Claim No: CFI-012-2014

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

PIERRE-ERIC DANIEL BERNARD LYS

**** **** ****

Claimant

and

ELSECO LIMITED

Defendant

REASONS FOR THE ORDER OF JUSTICE SIR DAVID STEEL MADE ON 26 NOVEMBER 2014

FURTHER TO the Order of Justice Sir David Steel dated 26 November 2014 dismissing with costs the Defendant's Application Notice CFI-012-2014/2 dated 21 September 2014 ("the Defendant's Application");

These are the reasons to be interpreted as the schedule to the Order of Justice Sir David Steel following the hearing of the Defendant's Application held on Wednesday 26 November 2014.

REASONS:

1.By an application dated 21 September 2014, the Defendant sought an order striking out some (but by no means all) of the heads of claim in this employment dispute. At the end of a hearing on 26 November 2014 I ruled that the application be dismissed with reasons to follow. These are the reasons.

2.The background can be summarised shortly. The Defendant company was founded in 2007 by the Claimant and a Mr Lemaire. They each held 50% of the equity. The Claimant acted as both an agent of the Defendant in the capacity of Chairman and as an employee in the capacity as Chief Financial Officer.

3.On 13 June 2011, the Claimant sold his 50% shareholding to Mr Lemaire. The terms of that sale were set out in a Sale and Co-operation Agreement ("SCA"). The purchase price was calculated by reference to the Retained Earnings (as defined) for the years 2010 to 2013. Clause 8 dealt with voting rights for the purposes of management of the company.

4.Clause 8.2 (so far as material) read as follows:

> "8.2 P. E. Lys in his capacity of director and chairman shall have a veto right in relation to any matters which could have a material impact on the execution of this Agreement and on the Business of the Company after Completion and before Completion of Payment including but not limited to:
>
> .
>
> (e) any amendments to salary packages and employment benefits as set out in Appendix 2."

5.So far as it concerned the Claimant , Appendix 2 recorded as follows:

> "2.1 P. E. Lys will keep the current salary package as follows:
>
> Annual salary 108,535.00 Euro
>
> 2010 bonus (paid in 2011) 50% of salary
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> 2011 bonus (paid in 2012) 50% of salary
>
> 2012 bonus (paid in 2013) 50% of salary
>
> 2013 bonus (paid in 2015): 10% of paid profit commission for 2013 U/W year with a minimum of 20% of salary and a maximum of 100% of salary"

Apart from salary and bonus, the schedule went on to record entitlements as to school fees, health insurance, pension, travel, housing, cars and so on.

6.It is the Claimant's case that his employment as Chief Financial Officer was terminated without good cause or notice on 11 February 2014. In the result, the Claimant contends that by virtue of Article 59(2) of the DIFC Employment Law No. 4 of 2005, the Claimant's employment ended 90 days later.

7.	In his claim form (as amended on 8 May 2014) the Claimant itemised his claim for loss and damage under a number of heads.	An acknowledgement of service filed by the Defendants on 1 June 2014 indicated an intention to defend the claim but not to contest jurisdiction.

8.	The Particulars of Claim set out the same heads of claim said to be payable as a result of the termination of the Claimant's employment without notice.	The position as regards employment was pleaded as follows:

> "5.	On or around 7 May 2007, the Claimant and the Defendant entered into an employment contract (the "Contract"). Pursuant to the Contract, the Claimant was employed as the Chairman of the Board as of 1 June 2007 (the "Claimant's Employment"). In around May 2007, the Claimant was also appointed as the CFO of the Defendant, although the other terms of the Claimant's Employment remained unchanged at that time.	The terms of the Claimant's Employment were varied by Appendix 2 [of the SCA] dated 13 June 2011."

9.	In response the Defence and Counterclaim first made reference in paragraph 5.2 to an unsigned letter in French dated 9 May 2007, which appeared to be concerned with the Claimant's terms of employment with a company called Space Co on "expatriation" to Dubai to join the Defendants.	This was not accepted as evidencing any employment contract with the Defendants but, to the extent it did, it was asserted it was subject to French law and jurisdiction.

10.	As regards the SCA the Defendants pleaded as follows:

> The Claimant's remuneration package during the period was set out in Appendix 2 to the SCA.	It is however denied that Appendix 2 varied the terms of an employment contract between the Claimant and the Defendant dated 7 May 2007 as alleged in the Particulars of Claim.	It is denied that such an employment contract existed and Elseco's position in this regard is as set out in paragraph 5.2.	To the extent that the Claimant's claim relies on the provisions of Appendix 2 of the SCA, the Court has no jurisdiction to hear the Claimant's claim.

	This want of jurisdiction reflected it was contended the ICC arbitration clause in Clause 19.2 of the SCA.

11.	Against that background the Defence went on to plead want of jurisdiction in respect of specific items in the claim by reason of the arbitration clause.	These were as follows:

> "(a)	Unpaid salary	?3,349.00
>
> .
>
> (j)	Pension contribution	?28,616.00
>
> (k)	School fees	?31,332.00
>
> (l)	Business flights	?9,205.00
>
> (m)	Rental accommodation	?6,697.00
>
> (n)	Bonus	?108,535.00"

This represented about half the total claim.

12.	In the Reply the Claimant contended that he had been retained under an employment contract as from 30 December 2008 on terms as to salary and benefits akin to those contained in the unsigned letter or memorandum referred to above.

13.	As already noted, the application challenging the jurisdiction of the court was not issued until 21 September 2014.	In the run up to the hearing the parties exchanged skeleton arguments.	The Defendant took the position that there was no written employment contract and that, whatever the terms of that contract, it did not encompass the items under challenge which arose under a separate agreement (namely the SCA) which was not an employment contract and which referred disputes to arbitration.

14.	At hearing, the Defendant's position underwent something of a sea change if not wholesale revision.	First it was accepted that there were no grounds to challenge the court's jurisdiction in respect of the first 5 items listed at paragraph 11 above.	Second, whilst the only head of claim asserted as subject to arbitration was thus the claim for 2013 bonus, it was not challenged that the bonuses for the years 2010 to 2012 at 50% of salary had formed part of the employment package.	Third, as I understood it, the reason advanced for excluding the 2013 bonus was (a) that it was dependent on "retained earnings" for that year which topic was already the subject of a mediation under the auspices of the ICC and (b) that accordingly it must have been the separate outcome of negotiations leading to the execution of the SCA and not part of the "current salary package."

15.	The problems with the Defendant's case are almost inexhaustible leaving aside the fact that the burden on the Claimant is to demonstrate a good arguable case on jurisdiction in the sense of having much the better of the argument on the material available.

16.	The first problem from the Defendant's point of view is the extraordinary vacillation on the existence, nature and terms of the Claimant's employment.	The court was faced with all of the following propositions:

> (a)	The Claimant was not a party to any employment contract
>
> (b)	The Claimant was a party to an oral employment contract

(c)������������ The Claimant was a party to an oral employment contract but this was terminated and replaced by the SCA (which was not an employment contract)

There were, I understood, other variations on this theme but they were all equally inconsistent.

17.The only non-documentary evidence advanced by the Defendant (who on any view must know the nature and terms of the Claimant's employment) is a statement from in-house counsel since December 2011. That contends that the "*employment relationship between Elseco and the Claimant arises solely from DIFC Law No. 4 of 2005 as amended.*" But the DIFC Employment Law lays down rules and regulations in regard to the employment. It is a necessary prerequisite to the application of the law that there is an actual or proposed contract: see the DIFC Employment Law Schedule section 3.

18.It is unfortunate that the statement was made by a person who has no personal knowledge of the terms on which the Claimant was appointed Chief Financial Officer. Nor were any documents produced by the deponent. However Mr Loubeyre went on to express his own views of the significance or otherwise of the unsigned memorandum referred to earlier. But the court is equally well placed to express a view. It seems clear to me that there is a strong probability that the Claimant transferred to the Defendant company on salary and benefit terms similar to those in the letter (including it might be noted payment of salary measured in euros). But even counsel for the Defendant balked of the prospect of adopting Mr Loubeyre's opinion that such a conclusion brought with it French law and French jurisdiction. This was disclaimed at the hearing.

19.But this is by the bye. Any commercially sensible reading of the SCA gives rise to the following propositions:

(a)������������ Appendix 2 identifies "salary packages / employment contracts"

(b)������������ Para 2 sets out the "current salary package" of the Claimant

(c)������������ This includes provision for the 2013 bonus (together with all the other heads of claim)

(d)������������ This bonus is entirely independent of "retained earnings"

(e)������������ The only purpose for recording those terms is so that it is clear what the scope of his veto amounts to under Clause 8.2(e)

20.As regards the arbitration clause it is difficult to see on what basis it applies to some parts of a salary package or employment contract but not others. In any event, by virtue of Art. 12(2) of the DIFC Arbitration Law No.1 of 2008, an arbitration clause in an employment contract is unenforceable absent an order of the court dis-applying it. Astonishingly, leave was sought to make an application for such relief during the hearing. No explanation (let alone a good one) was tendered for making such an application at that remarkable stage. In any event it would have been devoid of merit. I refused leave.

21.There is in any event an insuperable threshold difficulty for the Defendants. By virtue of rule 12.4 of the Rules of the DIFC courts, an application disputing the court's jurisdiction must be made within 14 days after filing an acknowledgement of services (i.e. on the facts by 15 June 2014). The application was not issued until late September. I fear I was wholly unable to understand why it was helpful let alone necessary to wait for disclosure of the unsigned memorandum. In any event this was produced on 7 July 2014. There are no good grounds for extending time.

22.I cannot but add that this application struck me as devoid of a commercial rationale. The sum at stake amounted to a small proportion of the overall claim the bulk of which was accepted to be within the court's jurisdiction. The inference has to be that the application was made not for any useful or valid purpose but solely to put an expensive impediment in the way of the Claimant advancing his claim. In the result the application is dismissed with costs.

Issued by:**Natasha Bakirci**Assistant RegistrarDate of issue: 11 December 2014At: 4pm