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 MARK BEER

BETWEEN

GILAH LLC

Claimant

and

GILAD LLC

Defendant

Hearing: **24 August 2016**

Judgment: **3 October 2016**

JUDGMENT OF SCT JUDGE MARK BEER

UPON hearing the Claimant's representative 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 vacate the retail unit, in DIFC (the "Premises") with immediate effect.

2. The Defendant shall pay the Claimant AED 300,911.60 for, among other things, unpaid rent, late payment penalty, bounced cheque fee and district cooling charges pursuant to the terms of the lease agreement dated 8th February 2015 for the Premises signed between the Claimant and the Defendant (the "Lease Agreement"), as set out in numbered paragraphs 1 and 2 of the remedies sought by the Claimant in its claim form.

3. All amounts paid by or on behalf of the Defendant to the Claimant in respect of the Premises and/or the Lease Agreement shall be set off against the amount payable under numbered paragraph 2 above.

4. The parties shall bear their own costs.

5. Enforcement of this judgment shall be stayed until the determination of the claim brought by the Defendant against the Claimant in connection with the Premises, or until an earlier order of Court.

THE REASONS

Parties:

6. The Claimant, Gilah LLC is the Landlord of retail unit DIFC.

7. The Defendant, Gilad LLC, is a DIFC registered company that provides beauty and health care services to women. It was represented in this claim by Defendant's Representative, its Founder and Managing Director.

Background:

8. On 7 December 2014 Defendant's Representative expressed an interest via email to the Claimant in leasing a retail outlet in the DIFC for fit-out as a Nail Bar. She said "I would like to express my interest in leasing the retail outlet of 1,365 square feet in DIFC , for my upcoming Gilad, Nail

Bar concept . . . we are offering to pay 158 per square feet for that..Can you also please send me the autocad drawing . . ." This email followed a visit by Defendant's Representative during which she had been shown a premises later identified as (see below).

9. On 8 December 2014 the Claimant's employee responded with a proposed revision to the rent payable with four cheques per year and offering a three month rent-free fit-out period "however, if at all, if there is any delay from apartment side to provide any approval or NOCs, or other documentations that delayed the fit out we can try to extend it, which is subject to confirmation."

10. On 9 December 2014 Defendant's Representative wrote to the Claimant saying "[I] would like to confirm my acceptable of your offer, for the details discussed that Will include 3 months fit out period , also for the Rent , with a total of 220,000 a year payable in 4 cheques . . . Could you please email me the autocad drawing . . . and highlight on it; where the full glass window is? Just to send it across to my interior designer ?, for a Quick view? . . . Could you send the detailed offer letter? As well , in order to move forward quickly?, and Will prepare the deposit cheque . . ."

11. On 10 December 2014 the Claimant's employee sent an email attaching ". . . the AutoCAD drawings as requested. I shall send you the offer letter later today . . ."

12. On 16 December 2014 Defendant's Representative wrote saying "My designer opened the file, but she was lost, about the exact outlet . . . which one is it??"

13. On the same day, the Claimant's employee wrote "Go ahead with unit please."

14. On 8 February 2015, the Claimant and Defendant entered into a Lease Agreement for the retail unit in DIFC.

15. On 8 March 2015, Defendant's Representative requested the Claimant via email to obtain two No Objection Certificates (NOCs) which she required before beginning the fit-out. These NOCs were not obtained until April. Defendant's Representative wrote via email on 9 April 2015 to the Claimant that "We are not able to start paying for rent on May 22nd!! If you delayed me for these weeks to get the NOC."

16. On 14 September 2015 Defendant's Representative wrote to the Claimant pointing out that unit as marked on the AutoCAD drawings provided by the Claimant's employee was not the unit referenced in the Lease Agreement. The email states "This is a complete disaster for me as a business, everything has to be done from 0, and all my business plan and investment forecast has been based on the space, that generates the income, now I'll have to squeeze everything, have less stations and practically no space for my stock room. It is a real disaster, and a big headache and a lot of loss, for me." This email followed an email from Mr Kaer, an architect at Company, highlighting the error.

17. By an invoice dated 21 September 2015, company charged the Defendant AED 160,400 for "Delay Charges due to discrepancy in shop unit As-built drawing & Actual shop."

18. According to the Defendant, the Gilad LLC opened in March of 2016; but the profit from the business since that date has not been sufficient to repay the debts caused by the delays, themselves caused (it is alleged) by the mistake of the Claimant. However, as the Defendant had not paid rent for a period of 12 months, and since the cheque given to the Claimant was bounced, the Claimant ordered the Defendant to vacate the unit and pay all outstanding amounts in a claim filed on 16 June 2016 at the DIFC Courts' Small Claims Tribunal.

19. The parties were unable to reach a settlement at their Consultation before SCT Officer Mahika Hart, held on 29 June 2016. Thus, I heard the arguments of both parties at a First Hearing on 20 July 2016. The parties made supplemental submissions after the First Hearing and I requested a Second Hearing on 24 August 2016 at which both parties attended and supplemented their arguments.

The Claim:

20. On 16 June 2016, the Claimant lodged a claim with the DIFC Courts' Small Claims Tribunal against the Defendant, in which it claimed that, in breach of the terms and conditions of the Lease Agreement, the Defendant had failed to fulfil its obligation to pay the due rent.

21. The Claimant's submissions in the claim form focused on the breaches of the Lease Agreement by the Defendant. The annual rent amount according to clause 9 of this agreement was AED 220,000 and it was claimed that rent had not been paid for a period of 12 months from 23 May 2015 until 22 May 2016. Additionally, the first instalment of the second year's rent was said to be unpaid and a cheque dated 25 May 2016 had been bounced. The Claimant sought AED 220,000 for the year of unpaid rent; AED 57,750 towards a bounced rent cheque; AED 5,000 as penalty for the bounced cheque; AED 15,811 as a late payment penalty per clause 2 of the Terms and Conditions of the Lease Agreement; and AED 2,350.60 for District Cooling Charges from March to June 2015. This came to a total of AED 300,911.60.

22. The Claimant also maintained that its claim was specifically about rent, which the Defendant agreed had not been paid. All other claims on the part of the Defendant regarding the size and the layout of the retail space and delays in obtaining NOCs were, in the view of the Claimant, separate claims that did not have relevance in this particular case. The Claimant was not open to waiving any rent payments but expressed the possibility of the creation of a payment plan for the first year of rent.

23. The Claimant's position during the hearings was resolute, although I can see from the correspondence that Mr Suad, CEO of company, had adopted a more compassionate approach during the course of the dispute, which is to be commended. During the hearings the Claimant maintained its position that the Lease Agreement is paramount to any equitable relief and must be honoured in accordance with its terms. It was unwilling to accept responsibility for the consequences of the mistake made by its former employee, suggesting that the Defendant was responsible for her own losses and, if not the Defendant, then it was an issue of the `building management'. I was not impressed by the Claimant's stance, although I can understand why it was in its interest to adopt the position it did**.**

The Defence:

24. The Defendant responded to the allegations of the Claimant during the hearings by arguing that it had every intention of paying the rent but was unable to do so due to delays caused by the Claimant both through the mistaken identification of the premises and delays in issuing NOCs and

other approvals. In addition, the Defendant maintained that it was the Claimant, as landlord, which had the responsibility to provide the correct information regarding the layout of the leased space, and therefore the Claimant should take responsibility for the consequences caused due to the misinformation regarding the retail space. This included loss of income due to the delayed opening and the wasted salaries of her employees. I find no liability upon the Claimant in respect of any allegations of delays regarding the NOCs, both because the Claimant appears to have acted within reasonable timeframes in the circumstances and because the Claimant had not taken on a responsibility to provide such documents within any specified timeframe.

25. As stated in Article 37 of the DIFC Contract Law, "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 known and (a) the other party . . . caused the mistake, or knew or ought to have known of the mistake."

26. During the hearing, while both parties expressly agreed upon the fact that mistakes were made with regard to the layout and plans of the retail space, the Claimant maintained that those mistakes were not material for the purposes of the signing of the Lease Agreement. The Defendant was of the opinion that they were so significant that they led to severe business losses which rendered her unable to pay rent. During the hearing, the Defendant expressed her desire for an extension of the Lease Agreement so that no rent payment would be due until the date of opening of Gilad in March 2016; an increase in the contractual notice period in the Lease Agreement from three to six months; reimbursement of the lost income during the elongated fit-out period; salaries of employees for three months; and a lease of five instead of three years.

27. The Defendant estimated its losses to be in the region of AED 380,000 excluding claims for rent abatement for the period of the delays caused by the mistake (which amounted to 18 months in her written submissions, but were reduced to 9 months in the hearings). The Defendant also seeks that its rent be reduced to reflect the smaller size of the premises versus unit.

28. I understand that the Defendant has filed a claim against the Claimant in respect of the above.

Findings:

29. This is a case in which an entrepreneur, Defendant's Representative, has acted in good faith to identify premises for her new business, seemingly single-handedly at times to struggle through the surprising complexity of renting a store, to work with designers and contractors to fit out the store, to establish her company (the Defendant) and to endeavour to build that business. Her submissions in the hearings and on paper evidence the challenges faced by those looking to commence a small business. Defendant's Representative would appear to have been operating against tight deadlines and with limited resources, which required her to open her store as soon as possible in order to generate cash-flows to set off her up-front expenses.

30. Defendant's Representative would not appear to have been legally represented during the course of this matter and there is no evidence to suggest that Defendant's Representative or the Defendant obtained legal advice about the terms of the Lease Agreement that was signed in February 2015. Based on the submissions made during the hearings, I would be surprised if Defendant's Representative understood the significance of some of the provisions within the Lease Agreement.

31. Prior to the signing of the Lease Agreement, a mistake which the Claimant acknowledges was made by its staff member, led to a chain of events which ultimately caused the Defendant to lose time and money, resources which the Defendant did not have, and which have no doubt contributed to the Defendant's inability to settle the rent due pursuant to the Lease Agreement.

32.That Defendant's Representative or the Defendant did not seek legal advice regarding the Lease Agreement, or possibly even understand the significance of many of its provisions, is problematic for the Defendant. It is a particularly onerous lease, drafted in favour of the Claimant, and it is not in a form which one would expect a party who has sought legal advice to sign. However, it has been signed. Of particular difficulty for the Defendant are clauses 10, 34, 45 and 58.

Relevant Law

33. Although not pleaded, I have examined the law of *non est factum* and its applicability to the current situation. Whether looking at our own jurisprudence or that of Australia, Canada or the UK, the facts do not extend to such a defence by the Defendant.

34. I have also looked at the common law position with regard to mistake, particularly unilateral mistake and the effect of misrepresentation. There is much to support an argument that such a defence is open to the Defendant, although I will not dwell further because it has not been pleaded in this matter and perhaps will form part of the claim made by the Defendant against the Claimant.

35. Lastly, I endeavoured to explore with the parties the application of the law of mistake as it applies in the DIFC under the DIFC Contract Law. I was grateful for the input provided by both parties.

36. The relevant provisions of the DIFC Contract Law are as follows:

"*37. Relevant mistake*

> *(1) 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 known, and*
>
> *(a) the other party made the same mistake, or was also mistaken, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or*
>
> *(b) the other party had not at the time of avoidance acted in reliance on the contract.*

(2) However, 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. . . .

42. *Confirmation*

If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of contract is excluded. . . .

44. *Notice of avoidance*

The right of a party to avoid the contract is exercised by notice to the other party.

45. *Time limits*

Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

46. *Partial avoidance*

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

47. *Retroactive effect of avoidance*

(1) Avoidance takes effect retroactively.

(2) On 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."

37. In this case, the Defendant, represented by Defendant's Representative who is not a lawyer, has not filed a notice of avoidance under Article 44 of the DIFC Contract Law, but her submissions include various pieces of correspondence in which she highlights the mistake and impact it has had. Indeed, the Defendant does not appear to want to void the contract *ab initio*, but rather to recover the losses it has incurred as a result of the mistake.

38. Under the DIFC Contract Law, the Defendant can only escape its obligations under the Lease Agreement if it can demonstrate that when the contract was concluded the mistake regarding the location and size of the premises was of such importance that a reasonable person in the same situation as the Defendant would not have concluded it at all if the true state of affairs had been known and (a) the Claimant made the same mistake, or was also mistaken, or caused the mistake or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or (b) the Claimant had not at the time of avoidance acted in reliance on the contract.

39. I am of the view that a reasonable person would take the view that a mistake regarding the location and size of the retail unit in the Lease Agreement is of such importance that he or she would not have concluded it if the true state of affairs had been known. In addition, the Claimant had caused the mistake by identifying the wrong unit in correspondence with the Defendant.

40. I do not find that the mistake falls within the contemplation of Article 37(2) of the DIFC Contract Law. Certainly it can be said that Defendant's Representative was careless, and possibly negligent, to rely entirely on the drawings and confirmations provided by the landlord, but I cannot hold that she or the Defendant was grossly negligent to have done so.

41. At this time, the Defendant has not given notice to avoid the Lease Agreement pursuant to Article 44 of the DIFC Contract Law, although Defendant's Representative did alert the Claimant to the mistake on the same day that it was discovered, back in September 2015. Since then Defendant's Representative has been endeavouring to resolve the issue with the Claimant to avoid a situation whereby the Lease Agreement would come to an end. As such, I find that the Defendant has not confirmed the contract for the purposes of Article 42 of the DIFC Contract Law, nor has the time limit expired for the purposes of Article 45 of the DIFC Contract Law.

Conclusion:

42. With no application by the Defendant to void the Lease Agreement under the DIFC Contract Law, or to apply the principles of common law unilateral mistake, I find that the binding terms of the Lease Agreement are clear and remain in force. It may be a one-sided lease, it may not be an accurate reflection of what both parties thought was the location and size of the leased premises upon signing, and it may contain clauses which many might consider draconian. Nonetheless, it is the lease signed by, and binding upon, the Defendant and I award the remedies numbered 1 and 2 as sought in the Claimant's claim form. I do not award remedy 3.

43. There seem to me to be strong grounds for the Defendant bringing a claim based on the misrepresentation of the Claimant, or to file a notice to void the contract (in whole or part) under the DIFC Contract Law, although those are matters for the Defendant and another Judge. I understand from the Registry that such a claim has been filed and so I order that enforcement of this judgment is stayed pending resolution of that claim, or earlier order of the Court.

Issued by:

Mariam Deen

SCT Judge

Date of issue: 3 October 2016

At: 4pm