Claim No: CA-006-2017

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 APPEAL

BEFORE THE CHIEF JUSTICE MICHAEL HWANG, JUSTICE SIR RICHARD FIELD AND H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

MAG FINANCIAL SERVICES LLC

Appellant

and

THERON ENTERTAINMENT LLC

Respondent / Cross-Appellant

Hearing: **6 December 2017**

Counsel: Harris Bor assisted by Alastair Graham of Mayer Brown for the Appellant

Sarah Malik (instructed by Taylor Wessing) for the Respondent/Cross-Appellant

Judgment: **28 January 2018**

JUDGMENT

Summary of Judgment

This is an appeal from the Judgment of H. E. Justice Ali Al Madhani dated 11 May 2017. The Judge at first instance awarded the Respondent/Cross-Appellant ("Theron") damages in the sum of AED 4,735,618.30 for breach of a Tenancy Contract dated 25 February 2014 ("the Tenancy Contract"). The Appellant ("MFS") now appeals alleging that Theron was not entitled to terminate the Tenancy Contract pursuant to Clause 36 and that the Judge at first instance erred in awarding lost profits to Theron. Theron resists MFS's appeal and cross-appeals contending that the Judge: (i) miscalculated the rent to which MFS was entitled by failing to give credit for the deductions of rent made in Theron's calculation of lost profit; and (ii) failed to take into account a returnable security deposit when determining the amount of rent due to MFS under the Tenancy Contract.

Theron originally filed a Part 7 Claim in the DIFC Courts of First Instance seeking a declaration that the Tenancy Contract executed between the parties had been effectively terminated and seeking additional damages to cover losses from MFS's alleged breach of the Tenancy Contract. MFS subsequently filed a Counterclaim seeking damages for Theron's alleged breaches.

Theron alleged that MFS's failure to timely obtain a change of use approval from the relevant authorities and failure to provide the premises in "shell and core" condition amounted to breaches of the Tenancy Contract. These breaches entitled Theron to terminate the Tenancy Contract, or, in the alternative, Theron terminated the Tenancy Contract pursuant to Article 36 of the Tenancy Contract. As a result of MFS's breaches, Theron sought damages, including lost profits.

MFS argued that the terms of the Tenancy Contract did not require it to obtain the change of use approval or, in any event, did not require it to obtain approval on unreasonable terms. Furthermore, MFS argued that it was not required to provide the premises in "shell and core" condition. Thus, Theron was not entitled to damages and in any event, the damages requested by Theron were not properly pleaded or calculated.

In its Counterclaim, MFS argued that it was Theron which had breached the Tenancy Contract and additional agreements made between the parties, resulting in severe harm to MFS. MFS argued that termination of the Tenancy Contract pursuant to Article 36 requires Theron to pay rent until the anniversary date of the Contract or, in the alternative, MFS requested reimbursement of the change in use fees paid to the relevant authorities. MFS also claimed additional damages. Theron responded arguing that no additional rent was owed pursuant to Article 36 and that MFS was not entitled to any further damages.

The Judge at first instance found that the Tenancy Contract was voluntarily terminated as of 14 July 2015 pursuant to Article 36 of the Tenancy Contract. Furthermore, the Judge found MFS's failure to timely obtain approval for change of use of the premises to be a breach of the Tenancy Contract entitling Theron to lost profits and other damages. However, the Judge also found that Theron must pay rent for the time it occupied the premises and for outstanding district cooling charges.

On appeal, MFS argued that Clause 36 of the Tenancy Contract should have been construed to confirm the more limited termination rights already articulated in Clause 19, and did give additional termination rights as the Judge at first instance found. However, giving consideration to Article 265 and 266 of the UAE Civil Code as the appropriate governing law, the Court of Appeal determined that Clause 36 must not be construed contrary to the interests of the lessee, the Tenancy Contract being a contract of adhesion. Thus, the Court of Appeal found that the Judge at first instance was correct to conclude that Theron had validly terminated the Tenancy Contract pursuant to Article 36 and MFS's first ground of appeal was dismissed.

As to lost profits, MFS argued that there was no sufficient evidential basis for the lost profits awarded to Theron. Counsel for Theron then abandoned Theron's claim for lost profits during the course of the appeal hearing and elected instead to claim for expenditure that had been wasted by reason of MFS's delay in procuring the change of permitted use of the premises. In abandoning the loss of profits claim, Theron's Counsel thereby implicitly conceded that the Judge at first instance's award of damages for loss of profits could not be sustained.

Having dismissed Theron's claims for lost profits due to insufficient evidence, the Court of Appeal addressed Theron's alternative claim for wasted costs. Due to the fact that termination of the Tenancy Contract was deemed voluntary pursuant to Clause 36 of the Tenancy Contract, the Court of Appeal determined that Theron could not succeed on all of its sunken costs. Instead, Theron was entitled to the wasted costs associated specifically with MFS's breach regarding the delay in changing the permitted use of the premises. The Court of Appeal held that Theron was entitled to recover the rent paid for the period from the start of the Tenancy Contract on 25 February 2014 down to the point when the change of permitted use was obtained, 9 February 2015. However, Theron remained liable for the rent for the period 9 February 2015 to 14 July 2015.

The Court of Appeal then considered which other items of expenditure listed in a Schedule put before the trial judge could be recovered as being a consequence of the delay in obtaining the change of use as distinct from Theron's abandonment of its restaurant project. The Court of Appeal held that none of those items could be awarded to Theron but it allowed Theron to advance a claim in the Court of First Instance on the basis of documentary evidence and written submissions only and without an oral hearing for wasted costs incurred in respect of the employment of staff because, once hired, the staff could not provide any useful service by reason of the said delay.

As for the cross-appeal, Theron was entitled to be repaid the security deposit that could be set off against MFS's entitlement to rent for the period 9 February 2015 to 14 July 2015. Theron's second ground of cross-appeal that the Judge at first instance should have given credit for the deductions for rent made in Theron's calculation of lost profits fell away with Theron's abandonment of the lost profits claim. This second ground for cross-appeal was therefore dismissed. As to costs, the Court of Appeal determined that unless either party filed written submissions to the contrary within 10 days of the Court of Appeal's decision, the Court of Appeal would set aside the order for costs made below and would order that there be no order as to costs both below and on this appeal.

This summary is not part of the Judgment and should not be cited as such

ORDER

UPON hearing Counsel for the Appellant and Counsel for the Respondent on 6 December 2017

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1. The Appellant's Appeal regarding Clause 36 of the Tenancy Contract is dismissed.

2. The Appellant's Appeal regarding the award of lost profits by the Court of First Instance succeeds.

3. The Respondent's Cross-Appeal regarding the security deposit succeeds. The security deposit is returnable and may be set-off against unpaid rent owed to the Appellant.

4. The Respondent's Cross-Appeal regarding lost profits is dismissed.

5. Unless either party files written submissions to the contrary within 10 days hereof, this Court shall set aside the order for costs made below and shall order that there be no order as to costs both below and on this Appeal.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 28 January 2018

At: 2 pm

JUSTICE SIR RICHARD FIELD:

Introduction

1.The Appellant ("MFS") appeals the decision of H.E. Justice Ali Al Madhani ("the judge") dated 11 May 2017 by which the judge awarded the Respondent/Cross-Appellant ("Theron") damages in the sum of AED 4,735,618.30 for breach of a Tenancy Contract dated 25 February 2014 ("the Tenancy Contract").

2. The Respondent ("Theron") resists MFS's appeal and cross-appeals contending that the judge: (i) miscalculated the rent to which MFS was entitled by failing to give credit for the deductions of rent made in Theron's calculation of lost profit; and (ii) failed to take into account a returnable security deposit when determining the amount of rent due to MFS under the Tenancy Contract.

3. At all material times, Theron was a licensee of the restaurant brand, "Asia de Cuba" and MFS was the owner of premises on the 26th and 27th floors of the South Tower of the Emirates Financial Towers in the DIFC ("the Premises"). In the Autumn of 2013, MFS and Theron entered into a Tenancy Contract dated 4 November 2013 ("the first Tenancy Contract") under which MFS agreed to lease to Theron the Premises for a term of 3 years, plus a 6 month rent-free period, for use as a restaurant and bar. Under this contract, Theron paid a returnable security deposit of AED 289,705.66, a rental payment on the date of the signing of the agreement and delivered 6 post-dated cheques in respect of the future rent as it was to fall due.

4. In December 2013, Theron engaged TGP Consulting Limited ("TGP") to manage and operate the contemplated restaurant. TGP was also managing and acting as a consultant to a restaurant in London and another in Abu Dhabi each under separate ownership, trading under the "Asia de Cuba" brand.

5. In February 2014, Theron and MFS entered into the Tenancy Contract dated 25 February 2014. This contract replaced the first Tenancy Contract dated 4 November 2013 and was on the same terms as that earlier contract save that the term of the tenancy was extended by two years, the floor space leased was increased, the electrical power to be supplied to the Premises was increased and the rent was increased. In place of the 6 post-dated cheques delivered under the first Tenancy Contract, Theron delivered 9 post-dated cheques for larger amounts than those provided for in the cheques delivered under the first contract.

6. It is necessary to set out a number of the clauses contained in the Tenancy Contract.

> "6. Permitted Business: ▯▯▯▯▯▯▯▯▯▯▯▯▯ Restaurant & Bar
>
> 7. Period of Tenancy: 5 years (with a rent free period for 6 Months)
>
> ▯▯▯▯▯▯▯▯▯▯▯▯▯ Free period:▯▯ ▯▯▯▯▯▯▯▯▯▯▯▯▯▯▯▯▯ From 10 November 2013 To: 09 May 2014
>
> Lease period: ▯▯▯▯▯▯▯▯▯▯▯▯▯▯▯▯▯ From: 10 May 2014 To: 09 May 2019
>
> . . .
>
> 11. Term of Lease: Subject to the right of the Tenant to terminate the lease by giving two months notice as specified in clause 19, this Lease shall be in force for the Period of Tenancy.
>
> . . .
>
> 19. The Tenant shall have the right to terminate the lease each year on the anniversary date, i.e., by giving two months' notice.
>
> . . .
>
> 23. The Unit is delivered as shell and core without ceiling and flooring and/or as its condition and the Tenant shall carry out his own interior fit-out works as applicable . . .
>
> 34. The UAE laws are the laws that should be referred to in the interpretation or application of this Tenancy Contract. The rules and laws applicable in the Dubai International Financial Centre shall govern the relation between the two parties to this Tenancy Contract.
>
> . . .
>
> 36. If the Tenant wishes to determine this Tenancy Contract at any time during the Period of Tenancy and of such wish gives not less than two calendar months' previous notice in writing to the Landlord then this Tenancy Contract and everything contained in this Tenancy Contract ceases and determines but without prejudice to any antecedent breach of any obligation by either party against the other in respect of any antecedent breach of any obligation contained in this Tenancy Contract and the Landlord shall on such determination the landlord (sic) will forfeit any part of the Annual Rent paid in advance by the Tenant in respect of any period beyond the date of such determination in accordance with this Tenancy Contract."

7. At the time both Tenancy Contracts were entered into, the premises were permitted to be used as offices.

8. Come November 2014, no authorisation had yet been obtained from the DIFC to change the permitted use from office space to a restaurant and bar. Theron took the view that it was MFS's obligation to obtain this authorisation at MFS's own cost and MFS had been refusing to pay the fee for change of use demanded by the DIFC on the ground that it was unreasonably high. On 25 November 2014, Theron issued proceedings against MFS seeking an order for specific performance of an alleged obligation on MFS to secure the change of use authorisation. On 1 February 2015, the judge ordered MFS to take all action necessary to secure from the DIFC the change of use authorisation and on 5 February 2014 such authorisation was obtained by MFS on payment of the required fee. Theron were informed of the change of use authorisation on 9 February 2014.

9.Following the conclusion of the first Tenancy Contract, Theron employed a contractor to do work which Theron regarded as necessary for the premises to be put into the state of "shell and core" referred to in Clause 23 of the Tenancy Contract and to fit out the premises for use as a restaurant and bar. However, this work could not be started until the necessary change of use had been authorised.

10. On 11 March 2015, in response to its application made on 8 March 2015 for approval of the proposed fit-out works, Theron was issued with a No Objection Certificate and the Dubai Technology and Media Free Zone Authority (Tecom) granted approval for the proposed d▯cor later in the month.

11. In May 2015, it was necessary for Theron to renew its trade license which was due to expire on the 14th of that month. In the belief that the renewal application form had to be signed by both Theron and MFS, Theron demanded that MFS sign such a form, which MFS declined to do since there was a dispute between the parties. Theron's 10 November 2014 rent had bounced shortly after 2 May 2015. However, Theron's trade license was nonetheless renewed; it turned out that MFS's signature on the form was not required for this to be achieved.

12. By letter dated 14 May 2015, Theron served a notice on MFS terminating the Tenancy Contract on two alternative grounds. The first ground was that MFS had refused to sign the license renewal application form. The alternative ground was that the notice constituted a notice of termination under Clause 36 of the Tenancy Contract.

13. On 30 June 2015, Theron issued proceedings against MFS claiming, *inter alia*, a declaration that the Tenancy Contract had been terminated, the return of the post-dated cheques provided to MFS under the Tenancy Contract, damages for loss of profit and wasted expenditure by reason of MFS's breaches of contract in failing to procure approval of the change of use when this ought to have been done, and for failing to deliver the premises, "shell & core".

The Judgment Below

14. The judge held that:

> (1) MFS's refusal to sign the trade license renewal form was not a breach of the Tenancy Contract and therefore did not constitute a ground for terminating the Tenancy Contract.
>
> (2) Nonetheless, Theron had lawfully terminated the Tenancy Contract under Clause 36 of the Tenancy Contract. Clause 36 did not have to be read as being subject to Clause 19.
>
> (3) It followed that MFS was not entitled to retain the cheques covering the period after the determination date, 14 July 2015, and those cheques must be returned to Theron.
>
> (4) MFS had breached the Tenancy Contract by not procuring approval from the DIFC for the use of the premises to be changed to use as a restaurant and bar until around 9 February 2015
>
> (5) Theron was entitled to damages representing loss of profit for the period from the "soft opening" date of 16 October 2014 to 14 May 2015 (the date of the notice to terminate). 16 October 2014 was the date on which Theron contemplated opening the restaurant but without extensive advertising or marketing at that stage.
>
> (6) The loss of profit damages were AED 6,282,933, as proved by a schedule of projected figures for 2014 for the proposed restaurant ("the damages schedule") based on figures for the Asia de Cuba restaurant in Abu Dhabi for the first four months of 2015. The damages schedule was said to have been produced by a Mr Wright of TGP and the figure of AED 6,282,933 was the total of projected retained net profit for the period of January to July 2014.
>
> (7) MFS must additionally pay Theron: (a) AED 50,000 for costs incurred for the storage of the contractor's equipment and materials; (b) AED 37,500 for costs incurred for the storage of furniture and fit-out materials; and (c) AED 485,691 for the cost of additional contracting works completed.
>
> (8) Theron must pay MFS: (a) on the return of the post-dated cheques, AED 2,040,780.83 as rent for the period 9 May 2014 to 14 July 2015; and (b) AED 79,724.87, for outstanding district cooling charges.
>
> (9) The judge made no explicit finding on the issue whether MFS had failed to deliver the premises "as shell and core" as required by Clause 23 of the Tenancy Agreement. In paragraphs 41 to 53 of his judgment, he rehearsed the parties' submissions on this issue. He then in paragraph 55 cited part of a letter from the Director of Property Development in the DIFC dated 25 August 2014 stating that the fit-out work on the premises could not begin because the premises remained designated for office use and went on to conclude in paragraph 56 that in light of this letter there was no need to examine the evidence on the "shell and "core" issue given that it was as a result of MFS's failure to

obtain the change of use that Theron had been prevented from starting work of any kind.

MFS's grounds of appeal

15. MFS did not challenge the finding of the judge that it had been in breach of the Tenancy Contract by not having procured the change of use from office use to use as a restaurant and bar.

16. What MFS did challenge were the judge's: (i) finding that Theron was entitled to terminate the Tenancy Contract under Clause 36; and (ii) award of AED 6,282,933 as damages for loss of profit based on the damages schedule.

**************** *The Clause 36 issue*

17. As recorded above, under Clause 34 of the Tenancy Contract, the interpretation of the contract is governed by the UAE Civil Code Articles 265 and 266, which provide:

"**Article 265**

(1) If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties.

(2) If there is scope for an interpretative construction of the contract, an enquiry shall be made into the mutual intentions of the parties beyond the literal meaning of the words, and guidance may be sought in so doing from the nature of the transaction, and the trust and confidence which should exist between the parties in accordance with the custom current in dealings.

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43. As to the contention that the judge should have given credit for the deductions for rent made in Theron's calculation of lost profits, this was not conceded by MFS but the point fell away with the abandonment of the lost profits claim.

Costs

44. In my judgment, unless either party files written submissions to the contrary within 10 days hereof, this Court should set aside the order for costs made below and should order that there be no order as to costs both below and on this appeal. I take this view because: (i) MFS has succeeded only on its appeal against the lost profits award and lost on the Clause 36 issue; (ii) Theron succeeded on its cross-appeal as to the return of the security deposit (although MFS conceded this point sometime before the hearing of the appeal); and (iii) the judge's decision that Theron was entitled to damages by reason of MFS's delay in obtaining the required change of permitted use has not been overturned.

CHIEF JUSTICE MICHAEL HWANG:

45. I agree with the judgment of Justice Sir Richard Field and have nothing further to add.

H.E. JUSTICE OMAR AL MUHAIRI

46. I also agree and have nothing further to add.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 28 January 2018

At: 2 pm

APPENDIX A - COSTS INCURRED BY THERON ENTERTAINMENT LLC ON THE ASIA DE CUBA PROJECT

No.	Company Name/Others	Description/Scope of World Purchases	Amount (AED)
		Works	1,527,797
		Lifts and Flooring	478,096
1	Al Reyami Interiors LLC	Cancellation	1,224,675
		Permits/Licenses	118,581
		Total	3,394,149
2	TGP Consultancy	Operational Management Consulting services	1,055,831
3	Reaction Project Management	Project Management services for Project Asia De Cuba	210,000
4	China Grill Management	Licensing Fee and Technical Services Fees under the Licensing Agreement with China Grill Management	596,375
5	MAG Group	Rent Payments	1,738,234
6	Employees	Payroll payments (August 2014-June 2015)	1,850,344
7	CORE ME Exhibition & Display LLC	a.Storage space with lockable door; b.Lights and Full Access; c.24 hour security services with warehouse insurance; d.Forklift and labour services	50,000
		Available equipment	110,800
		Losses incurred due to discounted sales	39,800
8	Commercial Catering Equipments LLC	Storage charge for 14 months	42,000
		Duct work	8,000
		Total	200,600
9	Real Events & Entertainment	Supply and installation of Void sound system at Asia De Cuba	167,832
10	Warings Furniture	Furniture Interior	88,135
11	Fusion International Trading Co.	Furniture Interior	0 (received money back)
12	Reem Asia Trading LLC	Range of tableware and glassware items	69,410
13	Flash Properties	Real Estate services	72,824
14	DIFC Registrar of Companies	Registration Fees and permit approvals	50,195
15	Computer Peripheral Services	Office and IT expenses	207,185
16	BETA Technologies	IT and Software Services - HR/Payroll Software along with Time and Attendance System including installation and on-site training	31,850
17	Key Information Technology	IT	110,096
18	Infor Hospitality AE	IT	12,299
19	A.Ronai LLC	Staff Uniforms	13,996
20	Procurio General Trading	Drinking barware and glassware items	12,945
21	Chabowski Trading LLC	Juice Machines Table Top	9,590
22	Mahmay Office Furniture LLC	Range of office furniture such as filing cabinets, worktops and chairs	8,180
23	Joma Trading	Catering products	4,345
24	Glow Star Creation	PR Marketing	3,125
25	Deep Sea	Transportation services	5,857
26	Star Link Trading CO LLC	Office stationary supply	1,711
27	Euro Coffee	Milk and coffee stock supply	1,605

28	Al Fahdi Stationary	Stationary supplies	1,333
29	Specifico & Co FZC	Food service cabinet	1,245
30	MGK Electromechanical Works LLC	Pen Style Digital Pocket Test Thermometer	750
31	Dreamer Trading LLC	Cold Storage Jacket	360
32	AXA Insurance	Staff insurance	36,554
33	Visas	2014-2015	104,975
TOTAL			10,111,930