Claim No: SCT 355/2017

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS

BEFORE SCT JUDGE NASSIR AL NASSER

BETWEEN

IFECHI SERVICES

Claimant

and

ICHTARCA TOWER RESIDENTIAL BODY CORPORATE

Defendant

Hearing: **7 March 2018**

Further submissions: **14 March 2018**

Judgment: **29 May 2018**

JUDGMENT OF SCT JUDGE NASSIR AL NASSER

UPON this claim having been called on 18 January 2018 for a Consultation before SCT Judge Natasha Bakirci

UPON the parties not having reached a settlement

UPON a Hearing having been held before SCT Judge Nassir Al Nasser on 7 March 2018, with the Claimant's and the Defendant's representatives attending

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

IT IS HEREBY ORDERED THAT:

1. The Claimant's claims are dismissed.

2. The parties shall bear their own costs.

Issued by:

Nassir Al Nasser

SCT Judge and Registrar

Date: 29 May 2018

At: 10am

THE REASONS

Parties

1. Ifechi Services (hereafter the "Claimant") is a company operating in Dubai and providing management and supervision services for bodies corporate and owners' associations. It provided management services to the Defendant and the other various bodies corporate for constituent parts of Ichtara Tower, a building located in the DIFC.

2. Ichtarca Tower Residential Body Corporate (hereafter the "Defendant") is the residential portion of the bodies corporate relevant to Ichtara Tower, created in accordance with the DIFC Strata Title Law (DIFC Law No. 5 of 2017) and the Strata Management Statement (SMS) relevant to Ichtara Tower.

Background

3. Both parties have presented significant submissions as to the background facts relevant to this case. I have included the facts as I find relevant herein, without unnecessarily repeating the lengthy submissions of the parties.

4. First, it is important to note that prior litigations in the DIFC Courts, namely CFI-XXX-2015 and CA-XXX-2016 (hereafter the "prior litigation"), are relevant to this matter. CFI-XXX-2015 was an Application for an Injunction brought by Ibtihal against both the Defendant and the Claimant in order to prevent the Annual General Meeting scheduled by the Claimant from moving forward as planned. That Application ultimately became unnecessary when the DIFC Registrar of Real Property became involved in the matter. However, as a result of CFI-XXX-2015, an Order was issued relevant to legal costs in the matter and the Claimant sought an appeal of that Order.

5. The DIFC Courts of Appeal ultimately overturned the Order as to costs in case number CA-XXX-2016. That was the end of the prior litigation, however the Claimant has now brought this claim for indemnity from the Defendant for the legal fees the Claimant incurred in the prior litigation.

6. Thus, the legal relationship, as the alleged source of the indemnity obligation, between the Claimant and Defendant becomes factually important to this matter. The Claimant was appointed as the body corporate manager for Ichtara Tower pursuant to a Management Contract in 2012. The parties disagree significantly on the facts leading up to a second management contract, allegedly entered into on 15 June 2015 (hereafter the "Second Management Contract"). The Claimant alleges that the Second Management Contract is valid and alleges that it is the source of the Defendant's legal obligation to indemnify the Claimant for the legal fees incurred in the prior litigation. The Defendant argues that the circumstances leading up to the Second Management Contract, especially the Claimant's behaviour in engineering its enactment, caused the Second Management Contract to be invalid. I will address this factual discrepancy below, as and when it is relevant to resolution of the dispute at hand.

7. It is also important to note the factual disagreement between the parties as relevant to the Annual General Meeting that led to the prior litigation. The Claimant alleges that it was perfectly within its duties to call this meeting and in fact, that the Defendant was in violation of the DIFC Strata Law during this time for failure to have a complete Management Committee in place, contributing to the Claimant's difficulties in calling this meeting in a timely fashion and otherwise making it difficult for the Claimant to act in the best interest of the members. The Defendant argues that the Claimant did not properly call this meeting, and instead that its own wrongful actions led to the prior litigation, all the costs incurred relevant to the prior litigation and thus to this claim. This factual disagreement will also be resolved as relevant below.

8. Otherwise, I find it unnecessary to detail the complex structures and obligations included within the DIFC Strata Law, the SMS, the Management Contract and the alleged Second Management Contract. Furthermore, I find it unnecessary to recite the extensive series of events and communications that occurred between the parties leading up to and through the prior litigation. Such facts will be detailed below if and when they become necessary to present the parties' arguments or to resolve the dispute at hand.

Procedural History

9. On 21 December 2017, the Claimant filed this claim in the DIFC Courts' Small Claims Tribunal (the "SCT") seeking a Judgment in favour of the Claimant in the amount of AED 500,000 from the Defendant "in respect of legal fees incurred in the course of acting for the [D]efendant under management contract dated 15 June 2015."

10. The Defendant filed an Acknowledgement of Service on 27 December 2017, articulating its intent to defend against all of the claim. The Defendant requested additional time to file its Defence.

11. After some back and forth between the parties, a Consultation, originally scheduled for 8 January 2018, was held on 18 January 2018 before SCT Judge Natasha Bakirci. On 16 January 2018, the Defendant's legal representative submitted an email application seeking to transfer the case to the Court of First Instance, to which the Claimant objected.

12. The parties discussed the application at the Consultation of 18 January, where it was determined by the SCT Judge that the matter would remain in the SCT, with the parties receiving permission to be represented by lawyers moving forward. Such decision was detailed in the Order of SCT Judge Natasha Bakirci, issued on 7 February 2018. The Defendant was granted permission in that Order to re-submit its application at the subsequent Hearing.

13. A Hearing was set before me, SCT Judge Nassir Al Nasser, for 7 March 2018 with the schedule permitting additional submissions from both parties in advance of the Hearing. The Defendant submitted its Defence and exhibits on 4 March 2018. After the Hearing, I permitted the parties to submit closing submissions of no more than 10-pages by 14 March 2018. Both parties provided such submissions.

14. Upon later review of the parties' submissions, it became clear that the Claimant's original submissions were inadvertently missing the document labelled as "Exhibit O." The SCT Registry requested such document from the Claimant on 10 May 2018. Due to some technological issues, the parties did not receive this request. However, the Claimant did submit Exhibit O on 16 May 2018, which the SCT Registry accepted into the case file over the Defendant's objection.

The Claim

15. In sum, the Claimant has claimed a total of AED 500,000 for legal fees allegedly incurred in the defence of CFI-XXX-2015 and CA-XXX-2016. The Claimant simply argues that such fees are the responsibility of the Defendant, pursuant to the Second Management Contract dated 15 June 2015.

16. The Claimant argues that it was, at all material times, the body corporate manager of Ichtara Tower pursuant to the Management Contract ratified in 2012 and reappointed on 15 June 2015.

17. During the course of the Second Management Contract, the Claimant incurred legal fees in respect to litigation brought by Ibtihal in the DIFC

against both the Defendant and Claimant (CFI-XXX-2015 and CA-XXX-2016).

18. The Claimant argues that, in accordance with the terms of the Second Management Contract, it was "duly authorised and delegated functions by the body corporate, `acting in general meeting' in accordance with Article 65 of the DIFC Strata Law." Thus, the Claimant was appointed and delegated authority for detailed "agreed" services outlined at Clause 4.3 of the Second Management Contract to include "functions related to the administration, management and control of the common property." The Claimant was also entitled to "call the meetings, including the annual general meetings of the body corporate."

19. The Claimant alleges that "Various impediments to the timely convening of the annual general meeting and associated due processes beyond its control occurred in 2015; including the request to re-open the committee nomination process."

20. The Claimant highlights that under the terms of the Second Management Contract, the Claimant is indemnified against any loss suffered under the Contract:

> "7.3. Indemnity by Body Corporate Manager and Body Corporate.
>
> 7.3.1. The Body CorporateIchtarcaindemnifies the Body Corporate Manager against any claim, liability or loss suffered by the Body Corporate Manager as a result of any breach by the Body Corporate of any of its obligations under this Agreement, except to the extent that the Body CorporateIchtarcaManager has directly caused (as finally determined by the Dubai Courts or relevant tribunal or authority having jurisdiction with respect to the dispute) the said breach by the Body Corporate."

21. The Claimant argues that, according to Clause 8 of the Second Management Contract, any instructions from the Body Corporate representatives must be lawfully compliant and not contrary to the best interests of the unit owners and not impeding on the Claimant's delegated authority.

22. The Claimant alleges that since June 2015, the Defendant had no validly elected Chairperson, contrary to Article 63(4) of the DIFC Strata Law. The Defendant was in further violation of Resolution 11 of its 2014 Annual General Meeting. The Defendant also had insufficient ordinary members to comply with Article 63(4) of the DIFC Strata Law and with Resolution 12 of its 2014 Annual General Meeting.

23. Thus, due to the Defendant's failure to have a validly constituted Committee of Management under Article 63(4)(a) of the DIFC Stata Law and due to the 2014 Secretary-elect's request to re-issue the nomination process (which was eventually agreed to by the DIFC Registrar of Real Property), the Claimant could not control the various delays in convening the 2015 Annual General Meeting. The delay was beyond the control of the Claimant.

24. Thus, the Claimant made steps to convene the Annual General Meeting on 20 October 2015, subsequently adjourned to 27 October 2015 for lack of quorum. This meeting was further postponed as a result of the intervention of the DIFC Registrar of Real Property, after Ibtihal brought the case CFI-XXX-2015 in the DIFC Courts on 25 October 2015. Due to the DIFC Registrar of Real Property's intervention, no determination was made on Ibtihal's application. The resulting appeal (CA-XXX-2016) dealt with Ibtihal being granted costs against the Claimant. Such costs award was overturned.

25. As a result of this prior DIFC litigation, the Claimant incurred legal fees in the sum of AED 665,001.03. The Claimant has invoiced the Defendant for payment of these fees, including a final legal notice send to the Defendant.

26. The Claimant, in order to have this claim remain in the SCT, has capped its recovery at AED 500,000 and thus claims that amount against the Defendant for legal fees incurred in the prior DIFC litigation, as allegedly owed pursuant to the Second Management Contract.

27. The above was articulated in the Claimant's Particulars of Claim and reiterated at the Hearing. The Claimant's Closing Submissions, received on 14 March 2018, largely repeats the above arguments but also included rebuttal arguments aimed at the Defence, which will be addressed in the Discussion below as relevant.

The Defence

28. The Defendant submits that the Claimant "has acted in ways that have been contrary to the best interests of [the Defendant] as a legal entity, its management committee, and its members." In summary, the Defendant alleges that the Claimant violated the DIFC Strata Law and the terms of its contractual obligations by:

- Ignoring lawful instructions of the management committee;
- Hindering the management committee's process when selecting a new body corporate manager to replace the Claimant;
- Replacing and editing notices, issued by the management committee, which the Claimant was contractually obligated to publish to members, with the Claimant's own self-serving notices;
- Preventing the management committee from communicating effectively or at all with members in whose best interest the Claimant had a fiduciary duty to act;
- Calling a purported Extraordinary General Meeting and purported Annual General Meeting;
- Misleading the members into an invalid vote for the reappointment of the Claimant as the Defendant's body corporate manager and the apparent entry into the Second Management Contract;
- Frustrating members of the management committee in attempts to hold elections to return the management committee to being quorate.

29. The Defendant alleges that the Second Management Contract of 15 June 2015 is not legally enforceable due to the Claimant's alleged behaviour in the execution of that contract. Furthermore, the Defendant alleges that the Claimant's unlawful and inappropriate behaviour caused Ibtihal to seek an injunction from the DIFC Courts in order to prevent the Claimant from holding the purported Annual General Meeting and to protect the best interests of the members. This injunction application and the subsequent appeal (CFI-XXX-2015 and CA-XXX-2016) were thus directly caused by the Claimant. Furthermore, the DIFC Registrar of Real Property ultimately intervened to make the Ibtihal litigation unnecessary.

30. The Defendant argues that it has no liability for any of the Claimant's legal costs at stake in this claim because the Second Management Contract under which the Claimant makes its claims is not legally enforceable and the prior litigation from which the legal fees stem was caused "squarely as a result of the Claimant's own wrongdoing."

31. The Defendant also argued to transfer the case to the Court of First Instance due to the complexity of the case and the monetary value of the legal fees at stake. Furthermore, the Defendant has alleged that the Claimant is a vexatious litigant whose unreasonable behaviour merits the award of the Defendant's legal costs in defending this claim.

Hearing

32. The Claimant reiterated its arguments at the Hearing. The Defendant's Representative, Mr Lagan of Lahel, presented the details of the Defendant's case point by point.

33. The Defendant's Representative also noted that the Defendant still seeks to transfer the case to the DIFC Courts Court of First Instance due to the alleged complexity of the case and the value of the claim being over AED 500,000. The Defendant also noted that the case should proceed on a summary judgment standard that the Claimant has no reasonable prospect of success. Finally, the Defendant also seeks reimbursement of its legal costs pursuant to RDC 53.70(2) due to the Claimant's conduct in the case being allegedly unreasonable.

34. It is noted that the Hearing had to be stopped at one point due to the Claimant's Representative's inappropriate conduct. However, this incident was resolved, and it has in no way affected the outcome of this case.

Discussion

35. The DIFC Courts have jurisdiction over this case, pursuant to Article 5 of the judicial authority law (Dubai Law No. 12 of 2004, as amended by Dubai Law No. 16 of 2011), sub-clauses (a), (b), and (c). It is noted that the Defendant objects to the inclusion of sub-clause (b), based on its allegation that the Second Management Contract of 15 June 2015 is invalid. However, the DIFC Courts remain the relevant jurisdiction regardless of the validity of that Contract.

36. The Small Claims Tribunal also has jurisdiction over this claim, as it falls within the jurisdiction of the DIFC Courts and the amount claimed is AED 500,000 or less, pursuant to RDC 53.2(1). It is also noted that the Defendant has objected to the Claimant's allegedly artificial reduction of the claim value in order to remain in the SCT, however this voluntary reduction is in compliance with the Rules of the DIFC Courts and shall limit the Claimant to a recovery of no more than AED 500,000, regardless of whether the Defendant is found liable for more than that amount.

37. At the outset, it is necessary to address the Defendant's argument that the case should proceed on a summary judgment standard. While the SCT rules are not set up to include a summary judgment phase, it is important to note that any case that would fail on a summary judgment standard would also fail upon final review at a Hearing stage in the Small Claims Tribunal. Thus, there is no need to proceed specifically with a summary judgment standard in mind, and I will instead assess the sufficiency of the claim and defence as appropriate in order to determine the claim.

38. Additionally, I find that the case at hand is not too complex for the SCT. I agree with the reasoning as articulated in the Order of SCT Judge Natasha Bakirci as issued on 7 February 2018 and therefore I dismiss the Defendant's renewed application to transfer this case to the CFI. Having regard to the considerations outlined in RDC 53.37(1)-(10), I find that the circumstances of this case do not merit a transfer to the CFI.

39. Contrary to the Defendant's arguments that this case is too complex for the SCT, the Claimant's case is really quite simple: The Claimant argues that it had delegated authority to call Annual General Meetings, in the course of duly performing that duty it incurred significant legal costs, and the Defendant should thus be responsible for those legal costs pursuant to the terms of the Second Management Contract. It is the details of the Defence that makes this case somewhat more complex, however there is no need to address the Defence until it is clear that the Claimant has made out its initial case.

40. As evidenced by the Claimant's citation of Clause 7.3 of the Second Management Contract, the Claimant contends that this is a case of indemnity due to the Defendant's alleged breach of contract. The Claimant cites Clause 7.3.1, which states:

> "7.3.1 The Body Corporate indemnifies the Body Corporate ◆Manager against any claim, liability or loss suffered by the ◆Body Corporate Manager as a result of any breach by the ◆Body Corporate of any of its obligations under this Agreement, except to the extent that the Body Corporate ◆Body Corporate Manager has directly cause (as finally determined by the Dubai Courts or relevant tribunal or authority having jurisdiction with respect to the dispute) the said breach by the ◆Body Corporate."

41. The Claimant has not been quite clear on the details of its breach of contract case. Presumably, from its explanation in the Particulars of Claim, the alleged breach of contract is that the Defendant failed to have a legally valid Management Committee in place, leading to the delays in the 2015 Annual General Meeting, which in turn led to the prior litigation of CFI-XXX-2015 and CA-XXX-2016. Alternatively, the Defendant's failure to pay the legal fees as previously invoiced by the Claimant could constitute a breach. It is noted that, along with contesting the validity of the Second Management Contract itself, the Defendant has objected in detail to either of these actions constituting a breach of contract. However, a breach is not the only element required for the Claimant to make out a breach of contract case.

42. In any breach of contract case, the Claimant must show (1) the validity and terms of the alleged contract, (2) the details of the alleged breach, (3) the details of the alleged damage or loss, and (4) causation between the damage/loss and the breach. The Claimant must show all of these

elements in order to initially prove its case before I can move on to assessment of whether the Defendant's arguments provide any defence against the claim.

43. Even if I accept, for the sake of argument and against the Defendant's noted and vehement objections, that the Second Management Contract of 15 June 2015 was valid, and that the Defendant had breached that Contract by failing to have a valid Management Committee and/or failing to pay the Claimant's invoices, I cannot overlook the Claimant's failure to show with particularity the loss or damage allegedly incurred relevant to this claim.

44. The Claimant has argued quite simply that it has received AED 665,001.03 worth of invoices from Lakob and Lason for services performed relevant to CFI-XXX-2015 and CA-XXX-2016 and that the Claimant has in turn invoiced the Defendant for those same sums. I do not doubt, and the Defendant would not likely object to my saying, that the Defendant has not yet paid those invoices issued by the Claimant. However, the Claimant has not provided any proof that it has, in fact, paid the invoices it has received from its legal providers.

45. Clause 7.3.1, upon which the Claimant has relied for its right to receive the sums claimed, states that the Defendant indemnifies the Claimant against "any claim, liability or loss suffered" by the Claimant "as a result of any breach by the Defendant." Even if I were to accept for the sake of argument that the Defendant had breached the Contract, an issue upon which I make no finding, the Claimant has not proven that it has a "claim, liability or loss suffered."

46. The Claimant has not shown that its legal providers have made a claim against it, nor that it is otherwise legally liable for these sums at this time. If the Claimant were to be relying on the "claim" or "liability" prongs of Clause 7.3.1, it would need to bring the Defendant into another litigation in which the Claimant was being sued for the sums indicated by its legal providers for failure to pay or otherwise be suing the Defendant based upon a valid judgment or award requiring the Claimant to pay its legal providers. There is no showing that this is the case here, and thus I cannot entertain this as a possibility.

47. The Claimant is therefore, presumably, relying on its ability to show a "loss suffered" pursuant to Clause 7.3.1. However, the Claimant has submitted no proof that it has actually incurred a loss. Instead, it has submitted invoices received from legal providers without any showing that those invoices were indeed paid by the Claimant. Without a showing of a real, as opposed to potential, loss, the Claimant's case cannot proceed due to failure to prove an essential element of the claim.

48. Should I award the Claimant the sums sought in this claim, there is no showing that the money received would be reimbursement for a real and actual loss. The Claimant could very well settle the sums with their legal providers for a lesser amount or could otherwise be insolvent. I will note that there is, of course, no proof of a potential settlement or insolvency, however I mention these possibilities to highlight that this claim is not ripe without proof that the sums were actually paid by the Claimant. The Claimant cannot be reimbursed now for sums not yet proven to be paid out and thus this claim must be dismissed in full for failure to prove an essential element of the claim.

49. Seeing as I have dismissed the Claim for failure to provide sufficient proof, I find it unnecessary to engage with the Defendant's lengthy Defence. It is important to note that in dismissing this case, I am making no findings as to the adequacy of the remainder of the Claimant's arguments nor any of the Defendant's arguments in defence.

Costs

50. The parties shall bear their own costs. While I acknowledge that the Defendant has made reference to RDC 53.70(2) in its application for reimbursement of its legal costs from the Claimant due to alleged unreasonable behaviour, I do not find this application compelling. The Defendant has likely incurred significant legal costs due to its own desire to be legally represented in this matter, contrary to the default rules of the SCT, RDC 53.52, and the Claimant is not responsible to offset those costs.

51. The Claimant has not made out a complete case, however I do not find its failure to do so to be based on any bad faith or unreasonable behaviour. I make no finding as to the Defendant's cited examples included in the Exhibited evidence and articulated at Paragraph 71(a) - (d) of the Defence, which it argues shows the Claimant's unreasonable behaviour during the course of the prior litigation. It is not relevant for this SCT matter and instead, I find that the relevant qualification for a party to have "behaved unreasonably" pursuant to RDC 53.70(2) involves an assessment of the Claimant's behaviour in the SCT proceedings, not before.

52. While the Defendant argues that the Claimant "artificially lowered the value of its claim in order to fit within the SCT's cap" and such action amounts to an abuse of process, I do not agree. This action, which serves to limit the Claimant's potential recovery to no more than the cap, is well within the Claimant's right as part of legal strategy. This act alone does not amount to unreasonable behaviour during the course of the proceedings. Furthermore, the Claimant's alleged failure to include certain items relevant to the prior appeal and objections to the length of the Particulars of Claim also do not amount to unreasonable behaviour.

53. The Claimant's Representative's behaviour during the Hearing was inappropriate, however such behaviour was limited and was addressed between the parties at the time of the Hearing and did not serve to increase either parties' legal costs. Thus, this is not relevant for an assessment of RDC 53.70(2). Therefore, I find that it is inappropriate to apply the discretionary terms of RDC 53.70(2) to this case, and thus the parties shall each bear their own legal costs as related to this SCT matter.

Conclusion

54. In sum, the Claimant's claims are dismissed in full and the parties shall bear their own costs.

Issued by:

Nassir Al Nasser

SCT Judge and Registrar

Date: 29 May 2018

At: 10am

