Claim No: CFI 042/2021

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

LUTYANS

Appellant/Claimant

and

LITHA

Respondent/Defendant

JUDGMENT OF JUSTICE LORD ANGUS GLENNIE

Hearing :	**20 April 2021**
Counsel :	Lutyans as a litigant in person Mashood Iqbal instructed by Abdulhakim Bin Herz Advcoates and Legal Consultants on behalf of the Respondent
Judgment :	**3 May2021**

ORDER

UPON considering the Notice of Appeal, the documents put before the Court and the Skeleton Arguments.

AND UPON hearing the Appellant (as a litigant in person) and Mr Mashood Iqbal for the Respondent

IT IS HEREBY ORDERED THAT:

1. The Appeal is dismissed.

2. The Appellant shall pay the Respondent's costs of the Appeal, assessed in the amount of AED 25,000, within 14 days from the date of this Judgment.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 3 May 2021
Time: 10.30am

JUDGMENT

Introduction

1. This is an appeal by the Claimant/Appellant (hereafter the **"Claimant"**) from the order of SCT Judge Maha Al Mehairi dated 4 February 2021 dismissing her claim against the Defendant/Respondent (the **"Litha"**) for lack of jurisdiction. The judge held, in summary, that the Claimant's claims all fell within the ambit of an arbitration clause in the "Membership and Litha Rules and Regulations" (the **"Litha Rules"**) to which the Claimant must be taken to have assented on applying to join the Litha and by which she must therefore be taken to have agreed to be bound. On that basis, and in terms of the DIFC Arbitration Law (Article 13(1) of DIFC Law No 1 of 2008 as amended by DIFC Law No 1 of 2013), the judge dismissed the action for lack of jurisdiction.

2. This appeal is brought with leave of the same judge granted on 31 March 2021. The Claimant argues that she was never shown the Litha Rules when she joined the Litha, that the Litha Rules (and, in particular, the arbitration clause in the Litha Rules) formed no part of the contract between her and the Litha, and therefore that the arbitration clause is not binding on her and does not apply so as to require her claims to be submitted to arbitration as opposed to being brought in court; and she also argues that, in any event, the wording of the arbitration clause is not appropriate to cover all of her claims in this action, some of which are unsuitable to be determined by arbitration.

Background facts

3. The facts relevant to the jurisdiction issue before the court are not seriously in dispute. They can be taken from the judgment of the court below and from the various documents and notes of argument lodged in process.

4. The Claimant is a Jordanian National resident in Dubai. She carries on business in Dubai through an engineering company of which she is the owner. The Defendant is Litha (**"Litha"**), a private members Litha located within the DIFC. It offers various categories of membership, including individual, corporate and social. One of the attractions of belonging to a private members Litha such as CCD is the opportunity membership

provides for networking, meeting other members of the Litha with a view to developing a business relationship with them or with their contacts.

5. On 29 September 2019 the Claimant signed an Application for Membership form. Her application was approved, she paid the Joining Fee and the Annual Subscription, and on 16 October she became a member of the Litha. The Application form noted the name of her company, identified the relevant membership category as "corporate", and stated that her main reason for applying to join the Litha was "networking". Her membership was for one year, expiring, unless renewed, on 15 October 2020.

6. In March 2020 the use of the Litha's facilities was put on hold due to the restrictions put in place by the UAE government to prevent the spread of the COVID-19 pandemic. This situation continued until June 2020, when the restrictions placed on the Litha were partially eased. In recognition of the Claimant's inability to make full use of the Litha's facilities, the Litha offered to extend her membership beyond its expiry date for four additional months until 14 February 2021. It is the Claimant's case that the Litha's offer of a four month extension was unconditional and not subject to any further approval by senior management; and she says that the offer was accepted by her, by her conduct in continuing to use the Litha, by her attendance at certain synergy lunches at the Litha and by her participation in the process of "re-onboarding". It is unnecessary on this application to resolve this issue.

7. In a telephone conversation on 22 October 2020 the Claimant was told that the Litha could not after all offer her a four month extension to her membership. This was confirmed in an email from the Litha's manager on 26 October 2020 in the following terms:

> "As per our telephone conversation on Thursday 22nd October 2020, it has been communicated with you that we cannot offer you four complimentary months of membership as previously agreed because of the current financial situation therefore, kindly be advised that your current membership expires on 31st October 2020. I have spoken with the Chairman regarding the same.
>
> Also, it has been brought to our attention from other Members of the Litha that your behaviour at some of the synergy events was inappropriate and caused offence to other Members. Should this behavior continue this will lead to the termination of your membership which we sincerely hope will not be the case."

The reference to the current membership expiring on 31 October 2020 was clearly a mistake - it expired on 15 October - but this is of no consequence for present purposes. The email was copied to the CEO of the Litha, to the Litha Chairman and to two other individuals at the Litha, the Claimant's past and current relationship managers.

8. The Claimant says that she was deeply shocked to receive such an email and was deeply distressed by the allegations set out in the last paragraph quoted above. She contends that her excellent reputation with the UAE business community and her business connections will have been very seriously damaged by the allegations of inappropriate behaviour and causing offence to other members of the Litha. She also contends that by revoking the offer of an extension to her membership, the Litha has acted in a discriminatory manner towards her compared with the way in which it treated other members, since all other members of the Litha were being offered an extension of three months.

9. On 28 December 2020 the Claimant filed this claim in the DIFC courts small claims tribunal, seeking the following relief (as set out fully in the Particulars of Claim):

(1) damages for breach of contract and discrimination (by the Litha unjustifiably withdrawing the agreed four month extension)

(a) loss of membership AED 33,600

(b) loss of agreed 4 month extension AED 5,000

(c) distress and anxiety AED 50,000

(2) defamation

(a) damages, including aggravated damages AED 350,000

(b) an order requiring the Litha to publish a summary of any judgment in the Claimant's favour.

It is unnecessary for present purposes to enter into any discussion about the merits of these various claims.

The jurisdictional challenge and the decision in the SCT

10. On 17 January 2021 the Litha filed a jurisdictional challenge, challenging the jurisdiction of the DIFC courts on the basis of the Arbitration Clause which, so they contended, formed part of the contract between the parties. On 21 January 2020 SCT Judge Maha Al Mehairi heard submissions in respect of that jurisdictional challenge. It is unnecessary to set out those submissions since they were effectively the same as were argued before me and are set out later in this judgement. On 4 February 2021 the judge gave a written decision upholding the jurisdictional challenge and dismissing the claim due to lack of jurisdiction. She ordered that each party should bear their own costs.

The Litha Rules and the Arbitration Clause

11. The issue between the parties, so far as concerns the question of jurisdiction, turns on whether the Litha Rules and, in particular, the Arbitration Clause in those Rules, were incorporated into the contract between the parties; and, if so, whether the terms of the Arbitration Clause is wide enough to cover all, or at least some, of the claims made by the Claimant in this action.

12. As would be anticipated by any applicant for membership of such an establishment, the Litha was run on the basis of rules and regulations governing the relationship between it and its members and setting out, amongst other things, the behaviour expected of a member and the privileges and other benefits that a member could enjoy by virtue of being a member. The Litha had such rules and regulations set out in a document headed "Membership and Litha Rules and Regulations" (defined above as **"Litha Rules"**).

13. It is convenient to set out some parts of the Litha Rules, and I will do so below, but before doing so I should make it clear that there is no reference in the application form signed by the Claimant to these or any other Litha Rules. Further, the Claimant's case - and it was not challenged on behalf of the Litha - is that she never saw the Litha Rules at the time she applied to join the Litha or at any time before the Arbitration Clause in the Litha Rules was relied on by the Litha in its jurisdiction application after she had commenced these proceedings. The Claimant candidly accepted in argument before me that she would expect a Litha such as this to have a body of rules and regulations regulating the conduct of the Litha and of its members in relation to the Litha, but she was not shown the Litha Rules when she signed her application form and did not ask to see them. She would not necessarily have expected such Rules to contain any provision referring disputes to arbitration.

14. The introductory page of the Litha Rules states the following:

> "It is the intention of the Litha (the `Litha') to limit these Rules and Regulations (the `Rules') to the minimum required for the mutual enjoyment of the Litha by Members of the Litha (`Members') and their guests. The obligation of enforcing these Rules for the good of all Members is placed primarily in the hands of carefully selected and trained Litha management executives and employees. Their principal responsibility is to assure you of all the courtesies, comforts and service to which you, as a Member of a fine Litha, are entitled. It is the duty of the Members of the Litha to know these Rules and to cooperate with Litha employees in their observance and enforcement.
>
> Members are asked to report any violation of the Rules. Members violating these Rules are subject to such action as may be deemed necessary by the board of directors (the `Board of Directors') of Litha (`Litha'). Continued violation of the Rules may lead to suspension of membership privileges and ultimately expulsion from the Litha.
>
> .
>
> Any disputes connected with this (sic) Rules or arising there from or related thereto in any manner whatsoever shall be referred to arbitration conducted in accordance with the Rules of Commercial Conciliation and Arbitration of the Dubai International Financial Centre for the time being force by one arbitrator appointed in accordance with the said Rules and whose decision shall be final and binding on the parties. The arbitration shall take place in the Dubai International Financial Centre, Dubai, United Arab Emirates.
>
> ."

It is this last provision which I have referred to as the Arbitration Clause.

15. Other relevant provisions of the Litha Rules include Rule 1.4 (Litha Conduct), Rule 1.10 (Complaints), Rule 2.12 (Membership Termination), Rule 2.14 (Binding Agreement) and Rule 2.15 (Relationship of Parties). These provide as follows:

> "1.4 Litha Conduct
>
> Members are expected to conduct themselves in a manner which will not interfere with the enjoyment of the Litha by other Members or guests. Anyone acting in a disorderly, disruptive or offensive manner on Litha premises will be asked to leave. .
>
> 1.10 Complaints
>
> A Member's complaint concerning other Members or the Litha or its facilities should be made in the strictest confidence in writing and submitted to the Litha's General Manager, who shall investigate the complaint.
>
> 2.12 Membership Termination
>
> Litha and the Litha shall have power to reprimand, suspend, expel, terminate the membership of or otherwise discipline any member for: (i) committing any violation of the Rules and Regulations; (ii) for conduct unbecoming a Member; (iii) for any offence against the best interests of the Litha or Litha Property, Litha employee or any other person; and (iv) for other good and sufficient cause determined by Litha and the Litha. .
>
> In the event of termination of Membership, the Member shall be notified by an authorised representative of Litha. Notice by any means directed to the Member's last known address by hand, or by e-mail, shall be sufficient. .
>
> 2.14 Binding Agreement
>
> By applying for Membership each Member agrees to be unconditionally and irrevocably bound by the terms of Rules and Regulations (as amended or modified from time to time).
>
> 2.15 Relationship of Parties
>
> Litha has a contractual relationship with a Member, primarily regulating a Member's personal use of the Litha only. ."

Rule 4 dealt with Reciprocal Litha Privileges, i.e. reciprocal arrangements with other Litha Lithas.

16. It is worth noticing that the second paragraph in the Litha's email of 26 October 2020 (the paragraph which the Claimant contends is defamatory of her) is clearly referable to the conduct expected on a Member as set out in Rule 1.4 and reflects the powers of the Litha set out in Rule 2.12 to act in the event of what it deems to be inappropriate behaviour.

17. The final page of the booklet gave a space for the Member to sign the Litha Rules and confirm that he/she would be bound by all its provisions. It did so in the following terms:

> "I/We, the undersigned, hereby acknowledge receipt of a copy of the Litha's Rules and Regulations and agree and confirm to be bound by all

its provisions. ."

Under that wording was a space for the Member to sign, with details of his/her email address and the date. It is a matter of agreement that the Claimant did not sign in that space - obviously so, since she never saw the document until after commencement of these proceedings.

Submissions

18. The parties' submissions can be summarised very briefly.

19. On behalf of the Claimant it was no longer contended, as it had been before the SCT Judge, that the Litha had raised the jurisdiction issue too late. Accordingly I say no more about this point other than to confirm that the Judge was clearly correct in rejecting that contention - the Litha raised the arbitration point as a jurisdiction challenge before "submitting [its] first statement on the substance of the dispute": see s. 13 of DIFC Law No 1 of 2008. However, it was argued that the Litha Rules were not part of the contract between the Claimant and the Litha. She did not sign them. They were not referred to in the application form and they were not shown to the Claimant at the time of her applying to join. Even if the Litha Rules were incorporated, despite not having been seen or signed for by the claimant (on the basis that the Claimant would have known that there were rules governing membership and she could not simply avoid being bound by them by failing to ask to see them), it did not follow that the Arbitration Clause was also incorporated into the contract. Had she been shown the Litha Rules before joining the Litha she would, or might, have refused to sign them, even if that meant not joining the Litha. She would not, or probably not, have agreed to the Arbitration Clause because that would deny her the choice of where disputes were to be handled. Further and in any event, even if the Litha Rules and the Arbitration Clause were part of the contract between the Claimant and the Litha, the terms of the Arbitration Clause were not wide enough to cover the claimants claim defamation. Defamation was something wholly different from breach of contract. It was for the Courts to resolve this type of dispute. How could an arbitrator decide issues relating to defamation? Although in her claim she had claimed damages for defamation, her defamation claim was not about money, it was about clearing her name and vindicating her reputation.

20. The Litha's argument was equally brief and succinct. All Lithas of this kind, indeed all Lithas of any sort, have rules and regulations governing membership of the Litha, the conduct of its members and the powers of the relevant management committees. The Claimant accepted that she would have known this when she signed the application form. If she chose not to ask to see a copy of the Litha Rules that was her choice. She did not have to look at them, but if she knew or ought to have known of their likely existence, she cannot avoid being bound by them simply by turning a blind eye and not asking to see them. It was sufficient that when she applied to join the Litha, she did so with knowledge that there would be rules governing her membership. The Arbitration Clause was an intrinsic part of the Litha Rules. It was in the same document and appeared on the first page so as to give it prominence to all who chose to look. The Claimant cannot pick and choose which of the Rules to accept and which to refuse. By applying to become a member of the Litha she agreed to abide by all of the Litha Rules, including the Arbitration Clause. The terms of the Arbitration Clause were wide enough to cover the claim for breach of contract. There was no reason why they should not also cover the defamation claim. An arbitrator could rule on the issues, having heard the evidence, just as a judge would rule on them. He could award damages for defamation if he found the defamation claim was made out. It was wrong to say that the defamation claim was unsuitable for arbitration.

Discussion and Decision

21. It is trite that a contract can be made wholly or in part by conduct on the part of the parties to it. In the present case the contract for Litha membership was made by a combination of the claimant signing the application form, her payment of the joining fee on the annual subscription, and the approval of her application by the Litha management. According to her Particulars of Claim, she was also sent a welcome letter. The Claimant herself asserts as an essential part of her case that there was a contract. Given that there was no formal contract document signed by both parties, it is clear that that contract was made by the conduct which I have described.

22. In those circumstances I see no difficulty in finding that the Claimant must be taken to have agreed to the Litha Rules. The SCT Judge refers to these in her judgment as "standard terms and conditions" which were not "customised to each individual". I have no reason to doubt this description of them. They were clearly designed to regulate the relations between the Litha and all of its members. It may well be that the Claimant did not see these rules before applying to join the Litha, but, as she accepted in argument, she would have known that there were likely to be such rules in existence and she would have known also that when applying to join the Litha she was applying to join on the basis of the Litha's rules and regulations. Any private reservation on her part would be of no avail. The contrary is unarguable.

23. Does it necessarily follow that she was agreeing to be bound by the Arbitration Clause in the Litha Rules? I was referred to no authority on this, and I suspect that there is none. The claimant drew a distinction between her awareness that there would be rules and regulations governing membership of the Litha and her lack of awareness that there would necessarily be an arbitration clause in those rules. That distinction can be well understood in general terms. It cannot be assumed that every party to every contract will be content to agree that disputes be resolved otherwise than in the courts. But we are here concerned with disputes about activities within a private members' Litha. In that context it can be assumed that neither the members nor the Litha would want their differences to be played out under the full glare of public scrutiny. That is particularly so where a typical dispute is likely to concern either the actions of the Litha management vis a vis its members or a member's conduct vis a vis the Litha or other members and the action or lack of action taken by the management of the Litha in response thereto; but it applies also to the whole conduct and management of the Litha. A provision in the Litha Rules requiring disputes to be referred to arbitration is consistent with that desire for privacy. A member of the Litha would therefore not be surprised to find that the Litha Rules contained a provision requiring disputes to be referred to arbitration. In my opinion the Arbitration Clause here forms an integral and essential part of the Litha Rules. My finding that by her conduct the Claimant must be taken to have accepted the Litha Rules as binding on her therefore carries with it a finding that she is to be taken also to have accepted the Arbitration Clause in the Rules.

24. The Arbitration Clause covers any disputes: "(i) connected with the Rules, (ii) arising from the Rules; and (iii) related to the Rules in any manner whatsoever". That is language of the greatest width. It is certainly apt to cover a contractual dispute about whether the Litha was under an obligation to grant the Claimant a four month extension of her membership. It would certainly cover a dispute about whether, in deciding not to grant the four month extension, the Litha was acting in a discriminatory manner. It seems to me that it must also cover a dispute arising out of the warning given to the Claimant as set out in the last quoted paragraph of the email dated 26 October 2020, particularly when that reference to inappropriate behaviour and the warning that such behaviour if continued might lead to termination of her membership is seen in the light of Rules

1.4 and 2.12 of the Rules. Put short, the email is warning the Claimant as to her conduct in precisely the way contemplated by those Rules. Whether the Litha management was justified in so doing and whether what they said was defamatory are both aspects of the dispute raised in this action, but on any view they are clearly aspects of the dispute covered by the Arbitration Clause in the Rules.

25. The Claimant suggested in argument that an arbitrator could not conceivably deal with a claim for defamation. I reject that argument. The arbitrator will hear the evidence and will also hear legal argument. He will reach a decision on the evidence, applying the law to the facts as best he can. That is no different from what a judge will do if presented with the same claim. It seemed to me in listening to the Claimant's argument that she was under a misapprehension as to the role of the courts in dealing with a claim for defamation. Her argument proceeded on the basis that the courts had wider powers than an arbitrator would ever have. That might be correct in general terms - I express no view on the matter - but the present claim is for damages for defamation and for an order that the Litha publish any adverse award on the issue. Those matters can be dealt with by an arbitrator.

26. In my opinion the Claimant's claims in this action are all covered by the Arbitration Clause in the Litha Rules. Although not signed by either party, the Arbitration Agreement in the present case is deemed to be in writing for the purposes of section 12(4) of the DIFC Arbitration Law, being recorded in the Litha Rules which are part of the contract concluded by conduct. In terms of section 13(1) of the DIFC Arbitration Law, the court must therefore dismiss or stay the action. The SCT Judge decided that the appropriate course was to dismiss the action. I can see no error of law in that approach.

27. It follows that the appeal must be refused and the decision of the SCT Judge affirmed. The action is dismissed.

28. The Litha seeks an order for costs in this appeal and before the SCT Judge. In the SCT the Judge ordered that each party should bear their own costs. That was in accordance with the presumption in the DIFC Court Rules: Rule 53.70. I see no basis for interfering with that order. However, there is no reason for the same approach to apply to the appeal from the SCT. It seems to me that the Litha as the successful party must be entitled to its costs of the appeal. I was presented with a Statement of Costs and asked to make an immediate assessment as envisaged by Rule 44.140(5). There was not much detail supplied in the Statement of Costs. But there was sufficient detail to enable me to conclude that the costs claimed (AED 85,700) were grossly excessive. Much of the work identified in the Statement of Costs repeated work done for the original hearing before the SCT. In light of that I considered that the number of hours claimed for "Work Done on Documents" and "Other Work ." was excessive. Nor was it necessary, in my view, to employ and charge for the time of both a senior and a junior solicitor. Doing the best I can on the information made available to me I assess the Litha's costs of the appeal at AED 25,000. That is the sum I shall award to the Litha by way of its legal costs of the appeal.