Claim No: CA 011/2016

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 APPEAL

BEFORE THE CHIEF JUSTICE MICHAEL HWANG SC, H.E. JUSTICE OMAR AL MUHAIRI AND JUSTICE JEREMY COOKE

BETWEEN

ELSECO LIMITED

Appellant/Defendant

and

PIERRE-ERIC DANIEL BERNARD LYS

Respondent/Claimant

Hearing: **14-15 December 2016**

Counsel: Andrew Hochauser QC instructed by Herbert Smith Freehills for the Appellant

Akash Nawbatt instructed by Hadef & Partners for the Respondent

Judgment: **5 July 2017**

JUDGMENT

This is an appeal against the judgment and order of H.E. Justice Ali Al Madhani ("the Judge") dated 14 July 2016, in which he decided that the employment of the Respondent had been terminated without good cause, contrary to Article 59A of the DIFC Employment Law, DIFC Law No. 4 of 2005, as amended and had awarded various sums to the Respondent by way of compensation and penalty.

The Appellant had appealed on three grounds: (i) The Judge had erred in his application of Article 59A both as a matter of law and fact because he had misapplied the objective standard of the reasonable employer set out in Article 59A. He had failed to consider whether a reasonable employer in the Appellant's position would have terminated the Respondent's employment and instead wrongfully introduced the requirement that the Respondent's conduct had to be "so serious as to strike at the heart of the employment relationship such that the employer can no longer continue to work with the employee" in order to be justified in terminating his employment with cause; (ii) Although the Judge had referred to the principle established in *Brandeaux Advisors (UK) Ltd v Chadwick* [2010] EWHC 3241, namely that an employee's unauthorised retention of company property for future use in litigation against his employer would ordinarily allow an employer to terminate for cause, he found that, in the circumstances which obtained, that conduct had not warranted termination for cause; and (iii) The Judge had erred by failing to consider the Respondent's conduct as a whole, and had erroneously considered the grounds put forward by the Appellant individually when reaching the conclusion that termination for cause had not been justified.

A further ground of appeal related to Article 18(2) of the DIFC Employment Law and the penalty regime implemented by that article where termination was found to have taken place without cause. In addition, permission was granted to the Respondent for a cross-appeal on the following (limited) aspects of the case: (i) The Article 18(2) penalty order, which the Respondent contended was erroneously computed on the basis of his "basic wage" rather than his "daily wage"; and (ii) the rate of interest that was awarded, which the Respondent argued was "significantly lower than the rate advanced by the parties and which was specified to run from the date of the Judgment".

As for the proper test under Article 59A of the DIFC Employment Law, the Court of Appeal held that the authorities regard this Article as giving rise to a two-stage test. The first stage is a characterisation of the conduct as that which "warrants termination". The second stage is to determine whether "a reasonable employer would have terminated the employment on that ground". There was no dispute that, for the latter purpose, all the surrounding circumstances could be taken into account. The Court of Appeal found that it is clear enough from the terms of Article 59A itself, that although the Article does not proceed on the basis of contractual classification, the first stage of the test is akin to that which is applied at common law for summary dismissal, and does involve some conduct which was fundamentally inconsistent with the employment relationship, seriously incompatible with it or repudiatory of it. The conduct in question had to be sufficiently serious to warrant summary dismissal, and likewise had to be sufficiently serious to warrant termination for cause. As indicated by Justice Roger Giles in the Court of Appeal's decision in CA-003-2014 ("McDuff"), the common law concept is not an inappropriate way of giving meaning to the first stage of the test. As is also clear from the terms of Article 59A and the authorities, the second stage of the test involves a positive finding as to what a reasonable employer would do, and is in that respect distinct from the unfair dismissal cases in the UK where the question is whether a reasonable employer could have acted in the way that the employer did in dismissing the employee, even though other reasonable employers might have done something different.

The Court of Appeal held there was no misdirection on the Judge's part. In examining whether the conduct of the employee "warrants termination" the Judge was entitled to consider whether "the employer could no longer continue to work with the employee", whether the conduct was "serious enough to go to the heart of the employment relationship on the basis that the employer could no longer continue to work with the employee for four more days", whether the conduct was "gross misconduct", constituted actions which "strike at the heart of the employment relationship that was already to come to an end in a few days" or "misconduct . so serious as to strike at the heart of employment relationship such that the employer can no longer continue to work with the employee owing to the employee's unjustified conduct." None of this was expressed in terms of fundamental breach of contract or anything of that kind but the seriousness of the conduct was being examined to ascertain whether Stage 1 of the test was met. Since the test was akin to that for summary dismissal at common law, the Judge was entitled to use the expressions which he did and was not elevating any of that language into a higher standard than that required by Stage 1 of the Article 59A test as set out in the relevant authorities.

It was not disputed that an employer was entitled to look at the conduct of an employee in the round in deciding whether or not it was reasonable to terminate the employment - stage 2 of the Article 59A test. It is also possible that an accumulation of individual incidents which would not, individually, warrant termination for the stage 1 part of the test could, together, cumulatively, amount to such conduct. The Court of Appeal did not consider that the Judge overlooked this and referred to paragraph 25 of his judgment where he specifically stated that his task was to determine whether any or all of the reasons would justify the termination under Article 59A.

As regards the Article 18 penalty payments, having carefully considered the parties' submissions, the Court of Appeal while recognising the potential for Article 18(2) to lead to absurd and harsh consequences for an unfortunate employer, found that the plain reading of Article 18(2) leaves no room for implying a discretion without doing violence to the statute, which is something the courts cannot do. The Golden Rule allows a Court to modify the language of legislation so as to avoid absurdity, repugnance or inconsistency with the rest of the instrument (Lord Wensleydale in *Grey v Pearson* [1843-60] All ER Rep 21). However, the Golden Rule can only be relied upon in circumstances where the wording of the statute is ambiguous or uncertain and cannot displace the clear intention of the legislator. While the Court of Appeal accepted that the Judge's interpretation of Article 18 could potentially lead to an absurd result, they disagreed with the Appellant's contention that the wording of Article 18(2) is sufficiently ambiguous to engage the application of the Golden Rule. The plain meaning of Article 18(2) is clear.

The Court of Appeal agreed with the Respondent that the phrase "fails to pay" in Article 18(2) has to be read in the context of Article 18(1). Article 18(1) does not make reference to any element of fault - it simply provides for a strict obligation on an employer to "pay all wages and any other amount owing to an employee within fourteen (14) days after the employer or employee terminates the employment." The Appellant did not pay the Respondent the sums that were owed to him within the requisite time, and hence failed its Article 18(1) obligation.

The objective of Article 18(2) is to act as a deterrent, and it is separate and in addition to the Court's power to award interest. The court's finding does not *create* the obligation to pay - the obligation is created by virtue of the circumstances of the case at the time the payment fell due and exists from then on, independent of when the judgment was made. While it is only at the point of the judgment that the parties are absolutely clear about the legal position between themselves, this is only relevant if Article 18(2) requires an element of fault on the part of the employer. In the Court of Appeal's opinion, there is simply no room in the phrasing of Article 18(2) for such an interpretation.

Looking at Article 18(2), it is simply impossible to say what amendments would have been made by the draftsmen (and approved by the Ruler), or indeed if any amendment would have been made at all. The meaning of Article 18(2) is clear, and so the Court is bound to give effect to it. Although the application of Article 18(2) has the potential to achieve absurd results that unduly punish the employer, which would be contrary to the Overriding Objective at Rule 1.6 of the Rules of the DIFC Court ("RDC") to (*inter alia*) deal with cases proportionately and ensure that the case is dealt with expeditiously and fairly, nevertheless, it is not within the purview of the Courts to alter the clear meaning of a statute, and it is up to His Highness the Ruler to conduct a review of a law that is considered unjust.

As for the cross-appeal brought by the Respondent where he submitted that the penalty awarded by the Judge was calculated on the basis of his "basic wage" rather than his "daily wage", and so should be corrected, the Court of Appeal rejected the Respondent's proposed reading of "daily wage" in the context of Article 18(2) of the DIFC Employment Law, and found that bonus entitlements should not be part of the computation of "daily wage," however, they emphasised that their present findings should be taken to be limited to the Article 18(2) context and not extended to the interpretation of the term "daily wage" in respect of the other Articles of the DIFC Employment Law.

Lastly, as regards interest, the Court of Appeal found that while paragraph 2 of PD 1/2009 concerns "Interest on Judgments" (i.e. post-judgment interest), Article 17 of the DIFC Law of Damages and Remedies concerns "Interest for failure to pay money" (which, in the absence of any specific provision otherwise, is a matter of pre-judgment interest). The confusion in argument probably arose because the Judge did not specify whether his order for 1% interest constituted pre- or post-judgment interest. In the Court of Appeal's view, since Article 17 of the DIFC Law of Damages and Remedies does not confer upon the Judge a discretion to award interest at a rate lower than "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment", the Judge's order stipulating annual interest at a rate of 1% must be taken to be his decision on *post-judgment interest*. It is clear from paragraph 2 of PD 1/2009 and Article 39 of the DIFC Court Law that the Court does in fact have a discretion to order a lower rate of interest than the stipulated "1% over the Emirates Interbank Offer Rate" contained in the PD. The Judge's order of annual interest at a rate of 1% was an exercise of that discretion, and the Court of Appeal made no order against this decision.

In respect of pre-judgment interest, since the Parties had both submitted before the Court of First Instance that the Court should order interest at a rate of 8% from the date that the principal sum was due, it would appear that they viewed 8% as the appropriate rate of *pre-judgment interest* at that time. However, there was no elaboration on how this figure had been derived, and the Parties were unable to explain the provenance of the 8% figure when queried, due in part to the fact that both sides were represented by different legal Counsel in the Court of First Instance. In any event, the Court of Appeal considered themselves bound by Article 17 of the DIFC Law of Damages and Remedies, which sets the applicable pre-judgment interest rate at "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment". The Court of Appeal clarified that pre-judgment interest only applies to the principal sum and *not* the Article 18 penalty. This is clear from the wording of Article 17(1) of the DIFC Law of Damages and Remedies.

Costs - Although the Respondent was the successful party in this litigation, he did not succeed on all his arguments. Taking into consideration the fact that the arguments in which he failed (the interpretation of "daily wage" and the appropriate rate of interest) are relatively small in the context of the case, the Court of Appeal ordered costs in favour of the Respondent in the sum equivalent to 75% of his reasonable costs, to be assessed by the Registrar if not agreed by the Parties.

This summary is not part of the Judgment and should not be cited as such

ORDER

UPON hearing Counsel for the Appellant and Counsel for the Respondents on 14 and 15 December 2016

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

IT IS HEREBY ORDERED THAT:

1.The appeal against the trial Judge's findings in relation to Article 59A of the DIFC Employment Law is rejected.

2. The appeal regarding Article 18(2) of the DIFC Employment Law is denied.

3. The Respondent's cross-appeal regarding the meaning of "daily wage" in the context of Article 18(2) of the DIFC Employment Law is rejected.

4. (a) Pre-judgment interest at the "average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment" (Article 17(2) of the DIFC Law of Damages and Remedies) shall be determined by the Registrar.

(b) Pre-judgment interest is not applicable to the Article 18 statutory penalty.

(c) Post-judgment interest at a rate of 1%.

5. Costs in favour of the Respondent in the sum equivalent to 75% of the Respondent's reasonable costs, to be assessed by the Registrar if not agreed by the Parties.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 5 July 2017

At: 12pm

CHIEF JUSTICE MICHAEL HWANG:

Introduction

1.This is an appeal against the judgment and order of H.E. Justice Ali Al Madhani (the "Judge") dated 14 July 2016 in which he decided that the employment of the Respondent ("Mr Lys") had been terminated without good cause, contrary to Article 59A of the DIFC Employment Law, DIFC Law No. 4 of 2005, as amended, and awarded various sums to Mr Lys by way of compensation and penalty.

2. The judgment set out the uncontroversial facts. The Claimant was a French national residing in Dubai and the former Chief Financial Officer (CFO) of Elseco Limited ("Elseco"). Elseco is a company engaged in insurance intermediation and management, incorporated in the DIFC. Mr Lys and Mr Lemaire, the CEO, founded Elseco in 2007, and from around that time Mr Lys was employed by Elseco. He was appointed both a director and CFO of Elseco and was, at one time, chairman of the company before Mr Lemaire took over that position.

3. In January 2009 Mr Lys and Mr Lemaire jointly purchased the entire shareholding of Elseco and, on 13 June 2011, Mr Lys and Mr Lemaire concluded a Sale and Co-operation Agreement ("SCA") by which Mr Lys agreed to sell his 50% shareholding to Mr Lemaire. The purchase price was to be calculated by reference to the Retained Earnings (as defined in the SCA) for each of the four accounting years from 2010 to 2013 inclusive.

4. Much more attention was focused on the SCA on the appeal than appears to have been the case at first instance. Elseco was party to it essentially because of an assignment by Mr Lemaire to Mr Lys of all his rights in relation to the Retained Earnings for the relevant years. In the SCA, Elseco acknowledged and agreed to the assignment, and agreed to pay the Retained Earnings directly to Mr Lys.

5. Clause 9.2 of the SCA provided as follows:

"[Mr Lys] and [Mr Lemaire] agree to act in good faith in relation to the management and conduct of the Business, which includes without limitation procuring that the Company carry on the Business in the ordinary and usual course."

6. Clause 9.3 provided that Mr Lys should continue as a director of the company until Completion of Payment (which was defined as 15 May 2015), but could (at his discretion and subject to giving written notice) extend his office as a director beyond that. Appendix 2 set out the salary packages for Mr Lemaire and Mr Lys (including bonus payments) and Appendix 3 set out their business responsibilities.

7. There were "Principles of Interpretation" also agreed between Mr Lys and Mr Lemaire in a document executed on 13and 27 June 2011, which included the following clause 2.1:

"Retained Earnings

[Mr Lys and Mr Lemaire] will ensure that the definition of Retained Earnings as provided in the Agreement allows a fair and just calculation and payment of the Purchase Price. They will amend the definition based on their auditors' review and advice if the current definition did not allow for such result."

8. It can be seen that there was therefore some scope for amendment of the definition of Retained Earnings in the SCA, where they were defined as "the aggregate of the amount of the consolidated capital and revenue reserves of the company for the relevant Financial Year as set out in the audited accounts of the company and calculated using the same method of calculation as the one used for the 2010 accounts."

9. It was Mr Lys' case that his employment as CFO was terminated without good cause or notice on 11 February 2014 at a time when it had been previously agreed that he would be leaving his employment on 15 February of that year. The termination was communicated by email on 11 February, and confirmed by a letter of 12February. On 17 April 2014, an Article 60 Employment Law Notification of the grounds for termination was sent by the HR manager of Elseco to Mr Lys. Whilst the Article 60 notification referred to actions taken by Mr Lys during the computation of the 2013 accounts as giving grounds to Elseco to conclude that he had sought to take advantage of his position as CFO to obtain a personal financial gain in relation to Retained Earnings "in a manner which was both unethical and fraudulent", the Defence and Counterclaim referred to his conduct in suggesting to Elseco's auditors PWC that the Retained Earnings should be increased by US$5.2 million as a breach of his duties as CFO, director and employee of Elseco, giving rise to grave concerns on Elseco's part about the "standards of probity and professionalism, as is required of a CFO and DFSA Authorised Individual" [paragraph 6.9 of the Defence and Counterclaim]. The Article 60 Employment Law notification also referred to his behaviour on 11 February as inconsistent with the standards of probity and professionalism required, and stated that he had made direct threats towards Elseco which led it reasonably to believe that he intended to damage its reputation.

10. The Defence and Counterclaim put forward the case that, on 11 February 2014, when Mr Lemaire had put to Mr Lys that he had sought to inflate the Retained Earnings in the 2013 accounts so as to increase the purchase price payable to him under the SCA, he denied having done so at a meeting where Price Waterhouse Cooper ("PWC; the auditors of Elseco) were present. On being asked to leave the meeting so that Mr Lemaire could discuss the matter with PWC, he challenged Mr Lemaire's authority to do so in his absence, but ultimately left the meeting room and told Elseco's internal accounts team that his employment had come to an end. It was then alleged that he left Elseco's offices taking with him a box of items belonging to the company, including (but not limited to) a company laptop computer containing extremely valuable data belonging to Elseco. Despite frequent requests from Elseco for the return of its property, it was not until late March 2014 that he returned the laptop, whereupon Elseco discovered that its entire memory and operating system had been destroyed. Allegations were made that he had been using the contact details of a number of customers on Elseco's database to advertise his own products and/or services and had thus made use of confidential information for his own purposes. However, the Judge rejected that complaint and there is no appeal against that finding.

11. The Judge described the pleaded allegations of misconduct by Mr Lys justifying termination as being:

(1) attempting to inflate the accounts by US$5.2 million

(2) taking company property

(3) contacting Elseco's customers.

12. The Judge also referred to further "minor reasons for termination" which were relied on by Elseco:

(1) Refusing to leave the room when he was asked to do so during the meeting with PWC on 11 February 2014.

(2) Self-proclaiming to staff that he had been fired when he had not.

(3) Refusing to allow Mr Lemaire to see the contents of a box of items that he took from the Defendant when he left the premises; and

(4) Informing Mr Lemaire that he would send an email to all of Elseco's clients regarding his exit from the company.

13. The Judge stated at paragraph 25 that the purpose of his examination of these reasons was to determine "whether any or all of them would justify the termination in accordance with the terms of Article 59A of the DIFC Employment Law."

Grounds of Appeal

14. Three grounds were advanced in relation to the Judge's conclusion that the termination of Mr Lys' employment was not for cause and therefore not in compliance with Article 59A of the DIFC Employment Law (as amended).

(1) The Judge erred in his application of Article 59A both as a matter of law and fact because he misapplied the objective standard of the reasonable employer set out in Article 59A. In particular, it was said that he failed to consider whether a reasonable employer in Elseco's position would have terminated Mr Lys' employment and instead wrongfully introduced the requirement that Mr Lys' conduct had to be "so serious as to strike at the heart of the employment relationship such that the employer can no longer continue to work with the employee" in order to be justified in terminating his employment with cause.

(2) Although the Judge referred to the principle established in *Brandeaux Advisors (UK) Ltd v Chadwick* [2010] EWHC 3241, namely that an employee's unauthorised retention of company property for future use in litigation against his employer would ordinarily allow an employer to terminate for cause, he found that, in the circumstances which obtained, that conduct did not warrant termination for cause.

(3) The Judge erred by failing to consider Mr Lys' conduct as a whole, and erroneously considered the grounds put forward by Elseco individually when reaching the conclusion that termination for cause was not justified.

15. A further ground of appeal related to Article 18(2) of the Employment Law and the penalty regime implemented by that article where termination was found to have taken place without cause.

16. In addition, permission was granted to Mr Lys for a cross-appeal on the following (limited) aspects of the case:

(1) The Article 18(2) penalty order, which Mr Lys contended was erroneously computed on the basis of the Respondent's "basic wage" rather than his "daily wage"; and

(2) The rate of interest that was awarded, which Mr Lys argued was "significantly lower than the rate advanced by the parties and which was specified to run from the date of the Judgment".

17. Under Rule 44.135 of the Rules of the DIFC Courts (RDC), "every appeal will be limited to a review of the decision of the Lower Court", save in circumstances which are of no application here. Under RDC 44.142, the Court of Appeal will allow an appeal from the decision of the Court of First Instance where the decision of the Lower Court was wrong or unjust because of a serious procedural or other irregularity in the proceedings. The latter is of no application here. At paragraph 30 of Elseco's skeleton argument accompanying the grounds of appeal, it was said that the Judge had erroneously found that Mr Lemaire had not at any stage sought to afford Mr Lys an opportunity to comment on his correspondence with PWC and, in that respect, Elseco relied upon Mr Lemaire's evidence in his first witness statement that he had been given such an opportunity. Other than that, there did not appear to be any other primary facts which were challenged by Elseco.

The Article 59A Test

18. Article 59A of the Employment Law (as amended) reads:

"Termination for cause

An employer or an employee may terminate an employee's employment for cause in circumstances where the conduct of one party warrants termination and where a reasonable employer or employee would have terminated the employment."

19. The authorities regard this Article as giving rise to a two-stage test. The first stage is a characterisation of the conduct as that which "warrants termination". The second stage is to determine whether "a reasonable employer would have terminated the employment on that ground". There was no dispute that, for the latter purpose, all the surrounding circumstances could be taken into account.

20. In its skeleton argument, Elseco maintained that the Judge had applied a different and higher standard, and had substituted his own view of what was reasonable for that of the objective reasonable employer. The focus of both the original and the supplementary skeleton argument of Elseco (in accordance with the grounds of appeal) was not on the primary ground for dismissal relied on by the Judge (namely the attempted inflation of the accounts) but the *Brandeaux* principles, and a contention that the Judge had applied the wrong standard in looking at this ground whilst not taking into account the totality of Mr Lys' conduct when reaching a decision about termination for cause. In oral argument, Mr Andrew Hochauser QC for Elseco also maintained that the Judge should have held that Elseco was justified in terminating Mr Lys' employment for cause on the grounds of his attempted or actual inflation of the 2013 accounts for his own financial interest, whilst submitting that Mr Lys' conduct as a whole had to be taken into account, particularly his conduct on 11 February about which the Judge had made inadequate findings.

21. As to the Article 59A test, we were referred to the decision of this Court in *Christopher James McDuff v KBH Kaanuun Ltd*, Claim No. CA-003-2014 (***"McDuff"***) where the leading judgment was given by Justice Roger Giles, who construed Article 60(4) of the previous version of the DIFC Employment Law, which included identical wording to that in the current Article 59A. At paragraphs 22-24 he set out the effect of the wording in a manner that both parties before us accepted as accurate:

"22. Article 60(4) expresses the cumulative requirements first, that the employee's conduct warrants termination and secondly, that a reasonable employer would have terminated the employee. The second is in strong terms, that a reasonable employer would have terminated the employee, and it is not enough that a reasonable employer could have terminated the employee. Ordinarily, if an employee's conduct warrants termination it would be reasonable for the employer to terminate the employee. Something more must be involved in deciding whether a reasonable employer would have terminated the employee.

23. The construct of "a reasonable employer" must be given content. It is not a hypothetical employer remote from the particular circumstances and armed only with knowledge of the conduct warranting termination. It is an employer in the circumstances of the actual employer, and the question is whether that hypothetical employer would, as a positive conclusion, have terminated the employee. Thus, for example, if the actual employer has known of the relevant conduct for some time and has done nothing, it should be asked whether a reasonable employer who had known of the relevant conduct for some time and had done nothing would have terminated the employee.

24. This does not mean, as was submitted by Mr McDuff, an importation of the test for unfair dismissal under the law of England and Wales, by which it is asked whether the employer had a genuine belief on reasonable grounds after reasonable investigation that the employee had misconducted himself and whether termination was within the range of reasonable responses; see for example: British Home Stores Ltd v Burchell (1980) ICR 303; Iceland Frozen Foods v Jones (1982) ICR 17; and J Sainsbury plc v Hitt (2003) ICR 111. That test stems from legislation in quite different terms, applying the concept of fairness fleshed out by whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason. For Article 60(4), whether a reasonable employer would have terminated the employee does not call for an investigation of the employer's beliefs and how they were arrived at. The conduct warranting termination is a given, and the knowledge of it must be attributed to a reasonable employer in the circumstances of the actual employer. The hypothetical employer is not allowed a range of reasonable responses; it must be found that it would have terminated the employee."

25. Further, the submission was made to the Court that the trial judge in *McDuff*, who was the same judge at first instance as in the present case, had erred in conflating the contractual power of termination under Article 60(4) (now Article 59A) with termination at common law for repudiatory breach. He had referred in his judgment to a number of breaches as not being "considered to be fundamental" to the employer and that, in doing so, he wrongly invoked the common law concept of fundamental breach. Justice Roger Giles did not think that he did, stating that the first instance judge was not addressing fundamental breach by Mr McDuff, but whether KBH considered the breaches to be fundamental to it, that is being at a particular level of significance to it. He said that this was "not invocation of a common law test (and in any event the common law concept is not an inappropriate way of giving meaning to Article 60(4) in its first requirement of conduct which warrants termination)."

26. In the Court of First Instance, in a later decision which is currently the subject of appeal, *Asif Hakim Adil v Frontline Development Partners Ltd* Claim No. CFI 015/2014 (**"Frontline"**), Justice Roger Giles referred to the wording of Article 59A in the following terms:

"The concept of conduct warranting termination in the Article appeals to a standard other than breach of contract or of fiduciary duty, one which may possibly be wider than either but in any event can involve different investigation. Further, the Article adds the integer that a reasonable employer would have terminated the employment, as construed, meaning a reasonable employer in the circumstances of Frontline."

He then referred to the Court of Appeal decision in *McDuff*.

24. What emerges from these decisions and is clear enough from the terms of Article 59A itself, is that, although the Article does not proceed on the basis of contractual classification, the first stage of the test is akin to that which is applied at common law for summary dismissal, and does involve some conduct which was fundamentally inconsistent with the employment relationship, seriously incompatible with it or repudiatory of it. The conduct in question had to be sufficiently serious to warrant summary dismissal, and likewise here has to be sufficiently serious to warrant termination for cause. As indicated by Justice Roger Giles in *McDuff*, the common law concept is not an inappropriate way of giving meaning to the first stage of the test. As is also clear from the terms of Article 59A and the authorities, the second stage of the test involves a positive finding as to what a reasonable employer would do, and is in that respect distinct from the unfair dismissal cases in the UK where the question is whether a reasonable employer could have acted in the way that the employer did in dismissing the employee, even though other reasonable employers might have done something different.

The test and its application by the Judge in the Court of First Instance

25. We have examined with some care the terms in which the Judge expressed himself and are satisfied that there was no misdirection on his part.

26. In his decision as to the primary ground relied on by Elseco, namely the attempt to inflate the accounts, the Judge came to a clear view that the first stage of the test was not satisfied. There was no conduct which would warrant termination within the meaning of Article 59A. This appears from paragraph 44 where he stated that "in his opinion" (his judgment) Mr Lys' conduct had never gone beyond being transparent in suggesting to Mr Lemaire, the company accountants, the auditors PWC and the management that revenues should be recognised which had not yet been recognised. Having set out the evidence on which he relied to reach that conclusion in paragraph 45, including the evidence of Mr Lemaire under cross-examination where he conceded that there were no instructions to PWC to include unrecorded revenues in 2013, and that there was nothing wrong with PWC being asked to research how IFRS would apply to revenues due from 2014, he stated that Mr Lys' actions "did not constitute serious misconduct and were done with the knowledge of the company's management". He relied on expert evidence that the email exchanges between Mr Lys and PWC were standard in the context of an audit and, at paragraph 46, stated that Mr Lys' actions amounted to "no more than an inquiry to the auditors, accountants and management, which was permissible and did not result in any actual inflation in the Company's accounts and was, in any event, done in a transparent way in accordance with the Company's procedures". He found at paragraph 47, based on Mr Lemaire's own evidence, that he had haphazardly concluded that Mr Lys was acting fraudulently, based primarily on an unjustified and arbitrary presumption of guilt. In concluding the matter at paragraph 48, he said that he accepted Elseco's expert's conclusion that, if Mr Lys' proposal had succeeded in inflating the Retained Earnings figure, it would be contrary to the previous year's accounting methods, but the way that Mr Lys had posed his questions to the Company's accountants, auditors and management did not reach the threshold of gross misconduct, and the transparency in his approach suggested that he had acted in good faith.

27. It is clear therefore that the Judge has reached findings of fact that Mr Lys' conduct in relation to the 2013 Accounts did not satisfy Stage 1 of the Article 59A test with the result that he did not need to go on to consider Stage 2 at all.

28. The same is true of the other conduct of which complaint was made.

(1) The Judge described the taking of the company laptop with sensitive data on it as constituting in normal circumstances "very serious misconduct as it goes to the heart of an employment relationship and would typically warrant termination", referring to *Bandeaux*. It is clear that here the Judge is referring to stage 1 of the Article 59A test.

(2) At paragraph 62, the Judge set out the wording of Article 59A and the test of reasonableness imposed, which is stage 2. At paragraph 63 he explained that the reasonableness test would require the Court to take into account all the circumstances and factors surrounding the employee's conduct and employer's reaction at the time of the termination in order to answer the question of what a reasonable employer would do. The Judge was therefore directing himself appropriately in relation to stage 2 of the Article 59A test.

(3) At paragraph 64, having stated that Mr Lys' retention of laptop and data might ordinarily justify instant termination by his employer, he concluded that, after a careful analysis of the facts in this particular case, Mr Lys' conduct "was not so serious as to warrant his immediate termination on the basis that the employer could no longer work with the employee." He then prayed in aid four reasons for that in paragraph 65. Here once again, in paragraph 64, the Judge was addressing stage 1 of the test.

(4) At paragraph 65(d), the Judge found that Elseco's conduct was unreasonable and that Mr Lys could genuinely have had concern about the potential destruction of emails which supported and/or vindicated his conduct in putting forward the figures he did to PWC, as auditors, with a view to increasing the Retained Earnings figure.

(5) At paragraph 66, having set out his reasons, the Judge found that Mr Lys' conduct was not serious enough to go to the heart of the employment relationship on the basis that the employer could no longer continue to work with the employee for four more days, after which Mr Lys was due to leave in any event. In consequence, he did not consider that Elseco could rely on such conduct as grounds for instant termination of the employment of the claimant. Once again it is clear that in this paragraph the Judge was again directing his attention to stage 1 of the Article 59A test.

(6) It is therefore clear that the Judge did not consider that the taking of company property, in these circumstances, satisfied stage 1 of the test, without ever getting to the need to consider stage 2.

29. At paragraphs 67-93, the Judge then dealt with the other allegations which related to either post-termination conduct, solicitation and conducting his own business, none of which was pursued on appeal, and the other "minor reasons" to which he referred earlier in the judgment as additional grounds upon which Elseco sought to justify termination. Once again, at paragraph 94, the Judge found that none of these minor reasons amounted to "gross misconduct qualifying as cause for a reasonable employer to terminate an employee just four days before the employee's scheduled last day of employment." Here, he appears to have run together the first and second parts of the test but not in a manner which could possibly justify criticism.

30. At paragraphs 96 and 97 he specifically found that Mr Lys' behaviour on 11February "in no way, in my opinion" constituted "actions that strike at the heart of the employment relationship that was already to come to an end in a few days". He concluded therefore that Elseco had "failed to satisfy this court that as a reasonable employer, immediate termination of the employment relationship was warranted due to the employee's misconduct, which must be so serious as to strike at the heart of the employment relationship, such that the employer can no longer continue to work with the employee, owing to the employee's unjustified conduct". Here once again the Judge has found that the conduct in question did not satisfy Stage 1 of the relevant test, without the need to move onto Stage 2.

31. Once it is appreciated that the criticised phraseology used by the Judge related to stage 1 of the test, we consider that there is no basis for any challenge. In examining whether the conduct of the employee "warrants termination" the Judge was entitled to consider whether "the employer could no longer continue to work with the employee", whether the conduct was "serious enough to go to the heart of the employment relationship on the basis that the employer could no longer continue to work with the employee for four more days", whether the conduct was "gross misconduct", constituted actions which "strike at the heart of the employment relationship that was already to come to an end in a few days" or "misconduct . so serious as to strike at the heart of employment relationship such that the employer can no longer continue to work with the employee owing to the employee's unjustified conduct." None of this was expressed in terms of fundamental breach of contract or anything of that kind but the seriousness of the conduct was being examined to ascertain whether Stage 1 of the test was met. Since the test was akin to that for summary dismissal at common law, the Judge was entitled to use the expressions which he did and was not elevating any of that language into a higher standard than that required by Stage 1 of the Article 59A test as set out in the earlier authorities.

The Judge's findings of fact

32. Despite criticism from Counsel for Elseco as to inadequate findings of fact by the Judge, a comprehensive reading of the judgment shows a series of findings made by the Judge at paragraphs 42-48 in relation to the attempt to inflate the Retained Earnings figure. The Judge considered that, central to Elseco's arguments were the allegations that Mr Lys had been seeking to persuade PWC to increase the revenue figure for the purpose of the Retained Earnings calculation, without consulting the management of Elseco or Mr Lemaire in particular. As already stated earlier in this judgment, however, he found that Mr Lys' conduct had never gone beyond making transparent suggestions to Elseco, its internal accountants and management and auditors to recognise revenues which had not yet been recognised. He recited at paragraph 45 various communications, including the provision by Mr Lys to PWC, with a copy to Elseco's internal accountants, of a recalculated figure in respect of unrecognised revenue amounting to $5.2 million, referring in the email to the research which PWC was effecting on IFRS Rules. Another communication was that of 2February 2013 where PWC sent Mr Lys, Mr Lemaire, the latter's wife and two members of Elseco's management, material relating to the first phase of the audit with a list of topics to be the subject of further discussion during the second phase. One of the topics included the "Proportional revenue recognition" and the attachment under that heading set out the figure of $5.2 million of revenue which had not yet been recognised.

33. The Judge went on to refer to the cross-examination of Mr Lemaire where he confirmed that, at this stage, this question of inclusion of additional revenue was a matter for further discussion, that Mr Lemaire had accepted there had not been any instruction to PWC to include unrecorded revenues in 2013, and that PWC had only been invited to opine on whether or not recognising deferred revenues would be compliant with the IFRS. The Judge then referred to a further tranche of cross-examination of Mr Lemaire where he had conceded that there was nothing wrong with PWC being asked to research how IFRS would apply to revenues due from 2014 onwards.

34. Having examined this evidence, the Judge came to the conclusions set out earlier in this judgment, that Mr Lys' actions did not constitute serious misconduct, and had in fact been done with the knowledge of the Company's management. Whilst his actions may have been an attempt to "move the goalposts" by persuading PWC to change the way in which Retained Earnings were calculated, as compared with the 2010 accounts (see Clause 2.1 of the Principles of Interpretation), all of this would necessarily have been the subject of discussion between PWC, Mr Lemaire and Mr Lys before the accounts could possibly have been signed off with an increased revenue figure of this kind.

35. As the central premise of Elseco's position was that Mr Lys sought to prefer his personal interests to those of the company by seeking to inflate the revenue in 2013 in discussion with PWC behind Mr Lemaire's back, the judge's findings of fact at paragraphs 42-48, namely that his conduct never went beyond making transparent suggestions to Elseco, its accountants, auditors and management about the recognition of revenues where the majority of the work had been completed, makes any challenge to his ultimate conclusion impossible to sustain. The Judge concluded that Mr Lys' actions in making enquiry of the auditors, accountants and managers about the figures was permissible, and did not result in any actual inflation in the company's accounts, quite apart from being done in a transparent way in accordance with the company's procedures. Allied with his findings that Mr Lemaire's approach to the whole issue was unreasonable, where he no doubt was seeking to protect his own financial interest whilst Mr Lys was seeking to advance his, it is wholly unsurprising that the Judge should have concluded that nothing that Mr Lys did was conduct which warranted termination for cause, without having to grapple with the question whether or not a reasonable employer would have terminated on those grounds.

36. The Judge found therefore that Mr Lemaire had unjustifiably and arbitrarily concluded that Mr Lys was acting fraudulently or dishonestly, and that this conclusion was haphazard whereas he, the Judge, went on to find that the transparency in Mr Lys' approach suggested that he was acting in good faith.

37. The criticism that the Judge did not refer to clause 9.2 of the SCA in his judgment is not merited because it played almost no part in the argument below. The clause was not pleaded expressly, and the SCA itself was only pleaded in paragraph 5 of the Defence in relation to the history of the sale of the shares, the Appendix 2 remuneration and what was described as a duty to continue to act in the best interests of the company to maximise shareholder value and ensure a smooth transition of business, a paraphrase of other provisions in the agreement. As Mr Akash Nawbatt, counsel for Mr Lys, pointed out, there was no plea of clause 9.2 itself, although it was referred to in Elseco's skeleton for the trial at first instance. Even there it was said to add little or nothing to the implied obligation of good faith and fair dealing provided by Article 57(C) of DIFC Contract Law. Furthermore, trust and confidence was put forward as a natural concomitant of employment in any event. In the light of the Judge's findings it could make no difference whether the good faith issue rested on one foundation or another.

38. In these circumstances Elseco's argument based on clause 9.2 of the SCA can take the matter no further. The Judge made a finding as to good faith on the part of Mr Lys, and it matters not whether clause 9.2 added anything to the latter's obligations to the company as CFO, director and employee. He did not fall foul of any good faith obligation.

39. The findings of fact which the Judge made, having heard the evidence and to which he referred extensively in his judgment, are not findings which this Court will overturn on a review. They are essentially primary findings of fact to which the Judge was entitled to come.

40. Elseco relied on English authorities for a number of different propositions. In *Neary* [1999] IRL 288, Lord Jauncey held that the seriousness of a breach of duty by an employee was to be seen in the light of the degree of trust placed in him by his employer. The role and responsibility of the employee impacted upon the way in which a reasonable employer would regard the breach in question. If the conduct was seriously inconsistent and incompatible with the duties of a senior employee, the trust and confidence in that employee would be lost, which would justify dismissal, whether or not there was dishonesty. Relying on other authorities relating to the implied obligation of good faith for employees, the proposition was put forward that the employee must not conduct himself in any manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It was in this context that the essence of Elseco's case was developed in its skeleton argument to this Court, stating that the reason why Elseco dismissed Mr Lys was because of the breakdown of trust and confidence in the employment relationship as a result of Mr Lys' conduct.

41. On the basis of other authority, it was submitted that his conduct had to be seen in the round. Reliance was placed on *GMP Packaging (UK) Limited v Haslem* UKEAT/0259/13/LA where, at paragraph 29, the Employment Appeal Tribunal held that, where the only reason for dismissal related to the conduct of the employee, that conduct included all of the matters which were taken into account on dismissal. It was wrong to focus simply on the principal reason advanced since it was the whole of the conduct which led to dismissal which fell to be taken into account. Furthermore, at paragraph 31, it was held that the Lower Tribunal had substituted its own views as to what was an appropriate sanction instead of ascertaining whether what was done was within the range of reasonable responses open to a reasonable employer.

42. The criticism was made that the Judge failed to take into account all the events of 11 February 2014 but, as pointed out elsewhere in this judgment, the focus of attention was always on Mr Lys' conduct in discussing with PWC the question of increasing the revenue attributable to the year 2013, and the 11 February conduct all took place in the context of that issue. Whether attention is paid to the termination email of 11th February, the letter of termination on 12February 2014 or the Article 60 Employment Law notification of 17 April 2014, the key to the conduct of which complaint was made, was, throughout, what Mr Lemaire characterised as a dishonest attempt by Mr Lys to manipulate the accounts with a view to increasing the purchase price payable to himself for his shares. In the termination email, Mr Lemaire stated that he had decided to "stop our collaboration with immediate effect" and referred to Mr Lys stating that he would bring back the computer and other Elseco property, but also saying that he did not want to hand over the computer at that point because he did not want Elseco personnel to delete the emails concerned, which Mr Lemaire said he understood and which was reciprocated.

43. The conduct relating to the meeting with PWC that day all centred on the Retained Earnings discussion, and the exclusion of Mr Lys from the meeting so that Mr Lemaire could discuss the matter independently with PWC (when Mr Lys wished to be present) and what was said by him on exclusion from the meeting. The Judge set out all of this conduct, of which complaint was made at paragraphs 23 and 24 but rightly focussed on the "attempt to inflate the accounts by US$5.2 million", whilst dealing with each of the others in that context.

44. There was little need for detailed findings about what occurred on that date, and we consider that the finding at paragraph 65(d) was sufficient to show that he accepted Mr Lys' evidence in relation to the lack of opportunity given to him to comment on the correspondence he had with PWC following his exclusion from the meeting, which he held to constitute unreasonable conduct on the part of Elseco in the person of Mr Lemaire.

45. We do not consider that the Judge erred in substituting his own opinion for that of a reasonable employer at any stage in his judgment. On a fair reading of his judgment and in particular paragraph 96, of which complaint is made, the Judge sets out his judgment, expressed as "in my opinion" that the first stage of the Article 59A test was not met, namely that the conduct of Mr Lys did not warrant dismissal for cause. In the context of the stage 2 test, he never used any language which could suggest he substituted his own judgment for that of the hypothetical reasonable employer, but it is plain that, in coming to a decision on that point, any judge would have to form his own view about that element, since the decision to be made is whether or not a reasonable employer would have acted as the employer did, not whether the action fell within the range of reasonable responses open to a reasonable employer, as is the test in the English unfair dismissal authorities to which we were referred.

46. With regard to the second reason for termination advanced, namely that Mr Lys took a laptop from the company containing all the information relevant to his case with the express purpose of supporting his claims against his employer, the Judge relied on four matters set out in paragraph 65(a)-(d) in support of his conclusion that Mr Lys' conduct, unlike that in *Brandeaux,* was not so serious as to warrant his immediate termination. Elseco had never relied in its defence upon the retention of the laptop as a ground for termination which would have been hard to do since it occurred after termination. It was never advanced as a reason for termination in the Article 60 letter.

47. We were referred by both Counsel to the decision of Jack J in *Brandeaux*, where the statement of principle upon which Elseco relied appears in paragraph [23]. It is worth quoting part of that paragraph:

> "I should not get drawn into any wide statements of principle which are unnecessary to my decision. I am doubtful if the possibility of litigation with an employer could ever justify an employee in transferring or copying specific confidential documents for his own retention, which might be relevant to such a dispute. If such a dispute arises in the ordinary course the employee must rely on the court's disclosure processes to provide the relevant documents: even if the employee is distrustful whether the employer will willingly meet its disclosure obligations, he must rely on the court to ensure that the employer does. But on any view there can be no justification for the exercise which Ms Chadwick carried out here. Nor, in the absence of any specific issue, was Ms Chadwick entitled to transfer documents to protect her own position in case a regulatory dispute might arise. If she wished to use confidential information to make a report to the regulator, a situation which has not arisen, she would not be prevented from using confidential information for that purpose: but whether that would entitle her to copy documents onto her private computer would be doubtful."

48. It can be seen that the general principle in the second sentence quoted above is hedged about by reservation. The Judge did not wish to make any general statement of principle and drew attention to the absence of any specific issue where Ms Chadwick needed to protect her own position, albeit in the context of a potential regulatory dispute.

49. At paragraph [32] the Judge stated that, in the context of a summary dismissal, the seriousness of what Ms Chadwick did fell to be judged in the context of her employer's conduct towards her insofar as relevant. He examined her motives at paragraphs [18] and [45] and found that she had transferred information to her private email address to arm herself for any future dispute she might have with Brandeaux, with a possible element of self-protection if there were problems with a regulator, without any reason to anticipate anything specific in that respect.

50. In *Farnan v Sunderland Association Football Club Ltd* [2015] EWHC 3759 (QB) Whipple J referred to a dictum of Coulson J in another case where he said that:

> "As a matter of common sense, it cannot be right for a defendant to retain information in breach of contract simply to bolster its claim in the Employment Appeal Tribunal. If there are documents to be disclosed in that dispute, they will be disclosed in the normal way. This sort of pre-emption is not therefore valid."

51. In the instant case, on the facts as he found them, however, the Judge found specific reasons why any principle of general application should not be applied in relation to the conduct of Mr Lys. He distinguished at paragraphs [56]-[58] the different disclosure regimes which operated in England and the DIFC (although the difference is now much less than might appear at first sight, given the menu of possible disclosure regimes now open in England). He nonetheless held that the balance of power between an employee and an employer might justify the retention of information, the gravamen of the employer's complaint really arising in the context of disclosure of confidential or sensitive information to third parties which could damage the employer's commercial interests or the use by the employee of information to conduct competitive business.

52. As the Judge pointed out at paragraph 65(a)-(d), Mr Lys was entitled to the information which he had at all points until termination so that, at the very moment he took the computer home with him, there was no bar to his access to it.

Even after termination he continued to be a director of the company until 15 April, with a right of access to accounting information and he returned the computer on 17 April. Criticism was made of the Judge because he did not deal with the fact that there was no material on the computer when it was returned, but as this was not a ground of appeal, as there was corroborative evidence that this was after a computer fault, and as Mr Lys' evidence on the subject was unchallenged, there was nothing to be made of this. All the material on the laptop in any event was backed up on the company's server. In the context of a dispute between Mr Lemaire and Mr Lys about the revenue figures, where each had a personal opposing interest in the amount of Retained Earnings for the calculation of the price under the SCA, and Mr Lemaire was accusing Mr Lys of dishonestly seeking to manipulate the figures behind his back, and in circumstances where the IFRS Rules were also in issue, it is easy to see how the Judge could form the view that any general principle stated in *Brandeaux* and other authorities was inapplicable. The question whether conduct warrants termination without cause is a question of fact depending on all the circumstances and it cannot be said that the Judge's finding here was perverse or against the weight of the evidence.

53. The specific four factors to which the Judge referred at paragraph 65 were as follows:

(1) The first factor upon which he relied was the nature of the employment relationship of Mr Lys. He was, as the Judge pointed out, not only CFO, member of the Board and co-founder but someone who had a special interest in the Company's final accounting year because of the terms of the SCA. As a member of the Board, a situation which continued after termination of his employment, he was entitled, under the Company's Law Amendment Law No. 2 of 2013, Article 101(2)(c) to inspect the Company's accounting records at all reasonable times. Prior to his termination, he was undoubtedly entitled also to take home the company's laptop and the information thereon.

(2) The Judge pointed out that the retention of company property and data was always a secondary reason relied on by Elseco for termination, the primary one being the attempt to inflate the accounts. This is borne out by the fact that this was not referred to in the Article 60 Employment Law Notification of Grounds for Termination.

(3) The Judge relied on the fact that 15 February was the agreed date for the termination of Mr Lys' employment in any event. There was thus only four days to go which was a material factor (whether at stage 1 or stage 2 of the test).

(4) The Judge found that, following the meeting on 11 February 2014, Mr Lemaire had not at any stage sought to afford Mr Lys an opportunity to comment on his correspondence with PWC, having excluded him from a meeting between himself and PWC. He concluded that Elseco's conduct was unreasonable, which could have led Mr Lys to be concerned about the destruction of emails between himself and PWC, Mr Lemaire and the accountanting team which supported and/or vindicated his position in relation to the attempt to increase the revenue figures in the 2013 year.

54. It was this last finding which was the subject of significant attack by Counsel for Elseco. That attack appeared to be based solely on the fact that the Judge did not accept paragraph 67 of Mr Lemaire's witness statement. Whilst it is true that the Judge did not expressly set out what Mr Lemaire had said, it is clear that there was a conflict of evidence as to what had occurred, and the Judge accepted the evidence of Mr Lys on the point. This is once again a primary finding of fact with which this Court will not interfere.

Treating the conduct of Mr Lys as a whole

55. It was not disputed that an employer was entitled to look at the conduct of an employee in the round in deciding whether or not it was reasonable to terminate the employment - stage 2 of the Article 59A test. It is also possible that an accumulation of individual incidents which would not, individually, warrant termination for the stage 1 part of the test could, together, cumulatively, amount to such conduct.

56. We do not consider that the Judge overlooked this and have already drawn attention to paragraph 25 of his judgment where he specifically stated that his task was to determine whether any or all of the reasons would justify the termination under Article 59A. Moreover, in reality, if neither the first nor second ground advanced could justify termination, none of the minor grounds could possibly do so individually or cumulatively. Since the first and second grounds were connected and were fully dealt with by the Judge, we consider that there is no question of the Judge misdirecting himself on this point.

Conclusion

57. We consider therefore that there is no basis upon which the appeal against the Judge's findings in relation to Article 59A can succeed. The Judge applied the right test and came to conclusions of fact to which he was entitled to come.

The Article 18 penalty payments

58. Article 18 of the Employment Law (as amended) ("**Article 18**") provides:

"18 Payment where the employment is terminated

(a) 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.

(b) If an employer fails to pay wages or any other amount owing to an employee in accordance with Article 18 (1), the employer shall pay the employee a penalty equivalent to the last daily wage for each day the employer is in arrears."

59. As mentioned above at paragraphs 15 and 16(1), the proper application of Article 18 of the Employment Law was the subject of both an appeal by Elseco as well as a cross-appeal by Mr Lys.

(a) Elseco, in its appeal, submitted that the Judge had erred in the proper interpretation of Article 18.2 by holding that the Court had no discretion in its application. This, in Elseco's submission, resulted in a regime that leads to absurd consequences.

(b) Mr Lys, in his cross-appeal, contended that the Judge had erred in calculating the Article 18(2) penalty based on his "basic wage" rather than his "daily wage".

60. The appeal and cross-appeal will be dealt with in turn.

Article 18(2) excludes judicial discretion

61. On its face, the meaning of Article 18(2) is simple: an employer who fails to pay any outstanding amounts to an employee whose contract has been terminated is liable to pay that employee his last daily wage for each day that he fails to settle the debt. The problem with the plain reading of Article 18(2), however, is that this has the potential to lead to absurd results - for example an employee who is owed AED 1 would be entitled to his full daily wage for each day he remains out of pocket. There are many other such examples which are given in an non-exhaustive list in the Judgment below and will not be repeated here. This problem is exacerbated by the fact that the failure to pay is oftentimes not the employer's fault, for instance if parties had a genuine dispute over their respective legal entitlements.

62. At this juncture, it is apposite to mention that the present case was heard at a time when the Court of Appeal was deliberating on another appeal (*Frontline*) concerning the application of judicial discretion and Article 18(2). Many of the arguments discussed in that judgment overlap with those submitted by Counsel in the present case. However, Counsel for Elseco also proffered several additional arguments which were not canvassed before the Court of Appeal in *Frontline*. Moreover, the *Frontline* Appeal judgment was issued on 20 March 2017, whereupon the parties to the present case were invited to comment on it and supplement their submissions if necessary. This offer was taken up by Elseco, which filed its further submissions on 11 April 2017. Having carefully considered the parties' submissions, the position of this Court remains regretfully the same: while recognising the potential for Article 18(2) to lead to absurd and harsh consequences for an unfortunate employer, the plain reading of Article 18(2) leaves no room for implying a discretion without doing violence to the statute, which is something the courts cannot do. We set out our reasoning in the sections below.

"The Golden Rule"

63. The Golden Rule allows a Court to modify the language of legislation so as to avoid absurdity, repugnance or inconsistency with the rest of the instrument (Lord Wensleydale in *Grey v Pearson* [1843-60] All ER Rep 21). However, the Golden Rule can only be relied upon in circumstances where the wording of the statute is ambiguous or uncertain and cannot displace the clear intention of the legislator.

64. Elseco submitted that, since the Judge had ruled that "there might be absurdity in the consequences of the application of Article 18" (paragraph 170 of the Judgment), he should have utilised his discretion, pursuant to the Golden Rule, to interpret Article 18(2) in a way that would remove the absurdity. Regarding the requirement of ambiguity, Elseco argued that the Judge had "failed to identify the correct interpretation of the Article" (see alternative interpretations proposed below) and hence it was "axiomatic that there is ambiguity and/or uncertainty in the drafting of the Article". While we accept that the Judge's interpretation of Article 18 could potentially lead to an absurd result, we disagree with Elseco's contention that the wording of Article 18(2) is sufficiently ambiguous to engage the application of the Golden Rule. The plain meaning of Article 18(2) is clear, and for the reasons given at paragraphs 65 to 84 below, we reject Elseco's alternate interpretations of Article 18(2) and uphold the ruling of the Judge below.

"fails to pay"

65. First, Elseco submitted that the term "fails to pay", properly interpreted, includes a requirement of wrongdoing, consistent with the penal nature of the clause. This, Elseco argued, would be consistent with Article 40(1) of the DIFC Law of Damages and Remedies (DIFC Law No.7 of 2005) ("**DIFC Law of Damages and Remedies**"), which provides that a Court may order punitive damages to a claimant provided the defendant's conduct was "deliberate and particularly egregious or offensive". In the context of the present case, Elseco argued that, since Mr Lys failed to particularise the amounts due from Elseco until mid-way through the proceedings, Elseco was simply unable to pay the outstanding amounts, and so should not be made to pay the Article 18(2) penalty. In addition, Elseco submitted that no fault should be attributed to it for not paying the outstanding amount in circumstances where there was a genuine dispute between the parties as to whether any outstanding amount was due.

66. In response, Mr Lys submitted that Article 18(2) must be read in context: ie in conjunction with Article 18(1). Accordingly, the words "fails to pay" should be interpreted as referring to a failure to comply with the requirements in Article 18(1). Mr Lys also rejected the analogy to Article 40(1) of the DIFC Law of Damages and Remedies, pointing out that there the legislator had made explicit the conduct requirement whereas it had not done so in Article 18(2).

67. We agree with Mr Lys that the phrase "fails to pay" in Article 18(2) has to be read in the context of Article 18(1). Article 18(1) does not make reference to any element of fault - it simply provides for a strict obligation on an employer to "pay all wages and any other amount owing to an employee within fourteen (14) days after the employer or employee terminates the employment", which is notably devoid of any reference to recognised standards of conduct. Elseco did not pay Mr Lys the sums that were owed to him within the requisite time, and hence failed its Article 18(1) obligation.

"For each day the employer is in arrears"

68. Next, Elseco argued that the phrase "for each day the employer is in arrears" should be taken to refer to each day the employer failed to pay the employee up to the date of the employee's termination. In other words, in Elseco's submission, "if the Employer did not pay 4 days' wages, the Employer is in arrears for 4 days' wages", the net effect being that the amount of the penalty is 100% of the unpaid sum. The rationale submitted for this was that the Court already has the power to award interest for delayed payment of wages and other amounts due. Alternatively, Elseco argued that the meaning of "in arrears" should be calculated from the date of the judgment which established the failure to pay.

69. We do not agree with Elseco's primary reasoning. The objective of Article 18(2) is to act as a deterrent, and it is separate and in addition to the Court's power to award interest. This purpose would be significantly blunted if the penalty were limited to the value of the outstanding daily wage at the time of termination as Elseco suggests. Moreover, as Elseco admitted in its supplementary submissions, its primary construction of the phrase "in arrears" is "only applicable if the Court determines that there had not been a failure to pay on the part of Elseco". We have rejected this premise in the previous section, and the proposed construction falls away with it.

70. Elseco's alternative argument is also rejected. The court's finding does not *create* the obligation to pay - the obligation is created by virtue of the circumstances of the case at the time the payment fell due and exists from then on, independent of when the judgment was made. While it is only at the point of the judgment that the parties are absolutely clear about the legal position between themselves, this is only relevant if Article 18(2) requires an element of fault on the part of the employer. As we have observed in the previous section, there is simply no room in the phrasing of Article 18(2) for such an interpretation.

Reading in words

71. Elseco further submitted that words should be read into Article 18(2). Two different variations were submitted.

72. In its written submissions, Elseco submitted that Article 18(2), on a proper construction, only expressly stated the amount of the penalty due for non-payment of wages but had not done so for non-payment of other amounts owing. Accordingly, Elseco proposed that the words "or equivalent to the other amount owing" be added to the end of Article 18(2) as follows.

> "If an employer fails to pay wages or any other amount owing to an employee in accordance with Article 18 (1), the employer shall pay the employee a penalty equivalent to the last daily wage for each day the employer is in arrears or equivalent to the other amount owing"
>
> [underline added]

73. However, at the hearing, Counsel for Elseco candidly admitted that he had "some difficulty in urging those submissions" upon the Court. Instead, he suggested a new amendment to Article 18(2) as follows.

> "If an employer fails to pay wages or any other amount owing to an employee in accordance with Article 18 (1), the court may order that the employer shall pay the employee a penalty up to the equivalent to the last daily wage ~~for each day the employer is in arrears~~"

74. This proposed amendment is very similar to that which was mooted before and rejected by Justice Giles at paragraph 335 of *Adil*.

> "Substituting "may" for "shall" in Article 18(2) would not be at all satisfactory. The Article would then read that "the employer may pay." a wording which says nothing of a discretion if a Court is asked to order payment of the penalty; and it could not be thought that the employer had a discretion. More radical surgery is required, such as deletion of the reference to the employer paying a penalty and provision that "the Court may order that the employer pay a penalty equivalent to.". Even that would have the difficulty that the Court would have an all or nothing discretion, to order the whole of the penalty or none of it; so additional words would be needed such as "the Court may order that the employer pay a penalty up to the equivalent to.". This would not be construction of the Article but rewriting of it."
>
> [underline added]

75. Elseco, however, suggested that Justice Giles was wrong to refrain from rewriting Article 18(2), relying on the House of Lords case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("**Investors Compensation Scheme Ltd**") for the proposition that rewriting a contract was permissible, and that this should be applied to the present case.

76. We note that Justice Giles accepted in *Adil* at paragraph 336 that "[w]ords may in some circumstances be added to or modified in legislation". However, Justice Giles, relying on the third of Lord Diplock's conditions in *Wentworth Securities v Jones* (1980) AC 74, held that reading words into an Act was impermissible unless it was "possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by [law maker]". To neglect this condition would be to usurp the function of the Ruler.

77. Looking at Article 18(2), it is simply impossible to say what amendments would have been made by the draftsmen (and approved by the Ruler), or indeed if any amendment would have been made at all. More fundamentally, as Lord Diplock observed in *Duport Steels Limited and Others v Sirs and Others* [1980] 1 All ER 529, "[w]here the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. A statute passed to remedy what is perceived by Parliament to be a defect in the existing law may in actual operation turn out to have injurious consequences that Parliament did not anticipate at the time the statute was passed. But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts, and if so, what are the precise limits that ought to be imposed. These are matters of wide legislative choice." In our opinion, the meaning of Article 18(2) is clear, and so the Court is bound to give effect to it.

Dakarai v Dalmatia and *International Electromechnical*

78. In arguing that the Court should have discretion in applying Article 18(2), Elseco sought to rely on two cases, *Dakarai v Dalmatia* [unreferenced] 5 December 2013 ("*Dakarai v Dalmatia")* and *International Electromechanical Services Co LLC v (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC* CFI 004/2012 ("*International Electromechnical Services*"). These cases do not assist Elseco.

79. First, Elseco cited *Dakarai v Dalmatia* as an example where the DIFC Court had found and exercised a discretion in determining whether a penalty under Article 18(2) should be payable. *Dakarai v Dalmatia* is a short 10 paragraph decision by the Small Claims Tribunal, in which the Judicial Officer ordered that a sum of AED 20,569 (being the final settlement of dues that was submitted by the Defendant) be paid by the Defendant to the Claimant. The breakdown of this sum is unclear, and it may well have been that the Defendant had already taken into account the Article 18(2) penalty when it proposed its final settlement, hence leading the Judicial Officer to hold that the Defendant was not "contractually or legally liable to pay any extra amount beyond [the ordered sum]". However, to the extent that the Judicial Officer had believed himself or herself in possession of a discretion in the application of Article 18(2), the decision reached should now be seen as in error for the reasons given above.

80. Second, Elseco cited *International Electromechnical Services* as an example of how the DIFC Courts have exercised discretion over mandatory provisions of law. The relevant provisions in that case are:

1. Article 13 of DIFC Law No.1 of 2008:

   "If an action is brought before the DIFC Court in a matter which is the subject of an Arbitration Agreement, the DIFC Court shall. dismiss or stay such action unless it finds that the Arbitration Agreement is null and void, inoperative or incapable of being performed".

   1.Article 7 of DIFC Law No. 1 of 2008:

   "7. Scope of application of Law

   (a) Parts 1 to 4 and the Schedule of this Law shall all apply where the Seat of the Arbitration is the DIFC

   (b) Articles 14, 15, Part 4 and the Schedule of this Law shall all apply where the Seat is one other than the DIFC"

- Article 10 of DIFC Law No. 1 of 2008:

  "10. Extent of court intervention

  In matters governed by this Law, no DIFC Court shall intervene except to the extent so provided in this Law."

81. Article 13 of DIFC Law No.1 of 2008 only applies to DIFC-seated arbitrations, and in *Injazat Capital Limited and Injazat Technology Fund B.S.C. v Denton Wilde Sapte & Co* CFI 019/2010 ("*Injazat*"), the Court had held that the Arbitration Law was a precise and detailed piece of legislation and so the court was deprived of any residual inherent jurisdiction to stay the case in favour of non-DIFC seated arbitration. However, the Court in *International Electromechnical Services* took a different approach, reasoning that the silence of the DIFC Arbitration Law on the subject of the granting of stays for non-DIFC seated arbitration agreements was not sufficient to demonstrate a legislative intention to remove the Court's inherent jurisdiction and statutory powers to grant a stay.

82. With respect, it is difficult to see how this case is relevant.

> 1.While Article 13 of DIFC Law No. 1 of 2008 is a "mandatory" provision (as can be seen from the term "shall"), Article 13 of DIFC Law No. 1 of 2008 only applies to DIFC-seated arbitrations. The Court's finding that it had a discretion *outside of the ambit of Article 13 of DIFC Law No. 1 of 2008* can hardly be said to amount to claiming a discretion over a mandatory provision.
>
> 2. Article 7 is a "mandatory" provision for the same reason, but the express indication that specific Articles are to apply to non-DIFC seated arbitrations does not exclude the Court from exercising its inherent jurisdiction *in addition* to those Articles.
>
> 3. Lastly, Article 10 is a "mandatory" provision circumscribing the Court's powers, but as Williams J points out in *International Electromechnical*, Article 10 does not apply to non-DIFC seated arbitration agreements (pursuant to Article 7).

83. Apart from the reasons given above, it is also relevant that Article 13 of DIFC Law No.1 of 2008 concerns the Court's procedural powers and not the parties' substantive rights. Contrary to Elseco's submissions, the Court in *International Electromechnical* did not purport to exercise a discretion over a mandatory provision of law.

Conclusion

84. For the above reasons, it is clear that the wording of Article 18(2) leaves no room for discretion, and we are bound to apply it. Having reached this finding, there is, strictly speaking, no room for considerations of public policy. This is not a conclusion we reach with any enthusiasm - as Elseco rightly points out, the application of Article 18(2) has the potential to achieve absurd results that unduly punish the employer, which would be contrary to the Overriding Objective at Rule 1.6 of the Rules of the DIFC Court ("**RDC**") to (*inter alia*) deal with cases proportionately and ensure that the case is dealt with expeditiously and fairly. Nevertheless, it is not within the purview of the Courts to alter the clear meaning of a statute, and it is up to His Highness the Ruler to conduct a review of a law that is considered unjust.

Article 18(2) refers to Basic Wage

85. The next point of interpretation arises not from the appeal but a cross-appeal brought by Mr Lys. Essentially, Mr Lys submitted that the penalty awarded by the Judge was calculated on the basis of his "basic wage" rather than his "daily wage", and so should be corrected.

86. Before we proceed, it is important to note that Mr Lys himself admitted that the Judge had awarded the penalty claimed in the Particulars of Claim and that the mistake was his own. Nevertheless, Mr Lys argued that the Court of Appeal can in fact raise new points on appeal in narrow circumstances, such as "where there is a point of law which does not involve any further evidence, and which involves little variation in the case which the party has already had to meet" (*Crane v Sky In Home Limited* [2008] EWCA 978 at paragraph [22]). Mr Lys also submitted that the Court should take guidance from *Pittalis v Grant* [1989] QB 605, which states "[w]here we can be confident, first, that the other party has had opportunity enough to meet [the pure point of law], secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it, and thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in court." Against this, Mr Hochhauser QC submitted for Elseco, that if there had been no appeal, Mr Lys would not have been able to invite the court to reconsider its order after it had been made. We agree with Elseco. Mr Lys succeeded in its claim before the Judge, and it is impermissible for him to seek to resile from his original position now. This alone is sufficient justification for us to dismiss this issue, but we will nevertheless proceed with the analysis in order to clarify the law.

87. The following definitions of "Wage" should be borne in mind:

> 1.Basic Wage is defined as "the employee's wage excluding any portion of an employee's wage received in-kind or as allowance for housing, travel, currency exchange (cashier), children's education, social and entertainment or any other type of allowance, bonus or commission payment, or overtime pay. The basic wage shall be calculated taking into consideration the total number of calendar days in a year." (Schedule 1 paragraph 3 of the DIFC Employment Law)
>
> 2."Daily wage" is defined as "the compensation received by an employee as wages for services performed during a working day. The daily wage shall be calculated taking into consideration the total amount of working days in a year."

88. From the above it can be seen that while the definition of "basic wage" expressly excludes certain elements from its calculation (e.g. bonus), the definition of "daily wage" is silent on this. Mr Lys thus argues that the very fact that the draftsman had chosen the term "daily wage" for Article 18(2) indicates that a calculation wider than "basic wage" was intended for the purposes of the penalty. In addition, Mr Lys pointed out that the term "daily wage" is not unique to Article 18(2) but is used in a wide variety of contexts ranging from maternity pay and sick leave to holiday pay.

89. Against this, Elseco points out that the definition of "daily wage" makes no mention of any element of bonus. Further, as a practical matter, in situations such as the case before us, where the bonus entitlement only accrues at a period after the date of termination, it would be absurd to expect an employer to make payment to the terminated employee within the 15 days post-termination period for a bonus entitlement that had not yet accrued (and possibly could not even have been calculated at that stage).

90. Having carefully considered the parties' submissions, we are of the opinion that the practical difficulties with Mr Lys' proposed reading of the "daily wage" mean that it has to be rejected. We do not go so far as to say that "daily wage" should be equated to "basic wage" for the purposes of Article 18(2) - there are many other exclusions in the definition of "basic wage" apart from bonus entitlement, and we were not addressed on them. For the present case, it is only necessary for us to decide whether bonus entitlements should be part of the computation of "daily wage", and we answer that question in the negative. In reaching this decision, we also bear in mind Mr Lys' caution regarding the impact our judgment would have on other Articles in the Employment Act. While the other Articles were mentioned at the hearing, they were only mentioned during Mr Lys' reply on the Cross-Appeal and were not elaborated on. Accordingly, we make no comment on how the term "daily wage" should be interpreted for those Articles, and our present findings should be taken to be limited to the Article 18(2) context.

Interest

91. Lastly, we turn to Mr Lys' second ground for its Cross Appeal, which is that the Judge had erred in granting an annual rate of 1% interest in circumstances where it was agreed that the appropriate annual rate would be 8% from the date that the principal sum was due.

92. The parties dispute the appropriate provision governing the rate of interest.

93. Elseco submitted that the rate of interest on judgments is provided in paragraph 2 of PD 1/2009 as follows.

> "PD 1/2009 provides that a judgment of the DIFC Courts shall carry interest, from the date the judgment is entered, at the rate of 1% over the Emirates Interbank Offer Rate ("EIBOR") or such other rate as the judge may prescribe in the judgment. For the sake of clarification, reference to EIBOR is to the EIBOR three months' reference rate as at the date of judgment." (emphasis added)

94. Based on the words emphasised, Elseco submitted that the Judge always retains a discretion to order interest, which the Court of Appeal should not overturn.

95. Mr Lys, on the other hand, submitted that the relevant provision is Article 17 of the DIFC Law of Damages and Remedies, which states the following.

"17. Interest for failure to pay money

> (1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.
>
> (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment.
>
> (3) Subject to the foreseeability standard of Article 12 of the Law, the aggrieved party is entitled to additional damages if the non-payment caused it a greater loss. The aggrieved party is entitled to additional damages if the non-payment caused it a greater loss.

96. Mr Lys thus argues that the Judge had no discretion to vary the amount of interest (subsection (3) does not apply to the facts), and so had erred in ordering such a low rate of interest.

97. These arguments are at cross-purposes. While paragraph 2 of PD 1/2009 concerns "Interest on Judgments" (i.e. post-judgment interest), Article 17 of the DIFC Law of Damages and Remedies concerns "Interest for failure to pay money" (which, in the absence of any specific provision otherwise, is a matter of pre-judgment interest). The confusion in argument probably arose because the Judge did not specify whether his order for 1% interest constituted pre- or post-judgment interest. In our view, since Article 17 of the DIFC Law of Damages and Remedies does not confer upon the Judge a discretion to award interest at a rate lower than "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment", the Judge's order stipulating annual interest at a rate of 1% must be taken to be his decision on *post-judgment interest*. It is clear from paragraph 2 of PD 1/2009 and Article 39 of the DIFC Court Law that the Court does in fact have a discretion to order a lower rate of interest than the stipulated "1% over the Emirates Interbank Offer Rate" contained in the PD. The Judge's order of annual interest at a rate of 1% was an exercise of that discretion, and we make no order against this decision.

98. That leaves us with the question of pre-judgment interest. Since the Parties had both submitted before the Court of First Instance that the Court should order interest at a rate of 8% from the date that the principal sum was due, it would appear that they viewed 8% as the appropriate rate of *pre-judgment interest* at that time. However, there was no elaboration on how this figure was derived, and the Parties were unable to explain the provenance of the 8% figure when queried, due in part to the fact that both sides were represented by different legal counsel in the Court of First Instance. In any event, we are bound by Article 17 of the DIFC Law of Damages and Remedies, which sets the applicable pre-judgment interest rate at "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment". For the avoidance of doubt, we now clarify that pre-judgment interest only applies to the principal sum and *not* the Article 18 penalty. This is plain from Article 17(1) of the DIFC Law of Damages and Remedies, which reads:

> "If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due." (emphasis added)

99. Having carefully considered the above, we now order as follows:

> 1.Pre-judgment interest at the "average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment" (Article 17(2) of the DIFC Law of Damages and Remedies) shall be determined by the Registrar.
>
> 2.Pre-judgment interest is not applicable to the Article 18 statutory penalty.
>
> 3. Post-judgment interest at a rate of 1%.

Costs

100. Although Mr Lys was the successful party in this litigation, he did not succeed on all his arguments. Taking into consideration the fact that the arguments in which he failed (the interpretation of "daily wage" and the appropriate rate of interest) are relatively small in the context of the case, we order costs in favour of Mr Lys in the sum equivalent to 75% of Mr Lys' reasonable costs, to be assessed by the Registrar if not agreed by the Parties.

JUSTICE SIR JEREMY COOKE

1.I agree with the abovementioned judgment and have nothing further to add.

H.E. JUSTICE OMAR AL MUHAIRI:

2. I agree with the judgment and have nothing further to add.

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Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 5 July 2017

At: 12pm