Claim No. SCT 141/2017

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum,

Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS

BEFORE SCT JUDGE NASSIR AL NASSER

BETWEEN

HEITOR

Claimant/Counter-Defendant

and

HELAH

Defendant/Counter-Claimant

Hearing: **17 July 2017**

Further Submissions: **27 July 2017**

Judgment: **1 August 2017**

JUDGMENT OF SCT JUDGE NASSIR AL NASSER

UPON hearing the Claimant and the Defendant

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

IT IS HEREBY ORDERED THAT:

1. The Defendant shall reimburse the Claimant the sum of AED 204,422.28.

2. The Claimant shall transfer the Defendant's visa with pending issues.

3. All other claims and counterclaims are dismissed.

4. The Defendant shall pay to the Claimant the Court Fees in the sum of AED 4090.38.

Issued by:

Nassir Al Nasser

SCT Judge

Date of issue: 1 August 2017

At: 4pm

THE REASONS

The Parties

1. The Claimant is Heitor (herein "the Claimant"), a company incorporated in the Dubai International Financial Centre, Gate Village, Dubai, UAE.

2. The Defendant is Helah (herein "the Defendant"), an individual employed by the Claimant.

Background and the Preceding History

3. The underlying dispute arises over the Defendant's wrongful act constituting misrepresentation under Article 29 of the DIFC Law of Obligation Law no. 5 of 2005 which directly caused the Claimant damage. The remedy sought by the Claimant is the reimbursement of the amount paid to the Defendant in the sum of AED 204,422.28.

4. The Claimant alleges that he is entitled to this remedy because it paid the Defendant the sum of AED 204,422.28 under the terms of a settlement agreement between the Claimant and the Defendant dated 1 March 2017, that the Claimant would not have agreed to but for the Defendant's misrepresentation by non-disclosure of his own wrongdoing in breach of his fiduciary duties to the Claimant.

5. On 1 August 2016, the Claimant and the Defendant entered into an Employment Agreement (herein "Employment Agreement") as a Senior Executive Officer, but the actual date of commencement was 5 September 2016. Due to changes in the Claimant's Business, both parties agreed that the Defendant's employment would terminate with effect from 28 February 2017. The Claimant and the Defendant as a result entered into a Settlement Agreement (herein the "Settlement Agreement") in which the Defendant agreed to forgo certain exit conditions under his Employment Agreement and the Claimant agreed to pay the Defendant an aggregate amount of AED 322,697.98.

6. The Claimant began making payments in installments, the first installment made was in the sum of AED 204,422.28. Subsequently, the Claimant discovered that on 24 February 2017 the Defendant had written a letter (herein "disclosure letter") to a third party, Helga Middle East Limited (herein as "Helga") who was a client of the Claimant. The Claimant discovered the disclosure letter by a communication made by Helga on 9 March 2017, after the Claimant inquired about the status of the Cooperation Agreement (herein "Cooperation Agreement") between the Claimant and Helga.

7. The Cooperation Agreement was signed between the Claimant and Helga on 14 November 2016, the Defendant was assigned as the authorized signatory, in fact he was the person signing the Cooperation Agreement.

8. The Claimant filed a Small Claim against the Defendant as a result of the alleged breach made by the Defendant in sending the disclosure letter which revealed confidential and privileged information about the Claimant and recommended that Helga cancel its relationship with the Claimant. The Defendant was the authorized signatory of the Claimant, in the disclosure letter the Defendant declared that he had thereby terminated the Cooperation Agreement between Helga and the Claimant, without any previous consultation or approval by the Claimant.

9. The Claimant asserts that if it had known about the disclosure letter, it would not have entered into a Settlement Agreement with the Defendant.

10. The Defendant responded to the claim on 4 June 2017 defending the claim and filing a Counterclaim on 11 June 2017 claiming amounts which are allegedly owed to the Defendant by virtue of his Employment.

11. The parties met for a Consultation with SCT Officer Lema Hatim on 15 June 2017 but were unable to reach a settlement.

12. Both parties attended the hearing before me listed on 17 July 2017.

The Claim

13. The Claimant's case is that it employed the Defendant as a Senior Executive Officer on 5 September 2016. As a result of changes in the Claimant's business circumstances, the Claimant and the Defendant agreed that the Defendant's employment would terminate with effect from 28 February 2017. The Claimant and the Defendant entered into the settlement agreement in which the Defendant agreed to forego certain conditions under his employment contract and the Claimant agreed to pay the Defendant an aggregate amount of AED 322,697.98.

14. The Claimant asserts that in good faith, the Claimant immediately began making payments to the Defendant in instalments. The Claimant made a total payment of AED 204,422.28. In addition, the Claimant asserts that on 24 February 2017 the Defendant had written a disclosure letter to Helga. The Claimant alleges that it had discovered the letter by a communication sent by Helga on 9 March 2017. Furthermore, he argued that the disclosure letter revealed confidential and privileged information about the Claimant and recommended that Helga cancel its relationship with the Claimant. He also asserts that the Defendant was an authorized signatory of the Claimant and in the disclosure letter the Defendant declared that he had thereby terminated the Cooperation Agreement with the Claimant. In addition, the Claimant alleges that the Defendant took this action without consultation or approval from the Claimant.

15. The Claimant alleges that the Defendant breached his fiduciary duties to the Claimant by disclosing to Helga confidential and proprietary information about the Claimant. He also added that the Defendant failed to disclose this breach to the Claimant as obligated by his status as a fiduciary. The Claimant also adds that as per Article 158(2)(b) of the DIFC Law of Obligations (Law no.5 of 2005) the Defendant was a fiduciary of the Claimant. As a fiduciary, as per Article 159 of the DIFC Law of Obligations (Law no. 5 of 2005) the Defendant owed the Claimant a number of duties, including but not limited to a duty of loyalty and confidence and a duty to avoid conflicts of interests. As a senior employee and fiduciary of the Claimant, the Claimant asserts that the Defendant had a duty to disclose any misconduct to the Claimant.

16. The Claimant made reference to Article 29 of the DIFC Law of Obligation (Law no. 5 of 2005), and added that it creates a cause of action where a representor makes an incorrect statement of fact in order to induce, and does induce, a person to enter into a contract. He also made reference to Article 29(5) of the DIFC Law of Obligation (Law no. 5 of 2005) which specifies that non-disclosure amounts to misrepresentation where the non-disclosure is a breach of a specific duty to disclose. The Claimant then added that the Defendant made a misrepresentation which induced the Claimant to enter into the Settlement Agreement, and the Claimant suffered losses of AED 204,422.28 in the form of payment to the Defendant which it would not have made but for the Defendant's misrepresentation.

17. The Claimant also made reference to Article 30 of the DIFC Law of Obligation (Law no.5 of 2005), a person is liable for misrepresentation to a representee if: (a) he is the representor in relation to a misrepresentation; (b) the representee has entered into a contract after the misrepresentation has been made; (c) the misrepresentation influences the representee to enter into a contract or affects the terms upon which he agrees to enter into it; and (d) the representee suffers loss as a result of entering into the contract.

18. Therefore, the Claimant requests the Courts to order payment from the Defendant in the amount of AED 204,422.28 pursuant to Article 25 of the DIFC Law of Damages and Remedies (Law no.7 of 2005).

The Defence and Counterclaim

19. The Defendant was employed in the position of Executive Director at Helga in the DIFC prior to joining the Claimant. The Defendant alleges that he and others were enticed on numerous occasions by Mr Helle (a former shareholder of the Claimant) and Mr Hella (a 100% shareholder of the Claimant) to leave their employment at Helga and join the Claimant. The Defendant alleges that he was promised that, if he joins the Claimant's employment he would:

(i) be tasked with reorganizing the Claimant's systems and processes; and

(ii) consolidate the existing book of clients and help grow the business with new asset managers.

20. The Defendant commenced his employment with the Claimant on 5 September 2016 as a Senior Executive Officer. During this time, a shareholder dispute began in October 2016 that could not be resolved until Mr Helle sold his share to Mr Hella and left the Claimant.

21. The Employment relationship continued to exist until the Defendant was informed by the Claimant that it would need to be reconsidered due to changes in the business circumstances and strategy under the new ownership. As such, there were discussions between the Claimant and the Defendant in order to agree on the Defendant's exit.

22. As a result of discussions, the Defendant agreed to consent to mutual termination of his employment with the Claimant with immediate effect from 28 February 2017, provided that the parties would mutually sign the Agreement pursuant to which the Claimant would agree to pay to the Defendant the following amounts in full and final settlement by no later than three (3) days of the date of the execution of the Settlement Agreement:

(i) The salary of February 2017 in the sum of AED 100,000 for work already undertaken by the Defendant and completed by the time of resignation;

(ii) Severance payment for the months of March and April 2017 respectively at AED 100,000 each month as compensation;

(iii) All submitted expenses claims incurred by the Defendant on behalf of the Claimant in the performance of his duties in the sum of AED 18,275.70; and

(iv) Any accrued annual leave.

23. The Settlement Agreement was executed on 1 March 2017 pursuant to which the Claimant agreed to make payment, in full and final settlement, of the amount by no later than 4 March 2017.

24. However, by signing the Agreement in order to receive a prompt payment of the Amounts by no later than 4 March 2017, the Defendant was induced by the Claimant to forfeit a number of entitlements under the alleged Employment Contract, but not limited to:

(i) His contractual right to receive a payment of twelve (12) months' salary in accordance with clause 8.2(i) of the Employment Contract, which provides as follows:

"".. The Company may terminate this Agreement by giving notice to the Employee.one (1) month notice if the period of employment is within the first year of employment in which event a penalty of twelve (12) months' gross salary shall be due and payable by the Company to the Employee being required to leave their position within the Company."; and

(ii) His contractual entitlement to receive a bonus payment of AED 220,446 (being 5% of the net profit of the Claimant as of 31 December 2016) in accordance with Clause 6.2 and appendix 2 of the Employment Contract. The Defendant also argues that the bonus payment is not on a pro-rated basis and was agreed between the Defendant and the Claimant in lieu of the Defendant agreeing to relinquish his guaranteed arithmetic bonus payment at Helga, which was significantly larger than the Bonus payment at Helga, which was significantly larger than the Bonus payment and which was due to the Defendant on 31 December 2016.

25. The Defendant asserts the he made it expressly clear to the Claimant that he has agreed to sign the Agreement and to forfeit his contractual entitlements to receive the contractual penalty payment and the bonus payment for the sole reason that the Claimant has agreed to make full payment of the Amounts by no later than 4 March 2017.

26. However, the Defendant argues that the Claimant has failed to honour its payment obligations under the Settlement Agreement. The Defendant confirmed that the Claimant has only made payment of AED 204,422.28 as per the calculation of the Final Settlement payment agreed between the parties. In addition, the Defendant argued that the Claimant was in breach of the Settlement Agreement when he failed to settle the aggregate amount of AED 118,275.70.

27. The Defendant alleges that he does not owe the Claimant the claimed amount or any other amounts. Furthermore, the Claimant has previously asserted in its letter dated 30 April 2017 that it is owed the amount of AED 917,091.85 which the Claimant thereafter reduced the amount to the Claimed amount that it wishes to claim from the Defendant. The Defendant argues that this is proof that the Claimant was making irrational and unreasonable demands from the Defendant without any basis in law or otherwise in order to exert undue pressure on the Defendant to forgo his entitlements and he also added that the Claimant's breach of contractual payment obligations renders the Settlement Agreement revoked by the Claimant and therefore entitles the Defendant to claim all his contractual and statutory rights including, but not limited to, the Bonus payment, which would entitle the Defendant a significantly larger payment than the amounts or the outstanding amounts.

28. Subsequently, the Defendant alleges that in respect of breach of the Law of Obligation, that the Claimant did not correctly and accurately reflect the details of the factual background in its claim relating to the disclosure letter.

29. In the disclosure letter dated 24 February 2017 sent to Helga, the Defendant disclosed:

(i) His and Mr Helios departure from the Claimant to Helga in accordance with the disclosure requirements under clause V.1 of the Cooperation Agreement dated 14 November 2016 executed between Helga and the Claimant and in his capacity as an authorised signatory thereunder and as the SEO of the Claimant. Clause V.1 states

". when applicable, the independent Asset Manager shall provide the bank with a list of the persons authorized to sign on behalf of the Independent Asset Manager as well as a list of the persons authorised to give orders for the management of the Client's account. The Independent Asset Manager undertakes to inform the Bank of any modification to these powers."; and

(ii) The existence of the DFSA investigation in accordance with the disclosure requirements under clauses II.4, II.5 and VIII.3 of the Cooperation Agreement and in his capacity as an authorised signatory thereunder and as a SEO of the Claimant.

30. The Defendant alleges that the disclosures made by the Defendant in the Disclosure Letter were in accordance with his contractual obligations under the Cooperation Agreement and were not in breach of any laws of the DIFC including, but not limited to, the Law of Obligations.

31. Furthermore, the Defendant alleges that the Claimant failed to disclose to the Courts that:

(i) The Defendant was not required under the Employment Contract to bring any assets whatsoever to the Claimant, including bringing assets from Helga;

(ii) Prior to the execution of the Cooperation Agreement and the commencement of the Defendant's employment with the Claimant, the Claimant attempted on several occasions to sign a similar agreement on similar terms with Helga; however, this was repeatedly refused by Helga as they did not want to work with the Claimant;

(iii) Helga agreed to execute the Cooperation Agreement as a result of its well-established business and past employment relationship with the Defendant, its negotiations with the Defendant, and strictly on the conditions that:

a. The Defendant continues to be an Authorised person of the Claimant and an authorised signatory under the Cooperation Agreement.

b. If any changed occur to the circumstances mentioned above, the Defendant would immediately inform Helga.

32. The Defendant also alleges that the purpose of the condition is that, if such changes occurred Helga would terminate the Cooperation Agreement immediately. He also adds that even if the Disclosure Letter was not sent by the Defendant, Helga would have terminated the Cooperation Agreement in any event. Thus, the Claimant's assertion that it has suffered loss of revenue as a result of the Disclosure letter is a groundless and baseless assertion and a futile attempt by the Claimant not to Honour its obligation under the Settlement Agreement.

33. The Defendant also asserts that Helga was not a client of the Claimant but it was a counterparty pursuant to the Cooperation Agreement. In addition, that the Claimant incorrectly and maliciously refers to Helga in its claim as a client of the Claimant in order to mislead the Court as to the facts and prevent the course of natural justice.

34. The Defendant also asserts that had the Claimant known about the Disclosure Letter it would not have entered into the Agreement or otherwise agreed to pay any amounts to the Defendant. The Defendant alleges that the Claimant was aware of the terms and conditions of the Cooperation Agreement, the circumstances surrounding the same, and the Defendant's disclosure requirements thereunder at all times.

35. The Defendant also filed a Counterclaim along with his defence. In the Counterclaim, the Defendant alleges that the Claimant's breach of its contractual payment obligations render the Settlement Agreement revoked by the Claimant and therefore entitle the Defendant to claim all and/or any of his contractual and statutory rights including the bonus payment. However, pursuant to rule 53.2(1) of the Rules of the DIFC Courts (the "RDC"), the ".amount of the claim or the value of the subject matter of the claim." must not ". exceed AED 500,000.". But a party is entitled to cap its claim at AED 500,000 in order to proceed in the SCT. Accordingly, the Defendant confirmed that he intends to cap his claim at AED 500,000 and waive his rights to claiming amounts over and above the threshold applicable in the SCT.

36. The Defendant therefore claims the following amounts from the Claimant, which are as alleged owed and due to the Defendant by virtue of his employment:

(i) Outstanding Amounts due in the sum of AED 118,275.70

(ii) The bonus payment of AED 220,446 (being 5% of the net profit of the Claimant as of 31 December 2016) in accordance with Clause 6.2 and Appendix 2 of the Employment Contract; and

(iii) AED 3,287.67 daily wage penalty to be applied by the Court up to and including the date of Judgment in these proceedings. This is pursuant to Article 18 of the DIFC Employment Law No. (4) of 2005 (as amended).

37. The Defendant also requests a visa transfer. The Defendant alleges that he provided the Claimant with the signed application for internal visa transfer with pending issues for the conclusion of this matter. However, the Claimant is insisting that in order to proceed with the Defendant's visa transfer, the Defendant must sign a visa transfer form with no pending issues.

38. Therefore, on the grounds of this Defence and Counterclaim, the Defendant requests the Court to order the following:

(i) To reject the Claimant's claim and to accept the Defendant's defence and Counterclaim;

(ii) To order the Claimant to pay to the Defendant, on an immediate basis, the following amounts:

a. The Outstanding Amounts due in the sum of AED 118,275.70;

b. The bonus payment in the sum of AED 220,446; and

c. AED 3,287.67 daily wage penalty to be applied by the Court up to and including the date of Judgment in these proceedings.

(iii) To order the Claimant to proceed with the transfer of the Defendant's visa with pending issues, on an immediate basis.

Discussion

39. Confusingly, the parties signed two Employment Contracts on the same date; therefore, the Court shall first determine which Employment

Contract is the applicable contract.

40. The Claimant admits that there were two Employment Contracts but argues that the official contract is the contract uploaded on the DIFC Authority's Portal.

41. On the other hand, the Defendant admits that the first contract is the one uploaded in the Portal but it was for the purposes of issuing an employment visa. Subsequently, the parties signed a contract which shall succeed the previous one and the second Employment Contract is the one that should be considered in determining the Claim. The Defendant also adds that the Claimant in his Final Payment Letter referred to Clauses that are in the second Employment Contract, namely, Clauses 9.1, 9.2 and 9.3 which are related to the Covenants.

42. In my view, I am satisfied to consider the second Employment Contract as the official contract because its succeeds the first Employment Contract, pursuant to the facts provided and by the admission of both parties at the hearing. Although the first Employment Contract is the one uploaded to the DIFC Authority's Portal, this does not preclude the second from being the official one.

The Claim

43. The Claimant's Claim for damages is subsequent to the allegation that the Defendant's misrepresentation under Article 29 of the DIFC Law of Obligations (Law no. 5 of 2005), which creates a cause of action where a representor makes an incorrect statement of fact in order to successfully induce, a person to enter into a contract. The Claimant argues that in this case, the Defendant was the representor and the Claimant was induced into entering the contract.

44. The Claimant also refers to Article 29(5) of the DIFC Law of Obligation (Law no. 5 of 2005) which states the following:

> "(5) Non-disclosure cannot amount to a representation, unless the non-disclosure is a breach of a specific duty to disclose."

45. The Claimant also argues that as an employee of the Claimant pursuant to Article 158(2)(b) of the DIFC Law of Obligation Law no. 5 of 2005, the Defendant was a fiduciary of the Claimant. As a fiduciary, as per Article 159 of the same Law, the Defendant owed the Claimant a number of duties such as: (i) duty of loyalty and confidence; and (ii) duty to avoid conflict of interest. As a senior employee and fiduciary of the Claimant, the Claimant argues that the Defendant had a duty to disclose any misconduct to the Claimant.

46. The Claimant also relies on Article 30 of the DIFC Law of Obligation which states that:

> "A person is liable for misrepresentation to a representee if:
>
> (a) He is the representor in relation to a misrepresentation;
>
> (b) The representee has entered into a contract after the misrepresentation has been made;
>
> (c) The misrepresentation influences the representee to enter into a contract or affects the terms upon which he agrees to enter into it: and
>
> (d) The representee suffers loss as a result of entering into the contract."

47. The Claimant is seeking the reimbursement AED 204,422.28 paid by the Claimant to the Defendant under the Settlement Agreement.

48. The Claimant believes that it is entitled to this payment because it paid the Defendant under the terms of a Settlement Agreement in which the Claimant would not have agreed to but for the Defendant's misrepresentation by non-disclosure of his own wrongdoing in breach of his fiduciary duties to the Claimant. The Claimant also added that if it had known about the disclosure letter, it would not have entered into the Settlement Agreement or agree to pay the Defendant.

49. The Claimant argues that the Defendant breached his fiduciary duties to the Claimant on 24 February 2017 by disclosing to Helga confidential and proprietary information about the Claimant and he is therefore liable to the Claimant for his loss under Article 30 of the DIFC Law of Obligations (Law no. 5 of 2005).

50. The Claimant made reference to Article 25 of the DIFC Law of Damages and Remedies (Law no. 7 of 2005), which states that:

> "the Injured party has a right to damages as measured by that sum of money which would put him in the same position as he would have been in if he had not sustained the wrong for which he is to be compensated, plus, in each case, any other loss caused by the breach of the Law of Obligations."

51. Therefore, the Claimant argues that applying Article 25 of the DIFC Law of Damages and Remedies (Law no. 7 of 2005), had the Defendant not made a misrepresentation (by omission) to the Claimant, the Claimant would not have entered into the Settlement Agreement or made payments.

52. In the Defendant's Disclosure Letter dated 24 February 2017 sent to Helga, the Defendant disclosed:

> (i) His and Mr Helios resignation from the Claimant, in which they will cease to be authorized persons of the firm.
>
> (ii) Ongoing investigation into the continued prudential functioning of the firm.
>
> (iii) Termination of the Cooperation Agreement with immediate effect.

53. However, the Defendant in his Disclosure letter, referred to Clause V.1 of the Cooperation Agreement which states that:

> ".When applicable, the Independent Asset Manager shall provide the Bank with a list of the persons authorized to sign on behalf of the

Independent Asset Manager as well as a list of the persons authorised to give orders for the management of the Client's account. The Independent Asset Manager undertakes to inform the Bank of any modification of these powers."

54. The Defendant also referred to Clause VIII.3 in his Disclosure letter, which states that:

"the Bank may terminate this Agreement with immediate effect, without paying any liquidated damages, for proper grounds. Proper grounds include, but are not limited to, a violation of this Agreement by the Independent Asset Manager, a violation of the DFSA legal provisions in force, the existence of any judicial proceedings (civil, criminal or administrative) against the Independent Asset Manager or any other fact which, in the Bank's opinion, affect or may affect the Bank's reputation or honorability."

55. The Defendant therefore argues that the disclosure made by the Defendant in the Disclosure Letter were in accordance with his contractual obligations under the Cooperation Agreement and were not in breach of any laws of the DIFC including, but not limited to, the Law of Obligations.

56. The Defendant also submitted that he had disclosed the existence of the DFSA investigation in accordance with the disclosure requirements under Clauses II.4 and II.5 of the Cooperation Agreement.

57. The Defendant then argues that the purpose of the condition set in Paragraph 31(3) of this Judgment above, is that if such changes occurred, Helga would terminate the Cooperation Agreement immediately. Accordingly, the Defendant argues that even if the Disclosure letter was not sent by the Defendant, Helga would have terminated the Cooperation Agreement in any event.

58. The Defendant also contends that he did not breach any of his Obligations, and that the Claimant was aware of the terms and conditions of the Cooperation Agreement, the circumstances surrounding and the Defendant's disclosure requirements thereunder at all times.

59. In my view, there is no sufficient evidence that the Claimant was under DFSA investigation and there is no evidence of what happened after the investigation. The Defendant was only obliged to disclose the changes occurring in his status as an Authorised Signatory pursuant to the Cooperation Agreement. I am also not satisfied that the Defendant was obliged pursuant to the Cooperation Agreement to disclose that the Claimant was under DFSA investigation, even if they were under investigation as the Defendant argued since November 2016, why did the Defendant not disclose such information if he argues that he was obliged to under the Cooperation Agreement.

60. I am also of a view that termination of the Cooperation Agreement should have been made by Helga and not the Defendant pursuant to Clause VIII.3 of the Cooperation Agreement. The Defendant had an obligation to inform the Claimant of the Disclosure Letter prior to sending it to Helga as he had a Fiduciary Duty of loyalty and confidence.

61. Furthermore, the Defendant's failure to disclose such information amounted to misrepresentation pursuant to Article 29 and 30 of the DIFC Law of Obligations (Law no.5 of 2005).

62. Therefore, I am inclined to terminate to Settlement Agreement and award a reimbursement to the Claimant in the sum of AED 204,422.28 pursuant to Article 25 of the DIFC Law of Damages and Remedies (Law no.7 of 2005).

The Counterclaim

63. The Defendant in its Counterclaim asserts that the Claimant's breach of its contractual payment obligations render the Settlement Agreement revoked by the Claimant and therefore entitle the Defendant to claim all his contractual and statutory rights including, but not limited to, the Bonus payment.

64. However, the Defendant understands that pursuant to the Rule 53.2(1) of the Rules of the DIFC Courts (the "RDC"), the ".amount of the claim or the value of the subject matter of the claim." must not ".exceed AED 500,000.". Accordingly, the Defendant confirms that he intended to cap his claim at AED 500,000 and waive his rights to claiming amounts over the threshold applicable in the SCT.

65. The Defendant in his Counterclaim claims the following amounts from the Claimant, which are as alleged owed and due to the Defendant by virtue of his employment, and which are to be capped at AED 500,000 as stated above:

(i) Outstanding Amounts due in the sum of AED 118,275.70;

(ii) The Bonus Payment of AED 220,446 (being 5% of the net profit of the Claimant as of 31 December 2016) in accordance with Clause 6.2 and Appendix 2 of the Employment Contract; and

(iii) AED 3,287.67 daily wage penalty to be applied fourteen (14) days from the due date of the Amounts, until the date of the submission of this Defence and Counterclaim (85 days of the delay), equating to the sum of AED 279,452. Pursuant to Article 18 of the DIFC Employment Law No. 4 of 2005 as amended.

(iv) To order the Claimant to proceed with the transfer of the Defendant's visa with pending issues, on an immediate basis.

The outstanding amount of AED 118,275.70

66. In response to the Defendant's Counterclaim, the Claimant argues that the Defendant voluntarily agreed to forfeit his rights to additional compensation under the Employment Contract when he entered into the Settlement Agreement.

67. The Claimant also argues that the Defendant's Counterclaim under the Settlement Agreement must be rejected, for the reason that the Defendant is not entitled to the outstanding amount under the Settlement Agreement because of the misrepresentation made to the Claimant, the Claimant would not have entered into the Settlement Agreement or paid AED 204,422.28 to the Defendant.

68. In my view, the Defendant is claiming the sum of AED 118,275.70 pursuant to the Settlement Agreement. I believe the Defendant's arguments

are contradicting, he first argued that the Claimant breached its contractual payment obligation which renders the Settlement Agreement revoked, but then claims the remaining amount due under the Settlement Agreement. Furthermore, I have found above that the Defendant's misrepresentation terminated the Settlement Agreement, therefore, the Defendant is not entitled to the remaining amount due.

Bonus Payment

69. In relation to the Bonus payment of AED 220,446, the Claimant argues that the Defendant would not be entitled to a bonus even under the Employment Contract. In addition, the Claimant argues that the Defendant was entitled to a discretionary bonus only. Clause 6.2 of the Employment Contract stipulates that the Defendant is "Eligible for annual performance-based bonus which will be pro-rated for the first year" of employment.

70. However, the Defendant argues that under the heading "profit share for Helah" in the Appendix entitled Bonuses Summary, it is clear that there are two distinct and separate bonus structures:

(i) The First is 5% of the Claimant's net profit (this is not discretionary and not pro-rated), otherwise it would have stated this.

(ii) The second is 5% of the increase in the Claimant's net profits year on year pro rata in the first year and in the last year of the employment unless terminated by the employer. The secondary part of the bonus is what is discretionary and what clause 6.2 refers to.

71. The Defendant also asserts that the position mentioned above is supported by the third witness statement of Helle dated 26 July 2017 who was at that time the one who negotiated and agreed the terms of the guaranteed bonus with the Defendant.

72. Firstly, I disagree with the Defendant's interpretation of the separate bonus structures. In my view, there are no two separate structures, in fact it is one bonus structure as mentioned in Appendix 2 of the Contract under the heading as stated below:

"Profit share for Helah:

1. 5% of La Tresorerie Limited net profits; and

2. 5% of the increase in La Tresorerie net profits, year on year, pro rata in the first year of employment and in the last year of employment unless termination by the employer."

73. Although point one of the above did not specify that the 5% of the Claimant's net profit is on a pro rata basis, it related the two points together.

74. Therefore, I am satisfied that the Defendant is not entitled to a bonus as he did not complete one (1) year of Employment with the Claimant. I am not persuaded to consider the witness statement of Mr Helle, because both parties confirmed in their submissions that there was a shareholders dispute in which Mr Helle was a minority shareholder and sold his shares in the Claimant's company.

Article 18 of the DIFC Employment Law no. 4 of 2005 as amended

75. Article 18 of the DIFC Employment Law no. 4 of 2005 as amended states the following:

"(1) An employer shall pay all wages and any other amount owing to an employee within fourteen (14) days after the employer or employee terminates the employment."

76. The Defendant alleges that he is entitled to the Article 18 daily wage penalty to be applied by the Court up to and including the date of Judgment in these proceedings.

77. On the other hand, the Claimant argues that it does not owe any amounts to the Defendant, but in fact the Defendant owes the Claimant reimbursement for payments it would not have made to him but for his misrepresentation to the Claimant. The Claimant also added that it does not owe waged or any other amounts to the Defendant due to the circumstances of the Defendant's termination.

78. The Claimant also reject's the Defendant's claim to outstanding payments under the Settlement Agreement by reiterating its position that the Claimant would not have agreed to make these payments in the first place but for the Defendant's misrepresentation.

79. In view of the facts mentioned above, the parties agreed to enter into a Settlement Agreement, which led the Defendant to relinquish his rights pursuant to the Employment Contract. Accordingly, the Claimant paid the Defendant as per the Settlement Agreement approximately 75% of the amount agreed by the parties, but later then the Claimant only discovered that the Defendant breached the Settlement Agreement for his misrepresentation to the Claimant.

80. Therefore, I am not satisfied that Article 18 of the DIFC Employment Law no. 4 of 2005, as amended, should be applied in the circumstances.

Visa transfer

81. The Defendant requested the Court to order the Claimant to proceed with the transfer of the Defendant's visa with pending issues, on an immediate basis.

82. I find that there is no harm to the Claimant in transferring the Defendant's visa with pending issues.

Conclusion

83. In light of the aforementioned, in relation to the claim, I find that the Defendant is liable to reimburse the Claimant the sum of AED 204,422.28 which was paid pursuant to the Settlement Agreement prior to the Claimant's discovery of misrepresentation.

84. In relation to the Counterclaim, I dismiss all the Defendant's claims except for the transfer of the Defendant's visa with pending issues.

85. The Defendant shall pay to the Claimant the Court Fees in the sum of AED 4090.38.

Issued by:

Nassir Al Nasser

SCT Judge

Date of Issue: 1 August 2017

At: 4pm