Claim No. CFI 029/2012

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BETWEEN

TECHNICAL ARCHITECTS GENERAL CONTRACTING COMPANY LLC Claimant
and

NAKHEEL PJSC

Defendant

JUDGMENT OF DEPUTY CHIEF JUSTICE SIR ANTHONY COLMAN

Counsel: Anthony Edwards and John Smy of Hadef & Partners on behalf of the Claimants

Graham Lovett and Karie Akeelah of Clifford Chance LLP on behalf of the Defendants.

Judgment: **20 December 2012**

Introduction

1. This is a claim for judicial review of a decision of the Dubai World Tribunal "DWT" given the judgment dated 5 July 2012. The facts are somewhat unusual but they may be summarised as follows.

2. On 8 June 2011 the DWT issued a judgment in default of acknowledgement of service in the sum of AED 73,129,905.

3. On 21 August 2011, at the initial inter-parties hearing, the Defendant's Counsel indicated that the only argument for setting aside of those available under Part 14.2(1) of the DWT Rules would be that the Defendant did have a real prospect of successfully defending the claim.

4. At the restored inter-parties hearing on 7 February 2012 there was a full argument on the substance of the Defendant's defence but the DWT refused the Defendant's application.

5. On 13 February 2012 the DWY's formal order dismissing the application was drawn up.

6. On 27 February 2012 the Defendant paid the claim in full.

7. On 20 March 2012 the DWT issued Reasons for Judgment, in which at paragraph 31 reference was made to a component of the total judgment of loss of profit, amounting to AED 11.6 million. The DWT stated that if, due to an oversight by the Defendants, no issue was raised at the hearing as to whether there was an arguable defence to the loss of profit claim, the Defendant could apply for re-consideration of that part of the claim within 14 days.

8. On 3 April 2012 - the Defendant filed an application for the default judgment to be varied to exclude AED 11.6 million and for the Claimant to reimburse that amount to the Defendant within 14 days; together with interest on AED 11.6 million.

9. The hearing of the Defendant's application took place on 20 May 2012 and the Tribunal gave judgment on 5 July 2012. In paragraph 27 it was concluded that the Defendant's Counsel had by an oversight omitted at the hearing on 7 February 2012 to challenge the claim for loss of profit. The relevant oversight was failure to challenge the mismatch between the sum of AED 50 million due under the relevant settlement agreement in full and final settlement of claims against the Defendant and the sum AED 73,629.905, for which judgment in default had been obtained. The difference of AED 11.6 million was said by the Claimant to be a claim for loss of profit arising from non-payment of the AED 58 million.

10. However, the full and final settlement under which AED 58 million was due, already covered claims for loss of profit and accordingly the claim for AEO 11.6 million was groundless.

11. The judgment concluded that the claim for loss of profit must in the interests of justice be refused and that the AEO 11.6 million must be paid back by the Claimant to the Defendant, together with interest.

Submissions

12. The foundation of the Claimant's application for judicial review is that by reason of Article 5(4) of Decree 57 of 2009 it was not open to the OWT to change its original judgment for AED 73,629,905 - the amount of the default judgment. Article 5(4) provides:

"The decisions and orders of the Tribunal shall be final, irrevocable and not subject to any appeal or review,"

13. The Claimant's submissions may be summarised as follows:

14. The DIFC is empowered to hear applications for judicial review under ROC Part 42. Part 42.2(1) provides:

> "a claim for judicial review means a claim to review the lawfulness of a decision, actions or failure to act in relation to the exercise of a public function."

15. I interpose that it is clear fROm ROC 42.11 and RDC 42.13(3) that a decision of a Tribunal falls within the scope of the Court's powers of judicial review since the provisions expressly refer to proceedings "in a Tribunal" (ROC 42.11) and a decision "of a Tribunal" (ROC 42.13).

16, Under Article 5A1 of Law No. 16 of 2011 (amending law No. 12 of 2004) the DIFC Courts is given exclusive jurisdiction over:
a) Civil or Commercial cases and claims involving ... any of the Centre's Establishments; and
b) Any application or case of which the Courts have jurisdiction under the Centre's Laws and Regulations.

17. The word "Centre" refers to the DIFC: see Law No. 12 of 2004, Article 2

18. The DWT is an institution which carries on its business within the DIFC. It thus falls within the definition of Centre's Establishment as defined by Article 3 of Law No. 16 of 2011:-

> "Any utility or project established, licenced or authorised to carry out business or practice any activity in the Centre according to the Centre's Laws."

19. In this connection, the Centre's Law is defined in Article 3 of Law No. 16 as

> "Any laws related to the Centre issued by the Ruler."

20. The Claimant then refers to Decree No. 57 of 2009, under which the DWT was established. In particular, Decree 57 provides by Article 4 as follows:

> "Subject to the provisions of this Decree, the Tribunal shall decide the demands and claims submitted to it by virtue of:
> 1. The DIFC Law No. (3) of 2009 concerning the law in Insolvency, according to the amendments stated in the Schedule hereto;
> 2. The Regulations Issued by the Board of Directors of the DIFCA Concerning DIFC Insolvency Regulation, according to the amendments stated in the Schedule hereto;
> 3. DIFC Law No. (10) of 2004 Concerning the Court of the DIFC, according to the amendments stated in the Schedule hereto;
> 4. Legislation in force in the Emirate;
> 5. Commercial custom;
> 6. Principles of justice, and rules of righteousness and equity."

21. interpose that the Schedule to the Decree excludes the application of numerous provisions of the DIFC Insolvency Law, These exclusions were obviously drafted in order to cater for the special circumstances surrounding the financial collapse of Dubai World, Nevertheless, the DIFC Insolvency Law provides the substantial basis for administration of the insolvency of Dubai World and is therefore the preponderant applicable law by reference to which the DWT determines disputes as to the claims against that Group.

22. The Claimant then relies on Article 5 of Decree 57 and in particular on:

> "(1) The Tribunal shall have its seat and hold its hearings in the DIFC.
> (2) All proceedings before the Tribunal shall be open to the public unless the Tribunal decides otherwise ...
> (3) The Tribunal shall issue its decisions and orders (i) by the unanimous or majority votes of its members and (Ii) in the name of the Rules."

23. The Claimant submits that, on this basis, the Tribunal carries on its business according to the Centre's Laws.

24. In this connection Article 3 of Law No. 16 refers to an entity or project licenced or authorised to carry out business or practice (sic) any activity in the Centre according to the Centre's Laws. Accordingly, the relevant questions are whether the entity is licenced or authorised to carry out the relevant activity and whether such activity is to be carried out in accordance with the Centre's Laws.

25. The Claimant further relies on Article 8 of Decree 57 which provides:

> "(1) The Government *and the DIFC* shall provide the necessary administrative and financial support to the Tribunal for it to discharge its duties under this Decree." (emphasis added).

26. On this basis it is submitted by the Claimant that the DWT being a Centre Establishment and this Court having jurisdiction under the Centre's Laws, this Court has exclusive jurisdiction under Article 5(1)A of Law 16 to hear an application for judicial review in respect of the judgment of the DWT given on 5 July 2012. Such a judgment was a decision of a tribunal in relation to the exercise of a public function within ROC 42.2(1).



27. The Claimant grounds the application for judicial review on Article 5(4) of Decree 57, by which it is provided as follows:

> "The decisions and orders of the Tribunal shall be final, irrevocable and not subject to any appeal or review."



28. It is argued that the DWT gave judgment at the hearing on 7 February 2012, refusing the Defendant's application to set aside the default judgment. That decision was then expressed in the Order of the Tribunal issued on 13 February 2012. The amount claimed in the underlying Particulars of Claim, being AED 73,629,905 for which judgment in default was given, inCluded the sum of AED 11.6 million in respect of loss of profit. Accordingly, the Order of the DWT covered that part of the claim. The Defendant had relied in the course of the hearing only on the ground for setting aside the default judgment that it had a real prospect of successfully defending the claim under Part 14.2(1) of the DWT Rules but had not in argument specifically addressed that part of the claim which related to loss of profit.



29. In addition to ordering that the Defendant's application be refused, the Order of the DWT of 13 February ordered that

> "The Claimant has liberty to apply within 14 days for a hearing before the Tribunal in relation to any elements of the Claim where judgment has not been handed down or an Order has not been made."



30. I interpose that, taking the claim for loss of profit as an "element" of the claim, judgment had been handed down and an Order had been made by 13 February 2012. Accordingly, by reason of the operation of Article 5(4), the DWT's decision and order given on that date were final and irrevocable.



31. The Reasons for Judgment issued by DWT on 20 March 2012 contained the following:

> "No issue was raised at the hearing as to the amount of the Claim which includes an item of AED 11.6 million as a claim for "Loss of Profit" ... if this was due to an oversight on the part of the Defendant, any application for reconsideration of this matter shall be made in writing forthwith, within 14 (fourteen) days of these Reasons being made available to the parties, but without prejudice to the Claimant's right to enforce the judgment for its full amount."



32. The Defendant having availed itself of this invitation from the DWT by applying for the default judgment to be varied to exclude AED 11.6 million, the amount of the loss of profit claim, and for interest on it, the judgment of the DWT on that application, stating as it did that "the Loss of Profit Claim therefore is refused" was contrary to Article 5(4) of Decree 57. That was because what the DWT was doing was to review and to revoke its previous decision which by reason of Article 5(4) had become final and irrevocable.



33. It was thus submitted that in as much as the Reasons for Judgment invited the Defendant to consider applying to the DWT for reconsideration of the loss of profit claim, it was inviting the Defendant to apply to it to do something which it could not lawfully do. Further, the Defendant having adduced no evidence that its representatives had overlooked the need to refer expressly to the loss of profit claim, the DWT erred in law in concluding that there was such evidence and therefore in entertaining the application to review it.



34. On the basis that the DWT had no power to change its decision, the Claimant both requests permission to proceed in the claim for judicial review, and claims declarations that (i) pursuant to Article 5(4) of Decree 57, the decision of the DWT on 7 February 2012 and the Order of 13 February 2012 were final, irrevocable and not subject to any review by the DWT or to appeal and (ii) that paragraph 37 of the of the Reasons for Judgment of 20 March 2012 amounted to a review of its earlier decision and Order and was therefore impermissible.



35. The Claimant further applies for an immediate injunction restraining the Defendant from taking any step in the Courts of Dubai to enforce payment from the Claimant of AED 11.6 million pursuant to the DWT's judgment of 5 July 2012, alternatively from continuing with any enforcement step in the Dubai Courts.



36. The Defendant's submissions are as follows.



37. The scope of the DIFC Courts's powers to hear and determine applications for judicial review is limited to Article 22(1) of the DIFC Courts Law - No. 10 of 2004 which provides:

> "The Court of First Instance may hear and determine applications for judicial review of statutory decisions as provided for in DI FC Law or in the Rules of Court."



38. Since DWT is an autonomous body set up by Decree 57 in the Emirate of Dubai and its judgments are not decisions taken to give effect to a specific statutory power or requirement they are not "statutory decisions" within Article 22(1). Nor is the claim underlying this application a civil or commercial dispute which involves the DIFC or any of the DIFC's Bodies, Establishments or Licenced Establishments within the meaning of Article 5(A)(1)(a) of Law No. 16 of 2011. The DWT is not a DIFC institution, having been set up in the Emirate of Dubai. Although the DWT has its seat in and is administered from offices, and holds hearings in, the DIFC, it is not an entity or project established, licenced, registered or authorised to carry out business or practise any activity in the DIFC according to DIFC Laws. It has no legal connection with the DIFC: it is merely physically located in the DIFC. In particular the DFSA has played no part in enabling as a matter of

DIFC Law the DWT to operate in the DIFC.

39. Further, as appears from Article 4 of the Emirate Decree 57, the law to be applied by the DWT to disputes before it is not necessarily the law of the DIFC. Legislation in force in the Emirate of Dubai, commercial custom and principles of justice and rules of righteousness and equity can be applied. Indeed, large parts of the DIFC Insolvency Law are expressly excluded from application in the DWT by the Schedule to Decree 57. Accordingly, the Claimant cannot ground jurisdiction of the Court on Article 5(A)(i)(e) of Law 16 of 2011.

40. Not surprisingly, the Defendant submits that, regardless of any question of the scope of the Court's jurisdiction, the words of Article 5(4) of Decree 57 expressly prohibit judicial review of decisions and orders of the DWT:-

> "decisions and orders of the Tribunal shall be final, irrevocable and not subject to any appeal or review."

41. Further, following the restructuring of the Dubai World Group, Nakheel and its associated entities ceased to be subject to the jurisdiction of the DWT and with effect from 23 August 2011 cases involving those entities were transferred to the Courts of Dubai. Accordingly, even if there might otherwise have been jurisdiction in the DIFC Courts, by the time that this application was launched, cases relating to Nakheel Entities could not be brought in the DWT or any other court except the Dubai Courts.

42. The Defendant further extends that by reason of RDC 42.7 the Claimant ought to have commenced proceedings for judicial review no later than 3 months after the grounds to make the claim first arose. That is to say 3 months after 20 March 2012, the date on which the judgment was given. In the event the Judicial Review claim was commenced in 5 August 2012.

Discussion

43. In order to permit this claim to proceed to a full hearing the Court must be satisfied that there is at least an arguable case that the Claimant has a ground for seeking judicial review which permits full investigation at a full oral hearing with all parties and all the relevant evidence.

44. The burden of establishing that there is at least an arguable case that the Claimant's case merits full investigation at a full hearing rests on the Claimant.

45. This Court must first be satisfied that it has jurisdiction.

46. The starting point is Article 22(1) of the DIFC Courts Law No. 10 of 2004. This is the only basis upon which the Court can exercise a judicial review jurisdiction. However, the Claimant is confronted by two distinct difficulties. First, there has to have been a "statutory decision." Second, there has to have been provision in DIFC Law or the RDC for the making of such decisions.

47. "Statutory decision" is not defined, but the probable meaning is that the statute must provide for a public official or body to make decisions about particular matters identified in the statute. Secondly, DIFC Law or the RDC must provide for the making of such decisions.

48. The Claimant has a real difficulty because the decisions of the DWT are not decisions taken with regard to specific matters which are required to be decided under a statute.

49. Secondly the existence of the DWT and the functions of that Tribunal are not prescribed by DIFC Law or by RDC but by Decree 57 - a legislative instrument of the Emirate.

50. The next jurisdiction issue is whether, even if that conclusion is wrong, the Court could still have jurisdiction under the Article 5(A)(1)(a) of Law No. 16 of 2011.

51. As to Article 5(A)(1)(a) of Law No. 16 of 2011 , - jurisdiction over civil and commercial disputes involving the DIFC or any of the DIFC's Bodies, Establishments or Licenced Establishments - this could only avail the Claimant if the DWT could properly fall within one of those descriptions. In my judgment, however, it does not even arguably fall within them. The problem is that each category is either part of the DIFC itself or subject to the DIFC's control under DIFC Law. That cannot be said of the DWT, which, although located within the DIFC and administered by and in receipt of financial support from the DIFC, is neither an emanation of the DIFC nor subject to control by the DIFC: it is a unique body in as much as, although it operates within the DIFC, it is an enclave within an enclave, being outside the control of the DIFC government. In this connection, the DFSA does not issue any licence or permit or process of registration to DWT to enable it to operate in the DIFC.

52. As to Article 5(A)(1)(e) of Law No. 16, this provision gives jurisdiction over applications or cases which provisions of the DIFC Law or Regulations require to be determined by reference to DIFC Laws and Regulations. The difficulty with reliance on this head of jurisdiction is that there are no DIFC Laws or Regulations which prescribe DWT as bound to apply DIFC Law.

53. Accordingly, the Claimant's case faces jurisdictional obstacles which I consider to be insurmountable.

54. However, more difficult even than those matters is the effect of Article 5(4) of Decree 57.

55. The legislative purpose behind this provision was clearly aimed at achieving a rapid determination of claims against Dubai World and its assorted companies in order to obtain finality as early as possible. Deprivation of any right of appeal from the decisions of the DWT is a very strong indicator of that purpose. The use of the word "review" alongside "appeal" really underlines the concept of finality of the DWT's

decision.

56. Accordingly, "review" being wide enough to cover judicial review, I have no doubt that judicial review is excluded by this provision.

57. Taking together all the jurisdictional matters discussed above, as well as the terms of Article 5(4) of Decree 57, I have therefore no doubt that the Claimant has no realistic prospect of success were there to be a full hearing. Accordingly this application for judicial review will be dismissed with costs.

Issued by

Registrar

Mark Beer

Date of Issue: 20 December 2012

At: 4 pm