IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

FIRST MIDDLE EAST DISTRIBUTION DMCC

Claimant

and

ORANGE CHAMELEON LTD

Defendant

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

UPON reviewing the Amended Claim Form and Particulars of Claim dated 16 June 2023

AND UPON reviewing the Defendant's Application No. CFI-066-2022/2 dated 13 July 2023 to strike out the certain parts of the Claimant's Amended Claim Form and Particulars of Claim (the "Strike Out Application")

AND UPON reviewing the Claimant's Permission to Amend Application No. CFI-066-2022/3 dated 20 July 2023 seeking the Court's retrospective permission to amend the Amended Claim Form and Particulars of Claim (the "Claimant's Application")

AND UPON the reading the Second and the Thid witness statements of Ms. Sara Jayne Sheffield and the First and Second witness statements of Mr. Rashid Khan

AND UPON the virtual hearing held before me on 23 August 2023

AND UPON the reviewing the Parties' email correspondence addressed to the Court dated 25 and 29 August 2023

IT IS HEREBY ORDERED THAT the Claimant shall be entitled to their costs on an indemnity 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: 5 December 2023
Time: 3pm

SCHEDULE OF REASONS

1. As set out under RDC 38.7(1) the unsuccessful party will be ordered to pay 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 Claimant on an indemnity basis for the reasons set out below.

2. I will set out the parties' submissions which arose in their costs submissions which will be dealt with swiftly in this short reasoning. I have carefully reviewed all submissions of the parties and if I may omit to reference an argument or authority on this does not mean that it has been mean overlooked or not considered.

3. The Claimant argued that their costs should be awarded on an indemnity basis because (i) the Defendant has inappropriately and without any justification commenced litigation against the Claimant knowing that there was no legal or factual basis for doing so; and (ii) the Claimant has repeatedly made its position clear and sought to dissuade the Defendant from pursuing a contested hearing or a strike out application which on any analysis would have incurred expensive costs, thereby, the Defendant's refusal to resile from its unjustified position should be reflected in costs when the Court is assessing the appropriate costs order. The Claimant further contends that it had provided the Defendant with an additional opportunity to avoid further litigation on issues related to costs, in support of its argument it relies on its offer to accept letter to the Defendant of 3 November 2023 which explains that the Claimant would be willing to accept a lower amount than it considers it is likely to obtain by an order from the Court. The Claimant explains that the aim of that letter is to simply avoid yet more costs in preparing costs submissions, which was met with no response from the Defendant.

4. In response to the Claimant's submission, the Defendant contended that it is cognisant to the fact that it has been unsuccessful in its Strike Out Application and the Claimant's Application for retrospective permission to amend. However, the Defendant contended that it was entirely reasonable for it to withhold consent to the Claimant's retrospective permission to amend application particularly in the circumstances where the principal question which the Court had to determine was a novel point, establishing whether the transfer of the SCT claim to the CFI pursuant to RDC 53.41 compelled the conclusion that a party to the proceedings is at liberty to amend its case as it wishes.

5. In support of its submission, it relied on the authority of *the Williams v Jervis* [2009] EWHC 1837 (QB) in that an indemnity costs order

should not be simply awarded because the paying party has been found wrong or that the other party's evidence was preferred to that of the paying party and when assessing the reasonableness of the paying party's conduct, it should be assessed on the ground if it was outside the norm for such cases and it should not be assessed on the knowledge of the outcome of the case or how the case might have been ultimately resolved.

6. Further, the Defendant made the observation that it was certain that the Claimant's failure to seek permission to amend its statement of case had been culpable that it considered the Court would be justified in marking its disapproval for the Claimant's conduct by refusing its application for retrospective permission to amend.

Discussions and analysis

7. Turning to the Claimant's proposal that their costs should be awarded on an indemnity basis. I remind myself of DIFC Courts Practice Direction 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.

8. I agree with the Defendant's observation that the principal question which the Court had to determine was a novel point that had not been addressed previously. Nonetheless, in the context of this case, there had been a myriad of indications which compelled the conclusion, that following the transfer of the SCT claim, the Claimant intended to serve an "amended" statement of case addressing issues that had been raised by the Defendant at the SCT hearing. In turn, once the amendment particulars of claim were served, this meant that the Defendant had various possible avenues to make use of, for instance, inviting the Claimant to file a formal amendment application before issuing its strike out application. Rather, the Defendant opted to apply for a draconian measure and failed to avoid any unnecessary expensive satellite litigation. As such, I disagree with the notion that the Defendant's analysis of the Claimant's failure in filing an amendment application meant that the Court would consider it a culpable action which would have been met with strike out of its introduced amendments.

9. Parties are absolutely free to make their own application before this Court and my judgment on this dispute should not be regarded or viewed as a denial of opportunity to do so or curtailing the parties access to justice. However, in light of these circumstances, it would have been preferable for the Defendant to have demonstrated a degree of willingness and provided the Claimant with an opportunity to explain the legal basis of its introduced amendments, or even invited the Claimant to file an amendment application before filing its strike out application.

10. It is important to note that the indemnity costs order has not been awarded because the Defendant's analysis or its own interpretation of RDC 53.41 was wrong in retrospect, or that they had been mistaken as to the RDC's effect. It was the Defendant's unnecessary actions and approach that were at odds with the narrow and straightforward scope of this litigation. The Defendant's lack of participation in any meaningful proposal to mediate with the Claimant should not have resulted in a strike out application or even a contested hearing.

11. The situation in which the Court finds itself calls for an indemnity costs order. In fact, if the Court does not award an indemnity costs order, it would be encouraging similar behaviour in the future.

12. Based on the above, as the Claimant was successful, the usual order is that costs follow the event and I consider it fair and reasonable that the Claimant shall be awarded their costs on an indemnity basis, otherwise assessed by the Registrar, if the parties do not agree.