Claim No. SCT 087/2018

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum,

Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS

BEFORE SCT JUDGE NASSIR AL NASSER

BETWEEN

INGEMAR INTERIORS LLC

Claimant/Counter-Defendant

and

IOLANA RESTAURANTS LLC

Defendant/Counter-Claimant

Hearing: **24 April 2018**

Judgment: **7 May 2018**

JUDGMENT OF SCT JUDGE NASSIR AL NASSER

UPON hearing the Claimant and the Defendant

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 the sum of AED 73,869.47 as the remaining actual amount.

2. The Claimant shall pay the Defendant the sum of AED 39,500 as the 50 days delay penalty, as per the Agreement.

3. The Claimant shall pay the Defendant the sum of AED 25,000 for the air conditioning.

4. The Claimant shall pay the Defendant the sum of AED 2,000 the fees of the air conditioning specialist (third party).

5. Therefore, after calculating the above, the Defendant shall pay the Claimant the sum of AED 7,369.47.

6. All other claims and counterclaims shall be dismissed.

7. Each party shall bear their own costs.

Issued by:

Nassir Al Nasser

SCT Judge

Date of issue: 7 May 2018

At: 1pm

THE REASONS

The Parties

1.The Claimant is Ingemar Interiors LLC (herein "the Claimant"), a Company Registered in Dubai Economics Department

2. The Defendant is Iolana Restaurants (herein "the Defendant"), a company registered in the DIFC, Dubai.

Background and the Preceding History

3. The underlying dispute arises over a Fit-Out Agreement signed by both parties dated 30 April 2017 (the "Agreement"). However, the commencement date of work was 17 July 2017.

4. Pursuant to the Agreement, the Claimant was to undertake the fit-out of the Defendant's restaurant located at DIFC (the "premises") in return, the Defendant agreed to pay the remuneration being AED 471,500 as per the Agreement in return of completing the scope of work by the Claimant.

5. The Claimant completed the scope of work as per the Agreement conditions, terms and specifications, however, the Defendant failed to settle the final invoice in the sum of AED 73,869.47.

6. On 28 February 2018, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") for payment of the final invoice in the sum of AED 73,869.47 and damages for breach of contract in the sum of AED 56,130.

7. The Defendant responded to the claim on 28 February 2018 defending the claim and filing a Counterclaim on 7 March 2018 claiming the maximum delay penalty of 10% as per the Agreement in the sum of AED 47,150, the sum of AED 25,000 for hiring another duct contractor to fix the issues caused by the Claimant, the cost of hiring a third party specialist for testing the air conditioning installed by the Claimant in the sum of AED 4,000, and damages for loss in the sum of AED 400,000.

8. The parties met for a Consultation with SCT Judge Ayesha Bin Kalban on 29 March 2018 but were unable to reach a settlement.

9. Both parties attended the hearing before me listed on 24 April 2018.

The Claim

10. The Claimant's case is that it entered into an Agreement for the provision of a Fit-Out, whereby the Claimant was to carry out all the contracted works in the project owned by the Defendant and located in the DIFC.

11. The Defendant agreed to pay the remuneration of AED 471,500 as per the Agreement, in return for the Claimant completing the agreed scope of work.

12. The Claimant alleges that it had completed the scope of work as per the Agreement conditions, terms and specifications, however the Defendant failed to pay the due amount of the final invoice being the amount of AED 73,869.47.

13. The Claimant alleges that it had demanded the payment due from the Defendant, but the latter refused to pay.

14. In addition, the Claimant alleges that it sustained damages as a result of the Defendant's breach of Contract in the sum of AED 56,130.53. Therefore, the total amount due to the Claimant is AED 130,000.

15. The Claimant now seeks the payment of AED 130,000 which consists of the actual amount of AED 73,869.47, damages in the sum of AED 56,130.53, interest at the rate of 12% from 15 February 2018, the return of the original cheque No. 000010 dated 12 August 2018 and an order that the costs occasioned to this claim or any later works performed or associated with this initial claim be assessed and paid for by the Defendant.

The Defence and Counterclaim

16. The Defendant filed a counterclaim alleging that as per the Agreement, there is a delay penalty clause in the Agreement of AED 790 per day to be deducted/paid by the Claimant for every day delayed after the agreed completion date.

17. The Defendant alleges that the Claimant started work in the premises on 17 July 2017, as per the Agreement the project must be completed 71 days including mobilization, which means the project must have been completed and handed over by 28 September 2017. The Defendant alleges that the project completion was delayed for more than 130 days which entitles the Defendant to the maximum delay penalty of 10% of the Agreement value, equal to AED 47,150.

18. The Defendant also alleges that as per the Agreement, the parties agreed on "carrier" as the brand for air conditioning units and the Claimant had installed another brand "Fin Power" without consulting or getting confirmation from the Defendant, as the client, before installing, which is considered a breach of the Agreement and the specifications proposed.

19. Furthermore, the Defendant alleges that the Claimant negotiated to provide the other brand without notifying the Defendant of the change even after installation, claiming that it was not able to provide "Carrier" units without notifying the Defendant as a client. In which the Defendant has approved knowing there would be delay of the project as the Claimant has failed to commit to the Agreement, and the Defendant alleges that they were put under pressure of approving to avoid delays as explained by the Claimant and the Claimant has referred to the brand as a good brand and promised to deliver good quality working air conditioning units.

20. The Defendant then alleges that the air conditioning units which were installed by the Claimant were designed and installed incorrectly which resulted in the Air Conditioning ("AC") unit not working properly (the Defendant provided reports issued by "Fin Power", the supplier which the Claimant purchased the FCU units from), which state that the design and ducts must be fixed in order for the air-conditioning unit to work

properly, which the Claimant has refused to fix and did not commit to its promise with respect to delivering quality.

21. The Defendant alleges that it hired other ducts contractors to fix the issue with the quoted price of AED 25,000. The Defendant alleges that the Claimant is liable for this, since it refused to fix or replace, or deliver the promised work. The Defendant further alleges that it also hired an air conditioning (Third Party) specialist for testing the AC after it was installed by the Claimant and was not working properly in terms of cooling and noise, which cost the Defendant the sum of AED 4,000. The Defendant alleges that the Claimant is liable for this since it refused to carry on the commissioning and fixing and the Defendant had to hire a specialist (the Defendant provided the reports of the Third Party).

22. The Defendant further alleges that the delay penalty plus the ducts fixing cost that the Claimant owes the Defendant is AED 76,150 which consists of the delay penalty in the sum of AED 47,150, cost of the other duct contractor in the sum of AED 25,000, and the cost of the Third Party as a specialist in the sum of AED 4,000.

23. The Defendant also claims business loss damages on the basis that it has another outlet registered under the owner's brother's name located in Dubai with the same menu, concept and business model, which generates the sum of AED 400,000 over the period of 130 days (November 2017 to 28 February 2018) which is projected for the Defendant.

24. The Defendant alleges that the loss of this profit has been accumulated for 130 days, as the Claimant failed to comply with the handover date (28 September 2017) and did not handover the certificates, nor a good condition air conditioning unit as per the Agreement which resulted in the Defendant's loss of AED 400,000 project net profit based on the other outlet sales of 5 months.

25. Therefore, the Defendant seeks the sum of 76,875 + AED 400,000= AED 476,875.

Discussion

26. This dispute is governed by the relevant Agreement between the parties dated 30 April 2017.

The Claim

27. The Claimant now seeks the payment of AED 130,000 which consists of the actual amount of AED 73,869.47, damages in the sum of AED 56,130.53, interest at the rate of 12% from 15 February 2018, the return of the original cheque No. 000010 dated 12 August 2018 and order that the costs occasioned to this claim or any later works performed or associated with this initial claim be assessed and paid for by the Defendant.

28. The Claimant and the Defendant entered into an Agreement, in which the Defendant agreed to pay the remuneration of AED 471,500 as per the Agreement in return of completing the scope of work by the Claimant.

29. The parties first agreed on a completion date as per the Agreement on 28 September 2017. However, the Claimant argues that this was later postponed because deliveries of some items ordered by the Defendant required 4 weeks to arrive, and that the Claimant would not be able to complete the work until such items were received and installed.

30. The parties both consented that the completion date would be postponed to an alternative date which was the end of November 2017.

31. On 10 December 2017, the parties had a meeting along with irja Consultants (herein "KC or "The Consultant"). The minutes of the meeting contained in an email dated 12 December 2017 were provided by both parties in their submissions, the contents of which reflect discussions on both the technical and the commercial side.

32. From the technical side, it was discussed that:

(a) The Defendant's direct appointed specialist informed that a fire suppression system (FSS) is connected to a fire panel and the balance work of connecting with extract fan would be completed by 12 December 2017;

(b) The specialist to verify if the above-mentioned extract fan should run or not in the event of fire scenario in the kitchen hood as per DCD regulation;

(c) The specialist further obtained confirmation from the Defendant to install a sink for the coffee machine area which would also be completed on 12 December 2017;

(d) The consultant checked with the Defendant regarding water filter installation and their specialist to install the same by 12 December 2017;

(e) The Claimant agreed to facilitate completion of the above works;

(f) The specialist confirmed that FSS certificate is ready and would be forwarded to the Claimant to enable them to get the Department of Civil Defence (DCD) appointment for site inspection. The Claimant double check regarding fast track of DCD inspection date; and

(g) The Claimant informed that, except the remaining above minor works, all the physical works are completed from its end. Their next course of action would be to apply for DCD inspection immediately and subsequently target DCCA inspection.

33. With regard to the commercial discussions in the email dated 12 December 2017:

(a) The Defendant and the Claimant mutually agreed that the balance payment as per contract agreement and inclusive of varied works is AED 147,738. This amount is exclusive of retention amount as per the Agreement.

(b) The Defendant would be issuing a cheque of AED 73,869 (50%) on 11 December 2017 to the Claimant and the balance amount as soon as the Claimant submits the authorities (such as DEWA, DCD and DCCA) inspection approval certificates to the Defendant.

(c) The above actions have been mutually agreed between the Claimant and the Defendant in the presence of Imoenand the Consultant.

34. The Claimant filed the Claim requesting 50% of the remaining actual amount which was not yet paid by the Defendant in the sum of AED 73,869.47. On the other hand, the Defendant argues that the Claimant failed to provide the certificates as per the mutual agreement between the parties in the meeting held on 10 December 2017 and as confirmed in the minutes of meeting (an email dated 12 December 2017).

35. The Defendant also argues that the mutual agreement held that the Defendant would be issuing the cheque as soon as the Claimant submits the authorities (such as DEWA, DCD, DCCA) inspection approval certificates to the Defendant. Furthermore, the Defendant argues that to date the Claimant did not provide the certificates, which caused a delay and argued that as per Clause D of the Agreement it states that:

"a. AED 790/per day from the date of the Handover date on the approved program schedule.

b. the total amount of delay penalties and shall not exceed 10% of the Contract value."

36. The Claimant argues that once the Defendant makes the payment it shall provide the certificates. However, pursuant to the mutual agreement as confirmed in the email dated 12 December 2017, which supersedes the original Agreement in this point specifically, the Claimant will provide the certificates to the Defendant, and the Defendant will issue the remaining payment.

37. Article 10 of the DIFC Contract Law No. 6 of 2004 states that:

"A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in this Law".

38. The Claimant breached the mutual agreement and argued that the Defendant should have made the payment first in order for it to provide the certificates.

39. Therefore, the Claimant is entitled to the remaining balance of AED 73,869.47 as confirmed by both parties, but it is not entitled to the 12% from the date of 15 February 2018. I am also satisfied that the Claimant breached the mutual agreement and failed to provide the certificates on time, following which the Defendant did not pay the remaining AED 73,869.47.

40. The Claimant also claimed damages as a result of an alleged breach of contract made by the Defendant. Pursuant to the above, the breach occurred by the Claimant and not the Defendant as the Claimant was the one who breached the mutual agreement dated 10 December 2017.

41. Therefore, I find that the Claimant is not entitled to damages.

The Counterclaim

42. The Defendant in its counterclaim sought the maximum delay penalty of 10% as per the Agreement in the sum of AED 47,150, the sum of AED 25,000 for hiring another duct contractor to fix the issues caused by the Claimant, the cost of hiring a third party specialist for testing the air conditioning installed by the Claimant in the sum of AED 4,000, and damages for loss in the sum of AED 400,000.

The delay penalty as per the Agreement

43. The Defendant sought the maximum delay penalty of 10% as per the Agreement in the sum of AED 47,150.

44. Clause D of the Agreement states that:

"a. AED 790/per day from the date of the Handover date on the approved program schedule.

b. the total amount of delay penalties and shall not exceed 10% of the Contract value."

45. The Defendant argues that the Claimant failed to provide the certificates as per the mutual agreement between the parties in the meeting held on 10 December 2017 and as confirmed in the minutes of meeting (an email dated 12 December 2017).

46. The Defendant also argues that the mutual agreement held that the Defendant would be issuing the cheque as soon as the Claimant submits the authorities (such as DEWA, DCD, DCCA) inspection approval certificates to the Defendant. Furthermore, the Defendant argues that the Claimant has still not provided the certificates, which caused a delay.

47. The Claimant also adds that from the period of 23 December 2017 up to 3 January 2018, the Defendant took possession of the premises and verbally terminated the Agreement with the Claimant.

48. On 4 January 2018, as per an email from the Defendant, it allowed access to the Claimant to finish the project. The Claimant, in its email, requested the Claimant to complete all approvals by no later than 20 January 2018.

49. The email establishes a new completion date as agreed in writing between the parties, namely, 20 January 2018, when the certificates are to be finalized and as per the completion clause in the contract.

50. It was then argued by the Claimant that once the Defendant makes the payment, the Claimant intended to provide the certificates. However, pursuant to the mutual agreement as confirmed in the email dated 12 December 2017, which supersedes the original Agreement in this point specifically, the Claimant will provide the certificates to the Defendant, and the Defendant will issue the remaining payment.

51. The Claimant breached the mutual agreement and argued that the Defendant should have made the payment first in order for him to provide the certificates.

52. Therefore, I find that the Claimant by its breach delayed the handover process from 20 January 2018 to 12 March 2018 (the date the Defendant received the completion certificate from the concerned authorities) which is a 50-day delay, because the main purpose is to get the certificates to commence operating.

53. As such, I find the Claimant liable to pay the delay penalty to the Defendant for 50 days in the sum of AED 39,500.

Air conditioning issue

54. The Defendant also alleges that as per the Agreement, the parties agreed on "carrier" as the brand for air conditioning units and the Claimant installed another brand "Fin Power" without consulting or getting confirmation from the Defendant, as a client, before installing, which amounts to a breach of the Agreement and the specifications proposed.

55. At the hearing, the Defendant confirmed that it had then agreed to the Fin Power brand, and the Claimant refunded the sum of AED 19,500 as the Fin Power brand cost less than Carrier (the brand that was in the Agreement).

56. The Defendant argues that the air-conditioning units which were installed by the Claimant were designed incorrectly which resulted in the AC units not working properly. The Defendant provided a report issued by "Fin Power" (the brand of the air conditioning).

57. On the other hand, the Claimant argues that the report of "Fin Power" filed by the Defendant does not contain any stamp or signature from Fin Power. The Claimant also argued that the inspection report stated that the AC was working properly. The Claimant also provided a report signed and stamped by Fin Power which states that: i) based on all the information/report, the sound level is acceptable and it is well within the ASHRAE standard; ii) the temperature levels are lower than the guidelines and we recommend to run the unit in medium speed; iii) we see no HVAC design flaw on the part of the Claimant and given the site/structural conditions, action taken by the Claimant has given positive result as per standards; iv) Fin Power unit designs are as per the standard and for the performance of the same all the criteria has to be determined as per the design date.

58. On 14 January 2018, the Defendant emailed the Claimant about the joint inspection, the email stated the following:

> "following the joint inspection, we had today that was attended by the Consultant, Imoen of behalf of the Landlord we have came to the following results:
>
> (a) The AC has an extremely loud noise that make it not in a good condition to open with it like that, this is gonna cause a delay as discussed today with Louise and the AC supplier to finish the work that needs to be done;
>
> (b) Louise has informed me that you have placed an order for the new ducts that is gonna take a bit time to deliver which we have be waiting for that as the current ducts condition are very bad;
>
> (c) There are other points that has been informed to Imber by the Consultant that must be fixed
>
> (d) We are waiting for the AC and ducts to be done in order for us to open, please confirm the finishing date."

59. On 23 January 2018, the Claimant sent the Defendant an email stating that:

> "we installed additional filter and speed control regulator so as to reduce the emitting noise of the FCU unit.
>
> On site reading found yesterday 22nd January 2018, 40Db of General Ambient Noise without switching the AC on and 50Db once FCU switched on (the Claimant provided evidence of the reading). These readings were witnessed by the Claimant as well as the consultant and latter's mechanical engineer.
>
> As per ASHRAE standard (the Claimant provided a copy of the handbook) allowable design guidelines for hotels (services) 45-65 Db and that for Hospitals the range is 35-65 Db. The readings taken on the site are well within the international HVAC design guidelines.
>
> As mentioned by the Mechanical Engineer of the Consultant also the sound is acceptable.
>
> Room temperature: please find the attached photo of onsite thermostat reading 18 degrees for FCU 4 and 19 Degrees for FCU 3 as recorded today afternoon (5:13 PM). Allowable design standard where also under recommended guidelines by ASHRAE.
>
> We conclude that the air conditioning issues that of unbearable noise and not enough cooling raised by the client have been looked into and found to be within acceptable norms. As such there is no further work to be carried out for this subject."

60. On 24 January 2018, the Defendant sent an email to the Claimant stating the following:

> "Hi Induna
>
> The motor noise coming out of the AC indicates poor quality and as per the inspection that was held earlier attended by the Consultant engineers we have all agreed that this does not meet a restaurant standard. The AC has been on for 2 days and the cooling level is poor. The blades of the kitchen AC are not fixed properly which should be fixed have agreed for you to come on the following day Tuesday 23 January 2018 for it to get fixed. No one has showed up at the site to fix that matter, if you refuse to fix the AC as per the inspection notes please reply."

61. On 25 January 2018, the Defendant again sent an email to the Claimant stating that in order for the Claimant to get its payment it must complete the following: i) fixing the grills of the kitchen AC; ii) fixing the AC motor noise at the dining area; iii) fixing the tables and chairs at the dining area; iv) deep cleaning touches and handing over all the approvals, certificates, and manuals at the same time of receiving the cheque.

62. The Defendant also provides a report from a Third Party dated 17 February 2018, the report stated that;

"we tested the FCU in 2 different conditions i.e. with voltage regulator and without voltage regulator.

With voltage regulators: it was observed that the measured airflow was less (44%) than the design airflow at all three speeds (Low, Medium & High). The noise level in the room was observed was appreciable.

Without voltage regulators: it was observed that the measured airflow was above 90% and is acceptable as per commissioning standards. The noise level is not acceptable since it was high."

"Chiller water system observation as per the report were:

1.It was observed that the supplied chilled water temperature is higher than the design (as suggested in the drawing) chilled water temperature (drawing no. IN-1703-2896-12).

2. Chilled water return temperature higher than the design chilled water temperature (as suggested in the drawing) chilled water temperature (drawing no. IN-1703-2896-12).

3. Chilled water is clear from debris and soluble contents.

4. For FCU-04 access to the unit was not available to check the chilled water system.

5. Equipment tag number for the FCUs is not matching the drawing. The reports are submitted as per the actual site condition."

The report's conclusion and recommendation were:

(a) FCUs are performing as per design airflow and observed noise from FCU blower, without voltage regulators & hence it is advised to reconfirm the FCU selection for the sound level.

(b) At current ambient conditions (approx. 25 degrees C) the room temperature is achieved and is well maintained by the FCU unit but not guaranteed during peak summer (approx. 45-50 degrees C) and hence it is advisable to check the coil performance at peak summer.

(c) Equipment tags numbers should be as per the drawings.

63. The Defendant also provided a report from Fin Power, however, the report was not stamped by the company.

"The report result was that:

1.Due to non-providing of clearance for air suction (shortage of space), from the unit suction noise is coming. Minimum 1-meter clearance is required for easy air flow.

2. Return air ducting is required (elbow 90 degrees duct)

3. Static pressure has to be maintained as per the design.

4. The noise issue raised by the customer is because of the incorrect installation. Kindly provide the proper installation as per the standards for normal performance of the unit."

64. The Defendant argues that on numerous occasions it asked the Claimant to fix the issues with the AC, but the Claimant refused to fix and did not commit to its promises on delivering quality.

65. The Claimant argues that it has fixed the issues with the AC pursuant to its email dated 23 January 2018. However, the Defendant kept on chasing the matter even after 23 January 2018 and kept on complaining about the issues.

66. The actions of the Claimant led the Defendant to hire another ducts contractor to fix the issues and provided a quote to the Defendant in the amount of AED 25,000, which the Defendant argues that the Claimant should be liable for since it refused to fix or replace or deliver the promised work.

67. The Defendant also submitted the invoice of AED 25,000, the scope of work as per the invoice states that: "*i) standard thermostats to control indoor temperature 2nos. indoor; ii) removing 2 FCU units and replacing them with new units better quality (carrier - train-yourk) with low noise and redoing duct works as the noise of the existing units and not convenient; iii) electrical hook up; and iv) testing & commissioning*."

68. Therefore, I find the Defendant's evidence sufficient to establish that the Claimant is liable for the replacement of the AC in the sum of AED 25,000.

69. The Defendant also argues that it hired an air conditioning specialist (Third Party) for testing the AC that was installed by the Claimant, which cost AED 4,000, which the Defendant argues that the Claimant is liable to pay.

70. At the hearing, the Claimant argued that the Third Party was hired without its consent and without the Claimant attending the tests that were carried out by the Third Party, therefore, the Claimant rejected the Defendant's claim.

71. In my view, both parties should be liable for the cost of the Third Party, as they both had different opinions and the third party was neutral.

72. Therefore, I find that both parties should bear the cost of the Third Party, each in the sum of AED 2,000.

Business Loss Damages

73. The Defendant claimed business loss damages on the basis that another outlet registered under the owner's brother's name located in Dubai with the same menu, concept and business model, which generated AED 407,425 over the period of 130 days (20 November 2017 - 28 February 2018) which is projected for the branch located in the DIFC.

74. The loss of this project accumulated for 130 days, as the Claimant has not complied with the handover dates (28 September 2017) and did not handover the certificates, a good AC unit as per the contract which resulted the Defendant to lose AED 407,425 project net profit based on other branch sales of 5 months (October 2017 - March 2018).

75. The Claimant argued that as per the completion date clause of the Agreement, it is stated that: *"Completion date has no bearing whatsoever with regards to final opening of the premises by the First Party (the Defendant). However, minor works, snagging and de-snagging would be carried out between the completion date and the business opening date."*

76. The Claimant argues that contractually the parties of the Agreement agreed to isolate the project and the completion of work from any relevance to the operation of the business. Therefore, it is contractually unacceptable for the Defendant to demand any purported business loss.

77. Article 11(1) of the DIFC Law of Damages, stipulates:

> "Compensation is due for loss, including future loss, that is established with a reasonable degree of certainty"

78. The Claimant argues that the Defendant has not provided any certainty as to the profits purported to be achieved from the project for 5 months. In addition, many factors contribute to achieving success in any commercial project, these factors vary from site to site, for instance a branch in Dubai has a different environment than a branch in the DIFC.

79. Therefore, I am satisfied with the Claimant's arguments, the Defendant also failed to provide reasonable certainty as to its claim for damages.

80. I am of the view that the Defendant's claim for damages should be dismissed.

Conclusion

81. In light of the aforementioned, I find that the Defendant is liable to pay the Claimant the actual remaining amount in the sum of AED 73,869.47. I also find the Claimant liable to pay the Defendant the sum of AED 39,500 as 50 days delay penalty as per the Agreement, to pay the Defendant the sum of AED 25,000 for the air conditioning and to pay the Defendant the sum of AED 2,000 for the fees of the AC specialist (third party).

82. Therefore, after calculating the above, the Defendant shall pay the Claimant the sum of AED 7,369.47.

83. All other claims and counterclaims shall be dismissed.

84. Each party shall bear their own costs.

Issued by:

Nassir Al Nasser

SCT Judge

Date of Issue: 7 May 2018

At: 1pm