IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

FURSA CONSULTING

Claimant

and

AJAY SETHI

Defendant

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

UPON the Part 8 Claim Form being filed on 19 August 2022 and amended on 25 August 2022 (the "Claim")

AND UPON reviewing the parties cost submissions in light of my Order with Reasons dated 5 October 2023

AND UPON reviewing the DIFC Rules on costs.

IT IS HEREBY ORDERED THAT:

1. The Defendant shall be entitled to their costs on a standard basis, if not agreed between the parties, a detailed assessment will be undertaken by the Registrar

Issued by:
Hayley Norton
Assistant Registrar
Date of Issue: 31 October 2023
Time: 2pm

SCHEDULE OF REASONS

1. As set out under RDC 38.7(1) the unsuccessful party will be ordered the costs of the successful party. The Claimant was unsuccessful in its claim against the Defendant, thereby it is just that the Claimant is ordered to pay the costs of the Defendant on a standard basis for the reasons set out below.

2. I shall set out the parties' submissions which arose in their costs submissions which will be dealt with swiftly in this short reasoning.

3. The Defendant argued that their costs should be awarded on an indemnity basis because (i) the Claimant inappropriately and without justification commenced litigation against the Defendant knowing that there was no legal or factual basis for doing so; and (ii) the Claimant failed to take any steps to settle the dispute with the Defendant at an early stage of these proceedings or any time prior to the trial. As such, the Defendant contends that the Claimant's conduct in these proceedings has been unreasonable because the disputed issue should never have been commenced and been subject to a trial. In addition, so much of the Court's time was taken in a matter which should have never been brought to trial. Based on the above assessment made by the Defendant and given the circumstances of the case, it was proposed that the Defendant's costs awarded on an indemnity basis is completely justified.

4. The Claimant proposed that although it was unsuccessful and its claim has been dismissed, the Defendant's costs shall not be awarded pursuant to the common practice and there shall be no order as to costs, albeit they acknowledge that in the ordinary course of determining costs, the winning party would be awarded their costs by virtue of RDC 38.7(1). However, the Claimant asserts its claim does not fall within the ordinary circumstances that would grant such allocation of costs in accordance with RDC 38.7(2). The Claimant elaborates on this issue adding that it had grounds to file a case against the Defendant through the contractual agreement signed between the parties, the main argument within this case was the interpretation of payment terms of the contract. The Claimant puts forward that the submissions advanced by both parties on the issue of interpretation of the payment were equally balanced and valid assertions. Further, the Claimant asserts that if the Court awards a costs order in favour of the Defendant, such a large sum in costs would make its access to justice unpracticable and it had reasonably believed that in accordance with the payment terms of its agreement and its literal meaning that it had been owed its financial compensation for the work it had done. Thereby, the Claimant proposes that based on its meritorious arguments, no order of costs shall be awarded in favour of the Defendant.

5. Before dealing with the issue of costs. I intend to address the Claimant's assertion pertaining to the validity of its claim on the Court's interpretation of the payment terms where it submits that had the Court adopted the "literal meaning" of a success fee in its agreement with the Defendant, the Claimant would have been successful in its claim and would have been awarded its success fee of AED 966,000 from the Defendant.

6. This argument is nonsensical and misconceived. Even if the Court had applied the literal meaning of a success fee, there were various factors nullifying that approach and the validity of that argument, for instance the scope of work agreed between the parties demonstrated the Claimant's

contractual duty in executing and closing the mandate by successfully securing the facility on behalf of the Defendant to establish its primary objective, one would assume that if that was not part of the Claimant's scope of work, the Agreement between the parties should have been amended to reflect the scope of the Claimant's involvement accordingly.

7. Further, the Claimant's obvious role in the negotiations and exchanges with ENBD on behalf of the Defendant following the issuance of the facility letter compelled the conclusion that their contractual duty could not have completed, or that their scope of work had been finalised at the point of when the facility letter was issued. Finally, in Mr Khan's cross examination, it was clear that the Claimant's contractual duty arising from its agreement with the Defendant involved their assistance and involvement in restructuring the Defendant's existing debt to execute the Defendant's primary objective which is the purchase of the apartments in Barsha Heights.

8. Therefore, the Claimant's argument that it envisaged its claim would have been successful but for the Court's application of the commercial reasonable man test is absurd.

9. Turning to the Defendant's proposal that their costs should be awarded on an indemnity basis. I remind myself of PD No. 5 of 2014 which mandates certain factors, *inter alia*, to be taken into account in determining whether costs should be assessed on the indemnity basis as opposed to standard basis being: (i) the circumstances where the facts of the case or the conduct of the paying party are/is such as to take the situation away from the norm, for example where the Court has found deliberate misconduct in breach of a direction of the Court or unreasonable conduct to a high degree in connection with the litigation or (ii) otherwise inappropriate conduct in its wider sense in relation to a paying party's pre-litigation dealings with the receiving party, or in relation to the commencement or conduct of the litigation itself or (iii) where the court considers the paying party's conduct to be an abuse of process.

10. The Claimant's conduct does not warrant a cause of concern because the type of deliberate misconduct has not been established, the Court takes a strict view in awarding costs on an indemnity basis and there is an exceptionally high threshold for the Defendant to demonstrate to the Court that costs should be awarded on an indemnity basis. I do not think that this threshold has been met in this matter. The Claimant has the right to put forward their application which they were entitled to do so under the legislation and before a court of law. Whilst it would have been preferable, and it is rather unfortunate, that the Claimant did not take enter into settlement negotiations with the Defendant in order to avoid contested hearing and avoid wasted cost.

11. I note that the Claimant submits that the Court should not award a cost order in favour of the Defendant because it would consequently cripple the Claimant in accessing justice. If the Court were to adopt this analysis and approach with every case, successful parties will not be awarded their costs irrespective of whether they have successfully established their pleadings or defended their position positively, it certainly would deprive RDC 38.7 (1) of its true purpose and effect. As such, I reject this argument, parties to a commercial litigation ought to have been advised and recommended on the prospect of success of their dispute to determine whether to pursue a matter or defend its position before a court of law and the risk analysis will be established on a thorough examination of the facts. I do not accept that the Claimant was not aware that their case could go either way and there are substantial risks involved in pursuing its dispute before the DIFC Court.

12. Based on the above and in the circumstances, the Defendant was successful, the usual order is that costs follow the event and I consider it fair and reasonable that the Defendant shall be awarded their costs on a standard basis, otherwise the Registrar will undertake a detailed assessment, if the parties do not agree.