Claim No: CFI 008/2024

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

NED

Claimant/Defendant in Counterclaim/Appellant

and

NASTASIA

Defendant/Claimant in Counterclaim/Respondent

ORDER WITH REASONS OF JUSTICE RENE LE MIERE

UPON the Order with Reasons of H.E. Deputy Chief Justice Ali Al Madhani dated 25 December 2023 in SCT-206-2023 (the "Order")

AND UPON the Order with Reasons of Justice Rene Le Miere dated 2 February 2024 granting the Claimant partial permission to appeal the Order

AND UPON hearing the Claimant's Counsel and the Defendant at the appeal hearing held on 6 May 2024

AND UPON reading the documents and submissions filed by both parties and recorded on the case file

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed in part.

2. The Order will be varied by setting aside the order that the Claimant shall pay the Defendant the sum of AED 184.627.75, for her counterclaim under subtitle Delay and ordering that the Claimant shall pay the Defendant the sum of AED 50,000, for her counterclaim under subtitle Delay.

3. There shall be no order as to costs.

Issued by:
Hayley Norton
Assistant Registrar
Date of Issue: 9 July 2024
At: 9am

SCHEDULE OF REASONS

Summary

1. The Appellant/Claimant (the "Claimant") and the Respondent/Defendant (the "Defendant") entered a contract (the "Agreement") by which the Claimant (described in the Agreement as the "Contractor") agreed to carry out renovation works to the Defendant's villa (the "Works") and the Defendant (described in the Agreement as the "Client") agreed to pay the total contract sum (the "Contract Sum") being the fixed fee of AED 1,374,623.25 adjusted by any Variations.

2. The Contract Sum is payable in 6 stages on the percentage of the Works that is complete. The Stage 5 payment is due on completion of the Works (the "Completion Date"). The final, Stage 6, payment of 5% of the Contract Sum is payable on completion of snagging, that is the rectification of defects.

3. On 8 May 2023, the Claimant started the snagging works.

4. The parties disagreed about the scope of the snagging work to be done and the means for rectifying the defects.

5. On 1 June 2023, the Small Claims Tribunal ("SCT") issued the Claimant's claim form. The Claimant states that it had to stop work because the Defendant was refusing to state that the snagging list was agreed. The Claimant claimed the Stage 6 payment of AED 91,630,30.

6. The Defendant filed a defence. The Defendant said the claim should be dismissed because the Defendant is not in breach of the Agreement and the Claimant is in breach of the Agreement.

7. The Defendant counterclaimed for damages of AED 778,782 for delay and poor workmanship.

8. A hearing took place before H.E. Deputy Chief Justice Ali Al Madhani on 28 August 2023 (the "Hearing").

9. A substantial part of the Hearing was concerned with a dispute about rectification of defective tiles.

10. On 25 December 2023 the Court issued an order, with reasons of H.E. the Deputy Chief Justice ("Reasons"), that:

(a) The Claimant's Claim is dismissed.

(b) The Claimant shall pay the Defendant the sum of AED 246,732.57 for her counterclaim under subsection Tiles.

(c) The Claimant shall pay the Defendant the sum of AED 184.627.75, for her counterclaim under subtitle Delay.

(d) The Defendant's remaining counterclaims shall be dismissed.

(e) The Claimant shall pay the Defendant the DIFC Courts' filing fee in the sum of AED 21,568." (the "Order").

11. The Claimant sought permission to appeal against the Order.

12. On 2 February 2024 the Court granted the Claimant permission to appeal against the order that the Claimant shall pay the Defendant the sum of AED 184.627.75, for her counterclaim under subtitle Delay. The Claimant's Application for permission to appeal was otherwise dismissed.

13. For the reasons that follow:

(a) The appeal is allowed in part.

(b) The Order will be varied by setting aside the order that the Claimant shall pay the Defendant the sum of AED 184.627.75, for her counterclaim under subtitle Delay and ordering that the Claimant shall pay the Defendant the sum of AED 50,000, for her counterclaim under subtitle Delay.

(c) There will be no order as to costs.

The Claim and Counterclaim

14. The Claimant filed a claim form and particulars of claim supported by many documents on which it relied. The Defendant filed a defence and counterclaim together with documents on which she relied including expert reports. The Claimant filed a reply and defence to counterclaim together with more documents on which it relied.

15. The Hearing took place by video conference on 28 August 2023 before H.E. Deputy Chief Justice Ali Al Madhani. The Claimant was represented by Mr Nasir , its managing director. The Defendant represented herself.

16. The Agreement provides that it shall be governed by and construed in accordance with the law of the Emirate of Dubai and the UAE.

17. The Defendant's counterclaim is that the Claimant breached the Agreement by failing to carry out the Works with reasonable care and skill and by failing to complete the Works within the time required by the Agreement. The Defendant claims as damages the losses she alleges she suffered as a result of those breaches of contract. Those losses relevantly consist of:

(a) the cost of rectifying the defective works;

(b) the cost of alternative accommodation and associated expenses as a result of the Works not being completed in the time required by the Agreement; and

(c) damages for stress and the inconvenience caused by the Claimant's delay.

18. This appeal is concerned with the damages or compensation awarded to the Defendant for the cost of alternative accommodation and associated expenses and for stress and inconvenience caused by the Claimant's delay.

19. The Claimant denied that the Works were not completed within the time required by the Agreement. The Claimant's case at the Hearing was that when the time for completion is extended in accordance with adjustments provided for in the Agreement, the Works were completed ahead of schedule. The Claimant has not been granted permission to appeal against the finding that the Works were not completed within the time required by the Agreement.

20. The Claimant disputes that the losses claimed by the Defendant for the cost of alternative accommodation and associated expenses were caused by a delay in completing the Works and denies that the Defendant is entitled to damages for stress and inconvenience caused by the Claimant's failure to complete the Works on time.

The SCT decision

21. The Judge considered the Defendant's claim for damages for the Claimant's breach of contract in not completing the Works within time in accordance with clause 21 of the Agreement.

22. Clause 21 relevantly provides:

"The Contractor shall start the Works on _____ or within 7 days of receipt of all relevant approvals from the developer and/or other regulatory authorities ("the Commencement Date") and complete the Works within 92 working days from the Commencement Date. Public holidays, Fridays and any days the Community Management do not permit the Contractor access are classed as non-working days. ."

23. Clause 21 provides for adjustments to the time for completion of the Works due to the following circumstances:

(a) reduced working hours during the holy month of Ramadan;

(b) working hours reduced by government regulation in the summer period;

(c) delay caused by the Defendant occupying the villa before completion;

(d) delay in approval of designs/layouts and any associated variations approved by the Client;

(e) delay caused by authority milestone site inspections required prior to the Contractor being permitted to proceed to the next stage; and

(f) additional time caused by variations requested by the Client.

24. The Judge agreed with the Claimant that the Commencement Date was 19 April 2022, and the Completion was on 30 March 2023, which was 284 working days after the Commencement Date.

25. The Judge considered the Claimant's claims that it was entitled to extensions of time. The Judge allowed extensions of time as follows:

(a) variations - 25 days;

(b) delayed payments - 27 days;

(c) Ramadan timing - 6 days;

(d) Summer working hours -0 days;

(e) milestone inspections - 0 days;

(f) third party contractors -15 days;

(g) access restrictions - 23 days; and

(h) client occupying the premises - 30 days

TOTAL: 124 working days.

26. I note that those extensions of time allowed by the Judge total 126 working days, not 124 working days as His Excellency stated.

27. The Judge found that the Claimant had not completed the Works within the time required by the Agreement and therefore had breached the Agreement.

28. The Judge found that the Defendant was entitled to the following damages for delay:

(a) Additional rental accommodation costs paid from 11 August 2022 to 3 December 2022 in the sum of AED 95,420.

(b) The cost of hotel accommodation for 10 days for her family in the sum of AED 19,0001.

(c) The combined storage fees for the Defendant's furniture in the sum of AED 13,907.75.

(d) Additional moving costs incurred due to delay in the sum of AED 6,300.

(e) Additional sum of AED 50,000 in damages for stress and the inconvenience caused by the contractor's delay.

29. The total sum awarded to the Defendant under this part of the counterclaim is AED 184.627.75.

Grounds of appeal

30. On 8 January 2024, the Court issued an Appeal Notice filed by the Claimant, by which the Claimant sought permission to appeal against the whole of the Order. However, the Claimant was given permission to appeal only against the order that the Claimant shall pay the Defendant the sum of AED 184.627.75, for her counterclaim under subtitle Delay on the grounds that:

(a) The learned Judge erred in fact in finding that the Claimant completed the Works with 160 working days of delay. On the Judge's findings in relation to extensions of time, the learned Judge should have found the Works were completed with 68 days delay.

(b) The learned Judge erred in fact and law in finding that the Defendant must be entitled to the damages for delay claimed by the Defendant. There was no evidence that the costs incurred by the Defendant for rental accommodation, hotel accommodation, storage fees, and moving costs were incurred because the Works were not completed within the time required by the Agreement adjusted by the extensions of time found by the Judge.

(c) The learned Judge erred in fact and law in finding that the Defendant must be entitled to the damages for stress and inconvenience. The evidence did not establish circumstances that warranted an award of damages for stress and inconvenience for breach of the Agreement.

Grounds 1 and 2: damages for delay - accommodation and associated costs

31. The Defendant claims damages for loss and damage caused to her by the Claimant's breach of contract in failing to complete the Works within the time required by the Agreement.

32. The Agreement provided that the Claimant shall complete the Works within 92 working days from the Commencement Date. The Agreement further provided that the time for completion should be adjusted for delays caused by variations to the scope of work and the other matters referred to at paragraph 25 above.

33. The Defendant's case is that the Works should have been completed by 10 August 2022 but were not completed until 31 March 2023. The Defendant says that the Claimant's breach of contract caused her to incur costs for accommodation and associated expenses between 11 August 2022 and 3 December 2022 when she was unable to take up residence in the villa.

34. The Judge found that the Claimant had breached the Agreement by failing to complete the Works within the time specified in the Agreement, allowing for justified extensions of time - 92 days plus the 126 days extension of time, that is within 218 working days of the Commencement Date. The Judge did not specify the date which is 218 working days after 19 April 2022, but it is implicit in the Judge's reasons, and is the fact, that the Completion Date, 31 March 2023, is more than 218 working days after 19 April 2022.

35. Having found that the Claimant is entitled to an extension of time of 124 working days the Judge said:

> "[106] As I have stated above, the delay will be counted from the official commencement date which as I set out above was 19 April to the completion date of 31 March 2023, the time the Defendant moved into the house, representing 346 calendar days. 50 of these days were Sundays (non-working) and 12 days were public holidays, leaving 284 working days in accordance with clause 21 of the Agreement.
>
> [107]. The Claimant submitted evidence supporting the fact that the Defendant attributed to the project timeline delay by 124 days to be added to the 92 working days of the contractual timeline. It appears from the established evidence and arguments that the Claimant has accomplished the house almost with 160 working days of delay according to my calculation."

36. I observe that the Judge treated Sundays as non-working days whereas clause 21 of the Agreement treats Fridays and not Sundays as non-working days. However, that is an immaterial error because the number of Fridays in the period is the same as the number of Sundays. As noted above, the extensions of time allowed by the Judge total 126 working days, not 124 working days as His Excellency stated. I will treat the extensions of time allowed by the Judge to be 126 working days.

37. It follows that the time the Claimant was required to complete the Works is determined by adding the 126 days extension of time allowed to the 92 days completion period specified in clause 21. That means that the adjusted time for completion is 218 working days. The date 218 working days after 19 April 2022 is 31 December 2022.

38. Having found that the Claimant was in breach of the Agreement by not completing the Works within the time required by the Agreement, the Judge said at [108]:

> "Therefore, under the Defendant's delay claim, I find that the Claimant is in delay of the completion date of the project and as such the Defendant must be entitled to the remedy claimed under this part of the judgment, namely ..."

39. The Judge then sets out the amounts claimed by the Defendant for accommodation, storage fees, moving costs and stress and inconvenience as damages for the Claimant's breach of contract in not completing the Works within the time specified in clause 21 of the Agreement.

40. The Defendant claimed the cost of rental accommodation and associated expenses incurred between 11 August and 3 December 2022.

41. However, the Judge did not find that the time required for the Works to be completed under the Agreement was 10 August 2023. The Judge found that the Claimant was not required to complete the Works until 218 working days after the Commencement Date, that is by 31 December 2022.

42. Therefore, the cost of alternative accommodation and associated expenses between 11 August and 3 December 2022 were not incurred by the Defendant as a result of the Claimant's breach of contract in failing to complete the Works by 31 December 2022.

43. The learned Judge erred in fact and law in finding that the Defendant must be entitled to the damages for delay claimed by the Defendant. The costs incurred by the Defendant for rental accommodation, hotel accommodation, storage fees, and moving costs were not incurred because the Works were not completed within the time required by the Agreement adjusted by the extensions of time found by the Judge.

44. Ground 2 of appeal is made out. The award of damages for:

> (a) additional rental accommodation costs paid from 11 August 2022 to 3 December 2022 in the sum of AED 95,420;
>
> (b) the cost of hotel accommodation for 10 days for the Defendant's family in the sum of AED 19,0001;
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> (c) the combined storage fees for the Defendant's furniture in the sum of AED 13,907.75; and
>
> (d) additional moving costs incurred due to delay in the sum of AED 6,300;
>
> must be set aside.

Defendant's contentions

45. On appeal the Defendant contended that the Order should be affirmed on grounds other than those relied on by the SCT.

46. The Defendant submitted that the Judge should have found that the commencement date was 21 January 2022, not 19 April 2022, "and with the completion dates provided by the Claimant up to variation 14 plus, additional time added using the calculation provided in clause 9 of the Agreement, the project should have been completed by 10 August 2021."

47. The Defendant further argues that the Claimant waived the right to rely on a "start date" calculated in accordance with clause 21.

48. The Claimant submitted that the Defendant was not entitled to make those contentions because she had not filed a notice of contention.

49. I do not accept that submission. It is a matter for the appeal Court's discretion whether to permit a respondent to contend that the order appealed from should be affirmed on grounds other than those relied on by the SCT for the following reasons.

50. RDC 44.75 provides that a respondent may file and serve a respondent's notice asking the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court. RDC 44.78 provides that if the respondent does not file a respondent's notice, he will not be entitled, except with the permission of the court, to rely on any reason not relied on in the lower court.

51. RDC 44.75 and RDC 44.78 do not apply to small claims. RDC 53.7 provides that only the specified parts of the RDC, which do not include part 44, shall apply to "small claims". RDC 53.1 provides that Part 53 sets out the special procedures for dealing with "small claims", that is claims which are issued in or have been transferred to the SCT. An appeal from a decision of the SCT is a small claim notwithstanding that the appeal is heard by the CFI.

52. That interpretation is confirmed by the history of RDC Part 53. The `amended' (and now current) RDC Part 53 came into effect on 6 June 2021 (the "Amended Part 53"). Rule 53.7 of the former Part 53 ("Old Part 53") expressly provided that Part 44 shall apply to small claims except to the extent that a Rule limits such application or the SCT Judge orders otherwise. Old RDC 53.75 made specific reference to Part 44 applying to appeals from the SCT to the CFI. However, following the implementation of the Amended Part 53, reference to Part 44 is no longer made within Part 53. The inference is that the RDC rules relevant to appeals from the SCT to the CFI are set out and self-contained within Part 53 only.

53. That is confirmed by *Miqal v Merani* DIFC CFI 041/2023 (11 September 2023) where H.E. Justice Maha Al Mheiri held that the effect of RDC 53.7 is that RDC Part 44 does not apply to matters in the SCT including appeals from the SCT and there is nothing in RDC Part 53 which prevents or otherwise regulates the introduction of fresh evidence in an appeal from the SCT and so it is a matter left for the judge hearing the appeal.

54. The decision whether it is just to permit a contention to be raised on appeal will depend upon an analysis of all the relevant factors including the nature and course of the proceedings in the SCT, the nature of the contention, and any prejudice that would be caused to the appellant if the contention is allowed to be raised on appeal.

55. Clause 21 of the Agreement provides:

> "The Contractor shall start the Works on _____ or within 7 days of receipt of all relevant approvals from the developer and/or other regulatory authorities ("the Commencement Date") and complete the Works within 92 working days from the Commencement Date".

56. The Judge observed that there was no agreed start date which was incorporated in the Agreement "as the commencement date relied on the approval dates." The Judge noted that Emaar's NOC which related to the general internal scope of work was received on 19 January 2022, but the Dubai Development Authority NOC required for the main structural scope was only received on 12 April 2022. Therefore, the Judge found, pursuant to clause 21, the Commencement Date was 7 days after 12 April 2022, namely, 19 April 2022 in accordance with the Agreement.

57. The Claimant's argument is that the Claimant started the Works on 21 January 2022 and that is or should be the "Commencement Date".

58. I reject that argument. The Agreement provides that the Contractor shall complete the Works within 92 working days from the Commencement Date. The Commencement Date is a defined term. The Commencement Date is the dated stated in the Agreement or the date or within 7 days of receipt of all relevant approvals from the developer and/or other regulatory authorities. The Agreement did not state a date on which the Contractor was to start the Works. Accordingly, the Commencement Date is the date within 7 days of receipt of all relevant approvals from the developer and/or other regulatory authorities. The Commencement Date, as defined, is 19 April 2022.

59. Further, the Judge did not accept that the Claimant started the Works on 21 January 2022. The Judge noted that the Claimant was able to commence some of the minor works covered under the Emaar NOC such as removing bathrooms and the kitchen, but that work was hampered as the Claimant could not start the main scope until it had the approval for the construction from the DDA - the regulatory authority.

60. On appeal, the Defendant disputed the Judge's finding that only minor works were done or able to be done before the approval for the construction from the DDA on 12 April 2022.

61. The Judge's finding is a finding of fact. The Court of Appeal in *Al Khorafi v Bank Sarasin - Alpen (ME) Ltd* [2015] CA 003 at [168] - [169] and *DAS Real Estate v First Abu Dhabi Bank PJSC* [2017] CA 007 (12 April 2018) at [22] confirmed that an appellant on an appeal against a Judge's finding of fact needs to show that the Judge was plainly wrong.

62. It was open to the judge to find that only minor works were done or able to be done before the approval for the construction from the DDA on 12 April 2022 and the Works did not commence until after the DDA approval. That finding of fact is not plainly wrong.

63. The Defendant argues that the Claimant waived the right to rely on a "start date" calculated in accordance with clause 21 for a number of reasons.

64. I am not satisfied that the decision of the Judge was wrong because His Excellency did not find that the Claimant waived the right to rely on a start date calculated in accordance with clause 21.

65. The arguments raised by the Defendant were not considered by the Judge because they were not part of the Defendant's defence or counterclaim. The case may have taken a different turn, and further evidence may have been led if the defence or counterclaim had raised that

argument.

66. Furthermore, there is no evidence or submission before this appeal court that the waiver argument now advanced by the Defendant is available under the laws of the Emirate of Dubai or the laws of the UAE, or if it is, the matters required to be satisfied to establish a waiver.

67. The Defendant raised further arguments concerning the extensions of time for delay allowed by the Judge. The Defendant has not demonstrated that the Judge's finding was not open or that the findings were plainly wrong.

68. I do not uphold the decision of the Judge on the grounds that the commencement date was 21 January 2022 or that the Claimant waived the right to rely on a "start date" calculated in accordance with clause 21 or the other matters raised by the Defendant.

Ground 3: damages for stress and inconvenience

69. The Judge allowed damages of AED 50,000 for stress and inconvenience caused to the Defendant by the Claimant's breach of contract in failing to carry out the Works properly in accordance with the Agreement and failing to complete the Works in accordance with the Agreement.

70. The Claimant appeals against that award of damages on the ground that the learned judge erred in fact and law in finding that the Defendant must be entitled to the damages for stress and inconvenience. The Claimant submits that the evidence did not establish circumstances that warranted an award of damages for stress and inconvenience for breach of the Agreement.

71. At the Hearing there was no discussion of the applicable law.

72. The traditional common law approach for breach of contract is that damages are awarded to compensate the innocent party for financial losses caused by the breach. However, if losses have manifested themselves in physical inconvenience or discomfort, where the purpose of the contract was to provide freedom from distress and peace of mind, the courts have allowed recovery for these non-pecuniary losses. See for example *Watts v Morrow* [1991] 1 WLR 1421, *Baltic Shipping Company v Dillon* (1993) 176 CLR 344, *AXA Insurance UK v Cunningham Lindsey* [2007] EWHC 3023.

73. A claim for distress and anxiety is more likely to succeed in the context of distress and inconvenience caused by physical consequences of the breach of a contract to renovate a residence than a purely commercial context, because as Lord Justice Bingham stated in *Watts v Morrow* at 1445:

> "Where the very object of the contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if a contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective".

74. It was for the Judge to assess the evidence and determine whether an award of damages for stress and inconvenience was justified and if so to assess the appropriate award.

75. The Claimant has not established that it was not open to the Judge to find that an award of damages for stress and inconvenience was justified or that it was not open to the Judge to assess the appropriate award to be AED 50,000.

76. On appeal the Claimant submitted that the Agreement is governed by the law of the Emirate of Dubai and the UAE which includes Federal Law (1) 1987 Concerning Civil Transactions Law of the UAE (the Civil Code). The Claimant referred to article 389 of the Civil Code which provides that

> "If the amount of compensation is not fixed by law or by the contract, the child shall assess it in an amount equivalent to the damage in fact suffered at the time of the occurrence thereof".

77. The Claimant did not raise that point in the SCT hearing. Whether to permit a point to be raised for the first time in the appeal is a matter for the court's discretion.

78. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

79. I will not permit the point to be taken on appeal. If the point had been taken in the SCT, the proceedings would have proceeded differently. Evidence may have been led and the Judge, who is learned in the law of the Emirate of Dubai and the UAE, may have analysed the relevant law. This Court does not have the benefit of any analysis of the relevant law.

80. Further, the Claimant did not demonstrate whether or how that provision of the Civil Code, if it applies, precludes the court from awarding damages for stress and inconvenience if the court finds that the Defendant in fact suffered stress and inconvenience at the time of and in consequence of the Claimant's breaches of contract.

81. I am not satisfied that the Claimant has established that the Judge was wrong to award damages of AED 50,000 to the Defendant for stress and inconvenience suffered as a result of the Claimant's breaches of contract.

82. Ground 3 of the appeal is not made out.

Conclusion

83. The appeal against the order that the Claimant shall pay the Defendant the sum of AED 184.627.75 for her counterclaim under the subtitle Delay is made out to the extent that the award of damages of AED 134,627.75 for accommodation and associated costs must be set aside.

84. The appeal is otherwise dismissed.

85. The decision of the SCT will be varied by ordering that the order that the Claimant shall pay the Defendant the sum of AED 184.627.75, for her counterclaim under subtitle Delay is set aside and it is ordered that the Claimant shall pay the Defendant the sum of AED 50,000 for her counterclaim under subtitle Delay.