Claim No: ARB 010/2024

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

NEVEN

Applicant/Claimant

and

NOLE

Respondent/Defendant

ORDER WITH REASONS OF JUSTICE ANDREW MORAN

UPON reviewing the order of Justice Andrew Moran dated 7 June 2024 and the Reasons for the Order dated 25 June 2024

AND UPON considering all the Statements of Costs and submissions of the Parties on the issue of the costs of the Application made by the Claimant in the Claim Form in these proceedings, issued on 23 May 2024, seeking interim relief, in the form of (i) an injunction, together with (ii) an order for the production of information and documents regarding certain corporate transactions ("the Application")

IT IS HEREBY ORDERED THAT:

1. There shall be no order for costs on the Application.

2. Each party shall bear its own costs of dealing with the Application and its determination.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 25 September 2024
At: 1pm

SCHEDULE OF REASONS

1. The material parts of the Court's order of 7 June 2024 ("the Order"), following the recital of an undertaking given by the Respondent at the hearing, which was later filed in writing, for present purposes of dealing with the costs of it, were as follows:

> **"AND UPON** the Defendant giving an undertaking to the Court that it will not declare, pay or distribute any dividends to its shareholders, or otherwise enter or give effect to any binding or non-binding commitment to do the same, shall not make any payment to them, whether by return of capital or otherwise, to like effect, and shall not cause any of its subsidiaries or any branch in any jurisdiction to do the same, until 31 December 2024, which undertaking the court has accepted in making this order
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> **IT IS HEREBY ORDERED THAT:**
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> 2. The Claimant's Application for an order of inunction that the Defendant shall not until further Order of the Court, declare, pay or distribute any dividends to its shareholders, or otherwise enter or give effect to any binding or non-binding commitment to do the same, shall not make any payment to them, whether by return of capital or otherwise, to like effect, and shall not cause any of its subsidiaries or any branch in any jurisdiction to do the same, is refused.
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> 3. The Claimant's Application for an order that that the Defendant must produce the documents and/or classes of documents responsive to the requests, and provide the relevant information, set out in a Schedule, to members of a scheduled Confidentiality Club, is refused. .
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> 5. Liability for the costs of this Application shall be determined by the Court after receiving the parties' submissions in writing thereon, on a date to be agreed by the parties, or ordered by the Court in default of agreement."

2. Following the Order, the Parties agreed to file their submissions on costs on 24 June 2024 and did so file them on that date. The following day, the 25 June 2024, the Court issued its reasons for the Order ("the Reasons") and directed that the Parties may revise and re-file their submissions on costs, in order for them to take account of the Reasons. The Respondent duly filed a revised version of its Cost Submission dated 5 July 2024 ("RCS") and the Applicant filed an addendum to its submissions of 24 June 2024, (respectively "AACS" and "ACS"). In the result, the court has made its decision and order above, based on the last three mentioned submissions and refers hereafter to paragraphs in them, using those acronyms followed by a paragraph number/s.

3. The Parties were ad idem (at ACS/13 and RCS/21-22) that the Court should immediately deal with and assess the issue of costs on a summary basis. The Court now does so, without the need to recite or summarise their written submissions and with summary reasons for its

determination and Order.

4. The Court must first determine the issue of liability for costs in principle, in accordance with the relevant rules of the Rules of the Dubai International Financial Centre Courts 2014 ("the RDC") and the well-established principles they reflect. Both Parties have set these out in detail in their submissions, to like effect and with no material difference. The Applicant did so at ACS/19 and the Respondent at RCS/5-9.

5. In short, each party claims it was the winner on the Application and the other the loser; and that its conduct in bringing or defending the Application was reasonable; and that of the other, unreasonable in varying respects and degrees. Their detailed submissions on these matters, which have all been weighed carefully by me, are set out by the Applicant at ACS/15-55 and AACS/3-5, with a sensible acceptance in paragraph 6 of the latter by the Applicant, that the Court might consider that an apportionment of costs 50%-50% between the two aspects of the Application, would be more appropriate. The Respondent puts its case and position at RCS/23-45 and 59-65. These later paragraphs concentrating on the degree of success/failure and the breadth and importance of the Document Production Order sought - countering and counterbalancing the Applicant's now convenient case of diminishment of its importance (in stark contrast to its vigorous pursuit and advocation of its need and importance in the written Application and hearing), and its emphasis on the prime importance of the injunction application.

6. I have concluded that the order made above is the fair, just and appropriate costs order, for the following reasons.

7. I am satisfied first, that measured by the comparative investment of time and legal resources on both sides, that the costs incurred by each party were reasonable and proportionate having regard to the matters at risk for their respective clients. I am satisfied that whilst time spent and rates charged differ, they are broadly and sufficiently comparable enough in total, as not to make any difference in the assessment of where liability for them should lie. I accept the Respondent's submissions in this respect at RCS/49-50 and 55-60 and reject the Applicant's submissions to the contrary.

8. I am satisfied that pursuit of the order of injunction until the offering of the undertaking at court, in the satisfactorily protective terms in which it was very belatedly offered, was justified and reasonably necessary to restrain the Respondent from the implicitly threatened breach of contract it sought to restrain, as measured by reference to the Respondent's prior conduct and response to the Application. The Respondent's responses and offers of a very limited undertaking were insufficient, unreasonable and causative of the Applicant continuing with that part of the Application. I am satisfied the Respondent's response, particularly its very short time limited offer of an undertaking, did not represent a reasonable opportunity for the contractual dispute resolution process to be pursued beyond a Dispute Meeting. This, as made clear by the stance the Respondent had adopted, would have been futile; and the undertaking then offered, amounted to insufficient protection for the Applicant. It was not enough to secure the effectiveness of the agreed dispute resolution process.

9. The Applicant was however equally motivated in its pursuit of the Application by an unreasonably wide, unjustified and unnecessarily urgent pursuit (disregarding the powers of an arbitrator in the agreed dispute resolution process) of a disclosure order for categories of documents, far exceeding *"the most basic information",* which the court has refused for the detailed reasons it has given. The Applicant has wholly failed in its quest for that relief. The Respondent was entitled to resist that part of the Application before this Court, which is certainly and sufficiently for an arbitrator in due course, from start to finish and in whole.

10. In my judgment, the respective measures of success achieved by the Parties were broadly equal; and the measures of their responsibility for the Application and hearing not being avoided by a reasonable compromise, to enable the safe and secure pursuit of the contractual dispute resolution process, were likewise, broadly equal.

11. In my judgment, the injunction application and the disclosure application were of broadly equivalent substance and difficulty, engaging broadly equivalent expenditure of legal time and resources and therefore costs. By the time the necessary undertaking was offered and gave the Applicant the protection it was entitled to and needed, the costs of the Application and hearing had all been incurred. Consequently, no saving was achieved by its late offering; and the Applicant failure to accept it (although it was conceded it gave it significant protection) and pursuit of the rest of the Application, has unfortunately made no difference to the costs already incurred by both parties.

12. Whilst the Court does not believe that if the undertaking had been offered earlier, the Applicant would have withdrawn the disclosure application (and of course it never did - even when it was belatedly offered), it was offered only at the eleventh hour, and too late to make a difference.

13. Thus, in the result, both parties were equally responsible for all costs being incurred to the point of no saving being possible, and each of them achieved an equivalent degree of success in making their choices to expend them. They shall each accordingly bear those costs they have incurred.