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 H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

GABBY

Claimant

and

GABE

Defendant

Hearing: **25 January 2016**

Submissions: **10 February 2016**

Judgment: **15 February 2016**

JUDGMENT OF H.E. JUSTICE OMAR AL MUHAIRI

The Parties

1. The Claimant is Gabby, a company operating sleeping cabin rentals in xxxx.

2. The Defendant is Gabe LLC, a company specializing in designing and manufacturing, operating out of the xxxx.

Background

3. The Claim arises out of an Independent Contractor Agreement ("Agreement") entered into on 17 November 2014 between the Claimant and the Defendant. The Agreement provided for the Defendant to complete all services and fittings for the Claimant's new premises at Dubai International Airport by the deadline of 28 December, mutually extended to 28 February 2015.

4. The Agreement carried a requirement for the Defendant to pay the Claimant 45% of the value of the Agreement in the event that work was not completed by the deadline.

5. The Claimant claims that work was not completed by the agreed deadline and that the Defendant's workmanship failed to meet proper standards. The Claimant, therefore, engaged a third party contractor, xxxxCo. to rectify and complete the project.

6. The Claimant claims a total of AED 341,024.45 from the Defendant, in addition to any Court imposed interest, made up of:

(a) AED 159,219.45, as 45% of the value of the Agreement, for failure to complete the work before the deadline; and

(b) AED 181.805.00, being the cost of work carried out by xxxxCo.

7. The Defendant disputes the Claim entirely and states that the actions of the Claimant prevented him from completing the work required under the Agreement. He also alleges the Claimant failed to return tools belonging to the Defendant and which have since needed to be replaced.

8. The Defendant counterclaims, in addition to any court imposed interest:

(a) AED 86,282, being the unpaid amount owed by the Claimant for work completed by the Defendant on the project; and

(b) AED 8,354, as the cost of replacing tools the Claimant is accused of withholding.

Jurisdiction

9. In accordance with Part 2, Article 7 of DIFC Contract Law 2004, parties may choose the governing law and jurisdiction their contract shall be governed by. Clause 12 of the Agreement states that it shall be governed and construed in accordance with the laws of the DIFC and as the value of the claim is less than AED 500,000 the Small Claims Tribunal is the appropriate venue for this case to be determined.

The Agreement

10. The valid and binding nature of the Agreement is not in dispute. Part 2, Article 10 of DIFC Contract Law provides:

> "A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in this Law."

11. The Agreement defines the "Effective date" as being 17 November 2014, the date it was made and entered into.

12. The main issue in this case is whether the Agreement was breached and in the event that it was, which of the parties is responsible. I will address the Claimant's Claim and the Defendant's response respectively before turning my attention to the Counterclaim.

The Claimant's Submissions

13. It is the Claimant's case that the Defendant breached the Agreement by failing to complete the work contracted for by the agreed deadline of 28 February 2015. He therefore claims the Defendant is liable to pay the Claimant 45% of the value of the Agreement, set out in Paragraph 2 as being the penalty payable if work was not completed in time. The second limb of the Claim is to recover the cost of commissioning a third party to rectify and complete work the Defendant was responsible for under the Agreement.

14. The Claimant relies on a Quality Report provided by the third party (Annex C), outlining the work completed by the Defendant and all outstanding work required to complete the project and bring the standard up to specification in order to be cleared for Airport certification. The Defendant is alleged to have been responsible for low quality work which caused the Claimant significant financial hardship and reputational damage. A letter from the Claimant's lawyers to the Defendant (Annex B) in addition to witness statements from xxxx, Manager of Gabby and xxxx, the Managing Director of XXXX LLC are submitted to support the assertion that the Defendant was responsible for the delays in the project being completed. It is also submitted that the Defendant displayed poor workmanship and improper work practices, particularly the Defendant's lack of the requisite commercial licence at the time of entering into the Agreement. An email from the Defendant to the Claimant dated 11 April 2015 (Annex D) is produced as it includes an admission by the Defendant that the Claimant is `facing major issues due to my trade license'.

The Defendant's Response

15. The Defendant submits an initial quote was provided to the Claimant on the basis of all fit-out work being managed by the Defendant as a `turnkey project' but the Claimant opted to manage his own set of subcontractors of which the Defendant would be one.

16. In response to the allegations of poor workmanship, the Defendant does not deny that there were issues with the quality of work but states there were many contributing factors which were beyond the Defendant's control. It is submitted that the Claimant's mismanagement of the project caused delays in work by the main contractor; therefore, the Defendant fixed ceiling bulkheads in place before sprinkler and other high level ceiling installations were complete, resulting in damage being done to the Defendant's work by other contractors' scaffolding and workers climbing onto it.

17. The Defendant acknowledges that his trade licence needed to be renewed but denies this had any real impact on the timeframe of the project and highlights numerous causes for the delays, one of which being that his scope of work was continuously amended as the Claimant made significant design changes. An email from Dubai Airport's retail consultants, Sam on 15 December 2014 is submitted in support of this assertion; He states `As there are some fairly sizeable changes being proposed we'll need you to submit the above & to review before we can allow you to start fit-out works'. Further drawings, specifications, pictures and layouts were being requested before approvals could be obtained and work started. Variations are also highlighted in the amended Summary Bill of Quantities dated 22 April 2015.

18. It is submitted that the Claimant was responsible for aspects of work outside of the Defendant's remit and when these were delayed they had a knock on effect, delaying completion of the Defendant's work. An email from Sam on on 24 May 2015 is referred to as evidence of work by the mechanical, electrical and plumbing ("MEP") contractors being rejected and the Defendant's cube installation work being suspended as a result.

19. On 25 May 2015 the Defendant notified the Claimant that his staff would no longer be attending the site until it was ready for installation work, but they would continue with some manufacturing work off site.

10. On 8 June 2015 the Defendant notified the Claimant of his intention to terminate the Agreement due to non-payment of invoices and the Claimant's inability to provide access passes for the Defendant's work to be completed. The Defendant also states that the Claimant's "disrespect of the sequence of work and disregard of Airport approval processes causing many items to be rejected" is the reason for the time delay and therefore he is not liable to pay 45% of the value of the Agreement as a penalty.

Discussion

The Claim

21. It is for the Claimant to prove on the balance of probabilities that the Defendant breached the terms of the Agreement and caused the Claimant harm. The principal issue to be determined is whether the Defendant is responsible for the time delays and therefore, failure to complete work by the agreed deadline.

22. In the notice of termination letter dated 8 June 2015, the Defendant is critical of the Claimant's attempt to manage a `multi-disciplined' project with individual contractors and submits that there was a `disrespect of the sequence of work', referring to the order of work being carried out by each subcontractor. In particular, as mentioned above, the Defendant's work was halted by Sam□on 24 May 2015 due to the MEP contractor's work being rejected. Part 2, Article 12(2) of DIFC Contract Law provides:

> `The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such usage would be unreasonable.'
>
> It is reasonable in the circumstances for the Defendant to expect the necessary MEP work to be completed prior to his installation work and therefore, it is my opinion that as the site was not ready for the Defendant, he is not responsible for this particular delay.

23. It is noted however, that the above suspension of work was caused after the deadline of 28 February had lapsed and therefore, I turn my attention to the causes of earlier delays. The Claimant submits that the expiry of the Defendant's trade licence was a factor in slowing the project but the Defendant asserts that this was resolved by January 2015, well before the deadline. I accept that lack of the requisite trade licence would have resulted in a delay but am not satisfied on the balance of probabilities that this is the cause of the breach.

24. The Defendant holds the Claimant responsible for significant time delays as a result of numerous design changes and subsequent approvals from sam□being required. In a number of emails produced by the Defendant, it is apparent that designs for the Claimant's premises were revised and that further plans and specifications were required before the necessary approvals could be obtained and work commenced. An email dated 8 February 2015 from the Defendant to Sam□demonstrates that design changes were taking place at a very late stage as final bathroom designs were submitted for approvals on this date. By 18 February 2015, lighting schedules were submitted to Vindico for approval as the Defendant states the Claimant had purchased lighting by this time. Furthermore, it is only after the deadline has passed, on 4 March 2015 that the Defendant claims he is requested to provide details for floor finishes for the Claimant's supplier. The Defendant adds that the carpet was subsequently rejected upon delivery by xxxx□in April 2015, causing further delays to his installation work.

25. Part 6, Article 60 of DIFC Contract Law states:

> `In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or duty to achieve a specific result, regard shall be had, among other factors, to (a) the way in which the obligation is expressed in the contract;. and (d) the ability of the other party to influence the performance of the obligation.'
>
> The Agreement requires the Defendant to achieve a specific result, namely the completion of the work set out in the Bill of Quantities ("BOQ") by the deadline. However, as the Claimant has revised the scope of the Defendant's work and made several design changes, he has certainly influenced the performance of the Defendant's obligation. The amended Summary BOQ dated 22 April 2015 displays the number of variations made to the Defendant's scope of work; the Claimant was responsible for ensuring all work outside of this scope was completed by other subcontractors. Therefore, in line with Article 60, the extent to which the Claimant's obligation involves a duty to achieve the specific result by the deadline can only be in so far as is possible considering arrangements made by the Claimant for all other necessary and/or preparatory work to be completed.

26. The Claimant also submits that the Defendant produced work of a poor standard that required rectifying by the third party□Part 6, Article 61 of DIFC Contract Law provides that:

> `Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable in the circumstances.'
>
> I find that in the circumstances, due to the presence of other contractors at the site which the Defendant asserts caused damage to his work, whether intentional or unintentional, and given that the order in which work was being carried out would not ordinarily be expected, the quality of work was reasonable.

27. In light of the foregoing observations, I do not find that the Defendant was responsible for breaching the Agreement. It is clear that the site at which the Defendant was meant to carry out the work he was contracted for was not ready for him to be able to complete the work before the deadline and this was outside of the Defendant's control.

28. For the reasons above I am satisfied that the Agreement was breached by the Claimant. The Claimant's Claim to recover the cost of rectifying and completing work in the sum of AED 181.805.00 is dismissed.

29. Accordingly, I dismiss the Claimant's Claim for the Defendant to pay 45% of the value of the Agreement, calculated as AED 159,219.45. Properly construed, paragraph 2 of the Agreement is a penalty clause intended to be activated upon breach of the contract and therefore would generally be unenforceable in any event.

The Counterclaim

30. The Defendant seeks to counterclaim for AED 86,282, submitted as being the amount owed by the Claimant for work completed and materials purchased by the Defendant for the project. In addition, AED 8,354 is claimed as the cost of replacing tools the Claimant is accused of withholding from the Defendant. I will address each part of the Counterclaim respectively.

31. In relation to unpaid invoices, I refer mainly to the initial Summary BOQ quote dated 2 November 2014 and the final Summary BOQ quote dated 22 April 2015. I have observed that the final quote includes a Civil Works and Cube Balance which is not accounted for in the initial quote. There is no evidence that any of the items listed in the Summary BOQ's fall into the category of Civil or Cube work.

32. Clause 2.0 of the Agreement provides for all services and fittings to be completed as per the Sam□retail requests and demands; neither party has produced evidence of what these requirements are.

33. In the absence of evidence pertaining to an additional agreement between the parties for the Civil and Cube works which are outside the scope of the initial agreement, I cannot be satisfied on the balance of probabilities, that the Defendant is entitled to the balance sought. No evidence has been produced to support the assertion that the Claimant offered the Defendant additional work to complete, nor that the Defendant accepted this offer. Therefore, in the absence of evidence of a further agreement or extension of the existing Agreement, I cannot find that the Claimant is liable to pay the amount sought by the Defendant and must dismiss the Counterclaim for AED 86,282.

34. I now turn my attention to the second limb of the Counterclaim for AED 8,354, being the cost of replacing tools allegedly withheld from the Defendant by the Claimant. The Defendant accuses the Claimant of stealing the tools and states that the matter has been reported, however, no evidence of the matter being referred to Dubai Police or the Dubai Airport Authority has been provided.

35. I have had sight of a text message dated 23 June 2015 that the Defendant submits as evidence that the Claimant is withholding the tools. Without further or corroborating evidence I cannot, on the balance of probabilities, be satisfied that the Defendant is in possession of the tools which the Defendant claims he has had to replace. It is my opinion that the text message is not definitive evidence and I am unable to find that the Claimant is liable for the cost of reimbursing the Defendant for replacing said tools. Therefore, the Counterclaim for AED 8,354 is dismissed.

FOR THE ABOVEMENTIONED REASONS IT IS ORDERED THAT:

36. The Claimant's Claim against the Defendant is dismissed.

37. The Defendant Counterclaim against the Clamant is dismissed.

38. Each party shall bear their own costs.



Issued by:

Maha AlMehairi

Judicial Officer

Date of Issue: 15 February 2015

At: 11am