Claim No. CFI 013/2010

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

Before Justice Sir John Chadwick

IN THE MATTER OF DIWAN CAPITAL LIMITED (in liquidation)

BETWEEN

GORDIAN GAETA

Applicant

and

SHAHAB HAIDER

(as liquidator of Diwan Capital Limited)

Respondent

Hearing: 23 June 2011

Counsel: **Dr Gordian Gaeta,** the Applicant appeared in person

Mr Kasshif Basit of KBH Kaanuun appeared for the Respondent

JUDGMENT

Transcribed from the oral Judgment delivered on 23 June 2011 and revised and approved by the Judge

1. Diwan Capital Limited, a DIFC registered company, is in voluntary liquidation. On 30 March 2010 the Court appointed Mr Shahab Haider of Sajjad Haider Chartered Accountants LLP to be the liquidator.

2. In or about August 2010, Dr Gordian Gaeta submitted a claim to the liquidator for payment of employment and services benefits. As submitted, the claim was in an amount of $84,000 or thereabouts. That amount has now been reduced to some $79,000 with interest.

3. Following correspondence between Dr Gaeta and the liquidator, the liquidator treated that claim as a proof of debt in the liquidation. He rejected the claim for the reasons which he gave in a letter of 21 April 2011. First, that Dr Gaeta had already received in full payment of his entitlement under a consultancy agreement; and, second, that Dr Gaeta was not entitled to any gratuity payment as he had not been an employee of the DIFC company. He pointed out that Dr Gaeta had signed a consultancy agreement with Diwan Capital Cayman Islands Ltd ("the Cayman company"); and that "although you were subsequently paid directly by the [DIFC company] it was always in the capacity as a consultant and not as a paid employee".

4. Dr Gaeta challenges the rejection of his proof of debt. He does so by an Application Notice lodged on 10 May 2011. He does not contend that he ever had a DIFC Employment Contract with the DIFC company. Indeed, it is plain from the material that he has put before the Court that he refused the offer of a DIFC Employment Contract. Nevertheless, he contends that, if the relevant provisions of the DIFC Employment Law (Law No.4 of 2005) are properly understood, he is an employee of the DIFC company for the purposes for that Law; and so is entitled to the employee benefits conferred by that Law.

5. Paragraph 3 of the schedule to the Employment Law contains defined terms. It is necessary to refer to two of them. The first is the definition of "contract of employment":

> "Any agreement, whether for a limited or an unlimited period, concluded between an employer and an employee whereby the latter undertakes to work in the employer's service and under his management and control in return for his remuneration that the employer undertakes to pay."
>
> The other is the definition of "employee":
> "An individual: (a) who has entered into or works under a contract of employment; or (b) who undertakes to do or perform any work or services for an employer and under an employer's management and control in return for remuneration."

6. It is plain, first, that paragraph (b) in the definition of "employee" is intended to include persons who do not have a contract of employment. If (as he accepts) Dr Gaeta did not have a "contract of employment", he can, nevertheless, be an "employee" of the DIFC company for the purposes of the Employment Law if he falls within the second limb of the definition in the schedule to that Law.

7. It is plain, also, that a person will not fall within the definition of "employee" in the schedule to the Employment Law (whether under the first or the second limbs of that definition) unless he undertakes to do or perform work "under [the employer's] management or control". The essential

difference between the two limbs of the definition is that a person within (a) - that is to say, an employee under a contract of employment - undertakes to work "in the employer's service", whereas a person within (b) - who has no contract of employment -undertakes to do or perform works or services for an employer. Put in terms which would be recognised by those familiar with the common law of England and Wales, under the first limb of the definition the employee is engaged under a contract of service: under the second limb of the definition the employee is engaged under a contract for services.

8. The purpose of the extended definition of "employee" - as Dr Gaeta contends and I accept -is to include amongst those who are entitled to the benefits and protection available under the Employment Law persons who enter into contracts for services to be performed under the employer's management and control. An employer cannot escape the regulatory framework of the Employment Law by arranging for those who undertake work or perform services for him to do so under contracts for services rather than under contracts of service.

9. For the purposes of the present application, it is sufficient to hold - as I do - that the common feature of the two limbs of the definition of "employee" in the schedule to the Employment Law is that there is a contract between the person claiming to be an employee, and the person said to be an employer. As it seems to me, a person cannot claim to be an employee under either limb of the definition, unless, at the least, he has entered into a contract - whether a contract of service or a contract for services - with the person who is said to be his employer.

10. I have pointed out that Dr Gaeta does not claim to have entered into a contract of employment with the DIFC company. After hearing his submissions, I have to say that I was left in doubt whether he claimed to have entered into any contract with the DIFC company. His primary case, I think, is that it was unnecessary for him to establish that he had done so. I am satisfied that that case is misconceived. I think that it was necessary for him to establish, to the satisfaction of the liquidator, that he had entered into a contract for services with the DIFC company

11. The material that Dr Gaeta put before the liquidator - and now puts before the Court -includes a letter of 31 March 2009 from the Interim Chairman of Diwan Capital Cayman Islands Limited. It appears from that letter that Dr Gaeta had made a request to the Cayman company for approval to terms under which he would sever his consultancy relationship with that company. The letter of 31 March 2009 refers to the fact that, since the date of that request, on 1 December 2008, he had continued to work as a consultant of the Cayman company; had continued to provide services, in that role, to the DIFC company and to Diwan Capital AG, together the Diwan Group, in his role as a consultant; and had been paid a monthly consultancy fee of $18,000 for his services. The letter of 31 March 2009, when read as a whole, is only consistent with the understanding of the Cayman company that Dr Gaeta was seeking to agree severance terms with that company as his employer under an existing consultancy agreement. The letter rejects some of the demands made by Dr Gaeta and accedes to others. The letter is quite inconsistent with the proposition that Dr Gaeta was providing services under a contract with the DIFC company: it was written on the premise that Dr Gaeta was providing services to the DIFC company - under some agreement or arrangement between the DIFC company and the Cayman company - as a consultant employed by the Cayman company.

12. Dr Gaeta relies on an undated document headed "Letter of Confirmation" apparently signed by Mr Bercinger who had become, in 2008, the Chief Executive Officer of the DIFC company. The letter is in these terms:

> "This is to confirm that I, Robert A Bercinger, then Chief Executive of Diwan Capital, had agreed with Gordian Gaeta, then Chief Risk Officer of Diwan Capital Limited, at the time when other staff received their DIFC employment contracts, that Gordian Gaeta would not be treated less favourably in employment terms than other comparable staff simply because he did not wish to have a DIFC employment contract."
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> That document makes plain that Dr Gaeta had had the opportunity to enter into a DIFC Employment Contract with the DIFC company; and that he did not wish to take that opportunity. It is also plain, from the terms of the document, that (although undated) it was written at a time after Mr Bercinger had ceased to be Chief Executive of the DIFC company. It is not a letter written to Dr Gaeta by Mr Bercinger in his capacity as Chief Executive Officer of the DIFC company. The document may be seen as an attempt to provide confirmatory evidence of some arrangement made between Dr Gaeta and Mr Bercinger in the past. The liquidator, unsurprisingly, viewed the undated document with some scepticism.

13. Taking the document at its highest, it cannot be said to be evidence that there was ever a contract between Dr Gaeta and the DIFC company. Rather, the document is some evidence of Mr Bercinger's view, after the event, that Dr Gaeta - under whatever arrangement he had within the Diwan Group, including his consultancy with the Cayman company - would not be treated less favourably than other comparable staff. There is no evidence as to how other comparable staff would have been treated.

14. In those circumstances, it seems to me impossible to reach the conclusion that there was ever a contract for services made between Dr Gaeta and the DIFC company. The material supports a conclusion that Dr Gaeta was providing services to the DIFC company under his consultancy agreement with the Cayman company; but that conclusion does not provide the basis for the claim which Dr Gaeta seeks to assert in his Proof of Debt.

15. For those reasons, this application is dismissed.

Justice Sir John Chadwick

Date of Issue: 18 July 2011