Claim No. CFI-045-2017

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BEFORE H.E. JUSTICE SHAMLAN AL SAWALEHI

BETWEEN

ACTINA FZCO

Claimant/Respondent

and

STANDARD CHARTERED BANK

Defendant/Applicant

ORDER WITH REASONS OF H.E. JUSTICE SHAMLAN AL SAWALEHI

UPON the Defendant's/Applicant's (hereafter the "Defendant") Application No. CFI-045-2017/3 dated 30 January 2018 (the "Application"), seeking Immediate Judgment pursuant to the Rules of the DIFC Courts ("RDC") Part 24 and/or seeking to strike out the Particulars of Claim pursuant to RDC 4.16

AND UPON reading the documents submitted in the Court file

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant and at the Hearing on 28 March 2018

IT IS HEREBY ORDERED THAT:

1. The Application is dismissed.
2. Costs in the case.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of Issue: 12 April 2018

At: 3pm

SCHEDULE OF REASONS

Introduction

1.The Applicant, as Defendant in the proceedings, has applied for Immediate Judgment against the Respondent/Claimant pursuant to RDC 24.1 and/or has requested that the Particulars of Claim be struck out pursuant to RDC 4.16. The Defendant has also applied for costs of the claim to be assessed by detailed assessment. In seeking the Application, the Defendant states that:

a. The Claimant has no real prospect of succeeding on the claim;

b. The Particulars of Claim disclose no reasonable grounds for bringing the claim;

c. DIFC Law does not apply to the claim;

d. Alternatively, the claim is time barred under DIFC Law;

e. There is no other compelling reason why this case should be disposed of at trial.

2. The Claimant has opposed the Defendant's Application and has sought the Court's directions on the Defendant's failure to file an amended Statement of Defence. The Claimant also seeks its costs of the Application.

Procedural Background

3. The Claimant filed its claim on 25 September 2017 alleging violations by the Defendant of the DIFC Regulatory Law and applicable DFSA Regulations. The facts of the case stem from the Claimant's investment in a certain index-linked, structure product sold to it by the Defendant's Bur Dubai Branch in May 2008. This product included certain capital protections important to the Claimant, however the Claimant also borrowed USD 2 million from the Defendant against its initial investment of USD 1 million. The Claimant also entered into an interest rate swap agreement in June 2008 as regards its USD 2 million loan, which was to mature in May 2013.

4. As a result of the global financial crisis, the stop trading limit for the product was triggered and the product was no longer able to realise gains on the principal investment. The Claimant remained liable for interest payments on the USD 2 million loan. The Claimant decided to unwind the product in Februrary 2009 and place the proceeds in a fixed deposit without repaying the loan. In July 2013, the Defendant set off the fixed deposit account against the outstanding balance of the loan, resulting in the Claimant receiving USD 200,391.59 of its initial USD 1 million investment, resulting in a loss to the Claimant of USD 799,608.41.

5. The Claimant's main claims are that it was missold this product in violation of DIFC Law, including allegations of misrepresentation and fraud. This was detailed in the Claimant's Particulars of Claim, as filed in September 2017, which was later amended.

6. After a series of procedural events, the parties convened for a Case Management Conference ("CMC") on 30 January 2018. Shortly before the CMC, both parties lodged applications: the Claimant sought to amend its Particulars of Claim on 21 January 2018 and the Defendant filed this Application seeking Immediate Judgment against the Claimant on 29 January 2018 (this Application was issued on 30 January 2018). As a result of agreements made at the CMC, a Consent Order was issued on 1 February 2018, detailing that the Claimant was permitted to amend its Particulars of Claim, the Defendant was permitted to amend its Defence, the Application for Immediate Judgment would proceed as a heavy application, and that costs would be in the case.

7. The Claimant filed the Amended Statement of Case on 6 February 2018. The amendments included additional claims against the Defendant pursuant to DIFC Law. Contrary to the Claimant's objection, the Defendant has not yet filed an amended Statement of Defence.

8. After submissions from the parties, a Hearing on the Application for Immediate Judgment was held on 28 March 2018. At the hearing, I reserved the Application for decision.

The Parties' Arguments

9. Both parties have engaged in lengthy arguments as regards the Application for Immediate Judgment. I will summarise the arguments in brief herein.

10. The Defendant has argued primarily that DIFC Law does not apply to the claims and therefore, as the Claimant has framed the case solely under DIFC Law, the case cannot proceed. The Defendant does not contest the jursidcition of the DIFC Courts nor does it claim that the Claimant has sued the incorrect party. Instead, the Defendant argues that because the Claimant has framed its case solely under a non-applicable law, the claims in their entirety should be dismissed.

11. In the alternative, the Defendant argues that the Claimant's claims under DIFC Regulatory Law, DIFC Law of Damage and Remedies and DIFC Contract Law are all time barred, pursuant to those laws. Furthermore, the Claimant's remaining claims for misrepresentation under DIFC Contract Law and DIFC Law of Obligations should be struck out for failure to provide full and specific details of the allegations of fraud and misrepresentation.

12. The Claimant responds that DIFC Law must and should apply to the circumstances of the case as the Defendant is a DIFC establishment and must be subject to the regulatory laws of the DIFC. Furthermore, the Claimant points to factual disagreements regarding whether the claims are time barred and denies that any of the claims are not pleaded with appropriate detail. Furthermore, the Claimant argues that the Defendnat has waived the right to file an amended Statement of Defense by failing to do so at this time.

Discussion

13. It is imperative to keep in mind the standard of review required in assessing an Application for Immediate Judgment pursuant to Part 24 of the RDC. RDC 24.1 clearly states that:

"The Court may give immediate judgment against a claimant or defendant on the whole of a claim, part of a claim or on a particular issue if:

(1) it considers that:

(a) that claimant has no real prospect of succeeding on the claim or issue; or

(b) that defendant has no real prospect of successfully defending the claim or issue; and

(2) there is no other compelling reason why the case or issue should be disposed of at trial."

14. The Defendant also makes reference to RDC 4.16, which provides that the Court may strike out a statement of case "if it appears to the Court: (1) that the statement of case discloses no reasonable grounds for bringing or defending the claim." As stated by Justice Roger Giles in *(1) Nest Investment Holding Lebanon S.A.L. and others v (1) Deloitte & Touche (M.E.) & (2) Joseph El Fadl*, [2016] DIFC CFI 027, RDC 4.16 and RDC 24.1 include some overlap where RDC 4.16 requires that even if the grounds as pleaded are accepted, the claim must still fail. RDC 24.1 applications may included evidence showing that the claim must fail, or the absence of evidence to support the claim. These types of applications will require a common approach.

15. As Justice Giles rightfully stated in the *Nest* case, the Claimant will be required to "have a realistic, as distinct from a fanciful, prospect of success," meaning a "case which is better than merely arguable and carries some degree of conviction." See [2016] DIFC CFI 027, citing *Swain v Hillman* [2001] 2 All ER 91, and *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472.

16. The Defendant would argue that the Claimant's claims are fanciful as they are based on inapplicable law. The Defendant may be correct that if DIFC Law is found inapplicable to this case, the Claimant's claims will fall away due to its failure to plead its case under any other governing law. However, I am of the view that DIFC Law may apply by default provided there is jurisdiction and the parties have not validly opted out of DIFC Law. This possibility is supported by the fact that the Claimant alleges that due to the fraud committed by the Defendant, the agreements executed between the parties are void. Should the Claimant be successful on its fraud argument, there will be question of the appropriate applicable law governing the relationship between the parties in the absence of an agreement. This is not a clear issue at this time and there is factual analysis that must be addressed at trial as to the validity of the various agreements which may result in differing analysis of the resulting applicable law. I do not feel it appropriate at this time to decide on the matter of applicable law without giving the Claimant the full opportunity to support its claims during trial.

17. Thus, the Defendant has failed to show that the Claimant has no real prospect of succeeding on the issue that DIFC Law is the appropriate applicable law, seeing as a determination of the factual discrepencies between the parties may change the analysis of applicable law. This issue is therefore more appropriately dealt with in a full trial where the parties will have the opportunity to make their case.

18. As to the Defendant's alternative arguments that the Claimant's claims are either time barred or pleaded without sufficient detail, I again find these arguments inappropriate for final dismissal at this time. There is a real factual question as to when the Claimant's claims accrued, with the Claimant arguing that it was not until July 2013. While the Defendant argues that the Claimant knew nothing more in July 2013 than it did in May 2009, the Claimant argues that it was only in 2013 that the full extent of the loss endured could be understood. I find this factual and legal discrepancy inappropriate for determination without a full trial on matter.

19. Furthermore, the Defendant's argument that the Claimant has not plead its fraud and misrepresentation claims with sufficient detail and specificity is not convincing at this time. The Defendant has argued that the Claimant has not pleaded its claims of fraud and misrepresentation within the requirements of RDC 17.43. RDC 17.43 provides:

"A party must specifically set out the following matters in his statement of case where he wishes to rely on them in support of his case:

- full and specific details of any allegations of fraud, dishonesty, malice or illegality;
- details of any misrepresentation;
- details of all breaches of trust;
- notice or knowledge of a fact;
- details of unsoundness of mind or undue influence;
- details of willful default; and
- any facts relating to mitigation of loss or damage."

20. In the present case, the Claimant has plead facts which, if proven at trial, may amount to fraud or misrepresentation. I cannot comment on the likelihood at the moment beyond my determination that the claims are not fanciful and have a realistic prospect of success. The Claimant pleads reckless and gross negligence on behalf of the Defendant, claiming that the Defendant provided incorrect information about the product being sold in order to induce the Claimant into purchasing it, in spite of the Claimant's articulated risk-tolerance. The Claimant alleges that the Defendant made numerous statements about the protections involved in the product that were incorrect.

21. While the Defendant is correct that the Claimant's Amended Statement of Case includes numerous allegations that the Claimant was "induced" into certain actions without further detail as to how exactly this was accomplished, the corresponding Witness Statement of Mr Beijt includes further details of the relationship between the parties, including allegations of specific assurances and guarantees. The Claimant also does not specify whether the alleged incorrect information was recklessly given or known to be wrong, however it is reasonable to allow that the Claimant will seek to find this out in the course of discovery and trial. On either theory, the Claimant has a non-fanciful claim and should be allowed to further pursue the claims at a full trial.

22. Therefore, I find that the Defendant has not shown that the Claimant has no real prospect of succeeding on the issues and claims presented in the Amended Statement of Case. Instead, the parties should be given the opportunity to further put forward their arguments at trial to ensure the most accurate administration of justice. At this time, it is not appropriate for me to dismiss any of these claims without the further opportunity for a full trial.

Costs

23. While the parties have submitted detailed assessments of costs in the event that the case concludes at this stage, I find that the case shall continue on and therefore I shall not make an assessment of costs at this time. Costs of this Application are in the case.

Conclusion

24. In sum, the Defendant's Application for Immediate Judgment and to Strike Out is dismissed in full, with costs in the case. As to the Claimant's arguments regarding the Defendant's right to submit an amended Statement of Defence, I will not make any finding on that issue as it has not been fully pleaded before me.