IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE:

BETWEEN

AS WORLD GROUP HOLDING LIMITED

Claimant/Respondent

and

SAJID BARKAT AL BARKAT

Defendant/Appellant

ORDER WITH REASONS OF H.E. DEPUTY CHIEF JUSTICE ALI AL MADHANI

UPON the Judgment of H.E. Deputy Chief Justice Ali Al Madhani dated 11 May 2023 (the "Judgment")

AND UPON the Defendant's Appeal Notice dated 1 June 2023 seeking permission to appeal the Judgment (the "PTA")

AND UPON the Claimant's reply to the PTA dated 22 June 2023

AND UPON reviewing the Claimant's and the Defendant's evidence in the Core Trial Bundle

AND UPON review of the Law of Obligations, DIFC Law No.5 of 2005 (the "Law of Obligations")

IT IS HEREBY ORDERED THAT:

1. The PTA is dismissed in its entirety.

2. The Defendant shall pay the Claimant's costs of the proceedings on the standard basis, to be assessed by the Registrar, if not agreed.

Issued by:
Delvin Sumo
Assistant Registrar
Date of Issue: 5 July 2023
At: 9am

SCHEDULE OF REASONS

1. This is an application for permission to appeal the Judgement issued by H.E. Chief Justice Ali Al Madhani (the "Judge") dated 11 May 2023 (the "PTA"). The Judgment was granted in favour of the Claimant awarding them an amount of AED 4,104,278 plus simple interest accruing at the rate of EIBOR + 1 per cent, together with the Claimant's cost. The Order is challenged by the Defendant on five discrete grounds which I will set out in detail below.

2. My reasons for dismissing the PTA are five-fold. First, the Defendant has failed to discharge its burden of proof and failed to provide any cogent reasons explaining why the Judgment should be overturned. Second, the grounds of appeal do not identify any real prospect of success. Third, the grounds of appeal even if were to be considered, are not sufficient to be considered persuasive and to have the effect of reversing the outcome of the Judgment. Fourth, there are no compelling reasons as to why the appeal should be heard. Fifth, the Court is not bound by criminal proceedings that are taking place in onshore Dubai.

3. I will not repeat the facts and the background of the case as it has been dealt with thoroughly in my previous Judgment. I have read through the Claimant's and the Defendant's submissions and in this short schedule of reasons, I do not intend to refer to each point that has been raised by the parties. The fact that I may omit some arguments do not mean that I have overlooked them.

4. Before I deal with the grounds of appeal, I will remind myself of the applicable test set under RDC 44.19 in which the Court will only grant permission to appeal if the Court considers that (a) the appeal would have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard.

5. The issues that arose out of the parties dispute were set out succinctly at paragraph 6 of the Judgment, however it might be worth listing those issues in this Order:

(i) to assess whether there had been an unlawful increase of the Defendant's Salary from AED 40,000 to AED 75,000;

(ii) to determine if the Noor Bank Cheques were issued with the approval of the Claimant or Mr Senghor to pay for the Defendant's Dubai Hill Villa and to ascertain if those payments were paid as a gift by Mr Senghor on behalf of the Claimant;

(iii) to determine if the registration of the Range Rover Vogue under the Defendant's name had been approved by Mr Senghor on behalf of

the Claimant and if the transfer of ownership from the Claimant to the Defendant intended to be a gift; and

(vi) finally, to establish if the bank transfer of AED 2 million from the Claimant's account into the Defendant's bank account had been approved and authorised in order to pay business expenses.

6. As the Judge at the original hearing, I had the benefit of absorbing the live evidence of all witnesses and reviewing the parties' submissions and skeleton arguments prior to the Trial and when drafting the Judgment.

7. I will now turn to the Defendant's grounds of appeal which, from my reading, do not properly engage in challenging the findings or the analysis conducted on the relevant disputed issues in the Judgment.

Ground one - alleged failure to consider whether the Defendant had resigned or was dismissed by Mr Senghor.

8. The first ground of appeal involves a factual issue related to the lack of any ruling on the termination of the Defendant's employment. The Appellant contends that if there had a proper determination of this factual dispute, it would have been in favour of the Defendant and against the Claimant. This view is based on the Defendant's allegation that the claims are a "reprisal" by Mr Senghor. Accordingly, the result of this issue would have compelled the Judge to find the Defendant a credible witness and dismissed AS World's claim in its entirety.

9. A Judge is not required to set out in a judgment all issues that have been considered and findings on every individual factual dispute, particularly ones that are not core issues to the main dispute between the parties. However, to the extent that the Defendant submits that any ruling would have been in his favour and against the Claimant, it is clear that the evidence weighed in favour of the Defendant having resigned. This is reflected in the analysis set out in paragraph 32 of the Judgment. In my Judgment this issue however, determined would not have impacted the outcome of the Trial, particularly given the overwhelming evidence against the Defendant on the key issues in this case.

10. It is for those reasons that this ground of appeal is dismissed as it does not identify any real prospect of success if the Judgment is overturned.

Ground two - lack of reasoning on a factual issue relating to para 21 of the Judgment

11. The second ground of appeal relates to the lack of any reasoning at paragraph [21] of the Judgement which reads as follows:

> "In early May 2021, Mr Senghor became aware of the Defendant's alleged unlawful use of the Claimant's funds, making various unauthorised instalment payments towards his personal villa. In light of that information, on 7 May 2021, Mr Senghor cancelled the Defendant's signatory powers granted to him by the Claimant".

12. This paragraph was set out to be part of the chronology of the events as the Court had understood them to be, based on the evidence and therefore there is no failure to give reasons for any finding. It is unclear to the Court how this ground of appeal relates to the key findings of the Judgment. Similar to the issues in Ground 1, this is not an important point or even a key issue which the Court needed to make a finding on. Assuming it was, this would not have impacted the final ruling or the credibility of the Defendant or the strength of his case.

13. It is for those reasons that this ground of appeal ought to be dismissed as it fails to identify any real prospect of success if the PTA is to be granted.

Ground three - the civil threshold was wrongly applied by the Court given the criminal proceedings being on foot in Dubai Courts

14. This was in relation to the allegedly damaging findings in which this Court made by failing to apply a higher standard burden of proof and *"given the serious consequences on the criminal proceeding it was incumbent on the Judge to apply a higher standard of proof"*.

15. The criminal proceedings which are on foot before the Dubai Courts are not, and have not been an issue before the DIFC Courts. The Court has not been required to make any relevant findings related to the criminal proceedings (between the Public Prosecutor and the Defendant) and assuming that the Defendant had intended to do so, the DIFC Courts does not have any jurisdiction to make rulings on criminal matters or any relevant findings. The criminal proceedings are taking place in the Dubai Courts, being the most appropriate forum, exercising its criminal jurisdiction which the DIFC Courts does not have.

16. I reject the Defendant's contention that the law is silent on the standard of proof in relation to breach of fiduciary duties, in civil cases, the balance of probabilities is the appropriate and standard of proof that ought to be applied. This question had been raised before in the Court of First Instance before Sir Justice Jeremy Cooke in GFH Capital v David Haigh [CFI-020-2014], there were allegations against Mr Haigh of fraud and breach of fiduciary duties and the view proposed by the Defendant's counsel on that occasion, that a higher standard of proof is required to be applied for the serious allegations, was firmly rejected. There is no justifying reason to depart from this point of view.

17. Further, the Defendant failed to properly address why this Court should have applied a higher threshold on standard of proof when this is purely a civil matter. The Defendant's counsel referred to two authorities being *Re D [2008] UKHL 33 and Commissioner of Police of the Metropolis v Ebanks [2012] EWHC (Admin) ("Ebanks")*, however having considered these cases I agree with the analysis of the Claimant's counsel [at para 26(a)and 26(b)] of her skeleton argument. In my view they do not support the proposition put forward by the Defendant `s counsel. The law is not silent on the test to be applied to cases of allegation of fiduciary duties, and where the criminal allegations are brought by a different party in a different court, albeit in relation the same underlying facts.

18. The criminal proceeding were not an issue that needed to be considered by this Court.

19. In any event, I note that this point was not raised by the Defendant's counsel at Trial, and if the Defendant intended this Court to apply a higher threshold to standard of proof, this should have been raised at the outset of these proceedings. It should not have been raised as a ground of appeal which would undoubtedly prejudice the Claimant's position. In fact, the Defendant's counsel reiterated that the Claimant needed to discharge its burden of proof but did not clearly set out that this had meant a higher standard of proof should be applied to the allegations brought

against him, however this was important for the Defendant's counsel to have clarified this position and this simply was not done.

20. Therefore, the Defendant is not permitted to raise new points in the PTA.

Ground Four - the alleged failure to determine whether Mr Senghor had seen the WhatsApp message of 20 April 2020

21. This ground of appeal seeks to challenge the decision on account that the Court failed to consider the evidence of WhatsApp message sent by the Defendant to Mr Senghor on 17 April 2020. "There was a requirement for the Judge to state why he preferred Mr Senghor's oral evidence over the objective documentary evidence".

22. The evidence relating to the WhatsApp message had been carefully considered by the Court to justify its findings in relation to the salary issue which was one of the pertinent issues in this dispute. The Court concluded [at para 50 and 53] that the Defendant could not simply rely on the WhatsApp evidence to support his argument that Mr Senghor ought to have known about the salary increase of AED 75,000 from September 2019 - March 2021.

23. Further, the Court weighed all of the evidence in the context of all issues relating to the authorisation of a salary increase concluding that the Defendant's evidence on that matter to be "contradictory and reasonably unconvincing". Even if the Court had not provided its analysis and findings on the WhatsApp issue there would still be no justifying reason that this would have been in favour of the Defendant or his credibility as a witness.

24. With respect to the rationale behind the Court's preference of Mr Senghor's oral evidence over the "objective" WhatsApp message is clearly set out [at para 44] in the Judgment. Namely, the Court concluded that it would have been a common practice to have a written document recording the Defendant's salary increase given his statutory and contractual duties owed to the Claimant which would have removed any uncertainty relating to his actual entitlement. As mentioned above, the Court had the benefit of hearing the Defendant's cross examination including the Defendant's evidence around the salary increase, and concluded that it was unrealistic and absurd to propose that he had been working for two companies and had been promoted to a CEO position.

25. To conclude, there was no failure by this Court to determine this issue and it is for those reasons set out above that this ground of appeal has no real prospect of success.

Ground five - alleged failure to consider evidence

26. The Defendant alleges that the Court had erred in finding that one reason Mr Senghor did not read AS World's bank statement was based on a language barrier, on the basis that during the cross-examination of Mr Senghor, the Court made a remark that Mr Senghor spoke good English.

27. The Court's findings that there was a language barrier had been primarily prompted by the Defendant during his cross examination [at para 115] whereby the Defendant contended that he "became a signatory of AS World's bank account as a result of Mr Senghor's difficulty in communicating directly with bank officials". Further, the Defendant referred to the language communication issues being a factor for why he was entrusted to be the person on the ground on behalf of Mr Senghor.

28. The fact that Mr Senghor did not read the bank account statement of the Claimant was not one of the reasons for the Court's findings against the Defendant, rather the Defendant failed to account for and justify the receipt of funds in his bank account and there was no basis for the Defendant to have received them or for the fact that they had been retained by the Defendant. This is another example of the Defendant's filing appeal ground based on factual issues that had no bearing on the outcome of the Court's ruling.

29. I reject the Defendant's contention [at para 3.3] that AS World's bank statement being the "objective documentary evidence" had corroborated and supported the Defendant's version of events. The Defendant's case was misconceived and weak. The existence of AS World's bank statements did not constitute any knowledge or consent either by the Claimant or Mr Senghor. The bank statements recorded that there had been payments from the Claimant's bank account to the Defendant's account. Those payments do not demonstrate that the Claimant authorised, approved or had knowledge of its debited transactions. Further, it is unconvincing for the Defendant to rely on the defence that Mr Senghor should have or ought to have had knowledge of those unexplained transactions during his employment to mitigate his dishonest behaviour and misconduct. The Defendant has been entrusted as a managing director of AS World and he had clearly abused his fiduciary and statutory position.

30. Further, the Court, carefully considered all documentary evidence (including Mr Senghor's language difficulties which had been admitted by the Defendant in his cross examination) and if Mr Senghor had read those bank statements this would not have materially affected the Court's findings that the Defendant had unjustly enriched himself using the funds of the Claimant and Mr Senghor and was therefore acting in his own best interests to the detriment of AS World.

There is no prospect of overturning the Judgment on this basis and this ground of appeal is dismissed.

Conclusion and cost

31. There is no reason why costs should not follow the event and therefore the Defendant should be ordered to pay the Claimant's costs of the PTA to overturn the Judgment. The costs should be on the usual standard basis if not agreed between the parties.