of the Defendant's costs of the application would be an excessive proportion. The Defendant has not however had a Pyrrhic victory, it has, as it submitted, been successful in considerably narrowing the ambit of the Claimant's claims. The Defendant therefore should recover more than 50% of its costs. In my judgment the overall justice of the case will be reflected in an award to the Defendant of 65% of its costs.

25. The Defendant filed a statement of costs on 28 May 2024 in the sum of USD 68,855.27. The Claimant has made no comments on the statement notwithstanding the opportunity to do so.

26. By RDC 38.30 the general rule is that the Court should make an immediate assessment of the costs at the conclusion of any hearing which has lasted no more than one day unless there is good reason not to do so. No such reason has been advanced in the present case and therefore I shall proceed to assess the Defendant's costs of the application.

27. The hours claimed seem reasonable to me, but I shall reduce (where necessary) the rates claimed to the indicative rates set out in Registrar's Direction No.1 of 2023.

Name	Time (hours)	Claimed Rate (USD)	Adjusted Rate (USD)	Adjusted Total (USD)
Nehemiah	1.1	1125	1020	1,122
Nephi	0.2	877.5	809	161.80
Nephi	2	877.5	809	1,618
Nadine	0.4	1462	1020	408
Neo	0.5	1255	1020	510
Nehemiah	2.8	1125	1020	2,856
Nephi	1.8	877.5	809	1,456.20
Nehemiah	1.5	1125	1020	1,530
Nephi	5.8	877.5	809	4,692.20
Nigel	7.6	715.5	715.5	5,437.80

Name	Time (hours)	Claimed Rate (USD)	Adjusted Rate (USD)	Adjusted Total (USD)
Nehemiah	2.7	1125	1020	2,754
Nephi	19	877.5	809	15,371
Nikhil	1.1	378	378	415.80
Ninian	1.6	342	342	615.60
Nephi	4	877.5	809	3,236
[illegible]	[illegible]	[illegible]	[illegible]	42,184.4

28. In addition, I shall allow the expenses claimed in the sum of USD 21,000 but not the VAT as the Defendant is a business and can reclaim the input tax, making a total of USD 63,184.40. 65% of that sum is USD 41,069.86.

29. In the circumstances, I order that the Claimant shall pay the Defendant's costs of the application in the case assessed in the sum of USD 41,069.86. I have decided to order the costs in the case because, while if the Claimant succeeds at trial on the remaining allegations, he would be in the position of a claimant who has not succeeded on all his claims at trial, I have held that certain of those claims should never have been brought and it follows that the Defendant should not be called upon to pay any costs in respect of them. Against that, if he succeeds on the remaining claims the Defendant may be obliged to remunerate him for his services after the termination of his employment contract, to indemnify him against liabilities incurred in the execution of those services and to pay him under the Carry Agreement. That was also the relief sought under the struck-out claims. While the Claimant may receive what he was always claiming I do not consider that he should recover any of his costs in relation to unarguable bases for that recovery.

30. Thus, if the Defendant successfully defends the claim, the costs assessed as attributable to this application shall be payable in addition to any others that may be awarded. If the Claimant succeeds each party shall bear its own costs of the application.