Claim No:XXXX

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 FIRST INSTANCE

ON APPEAL FROM THE SMALL CLAIMS TRIBUNAL

BEFORE JUSTICE ALI AL MADHANI

Between

EARLENE

Appellant

and

EARL

Respondent

Hearing: **28 April 2014**

Judgment: **20 July 2014**

JUDGMENT OF JUSTICE ALI ALMADHANI

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1. This is an appeal against the Decision of the Small Claims Tribunal Judge Shamlan Al Sawalehi brought by the Defendant (Appellant), who had filed a Defence in the DIFC Courts' Small Claims Tribunal (SCT) against the Claimant's Claim.

2. The Claim was based upon a complaint lodged before the SCT by the Respondent (the Claimant) at the time that the Appellant had entered into a tenancy agreement with the previous landlord of the leased Apartment by way of a Tenancy Contract dated 15 November 2012. The apartment was leased for a one year period of tenancy starting from 23 November 2012 and ending on 22 November 2013, for the rent amount of AED 155,000.

3. Having bought the Leased Apartment from the previous owner, the Respondent requested the Appellant to vacate the leased apartment by the expiry of the Tenancy Contract, so as to be able to move into his new owned property. The Appellant, however, refused to do so.

4. The parties attended a consultation hearing on 11 July 2013 but failed to reach an agreement. The Appellant contested the jurisdiction of the SCT on the basis that the parties had officially opted out of the DIFC Courts's exclusive jurisdiction and had opted instead for the jurisdiction of the Rental Disputes Settlement Centre in the Emirate of Dubai, which is generally the body that would hear disputes regarding leasehold matters.

5. During the consultation, Justice Omar Al Muhairi dismissed the Appellant's challenge to jurisdiction and decided on 23 December 2013 that the DIFC Courts had jurisdiction to deal with the case at the SCT level.

6. During the consultation, no settlement was reached between the parties and the matter was subsequently listed for a hearing.

7. The claim was heard by Justice Shamlan Al Sawalehi on 7 January 2014, following which a Judgment was issued on 23 January 2014.

8. The Appellant's argument before the SCT was that the parties had agreed in the Lease Agreement that Dubai Law (Law No. 26 of 2007 Regulating the Relation between Landlords and Tenants in the Emirate of Dubai) would apply to the contract and dispute, and that the said law (the Dubai law) provided that the contract would be deemed renewable unless the Landlord notified the Tenant of eviction. In addition, the Appellant argued that the Landlord could only evict the Tenant upon expiration of the lease or under certain circumstances prescribed in the Law which did not apply in this case.

9. In the Appealed Judgment, the Judge dismissed the Appellant's argument for the reason that such Law could not be applied in the DIFC unless it was explicitly stated in the Law that it was applicable in the DIFC, any application of such law was against public policy, and in particular Law no. 7 of 2011, amending certain provisions of DIFC Law no. 9 of 2004.

10. The SCT Judge ordered the Appellant to vacate the apartment and to pay the rent until the day the judgment was issued, at the rate of AED 12, 916 monthly.

11. On 30 January 2014, the Appellant filed an application for permission to Appeal, followed by an Appellant's Notice which sets out the grounds of her appeal; on 19 February 2014 I granted leave to appeal.

12. The Respondent filed a Respondent's Notice, and both parties filed Skeleton Arguments before the hearing took place.

13. The appeal, as it is an appeal from the SCT, has limited scope and, in particular, attention must be drawn to RDC (Rules of the DIFC Courts) 44.143, which reads as follows:

"The Court of First Instance will allow an appeal from a decision of the tribunal where the decision was (1) wrong in relation to a question of law; (2) unjust because of procedural unfairness or miscarriage of justice and/or (3) wrong in relation to any other matter provided for in or under the DIFC law."

14. Accordingly, the only grounds against the decision of the Small Claims Tribunal are that it must have been either procedurally unfair, or have demonstrated an error of law. Any factual questions are not subject to this appeal.

15. The grounds of appeal in this case are in fact based on arguments concerning whether the SCT Judge was wrong in relation to a question of Law, therefore permission to appeal was allowed.

16. The Appellant's grounds for appeal are based on the question of whether the SCT Judge erred in law by finding that the Law applicable to the dispute (the tenancy dispute) was the DIFC Law and not Dubai Law no. 26 of 2007, as amended (the Landlord and Tenant Law), and then consequently whether the SCT Judge reached the right conclusion (by ordering the Appellant to vacate the Apartment immediately) based on that finding.

The Issue of Jurisdiction

17. Before getting into the discussion related to the question above, it is essential to remark that in this case, the Appellant has raised an argument challenging the jurisdiction of the DIFC Courts (SCT), as regards which I shall decide first whether this challenge qualifies in light of RDC 44.143 in due course.

18. In her grounds of Appeal, the Appellant raised the argument that "*The Lease therefore adopts the Rent Committee as the forum with relevant jurisdiction, but this is not recognized in the Judgment*".

19. In the Respondent's Notice, the Respondent argues that the issue of jurisdiction was raised before the SCT Judge Omar Al Muhairi who issued an Order on 23 December 2013 dismissing the challenge to jurisdiction, and upholding the DIFC SCT's jurisdiction, and that the Appellant should have applied for permission to appeal that Order, she has not done so within the time frame until the Order became final.

20. In her Skeleton Argument the Appellant contests the Respondent's argument by saying that "*the Appellant had no procedural option but to appeal the said order under the current appeal of the court of first instance (after hearing the whole dispute in substance by the SCT.*"

21. She went further to say that Rules 12.8 and 53.7 of the RDC allowed her to proceed in this manner and that there was no scope for the Respondent to argue *Res Judicata*.

22. It is clear that the Appellant has argued before the SCT Judge Omar Al Muhairi (during the first consultation) that the DIFC Courts (SCT)) had no jurisdiction to deal with the dispute since the parties in the Tenancy Contract had agreed to refer their dispute to the Dubai Rent Committee.

23. Justice Al Muhairi in his Order of 23 December 2013 dismissed the Appellant's application challenging jurisdiction and gave directions to proceed with considering the merits.

24. The Appellant took no action against the said Order finding jurisdiction, instead, in her submissions before the SCT hearing on 3 January 2014, the Appellant recognised that the jurisdiction issue had been determined but she sought the application of Dubai law to the dispute instead of DIFC law "*the Jurisdiction for the dispute between the Claimant and the Defendant is determined to be DIFC. However, I believe the governing Law for the dispute is Dubai law as Agreed.*"

25. At no time before this appeal, which is in fact an appeal from the SCT Judge Shamlan Al Sawalehi's judgment of 23 January 2014 did the Appellant try to challenge the decision of Justice Al Muhairi or seek permission to appeal against it.

26. The SCT Judge Shamlan Al Sawalehi has not dealt with the jurisdiction issue as it was not put before him, nor did he discuss it in his Judgment.

27. Accordingly, the Order of Justice Al Muhairi of 23 December 2013 dismissing the Appellant's application to contest jurisdiction is final, and the principle of *Res Judicata* is adhered to by the DIFC Courts, as a fundamental principle of English Common Law. Therefore, I do not have the authority to reconsider the question of jurisdiction, even if the Appellant were to have good arguable reasons.

28. Finally, on the Jurisdiction issue, I do not see any apparent grounds for the Appellant to refer to RDC 12.8, which provides:

"If on an application under this Part the Court does not make a declaration:

(1) the acknowledgment of service shall cease to have effect;

(2) the defendant may file a further acknowledgment of service within 14 days or such other period as the Court may direct; and

(3) the Court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed."

29. The said Article deals with the situation where a party has applied to the Court to decline Jurisdiction and where the Court takes no decision and makes no determination of that application, which is not the case in this SCT application, where the Court in fact found that it had Jurisdiction immediately, therefore this Article is not helpful to the Appellant's case.

The Applicable Law

30. The first ground raised by the Appellant in her submissions is that the parties to the Tenancy Contract had chosen to apply Dubai law. which in this case was Law No. 26 of 2007, as amended (the Landlord and Tenant Law), taking advantage of Law No. 12 of 2004 in respect of the DIFC Judicial Authority which provides that: "*The Courts shall apply the Centre's Laws and Regulations, except where parties to the dispute have explicitly agreed that another law shall govern such dispute, provided that such law does not conflict with the public policy and public morals"*.

31. The Appellant asserts that the SCT Judgment did not honour the parties' choice and failed to apply the contractually elected Dubai law. Therefore the SCT Judge erred in law.

32. The second ground raised by the Appellant against the SCT Judgment is that the judge erred in law by referring to Article 13 (1 and 2) of Law No. 7 of 2011, amending certain provisions of DIFC Law No. 9 of 2004;

"Laws Applicable in the Centre

Article (13)

1. The Centre's Bodies and Centre Establishments shall carry on its commercial activities in accordance with the Centre's Laws and the Centre's Regulations.

2. shall not be governed, in relation to matters within the jurisdiction of the Centre, by the laws of the Emirate and the regulations and resolutions of any local government body, except as may be provided by a special provision in such laws, regulations or resolutions that they shall apply in the Centre"

33. The argument maintains that none of the parties to the dispute fall under the description of the said Article *"The Centre, the Centre's Bodies, the Centre Establishments, and their employees and their delegates"*. They are rather individuals with the freedom to choose any law and not to be subject to Article 13 above. Therefore this Article is not applicable to this case and cannot exempt the party from agreeing to apply Dubai Law.

34. The SCT Judgment, in considering the parties to the dispute to be DIFC Bodies or establishments is wrong in law, as they cannot be subject to the public policy the Judge referred to in his judgment.

35. The third ground against the SCT Judgment is that Dubai Law No. 26 of 2007 predated Dubai Law No. 7 of 2011 by almost 4 years and that one would not expect the old law to contain an explicit provision that it would be applicable in the DIFC. It was said to be applicable in the Emirate of Dubai with no exclusion in the DIFC or any other free zone in the Emirate.

36. A further ground of appeal is that if it was the intention that only DIFC Real Property Law No. 4 of 2007 would apply in respect of all property leases in the DIFC, then the DIFC Law No. 4 of 2007 should explicitly state that and accordingly the DIFC Registrar of Properties should have actively ensured that all parties were made aware of that. According to the Appellant nothing was done to reflect that. The Appellant quoted a statement of the DIFC Properties CEO saying "*The Parties' freedom to contract is considered paramount within the DIFC.this means that parties are free to agree with certainty in their lease as to how they choose to deal with lease renewals, rent renewals and other issues that may arise in the landlord-tenant relationship." (Emirates 24/7 3 SEP 2013)*

37. The SCT judgment was succinct in reasoning, due to the fact that short and limited arguments had been put before the Judge in addition to no legal representation, which might have assisted the judge to develop and advance the arguments in the Small Claims hearing. However, the SCT Judge in my view was right in concluding that Dubai Law No. 26 of 2007 was not applicable within the DIFC or before the DIFC Courts, and that none of the Appellant's grounds of appeal were sufficient to find otherwise.

38. The freedom to contract and the freedom to choose the applicable law to the contract or to the dispute are indeed available within the DIFC, as provided by Law No. 12 of 2004 in respect of the DIFC Judicial Authority which provides that: "*The Courts shall apply the Centre's Laws and Regulations, except where parties to the dispute have explicitly agreed that another law shall govern such dispute, provided that such law does not conflict with the public policy and public morals."*

39. However, the remaining question is whether the right or freedom to choose to apply another law within the DIFC has any restrictions or limitations.

40.This question is in fact answered by the same Article's requirement that such chosen law does not conflict with public policy or public morals.

41.The definition of public policy is in reality a broad one but can roughly be described as the governing policy within a community which is reflected in its legislative enactments, which serve as a basis for determining what actions are to be regarded as contrary to the public good. Although public policy has been defined in a wide range of academic and legal texts, I refer to the clear and succinct explanation of **Dean G. Kilpatrick, Ph.D.[National Violence Against Women Prevention Research Center, University of South Carolina]** whostates: "*In any society, governmental entities enact laws, make policies, and allocate resources. This is true at all levels. Public policy can be generally defined as a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by an entity or its representatives."*

42. The SCT Judgment's reference to one or more legal provisions that would restrict the parties' choice to adopt Dubai mainland Real Property law must be right, as we can see from the proper definition of public policy that law and regulations passed by the government can form public policy to deal with certain aspects of citizens' and residents' affairs.

43. Article 13 (1 and 2) of Law No. 7 of 2011, amending certain provisions of the DIFC Law No. 9 of 2004, although it is not directed to individuals such as the SCT parties, in fact prohibits the DIFC Courts as a DIFC Body (including the SCT) from applying laws of the Emirate and the regulations and resolutions of any local government body, except as may be provided by a special provision in such laws, regulations or resolutions that they shall apply in the Centre.

44. This restriction is not a new one, it already existed in amended Article 13 (2) when it was first issued in 2004 in Law No. 9 of 2004 where it states "*The Centre's Bodies and the Centre Establishment and their employees (for the purpose of transactions carried out within the Centre and related thereto) shall not be subject to the rules or the regulations of Dubai Municipality, the Department of Economic Development, the Department of Tourism and Commercial Marketing, the Rent Committee or the authority of all those departments."*

45. Amended DIFC Law No. 9 of 2004 was even more restrictive as regards the applicability of Dubai local laws than Law No. 7 of 2011, as it did not accept the application of Dubai local Laws even if the law specifically provided that it would apply in the DIFC or the Free zones in the Emirate of Dubai.

46. Furthermore, Articles 8 and 9 of the DIFC Real Property Law No. 4 of 2007 provide that:

"Real property governed by this Law

(1) From the date on which this Law comes into force, all real property from time to time within the jurisdiction of the DIFC is governed by this Law.

(2) Real property within the jurisdiction of the DIFC includes:

(a) the real property referred to in Article 4(1); and

(b) any real property later brought within the jurisdiction of the DIFC, by any method.

9. Non-applicability of certain other laws

(1) Dubai real property laws do not apply to real property governed by this Law.

(2) Nothing in the Law of Security (DIFC Law No. 8 of 2005) affects real property governed by this Law"

47. There are explicit restrictions that the real properties within the jurisdiction of the DIFC are exempted from the application of Dubai Real Property laws in general and the property which is the subject of this dispute, an apartment located in the Index tower within the DIFC, therefore must be subject to the restriction in Article 9 of the DIFC Real Property Law No. 4 of 2007.

48. Additionally, I do not see in the quoted statement of the DIFC Properties CEO Mr Brett Scaffer (referred to by the Appellant) any conflict with my finding above that parties are free to choose the applicable law to their Tenancy Contract, but with the limitation that such choice must not conflict with public policy related to the management of real property within the DIFC. In any event, a statement of an employee in the DIFC shall not change the Policy laid down by the government or a governing authority that parties might elect to apply any law that is not precludedby the source of that public policy, such as DIFC Real Property Law No. 4 of 2007.

49. There is no provision at all in Law No. 26 of 2007 that the Appellant intended to apply to the dispute as referred to in the Tenancy Contract, that it was applicable in the DIFC, as such that Law would remain subject to the restriction of both Article 13 of DIFC Law No. 7 of 2011 and Articles 8 and 9 of the DIFC Real Property Law No. 4 of 2007.

50. In sum, the SCT judge was quite right to hold that the application of provisions of Dubai Law No. 26 of 2007, although chosen by parties in the Tenancy Contract, however conflicted with DIFC policy that such law could not be applied unless that Law specifically stated that it was applicable in the DIFC.

51. The SCT judge was quite right not to apply Article 25/2 (b) of Dubai Law No. 26 of 2007 that required the Landlord to serve 12 months' notice in order to require the Tenant to vacate the apartment, and instead to apply the contract and interpret it in the light of the relevant DIFC laws.

52. Nothing in the rest of the Appellant's submissions or grounds of appeal require further comment from me than what has been said above.

53. Each Party Shall bear their own costs.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of issue: 10 August 2014

Time: 4pm