Claim No. TCD 003/2019

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

PANTHER DEVELOPMENT REAL ESTATE LLC

Claimant

and

MODERN EXECUTIVE SYSTEMS CONTRACTING LLC

Defendant

ORDER WITH REASONS OF JUSTICE WAYNE MARTIN

UPON the Part 7 Claim Form dated 8 December 2019

AND UPON the judgment of Justice Sir Richard Field dated 26 September 2022 (the "Judgment")

AND UPON the consent order dated 6 September 2023 reflecting the parties' agreement to exchange submissions with respect to the costs of the proceedings at first instance (the "Consent Order")

AND UPON reviewing all relevant material added onto the Court file

AND UPON reviewing the Rules of the DIFC Courts (the "RDC")

IT IS HEREBY ORDERED THAT there be no order as to the costs of the proceedings at first instance, other than the order made by the trial Judge to the effect that the Defendant must pay the costs incurred by the Claimant in respect of Mr Allan's reports on delay, to be assessed by the Registrar in default of agreement.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 27 November 2023
Time: 9am

SCHEDULE OF REASONS

Summary

1. For reasons which will be explained below, the issue of responsibility for the costs of the proceedings was deferred until after certain processes and adjustments to certain valuations had taken place in accordance with the directions of the trial Judge, enabling the final balance of account to be struck as between the parties.

2. By the time those processes and adjustments had occurred, and the final balance was struck, the trial Judge had retired from the Court. Orders were made referring the issue of the costs at first instance to another member of the Court.

3. After considering the submissions served by the parties, I have concluded that there should be no order as to the costs of the proceedings at first instance, apart from the order made by the trial Judge in relation to the cost of one of the expert witnesses.

Procedural history

4. On 26 September 2022, Justice Sir Richard Field published reasons for judgment in these proceedings. It will be necessary to return to those reasons in due course but for present purposes it is sufficient to note that the Judge directed that the Claimant ("Panther") was entitled to damages to compensate it for the additional cost of completing the project over and above what it would have cost if the Contract had not been terminated, and the Defendant ("MESC") was entitled to be paid for the value of the unpaid work which had been performed as at 6 November 2019, which was the date upon which the Contract was terminated.

5. The Judge adopted the assessment of the amounts due in respect of each of these components of the final account as between the parties made by Mr Allan, an expert witness called by Panther, subject to certain adjustments to those assessments which the Judge directed to be made in the course of his reasons.

6. The Judge further directed the parties to attempt to agree the sums to be awarded as damages as a consequence of the conclusions referred to above, after which the parties were to exchange submissions on the question of the costs of the proceedings.

7. On 9 November 2022, the Judge issued a further ruling and directed that the parties provide final itemized statements showing the totals of the sums of damages which the Court is awarding to each of the parties and the component elements of those totals.

8. Eachof Panther and MESC appealed from the components of the Judgment at first instance which were adverse to their respective claims and cross-claims. On 24 May 2023, both appeals were dismissed.[1]

9. On 8 June 2023, Panther filed a document described as its "final itemised statement" setting out the various components of its claims.

10. On 9 June 2023, MESC filed a document entitled "summary of final quantum calculations" setting out its position in relation to various components of the claims and cross-claims.

11. The parties then reached agreement with respect to the balance of account as between them. That agreement was reflected in an amended order made by the trial Judge on 17 July 2023 which records the parties' agreement that the amount of AED 3,431,507.36 was owed by Panther to MESC.

12. By Consent Order made on 6 September 2023 (the "Consent Order"), it was recorded that any sum payable by Panther to MESC would be adjusted to take account of any orders for costs in relation to the proceedings at first instance and on appeal. The Consent Order noted that costs had been awarded in Panther's favour on the appeal and that the parties would endeavor to agree those costs within 14 days of the date of the Consent Order, failing which Panther was at liberty to commence proceedings for the assessment of those costs.

13. In relation to the costs of the proceedings at first instance, directions for the exchange of submissions with respect to those costs were made in the Consent Order.

14. The parties have exchanged submissions pursuant to those directions, although MESC contends that Panther failed to comply with the time specified for the service of submissions. That complaint will be addressed below.

15. As Justice Sir Richard Field has retired from the Court, the determination of the responsibility for the parties' costs of the proceedings at first instance has been referred to me. By the terms of the Consent Order, after that determination has been made, the parties are to attempt to agree the quantum of costs, failing which assessment proceedings may be commenced.

The parties' submissions

16. In its first submission, MESC contended that the general rule to the effect that costs follow the outcome should be applied, and it was the successful party in the proceedings, having achieved an award in its favour. MESC further submitted that responsibility for the delays in the performance of the works was "the crux of the dispute" and as 306 out of 325 days of delay were attributed to causes for which Panther was responsible, MESC was substantially successful in its delay case. MESC acknowledges that Panther's quantum evidence was preferred, but contends that the dispute with respect to quantum was not significant. MESC further contends that even though Panther was successful in relation to the issue of termination, that issue "did not significantly affect the ultimate outcome". MESC further submitted that if Panther did not make payment of the amount of costs agreed upon or determined within 30 days, interest on any outstanding amount should accrue at the rate of 8% per annum.

17. In its first submission, Panther accepts that Rule 38.7 of the Rules of the DIFC Courts (the "RDC") provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but notes that the rule specifically provides that the Court may make a different order. Panther further notes that RDC 38.8 provides that in deciding what order to make about costs the Court must have regard to all the circumstances including the conduct of the parties and whether a party has succeeded on part of his case, even if he has not been wholly successful.

18. In this context, Panther submits that various aspects of MESC's conduct were unsatisfactory. Panther further contends that while the ultimate result was an amount payable to MESC, Panther nevertheless succeeded on significant components of its case, and MESC was unsuccessful on a number of components of its case. Panther submits that approximately 80% of the time and resources was spent addressing three key issues namely: termination, liquidated damages and delay. In relation to delay, Panther submits that even though it was held responsible for 306 days of delay, MESC's claim for prolongation costs was dismissed because of its failure to comply with provisions of the Contract relating to the giving of notice. Panther submits that it should be awarded its costs of addressing those key issues and further submits that it succeeded on the majority of the remaining issues which took approximately 20% of the parties' time and resources.

19. The precise order sought by Panther is unclear from its submissions, which conclude with the proposition that the Court should exercise its discretion taking into account the conduct of the parties and the fact that the Claimant succeeded on the majority of its claims. The effect of that general proposition is not stated.

20. Panther's submissions in reply effectively restate the propositions advanced in its first submissions.

21. In its reply submissions, MESC contends that Panther's submissions were served outside the time specified by the Court in the Consent Order as a result of which they should be disregarded entirely and Panther should be sanctioned with an appropriate cost order in MESC's favour.

22. The documents available on the file of the Court suggest that MESC's submissions were filed on 9 October 2023 and Panther's submissions were filed the following day, namely 10 October 2023. MESC does not contend that it has suffered any prejudice by reason of Panther's submissions being served one day later. MESC's contention that Panther's submissions should be disregarded entirely because of one day of delay lacks any merit or substance and is rejected.

23. In its reply submissions, MESC further contends that Panther did not state its intention of pursuing a claim for costs until 24 August 2023 when the parties were discussing the draft Consent Order. MESC contends that Panther did not respond to a request for details of the costs which it proposed to claim, and contends that Panther was careless in not filing its costs submissions by the due date. MESC contends that "it is evident that the Claimant is not serious about pursuing a claim for costs".

24. The trivial nature of Panther's delay in filing its costs submissions has already been noted. The fact that Panther did not raise its claim for costs

until August 2023 is easily explained by the fact that until the appeal proceedings were determined, any discussion with respect to costs would have been premature. The assertion that Panther is not serious about pursuing its claim for costs is not justified by Panther's conduct and it is rejected.

25. In its reply submissions, MESC responds to Panther's allegations of misconduct by alleging misconduct on the part of Panther in a number of respects.

26. In its reply submissions, MESC rejects Panther's assertions with respect to the time and resources spent on particular issues, and disputes Panther's contention that it was successful in relation to a number of aspects of its claim, reiterating that the balance of account was found to be in favour of MESC.

27. MESC contends that it should be awarded all its costs in relation to the proceedings at first instance.

Analysis and conclusion

28. As already noted, RDC 38.8 requires the Court to have all the circumstances including the conduct of the parties and whether a party has succeeded on part of his case even if he has not been wholly successful.

29. In this case, each party contends that the conduct of the other deserves sanction in the form of an adverse award of costs. It can be accepted that some aspects of the conduct of each party were, at times, unsatisfactory. On the one hand Panther called up the security guarantees without notice and at a time when, in fact, as is now known, there was a balance of account in favour of MESC. Although the trial Judge found that Panther was entitled to call on the guarantee, it is now obliged to refund at least some of the funds drawn down to MESC. On the other hand, after the Contract was lawfully terminated, MESC took forceful possession of the site and endeavoured to stop any work being performed by an alternative contractor. However, the trial Judge made an award of damages in Panther's favour by reason of that conduct, and MESC should not be doubly punished. Similarly, although MESC failed to file the requisite papers after being served with notice of the proceedings, as a result of which default judgment was entered, it was ordered to pay the costs of setting aside that judgment. Again, although MESC failed to comply with the Court's orders with respect to the production of documents, the trial Judge has already imposed a sanction for that conduct in the form of express orders relating to the costs of the expert evidence in the case. Those orders will not be disturbed by this determination.

30. On balance, neither party can justifiably claim that its conduct of and in connection with the proceedings was blameless. The considerations of misconduct, after allowing for the sanctions already imposed, in effect cancel each other out and provide no basis for the exercise of the discretion with respect to costs in the particular circumstances of this case.

31. This is one of those cases in which each party was partly successful and partly unsuccessful. Accordingly, consistently with the general principle embodied in RDC 38.7, the exercise of the discretion depends upon an analysis of the relative successes and failures of each party as found by the trial Judge.

Analysis of the judgment

32. After enunciating his detailed reasoning, the trial Judge conveniently summarised his conclusions, which were:

(1) Panther lawfully terminated the Contract on each of two grounds - namely, the maximum amount of liquidated damages had been exhausted and MESC had abandoned the works;

(2) Panther was entitled to liquidated damages in the amount of AED 4,181,153.25;

(3) Panther was entitled to damages to compensate it for the additional cost of completing the project over and above what it would have cost if the Contract had not been terminated;

(4) The retention amount of AED 3,383,549.39 should be set off against the damages to be awarded to Panther following the adjustments that must be made to Mr Allan's assessments of the component parts of the total damages due to Panther;

(5) Panther's claims for damages for the lost opportunity to sell or rent the units constructed under the Contract was dismissed;

(6) MESC is entitled to be paid for the value of the unpaid work performed at the date of termination;

(7) The completion of the project was delayed by 325 days, of which 19 days are to be assigned to MESC and 306 days are to be assigned to Panther;

(8) If it be held on appeal that MESC is not debarred from seeking an EOT of 306 days by reason of failure to comply with the notice requirements of the Contract, MESC will be entitled to prolongation damages in the sum of AED 1,741,313.42 - otherwise MESC's claim for prolongation was dismissed;

(9) Panther was entitled to liquidate the security guarantees but to the extent that the sums awarded to Panther are less than the sums received under the guarantees, Panther must pay that balance to MESC; and

(10) MESC is debarred from seeking the costs of Mr Singhal's expert evidence on delay even if MESC would otherwise be entitled to recover those costs and MESC must pay the costs incurred by Panther in respect of Mr Allen's reports on delay.

33. It is clear from the reasons that the two main issues in the case were the issue of whether Panther was entitled to terminate the Contract when it did, and responsibility for the delay in the performance of the works and the consequences of that allocation of responsibility.

34. Panther succeeded on the issue of termination on two alternative grounds. Its claim to an entitlement to terminate because of the exhaustion of

the amount available by way of liquidated damages succeeded because MESC had failed to comply with the provisions of the Contract relating to the extension of time. Further, Panther succeeded in establishing that MESC had abandoned the performance of the Contract works. Contrary to MESC's submission, these successes were significant because they resulted in an entitlement to the maximum amount of liquidated damages available under the Contract, and damages for the additional cost of completing the work over and above that which would have been incurred if the Contract had not been terminated.

35. On the other hand, Panther failed in its claim for consequential damages for delay in completion of the Contract works, in the form of inability to rent the units in the development for two reasons - liquidated damages were the sole remedy for delay under the Contract and in any event, Panther was largely responsible for the delays in the performance of the works. Further, Panther was found liable to pay MESC for the value of the work performed up to the time of termination.

36. MESC's claim for damages for breach of contract by reason of what was said to be the unlawful termination of the Contract failed. Further, although MESC succeeded in establishing that Panther was responsible for the overwhelming portion of the delays, MESC's claim for prolongation costs failed because of its failure to comply with the provisions of the Contact in relation to the giving of notice.

37. The conclusions of the trial Judge with respect to the application of the retention amount and the funds realised through the calling up of the performance guarantees were inevitable when the final account balance was to be struck. When that balance was struck, it turned out that the balance was in MESC's favour. To that extent, MESC was at least partially successful in these proceedings. However, MESC was unsuccessful in the issues of termination, liquidated damages, Panther's claim for the additional cost for completion of the works and MESC's claim for prolongation costs. Although Panther was successful on those issues, it was unsuccessful in its claim for damages for lost opportunity to sell or rent the units, in its assertion that MESC was responsible for the delays in the performance of the works, and in resisting MESC's claim for the value of work performed up to the time of termination.

38. Analysed in this way, it is clear that each party has had successes and failures in roughly equal measure. Although the balance of account turned out to be in favour of MESC, it by no means follows that MESC can be said to have been the successful party, having failed on many of the issues litigated.

39. As neither party can be said to have been substantially successful or substantially unsuccessful, the costs incurred should lie where they fall and there should be no order as to costs. Of course, the orders made by the trial Judge with respect to the costs of the expert evidence are undisturbed by this determination.