Claim No. TCD 003/2019

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

PANTHER REAL ESTATE DEVELOPMENT LLC

Claimant/Applicant

and

MODERN EXECUTIVE SYSTEMS CONTRACTING LLC

Defendant/Respondent

ORDER WITH REASONS OF JUSTICE SIR RICHARD FIELD

UPON considering the Claimant's application by letter that the Defendant be ordered to: (1) conduct searches for the documents in each of Request 2(a), Request 3 and Request 6 (f), 6(i) and 6(j) made by the Claimant; (2) provide the documents received by it from sub-contractors within the class of the Request 5 documents; and (3) provide a Supplemental Document Production Statement in respect of the aforesaid Requests (the **"Application"**)

AND UPON considering the pleadings served by the parties

AND UPON considering the Claimant's Requests for the production of documents and the Defendant's response thereto set out in the parties' respective Redfern Schedules

AND UPON considering the Order dated 23 May 2021 directing that the Defendant produce by 4 pm on 6 June 2021 the documents identified in Requests 2 (a), 2 (b), 3, 5 and 6 served by the Claimant

AND UPON considering the Defendant's Disclosure Statement dated 6 June 2021 signed on the Defendant's behalf by Mr Abdul Aziz Ebrahi Al Kerdi

AND UPON considering the emails sent by the parties to the Registry setting out their respective positions on the Claimant's Application now before the Court

IT IS HEREBY ORDERED THAT:

1. Within 7 days of the date of this order the Defendant must:

   (a) conduct searches for the documents specified in each of Request 2(a), Request 3 and Requests 6 (f), 6(i) and 6(j) made by the Claimant;

   (b) conduct another search for documents covered by Request 5 including documents received by it from sub-contractors including any complaints by them of non-payment;

   (c) provide the documents received by it from sub-contractors within the class of the Request 5 documents; and

   (d) provide a Supplemental Document Production Statement in respect of the aforesaid Requests.

2. The Defendant must pay the Claimant's costs of this successful Application to be assessed by the Registrar on the standard basis unless agreed.

Issued by:
Nour Hineidi
Registrar
Date of issue: 24 June 2021
At: 12.30pm

SCHEDULE OF REASONS

1. In the Claimant's Request 2 (a), the documents sought were the documents evidencing or relating to requests made in accordance with Sub-Clause 8.13 of the Contract containing the minimum time impact analysis elements stipulated in Sub-Clause 8.13 (a) to 8.13. In the Claimant's Request 3 the documents sought were all documents not previously disclosed by either party on standard production evidencing or relating to the delay of 292 days alleged against the Claimant in the Counterclaim. The Court ordered the production of the documents sought in both of these Requests notwithstanding the Defendant's response to the requests that a Delay Analysis Report will be forwarded on 8 April 2021.

2. In paragraph 4 of the Defendant's Disclosure Statement (the **"DDS"**) Mr Kerdi states that there had been no search for the documents within Requests 2 (a) and 3 in the light of the Court's direction by Note that the Delay Analysis Report (the **"Report"**) was inadmissible as expert evidence. This is an unsupportable position for the Defendant to take since the requests do not go to the Report but to documents containing the minimum time impact analysis elements stipulated in Sub-Clause 8.13 (a) to 8.13. In a letter to the Registry from the Defendant dated 22 June

2021, it is now stated that the Defendant will produce the documents requested which can be accessed through a particular specified link.

3. In my judgment, it is plain that the Defendant should have searched for the aforesaid requested documents and produced them pursuant to the order of 23 May 2021 by 4.00 pm on 6 June 2021.

4. The Claimant's Request 5 sought all documents and communications not previously disclosed by either party on standard production evidencing or relating to the due payment of subcontractors, including communications between the Defendant and subcontractors for payments of sums due for work certified under the Contract. The Court ordered that this request must be met. The Claimant submits that the documents produced pursuant to this request are wholly one-sided; they emanate solely from the Defendant and leave out all correspondence from the Defendant's subcontractors (including any complaints by them of non-payment). In the DDS, Mr Kerdi states that he carried out a search for the requested documents.

5. In its first response to the Claimant's letter of complaint to the Court, the Defendant simply said: *"The Defendant believes that the Claimant has not been prejudiced as the Defendant has complied with the terms of the order"*.

6. In its letter to the Registry dated 22 June 2021, the Defendant now says the documents pertaining to the due payment of subcontractors, including communications between the Defendant and subcontractors for payments of sums certified under the Contract can be accessed through a specified link. This appears to me to be an admission that the production of documents sought in Request 5 was deficient. Whether it is an admission or not, the documents ordered to be produced in respect of Request 5 included all correspondence from the Defendant's subcontractors (including any complaints by them of non-payment) and there exists a real doubt that the Court's order was complied with.

7. In its Requests 6 (f), (i) and (j), the Claimant sought all documents and communications not previously disclosed by either party on standard production evidencing or relating to: (f) losses attributable to increases in the premiums payable on the Defendant's guarantees due to the liquidation of the bond; (i) losses attributable to costs of repatriation of staff and other persons in its "labour force"; and (j) interest on recognised debt.

8. The Claimant complains that in the DDS, Mr Kerdi states that he did not carry out a search for the documents requested in 6 (f), (i) and (j) because the Defendant does not have any documents of that description in its control; instead the figures will form part of a Report to be prepared by QGS. I accept the submission of the Claimant that this response from the Defendant confuses the opinion of its expert and the documents to be relied on by the expert. I note too that: (a) the Defendant did not state in its response to these requests that none of the requested documents were in its control and that the Court ordered that these requested documents must be produced; and (b) it is in the nature of things that a party is likely but not certain to have in its control documents falling within Requests 6 (f), (i) and (j).

9. In my judgment, notwithstanding that the Defendant now says that documents covered by the Claimant's Requests 2 (a), 3 and 5 can be accessed through specified links and that it does not have in its control the documents covered by the Claimant's Requests 6 (f), (i) and (j), given the circumstances related above, the Defendant must within 7 days of the date of this order: (i) conduct searches for the documents specified in each of Request 2(a), Request 3 and Requests 6 (f), 6(i) and 6(j) made by the Claimant; (ii) conduct another search for documents covered by Request 5, including documents received by it from sub-contractors (including any complaints by them of non-payment); (iii) provide the documents received by it from sub-contractors within the class of the documents the subject of Request 5; and (iv) provide a Supplemental Document Production Statement in respect of the aforesaid Requests.