Claim No: CFI 015/2014

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE BEFORE JUSTICE ROGER GILES ❓

BETWEEN

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❓ ❓ ❓ ❓ ❓ ASIF HAKIM ADIL

❓ ❓ ❓ Claimant

❓and

❓FRONTLINE DEVELOPMENT PARTNERS LIMITED

Defendant

❓ ❓ ❓ ORDER OF JUSTICE ROGER GILES MADE ON 18 SEPTEMBER 2014

UPON reviewing the Claimant's Application Notice CFI 015/2014-1 dated 22 July 2014

AND UPON reviewing the Defendant's response to the Application dated 20 August 2014

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant on 18 September 2014

IT IS HEREBY ORDERED THAT:

1.❓The Defendant is granted permission to amend the defence and counterclaim, by deleting the claim in the counterclaim to an order for the transfer of 510 shares in Fronteria LDA to PDEL.

2. The Defendant shall file and serve the amended defence and counterclaim within 7 days.

3. The Claimant's application issued on 22 July 2014 be dismissed.

4. The Claimant shall file and serve its reply (if any) and defence to counterclaim within 21 days of service of the Defendant's amended defence and counterclaim.

5. There be no order as to the costs of the application up to and including 11❓August❓2014, and the Claimant shall pay the Defendant's costs of the application thereafter.

Issued by:

Nassir Al Nasser

Judicial Officer

Date of issue: 8 October 2014

At: 9am

The Reasons

6. In circumstances I❓will describe, this has become an application to strike out paragraphs from the defence and cross claim.

7. The Claimant was employed as the managing director of the Defendant from 1❓September❓2011 under a contract dated 20❓August❓2011.❓ In his particulars of claim filed on 11❓June❓2014 he alleged that the Defendant had failed to pay or provide his salary and other benefits from 1❓July❓2013; that he had resigned by giving three months' notice in accordance with the contract expiring on 3❓March❓2014; and that the Defendant "did not activate the resignation letter" and itself had terminated his employment on 27❓April❓2014.❓ He claimed unpaid salary, damages compensating for failure to provide the other benefits, and other pecuniary relief including payment in lieu of notice.❓ The details of those claims do not presently matter.

8. ❓The Defendant filed a defence and counterclaim on 8❓July❓2014, of which some detail is necessary. 4. ❓In the defence, the case in summary was that the Defendant had validly terminated ❓the Claimant's employment without notice on 30❓June❓2013 (the stated year is 2014 but that is an obvious error).❓ The Defendant relied on a❓provision of the contract entitling it to do so if the claimant disobeyed a lawful direction, was guilty of other serious misconduct, behaved contrary to expectations of responsible behaviour, or breached any of a❓number of other provisions of the contract.❓ Over a number of paragraphs the defence described the Claimant's conduct which was said to enliven this entitlement. 5. The conduct included, when the paragraphs last mentioned are read together with preceding paragraphs, and again in summary and with some adjustment to the wording and reordering which I❓have done in the interest of coherence, the conduct was this.

- The Claimant was entrusted with establishing a liquor project in Mozambique, to be funded by a Mauritian subsidiary of the Defendant,

Project Development and Engineering Limited ("PDEL").

- The Claimant was directed to set up a joint venture company, Fronteira LDA ("Fronteria").
- The Claimant was to be given an equity stake in the project, but he was directed to transfer 25.5 per cent of the Fronteira shares to PDEL.
- PDEL paid US$600,000 in funding, in part to the Claimant.
- The Claimant transferred money from the Defendant's bank accounts to his own bank accounts, purportedly to be used in various projects, including the Fronteria project.
- The Claimant circulated a draft shareholders agreement under which PDEL owned 25.5 per cent of the shares in Fronteria, but despite many requests he "failed to confirm the status" of that agreement.
- Further, despite many requests the Claimant did not transfer 25.5 per cent of the shares in Fronteira to PDEL.
- Instead, the Claimant held 25.5 per cent of the shares in Fronteria himself and allotted the remainder to third parties as co-venturers in that company.
- A shareholders agreement with third parties asserted the Claimant's ownership of intellectual property rights in Fronteria.
- Despite many requests, the Claimant failed to account for the money transferred to his own bank account or to disclose how the money was utilised for, inter alia, the Fronteria project.
- Finally, the Claimant supplied services to Fronteria through his own firm without disclosure to the Defendant.

9. Going to the counterclaim, it included a global repetition of "the various breaches set out in the preceding paragraphs", with specific reference to failure to transfer 25.5 per cent of the shares in Fronteria to PDEL, misuse of intellectual property and misappropriation of money. I will call the paragraphs to do with the Fronteria project which I have sought to summarise together with the subparagraphs taking them up by reference in the counterclaim "the Fronteria paragraphs".

10. In the counterclaim, the Defendant claimed damages of various kinds, including for breach of contract, restitution of money paid and relief in relation to confidential information, intellectual property and restraint of trade. It also claimed an order for the transfer of 510 shares in Fronteria to PDEL. I will call this "the shares relief".

11. On 22 July 2014 the Claimant filed the application presently before me. He sought to strike out, or to have immediate judgment on, or to have the court declare it had no jurisdiction to determine, or to decline to exercise its jurisdiction to determine the claim to the shares relief. He sought also in para. 42 of the application to "set aside all related statements in" the defence and counterclaim, specifically identifying the Fronteria paragraphs. He sought also an order for the costs of the application. At the heart of the application was that PDEL was not a party to the proceedings and, so it was contended, the defendant had "neither capacity nor interest" to obtain the shares relief. As will appear, that does not arise for determination.

12. By a letter dated 11 August 2014 the Defendant's representatives said that, in order to avoid protracted proceedings and further costs, the Defendant would no longer claim the shares relief. They provided a proposed amended defence and cross claim in which that claim to relief was deleted. They said that the amendment would dispose of the application and invited the Claimant to withdraw it, and supplied a form of consent order providing for amendment and withdrawal, vacation of the hearing date then fixed for the application, the filing of a reply and defence to counterclaim, and that there be no order as to costs.

13. The Claimant's representatives replied on 12 August 2014 in the terms that the Claimant "is keen to incorporate our Claims under Para 42 of the Application Notice in the consent order proposed from your end". The Defendant's representatives responded on the same day, declining to delete the Fronteira paragraphs. Their explanation included that the facts in those paragraphs related directly to whether or not the Defendant had cause to dismiss the Claimant. They invited agreement to the consent order previously supplied.

14. In letters exchanged in early September, agreement to the consent order was once more invited but was not forthcoming. Thus matters stood when the application came before me.

15. Perhaps remarkably, in his skeleton argument the Claimant expounded the grounds for disposing of the claim to the shares relief as if the Defendant was still seeking that relief. In oral submissions, he suggested that he was entitled to judgment in his favour on the claim to that relief. That is not so; a party can withdraw a claim. So far as the Claimant also suggested that a notice of discontinuance should have been filed in order to give him a costs entitlement, subject to an order otherwise, under the Rules, I do not accept that the Defendant should have done more than it did. It may be noted that in the letter of 12 August 2014 the Claimant's representative did not insist on a notice of discontinuance. The Defendant should have leave to file the amended defence and cross claim, subject only to whether the Fronteria paragraphs should remain.

16. As to that, the Claimant's submissions were (with respect) not easy to understand. In the skeleton argument he said that the Fronteira paragraphs would "drag the whole proceedings to an area which is out of the jurisdiction of DIFC courts, will incur the Applicant unnecessary costs and will affect in one way or another a third party (PDEL) who is neither represented nor admitted as a litigant party". He said:

> *"The Applicant strongly believes that the Respondent is using such paragraphs to fuse two different and separate relationships, the employment relationship between the Applicant and the Respondent and the business relationship between the Applicant and another non-litigant party (PDEL). Such behaviour is used by the respondent, as the Applicant believes, to defend the*

Respondent's failure to attend to its contractual obligations under the employment relationship between the two litigant parties and to juxtapose the Respondent's contractual breach by other irrelevant facts and disputes which are not within the jurisdiction of the DIFC courts and represent the substance of another dispute to be tried by other forums to hear such dispute."

17. Submissions to like effect were made orally. The point of concern appeared to be that, because PDEL was not a party to the present proceedings, anything which might involve the relationship between the claimant and PDEL, which was said to be separate from the employment relationship between the Claimant and the Defendant, was out of contention. It was said that dragging considerations of that other relationship into these proceedings would be an inappropriate diversion and would bring unnecessary costs, and indeed it was said that the Fronteira paragraphs were irrelevant to the employment proceedings and were used to fuse two different relationships.

18. What the submissions did not do is grapple with whether the Fronteria paragraphs were relevant to the defence and counterclaim. If they were relevant, it does not matter that PDEL is not a party to the proceedings, nor does it matter that there was some relationship between the Claimant and PDEL distinct from the employment relationship. The former relationship indeed could be, and to an extent was, part of the complaint as to the Claimant's conduct. 16. In my view, the Fronteria paragraphs were and were plainly relevant to the defence and counterclaim notwithstanding that the claim to the shares relief is no longer maintained in the counterclaim, and the Claimant's position is wholly untenable. The Fronteira paragraphs express in part the Defendant's case for valid termination of the Claimant's employment, which, if made out, will be a complete answer to the Claimant's claims. They also provide, if established as breaches of contractual or other duty, grounds for damages on the counterclaim. Abandonment of the claim to the shares relief does not affect this. There is no want of jurisdiction.

19. I should refer to a specific submission made orally by the claimant. Paragraph 28 of the defence, which is one of the Fronteria paragraphs, asserts the transfer of 25.5 percent of the shares in Fronteira to the Claimant and the allotment of the remainder to third parties and includes, "the said conduct is tantamount to fraud". The Claimant submitted that there was contravention of RDC 17.43, which requires that a party must specifically set out certain matters in his statement of case if he wishes to rely on them in support of his case; the matters include full and specific details of any allegation of fraud. Although it was not put in this way, perhaps there was an application to strike out para 28 and associated paragraphs concerned with whether the shares should have been transferred to Fronteira on the ground that an allegation of fraud was made but not particularised.

20. So far as there was such an application, I do not accept it. RDC 17.43 is principally concerned with where there is a cause of action in deceit. To the extent to which goes further, the defence does particularise what is said to be tantamount to fraud. From the other paragraphs, it is alleged that there was a direction to transfer the shares to Fronteria and that, contrary thereto, the claimant took a shareholding for himself and allotted the remainder to third parties. Whether or not the description "tantamount to fraud" is ultimately justified, as well of course as whether or not the factual basis for that description is ultimately made out, is a matter for the future. 19. It follows that the rump of the filed application fails. I will hear the parties on costs.

[Counsel addressed on costs]

21. The Claimant has failed in the application as it became. He had a measure of practical success in the abandonment of the claim to the shares relief, but could have had that success for the taking but for his endeavour to have the Fronteria paragraphs struck out. In recording no order as to costs, the proposed consent order in my view correctly reflected that the application had the two limbs relating first to the shares relief and secondly to Fronteria paragraphs and anticipated the differential success on those limbs. In my view, that the Claimant could not succeed in having the Fronteria paragraphs struck out was quite clear at the time the partial success could have been had for the taking, and the Claimant was objectively unreasonable in not agreeing to the orders as that time. Since then, of course, the Claimant has failed on the rump of the application. 21. In those circumstances, in my view the appropriate disposal of costs is that there should be no order as to the costs of the application up to and including 11 August 2014 and the Claimant should pay the respondent's costs thereafter.