IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

NATASHA

Claimant

and

NOAH

Defendant

ORDER WITH REASONS OF JUSTICE SIR JEREMY COOKE

UPON the Claimant's Part 8 Claim form dated 15 April 2024 as amended on 17 May 2024 (the "Claim")

AND UPON the Consent Order dated 5 June 2024

AND UPON the Defendant's Legal Representative's (MB Kemp LLP) Application No. 1 dated 17 July 2024 seeking an order to cease to act (the "Application")

AND UPON hearing Counsel for the Claimant and the Defendant as litigant in person at the hearing held on 19 July 2024 (the "Hearing")

IT IS HEREBY ORDERED BY THAT:

1. The Defendant shall forthwith repay the Claimant the sum of AED 7,097,652.

2. The Defendant shall pay the Claimant's costs of the action to be the subject of assessment by the Registrar, if not agreed.

3. MB Kemp LLP has ceased to be the legal representative of the Defendant in these proceedings.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 22 July 2024
At: 8am

SCHEDULE OF REASONS

1. This action was begun by a Claim Form issued on 15 April 2024 accompanied by a witness statement of Andrew Lyons dated 3 April 2024 in support of it as a Part 8 Claim on the basis that there were no facts in dispute between the parties. An amended witness statement was filed on 17 May 2024 with an Amended Claim Form. No Acknowledgement of Service has been filed by the Defendant despite a Consent Order made on 5 June 2024 in which it was agreed that time should be extended to 18 June 2024 for service of this and any evidence that the Defendant wished to file in opposition. No evidence was filed by the Defendants either. On 4 June 2024, the Defendant had notified the Court that M B Kemp LLP were his lawyers.

2. On 17 July at 15:45, on the day before the scheduled Hearing, MB Kemp applied to come off the record as the Defendant's solicitors on the basis that it had ceased to act for the Defendant (the "Application"). It was said that MB Kemp's engagement was only to obtain an extension to file an acknowledgement of service and response and that the Defendant had failed to pay for the work done or to enter into an engagement letter for the provision of services in relation to the substantive issues in the proceedings. What the signed letter of engagement provided to the Court shows is that the scope of work undertaken was to review all the underlying documents, to seek an extension to file the Response to the Claim, to prepare all documents for, and seek an extension of time, and if necessary apply for such an extension. That work appears to have been done but nothing more. I will make the order sought by MB Kemp and grant the Application.

3. The Defendant himself appeared at the Hearing with his son. The terms of RDC 8.16 provide that where a defendant has failed to file an acknowledgement of service in time, he may attend the hearing of the claim but may not take part in it unless the Court gives permission. I gave permission so that the Defendant, with his son, could say anything he wished. He had sought an adjournment in order to file applications, the nature of which were, despite enquiry, never explained. The Defendant said that he wanted time to get documents together but when asked what they might be, above and beyond those served upon him by the Claimant, he had no answer. He had no submissions to make on the substance of the claim made by the Claimant.

4. In my judgement, the Defendant has engaged in a deliberate attempt to delay the proceedings and, between him and his solicitors, has brought about the position where he has come to the Court at the last moment in person to seek an unjustified adjournment.

5. The Defendant had apparently been indisposed for medical reasons. Whilst MB Kemp were on the record, the Defendant's personal assistant

sent a medical report to the Claimants, to MB Kemp and to the Court on 1 July 2024, in which Neil stated that the Defendant undergone a removal procedure under local anesthetic on 15 June. The personal assistant, who did not say that she had been in touch with MB Kemp, who made no application, asked the Court to extend the time further to 3 July 2024 for the Defendant to instruct lawyers and take action.

6. On 5 July, MB Kemp sent an email to the Court saying that they were no longer acting for the Defendant and it was said that the Defendant had sought to tell the Court of the position on 4 - 5 July, but the Court, as is the practice, will not deal with individual parties when there is a solicitor of record and said so on the telephone. On 5 July, the Court replied to MB Kemp's email, informing them of the need to file a Part 37 Notice of change of representatives in order to come off the record. On Thursday 11 July at 18:47, the Defendant sent an email saying that he had sent a Notice of Change of legal representative via email of 3 July because he wanted to represent himself and attend the Hearing in person and had been told by the Court's email that a Part 37 Notice of change should be filed. He complained that he had asked for and not received a username and password to the DIFC Portal to file such a notice, being told that MB Kemp had such a username and password which should be used to file the necessary notice. He asked for his email to be registered as a formal complaint and to be processed accordingly, for the issue of a username and password to him personally and to delay the hearing for at least three weeks so that he could submit applications well in time before the Hearing. The terms of the Defendant's email give all the signs of assistance in drafting by lawyers with a view to engineering delay. On Monday 15 July, the Court replied, reiterating the need for MB Kemp to file the notice of ceasing to act so that the Defendant could gain access to the portal and could submit documents. It was not until 17 July that MB Kemp made the Application to come off the record, which is referred to in paragraph 2 above.

7. In the circumstances, I decided that the Court would proceed to hear the Claimant's Claim and that the Defendant, with the aid of his son, could make whatever representations they wished. An adjournment was sought and refused, and the Court proceeded to deal with the matter on the basis of the evidence before it, with submissions from Counsel for the Claimant and, despite the opportunity given to them, no submissions from the Defendant on the substance of the Claimants' Claim.

8. By a contract dated July 2023 (the "Contract"), the Claimant agreed to purchase the share capital of Nestor for the sum of AED 6.5 million plus a security deposit ("Security Compensation") in respect of the lease of the restaurant, amounting to AED 597, 682. Under clause 2.3 of the Contract, the First Instalment of AED 2.5 million was to be paid upon signature and was paid on 2 August 2023. The Second Instalment of AED 4 million was to be paid on 1 November 2023, together with the Security Compensation, by postdated cheques which were delivered to the Defendant. Under clause 2.5, an amendment to the Memorandum of Association of the Company which confirmed the transfer of shares and change in management was to be signed and registered following the payment of the Second Instalment and Security Compensation on 1 November 2023.

9. The Contract included a termination clause in the following terms:

> *"4.1 Before Completion, the Seller shall be entitled to terminate this Agreement by giving a 14 days' notice in writing ("Termination Notice") upon occurrence of any of the following events:*
>
> ...
>
> *4.1.2 The Post-Dated Cheque for the Second Instalment or the Security Compensation is returned.*
>
> ...
>
> *4.2 In the event this Agreement is terminated pursuant to clause 4.1, then the Seller shall be entitled to forfeit the First Instalment. Additionally, the Buyer will pay the Seller damages in the amount of AED 2,500,000; and*
>
> *4.3 In the event the Agreement is terminated by the Seller or the Seller decides not to proceed with Completion for reasons other than those mentioned in clause 4.1, the Seller shall return the First Instalment to the Buyer. Additionally, the Seller shall pay the Buyer damages in the amount of AED 2,500,000..."*

Clause 5 provided for DIFC law to apply and for the exclusive jurisdiction of this Court.

10. Although the first instalment of AED 2.5 million was paid, the postdated cheques for the Second Instalment and Security Compensation bounced when presented on 1 November 2023, following correspondence between the Claimant and the Defendant in which the Claimant had said that he could not pay the Second Instalment until he had in turn received payment from a third party in another business transaction. He sought an extension of time for payment to 15 December 2023.

11. On 2 November 2023, the Defendant sent a Termination Notice, relying on clause 4.1 of the Contract, stating that the notice was a 14-day notice and claiming an entitlement to forfeit the deposit and to liquidated damages of AED 2.5 million under clause 4.2. The notice said that the Defendant would take back control of the running of the restaurant at the end of the 14-day period in circumstances where the Contract had provided for such control to pass temporarily to the Claimant prior to completion.

12. The parties then entered into negotiation in that 14-day period and concluded an agreement that:

12.1 The Claimant would pay AED 1 million to the Defendant, by way of a bank transfer on or around 17 November 2023, as he duly did.

12.2 The Claimant would provide replacement cheques for AED 3 million (being the remaining balance of the Second Instalment) and for AED 597,682 (being the Security Compensation), both postdated to 15 December 2023. These postdated cheques were duly provided.

12.3 The Payment date was thus agreed to be 15 December 2023, which meant that, under the terms of clause 2.5, the transfer of shares and change in management should be formalised thereafter by amendment of the Memorandum of Association of the Company.

13. On the evidence before this Court, there was never any suggestion made by the Defendant to the Claimant that the Contract would terminate automatically if payment was not made on 15 December 2023. The effect of agreeing a new payment date for the Second Instalment and Security

Compensation was therefore, essentially, to replace the date of 1 November 2023 with 15 December 2023, with the termination provisions of clause 4 applying to the new date in the same way as to the old date for payment.

14. On 15 December 2023, the Defendant sought to cash the two replacement postdated cheques for AED 3,597,682 but they bounced and further negotiations ensued. In the witness statement evidence before the Court, it is said that the Defendant, knowing by reason of correspondence shown to him, that payment would be forthcoming when the Claimant received funds from the third party referred to earlier, was taking a relaxed attitude towards the time for final payment to be made. There is no documentary evidence to support that position before this Court.

15. What happened however was that on 25 December 2023, the Defendant did cash the two replacement postdated cheques and received full payment. There is no dispute about receipt of these payments and that this was on the first occasion upon which they were re-presented following their dishonour on 15 December 2023. Furthermore, on clearance into the Defendant's bank account, as recorded in his later correspondence, on 26 December 2023, the evidence is that, on that same day, the Defendant's representative, Newland agreed with the Claimant's representative, Nessim , on the date for attending at the Department of Economic Development/transfer office in order to effect the transfer of shares on 27 December 2023. That is supported by WhatsApp messages.

16. Having cashed the replacement postdated checks and received full payment of the Second Instalment and Security compensation, on 4 January 2024, the Defendant sent, by email a further termination notice (the "Second Termination Notice") stating, in the email, that he would take back control of the running of the restaurant on 10 January 2024, some 10 days later.

17. In the Second Termination Notice which was dated 31 December 2023 (though sent later), the Defendant relied on the bouncing of the postdated cheques on 15 December 2023 and stated that the Defendant was entitled to terminate under clause 4.1.2, again stating that control would be taken back of the restaurant on 10 January 2024. The Second Termination Notice also referred to the full payment made which had cleared on 26 December 2023 but claimed entitlement to hold onto the sums remitted as forfeit of the deposit, liquidated damages and because, it was said, additional losses had been suffered by the Defendant in relation to another transaction by reason of the Defendant's inability to pay sums due with the funds that he had been expecting to receive from the Claimant on 15 December 2023.

18. Whatever the precise effect of Article 81 of the DIFC Contract Law on the absence of any statement by the Defendant at any stage that an extension of time for payment from 2 November 2023 to 15 December 2023 would have the effect of permitting automatic termination should there be a default in payment on that date, the Defendant's conduct in cashing the postdated cheques on 25 December 2023 and arranging for the transfer of shares on 27 December 2023 amounted to a waiver of any right to terminate, whether by a further termination notice or otherwise and an affirmation of the Contract.

19. As a matter of law and on the proper construction of the Contract, clause 4.1 entitled the Defendant to give a 14-day notice of termination to bring the contract to an end. It is not even as if the payment of the Second Instalment and the Security Compensation was made within the 14-day period following the Second Termination Notice. Full payment was made a full 9-10 days before the issue of that notice on 4 January 2024, which appears, on its terms, to seek to terminate immediately with the resumption of control over the restaurant itself within six days. By taking the action that he did, the Defendant had affirmed the continued existence of the contract by seeking and securing payment of the Second Instalment and Security Compensation and making arrangements for completion of the sale. In those circumstances, the Defendant had waived any right to terminate and was not entitled to serve a further notice of termination on the basis of late payment of any sum that might have been due on 15 December 2023.

20. The Defendant's termination was therefore wrongful, as was the failure to transfer the shares in Nestor, both of which amounted to a fundamental nonperformance of the Contract within the meaning of Article 86 of the Contract Law (a repudiatory breach, as it would be termed in English law). I was informed also that the Defendant had resumed control of the running of the restaurant, albeit not until 4 April 2024, but had retained all the proceeds of running the restaurant in the interim in the company's bank account over which he had control. There was no evidence of this, but there is no doubt that the Defendant has committed acts which amount to a fundamental nonperformance of the Contract.

21. By bringing these proceedings, seeking recovery of the sums paid by him, the Claimant has accepted those breaches as bringing the contract to an end with the result that he is entitled to claim restitution of sums paid under Article 90, alternatively damages for breach, which amount to the same thing in the present case. He is entitled therefore to the return of AED 7,097,652. I decline to award any interest, though the last payments were made on 26 December 2023, because the Claimant does not appear to have terminated the Contract until April 2024 and retained possession of the restaurant up to that point. The Claimant seeks various forms of declaratory relief which it is unnecessary to grant in the light of the money judgment given.

22. Costs must follow the event. There is no schedule of costs, so they will fall to be assessed by the Registrar, if not agreed.