IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

MASON

Claimant/Respondent

and

MADISON

Defendant/Appellant

JUDGMENT OF H.E JUSTICE ALI AL MADHANI

UPON reviewing the Defendant's Appeal Notice dated 2 August 2021 (the **"Appeal"**)

AND UPON reviewing the judgment of H.E Justice Maha Al Mheiri dated 22 June 2021 (the **"Judgment"**)

AND UPON hearing the Defendant and the Claimant's representative at the Appeal hearing on 20 September 2021

AND UPON reviewing the relevant submissions and documents on the Court's file including the Defendant's and the Claimant's submissions in support of and in opposition to, respectively, the Appeal

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The Appeal is dismissed.

2. The Judgment is upheld.

3. The Defendant is entitled to the Claimant's performance under the Contract (as defined in [1] of the Schedule of Reasons). This may include installation of the Products in the Property (as both defined in [1] of the Schedule of Reasons), and it will almost certainly include delivery of the Products to the Property if installation is no longer required by the Defendant. The parties are requested to cooperate with one another until work under the Contract is concluded.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 6 January 2022
Time: 12pm

JUDGMENT

Introduction

1. This is the Defendant's appeal against the judgment of H.E. Justice Maha Al Mheiri (the **"Judge"**) dated 22 June 2021 by which she ordered the Defendant to pay the Claimant AED 16,779 (the **"Amount"**) for a door and windows (the **"Products"**) along with the Court fee in the amount of AED 838.95 (the **"Judgment"**). The Judge made these orders based on the following findings:

i) following the Defendant's acceptance on 23 November 2020 of the Claimant's offer, embodied in a document entitled "Order Confirmation" and dated 23 November 2020 (the **"Order Confirmation"**), the Claimant and the Defendant concluded a contract pursuant to which, amongst other things, the Claimant would procure, deliver and install in a property belonging to the Defendant (the **"Property"**) the Products in exchange for the payment of AED 24,759 (the **"Contract"**);

ii) the Defendant paid the Claimant a deposit in the amount of AED 7,980;

iii) the Claimant delivered to the Property the Products, which conforming to the specifications in the Order Confirmation;

iv) while the Claimant did not install the Products in the Property and ultimately took them back to its own premises, apart from some glass, this was because the Defendant rejected them, notwithstanding that the items conformed to the Contract; and

v) the Defendant did not pay the balance of AED 16,779.

2. In his second application for permission to appeal, made to the Court of First Instance, the first application having been rejected by the Small Claims Tribunal, in which the claim was heard and determined, the Defendant stated, amongst other things, that he "disagree[d] with the decision" of the Judge. The Defendant explained that he wanted to be provided with "Certificate from manufacture from England (frame/door/glass)" and "Custom, Shipping documents and delivery Note from country of origin". It is the Defendant's case that, whereas the Claimant had assured him that

the Products would be manufactured in England, only the door came from there while the parts for the windows were manufactured elsewhere.

3. The Claimant denies that this was the parties' common understanding at the time the Contract was concluded. It says that a salesman of the Claimant had proposed that the windows be sourced from other places in order to bring the overall cost down and that the Defendant had agreed to this.

Background with comments

4. Some time in early November 2020, the Defendant visited the Claimant's showroom in, Dubai. He wanted to buy a door and windows for a commercial unit he owns. It is common ground that the Defendant initially wanted anything he purchased from the Claimant to be sourced from England/the UK. The Defendant says that he spoke to the Claimant's employee, Ms Mia, while at the showroom and that she assured him everything would indeed be from England. (It is worth highlighting that the Claimant denies that the Defendant met Ms Mia in person on that occasion or thereafter and says that he had met with another employee, Mr Mistan, instead.)

5. On 12 November 2020, Ms Mia emailed the Defendant stating:

> Dear Mr. Madison,
>
> Many thanks for your enquiry. I am pleased to attach our proposal for sets of Origin's door which contains a full specification, pricing, terms and conditions, plus a summary at the beginning.
>
> The Origin Home is a collection of the finest quality doors and windows, designed and manufactured in Great Britain by Origin.
>
> *Elegant, simple and unique.*
>
> *Enhanced security features*

Two stamp-like images followed the words "Enhanced security features", one comprised of a partially shown British flag and the words "MADE IN BRITAIN" and the other a solid blue disc with the words "10 YEAR GUARANTEE". Following these images were further product descriptions:

> Our windows are:
>
> Thermally broken to help keep the costs of air-conditioning to a minimum
>
> Fitted with weather tight seals, keeping out wind, rain, sand and dust
>
> Guaranteed for 10 years for residential properties
>
> Fitted with a high security lock
>
> Fitted with thermal efficient glass to keep out the extreme heat
>
> Inspired by colour with over 150 RAL colours and a selection of woodgrain finishes to choose from.

Following these descriptions were links to further details about the Claimant's range of products.

6. The Court asked the parties when granting the Defendant permission to appeal the Judgment whether the Defendant could have reasonably understood from the 12 November email that all the products in the proposal were to be designed and manufactured in the UK. The Defendant's response was: "From email that I received from Mia. I understood that all products will be manufactured and delivered from Great Britain". The Claimant's response was:

> Our proposal is very specific and it follows the visit of Mr Madison to our office, a number of texts, and a phone call about price. In order to bring the price down, Mithi and Madani offered two fixed windows as being "Mason" not "Origin".
>
> During Mr Madison's visit to our showroom Mithi discussed the glass with Mr Madison. We recommended tempered glass instead of heat strengthened, that Mr Madison asked for, and we proposed "Mithal," as the best choice as it was colourless, had excellent thermal performance characteristics and was made by a globally recognised glass company in the Middle East. At this point, having everything sourced from the UK was no longer being debated, and the focus was on keeping the price down. The only thing coming from the UK now was the single door leaf and frame.

7. While the Claimant did not answer the question asked directly, it is to be inferred from what it did say that its position is that it should have been clear to the Defendant based on discussions he had with Mr Mistan at the showroom that "The only thing coming from the UK now was the single door leaf and frame", with this being confirmed later on the phone.

8. I note that the proposal referred to in the 12 November email was not shown to the Court. Nor is it clear to the Court why the email made reference to "sets of Origin's door", which suggests that the proposal was for more than one Origin door or that words are missing from this sentence, while Ms Mia meant to say "sets of windows and an Origin door" or something similar.

9. On 15 November 2020, Ms Mia sent another email to the Defendant:

> Dear Madison, Good Afternoon!
>
> Please find attached the Offer and the order confirmation document.

> Thank you for your order for the above project, for which I attach your Order Confirmation, against the revised proposal with just the folding doors as we discussed.
>
> If you are happy with this, please could you sign where indicated, scan the complete document and return as soon as possible.
>
> Also, please find attached the payment invoice. At this stage we would require a deposit of 40%. Please let me know when we can collect your deposit cheque, or if you wish to make a transfer to our bank account?...
>
> We will get the order into production as soon as we complete the site survey. Our customer services team will be in touch with you to arrange it.

10. The Court asked the parties when granting the Defendant permission to appeal what the revisions to the proposal were which Ms Mia referred to and why they were made. The Defendant answered: "This proposal was revised in context of payment terms. Mason Company Representative Miacollected advance payment on November 12". And the Claimant answered:

> In this document, which contained our order confirmation, the revision included the changes, listed [in response to the first question] above, made between Mistan and Mr Madison. They were agreed and made in order to reduce the price Mr Madison would pay for his door and windows, and we also altered the payment terms as requested by Mr Madison.

11. With respect, I do not think that either party has given a satisfactory answer to the question asked. Firstly, it does not appear that the revisions referred to by Ms Mia were related to either payment terms or to the types of products ordered, and instead appear to be related to the quantity of products: ". against the revised proposal *with just the folding doors as we discussed*". The word "just" here strongly suggests that before the revision there was "more than just" the folding doors (I use the plural "doors" following the email) which is a question of quantity, not quality. And I think the word "just" also suggests that the unidentified object(s) will be of the same category of objects as the identified object. For example, it can be said, "this proposal is just for one door as I have taken out the other door", while it would not make sense to say, "this proposal is just for one door because I have changed the type of window to bring the price down".

12. Moreover, the term "revised proposal" strongly suggests that there were at least two proposals. We know that a proposal was attached to the email of 12 November and that this proposal was not referred to as a revised proposal, such that that proposal may have retained the name "revised proposal" throughout the course of dealings between the parties notwithstanding that it itself was never subsequently revised. Indeed, it seems very clear that that was the first proposal. Ms Mia refers to it as following the Defendant's enquiry: "Many thanks for your enquiry. I am pleased to attach our proposal.". I am satisfied that the proposal in the email of 12 November was likely a first proposal (the **"First Proposal"**) and that the "revised proposal" in the email of 15 November was likely a revision of the First Proposal i.e. a second proposal (the **"Second Proposal"**).

13. It will be recalled that, commenting on the First Proposal, the Claimant stated that it "follow[ed] the visit of Mr Madison to our office, a number of texts, and a phone call about price. *In order to bring the price down, Steve and Glares offered two fixed windows as being `Mason' not `Origin*'" (emphasis added). As such, on the Claimant's version of events, the changes to the Defendant's order to bring the price down were already incorporated in the First Proposal. It is not clear how, then, these changes can also be an explanation for the revisions made to the First Proposal which resulted in the Second Proposal.

14. The Second Proposal was not shown to the Court. It is therefore not possible to know exactly what the revisions to the First Proposal, referred to by Ms Mia in her email, were. I am content to conclude, however, that the Claimant has likely made a mistake in its review of the documents.

15. On 23 November 2020, Ms Mia sent another email to the Defendant:

> Dear Madison,
>
> Please find attached the drawings for you to sign and stamp your approval on it.
>
> As discussed, An adjusted amount of 780AED additional will be added to the Order confirmation for the increase in height to 2200mm. The top part above this height will be done by you & is your responsibility, as confirmed earlier on the phone.
>
> Attached is the revised quote & OC as well for your payment references.
>
> Looking forward to the signed & stamped Drawings, to begin production.

16. The order confirmation referred to in the email of 23 November 2020 has been shown to the Court (the **"Order Confirmation"**). It is a 13-page document. For present purposes, the following product description and contractual provisions are most important:

> i) on page three, under the heading "SECTION 1 - PROPOSAL SUMMARY", the products the subject of the order are described as follows: "1 Set of Origin Single Door; 2 Set of Mason Fixed Windows";
>
> ii) on page six, under the heading "SECTION 3 - CONTRACT", it is provided that: "Any dispute arising out of or in connection with the contract which cannot be resolved amicably between each party within fifteen (15) days will be subject to the exclusive jurisdiction of the Courts of the Dubai International Financial Centre (DIFC)";
>
> iii) on page six also, the Defendant was supposed to sign a confirmation "that the specifications, colours and sizes detailed in this Order Confirmation Ref: 20152 dated 23th November 2020 based on Proposal Number Q200140.Rev2 are correct. I understand that this a is a binding order subject to the attached Mason Systems LLC - Terms & Conditions" (I note in passing that the Proposal Number ends with "Rev2" which presumably means "revision two" which presumably means, in turn, that there were two, not just one, revisions of the First

Proposal);

iv) on page seven, under the heading "MASON DOOR SYSTEMS LLC - TERMS & CONDITIONS" and the subheading "BASIS OF CONTRACT", it is provided that: "The Contract applies to the exclusion of any other terms that the Customer seeks to impose or incorporate. The Customer is responsible for ensuring that the Order Confirmation is complete and accurate. These Terms prevail over any inconsistent terms or conditions contained in or referred to in the Proposal, Order Confirmation, invoice, other documentation, or implied by trade custom or previous course of dealing";

v) on page 12, under the heading "MASON DOOR SYSTEMS LLC - TERMS & CONDITIONS" also and the subheading "ENITRE AGREEMENT", it provided that: "These Terms and the Order Confirmation constitute the entire agreement between the parties. The Customer acknowledges that it has not relied on any statement, promise or representation otherwise made or given by or on behalf of Mason".

17. Shortly after receiving Ms Mia's email of 23 November, the Defendant replied: "To Ms. Mia. Ok agree its go ahead with it. Thanks".

18. In early 2021, the Claimant delivered a door and two windows to the Property. During this process, the Defendant noticed a "Made in RAK" sticker on a pane of glass. The Defendant halted the installation of the Products and demanded to know where they came from. The Court does not have a lot of information about what was said between the parties on this occasion. It does know, however, that the Claimant left the Property with the Products, minus the glass.

19. The Defendant says that the Property was left without a door and windows for over six months. The Claimant has not disputed this.

20. On 12 April 2021, the Claimant issued these proceedings against the Defendant, seeking the balance of the Amount. The Defendant disputed the Court's jurisdiction and the Claimant's entitlement to the rest of the money under the Contract. The Defendant's case was that there was no contract between him and the Claimant and therefore no agreement opting into the Court's jurisdiction and no obligation on his part to pay the Claimant the Amount.

21. As stated above, the Judge below found that there was a contract between the parties, being the Contract, and that there was a clause opting into the jurisdiction of the DIFC Court and an obligation on the Defendant, in circumstances where the Claimant had complied with the terms of the Contract, to pay the balance of the Amount.

The Appeal Court's Findings

22. It is the Claimant's case, as I understand it, that the products it was bound to supply and that the Defendant was bound to pay for are found on page three of the Order Confirmation. It will be recalled that the order was stated to be for "1 Set of Origin Single Door; 2 Set of Mason Fixed Windows". The Defendant maintains that he had agreed only to products sourced from the England. Nothing was said in the Contract, however, on the question of where the products would be sourced from. There was no obligation upon the Claimant in writing, therefore, to source the products from the UK.

23. The confirmation that the Defendant was supposed to sign on page six of the Order Confirmation, the "basis of contract" clause on page seven and the "entire agreement" clause on page 12 each give support to the Claimant's position that there was no agreement between the parties that the windows would be sourced from the UK. Is it permissible to look behind a contract that contains terms such as these which attempt to make the written contract the only source of the agreement between the parties?

24. Under DIFC law, the answer to this question is a qualified yes. Article 30 of DIFC Law No. 6 of 2004 (the **"Contract Law"**) provides that:

> A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. *However, such statements or agreements may be used to interpret the writing*. (emphasis added)

As such, while a party to a contract containing a "merger clause" as it is referred to in the Contract Law cannot rely on, say, a statement made by his counterparty before the contract was concluded which contradicts or supplements something in the contract. But if the statement does not contradict or supplement the contract, then it can be used to interpret the contract.

25. As noted above, the Contract does not stipulate where the Products would be sourced from. It would follow, in my judgment, that a statement made by the Claimant that all products would be from England cannot, as a matter of logic, contradict the Contract. However, it would follow with nearly as much force that a statement made by the Claimant prior to the parties concluding the Contract to the effect that all products would be from England would, but for Article 30 of the Contract Law, supplement the Contract: in my judgment, but for Article 30 of the Contract Law, any requirement that the Products be sourced from England would have come from statements made by the Claimant prior to entering into the Contract, not from the Contract, with the former supplementing the latter. The effect of Article 30, in my judgment, combined with the basis of contract clause on page seven and the entire agreement clause on page 12, is that any such statements are barred from supplementing the Contract.

26. If it was important to the Defendant that the Products come from England, he should have ensured that this was expressly stipulated in the Contract-which after all contained the basis of contract clause and the entire agreement clause-before telling the Claimant to "go ahead" with the Contract i.e. accepting the offer and paying a deposit under the Contract. Both the Defendant and the Claimant have asked the Court, ultimately, to take his or its word, respectively, over the other's without providing any evidential support to the request. And as I have demonstrated above, in my view neither the Claimant's nor the Defendant's factual case adds up completely.

27. Pursuant to Article 49(1) of the Contract Law, "A contract shall be interpreted according to the common intention of the parties". Pursuant to Article 49(2): "If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances". As such, under DIFC law, a contract is first interpreted "subjectively", and if

the common intention of the parties cannot be established, it is to be interpreted "objectively".

28. In my judgment, it is not possible for the Court to determine the common intention of the parties on the question of the Products' requirements at the time the Contract was concluded and to interpret, in turn, the product description on page three of the Order Confirmation subjectively in accordance with the common intention so determined. Again, the parties have contradictory positions on this question with neither being supported by evidence. In such circumstances, the product description in the Order Confirmation must be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

29. In my view, there is nothing in the product description on page three of the Order Confirmation that would lead a reasonable person to conclude that the Products were required to be from England, or indeed from elsewhere. Any statement by the Claimant that the Products would be sourced from England would, in my judgment, be seen as supplementary to the Products' requirements as stipulated in the Contracts by reasonable persons of the same kind as the parties. It would follow that, by operation of Article 30 of the Contract Law, such a statement cannot be used to supplement the Contract.

30. The Claimant is, therefore, entitled to payment of the remainder of the Amount. However, the Defendant is also entitled to the Claimant's performance under the Contract. This may include installation of the Products in the Property, and it will almost certainly include delivery of the Products to the Property if the Defendant no longer requires their installation. I have not attempted an analysis of the parties' rights and obligations under the Contract, but unless the Defendant relinquishes any of his rights, it would be surprising if the Claimant was entitled to payment for the Products and to keeping those same products also. The parties are requested to cooperate with one another until work under the Contract is concluded.