IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

FIRST MIDDLE EAST DISTRIBUTION DMCC

Claimant

and

ORANGE CHAMELEON LTD

Defendant

ORDER WITH REASONS OF H.E. DEPUTY CHIEF JUSTICE ALI AL MADHANI

UPON reviewing the Amended Claim Form and Particulars of Claim dated 16 June 2023

AND UPON reviewing the Defendant's Application No. CFI-066-2022/2 dated 13 July 2023 to strike out the certain parts of the Claimant's Amended Claim Form and Particulars of Claim (the "Strike Out Application")

AND UPON reviewing the Claimant's Permission to Amend Application No. CFI-066-2022/3 dated 24 July 2023 seeking the Court's retrospective permission to amend the Amended Claim Form and Particulars of Claim (the "Claimant's Amendment Application")

AND UPON the reading the Second and the Thid witness statements of Ms. Sara Jayne Sheffield and the First and Second witness statements of Mr. Rashid Khan

AND UPON the virtual hearing held before me on 23 August 2023

AND UPON the reviewing the Parties' email correspondence addressed to the Court dated 25 and 29 August 2023

IT IS HEREBY ORDERED THAT:

1. The Defendant's Strike Out Application is dismissed in the absence of any substantial grounds to resist the Claimant's Application.

2. The Claimant's Amendment Application is granted.

3. The Parties are directed to provide brief costs submissions, no more than approximately 5 pages, by no later than **4pm on Tuesday, 7 November 2023**.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 31 October 2023
At: 2pm

SCHEDULE OF REASONS

1. This is a case with a number of preliminary issues arising out of the main question to be determined, namely whether the Claimant breached a fundamental and basic principle of procedure (RDC 18.2) when amending its statement of case following the transfer of these proceedings from the Small Claims Leasing Tribunal (the "SCLT") to the Court of First Instance (the "CFI") or rather simply and properly exercised a right afforded to it under RDC 53.41.

2. The Defendant's response to the purported breach was to file a strike out application against some of the amendments the Claimant had sought to introduce in its statement of case (the "Strike Out Application"), disputing the Claimant's interpretation of RDC 53.41. In reply to the Strike Out Application, the Claimant filed an application with the Court for retrospective permission to amend its claim (the "Amendment Application"), to which the Defendant asserts is a clear indication that the Claimant lacks the necessary confidence in their conduct. Therefore, the underlying issue is one related to the proper interpretation of RDC 53.41.

3. Following the parties' oral arguments at a hearing of this application on 23 August 2023 ("Hearing"), the Court issued an order dated 5 September 2023 with reasons to follow, granting the Claimant retrospective permission to amend its statement of case and proceed with these proceedings with its Amended Claim Form and Particulars of Claim (the "Order"). In doing so the Court found that the retrospective permission is consistent with the wording of RDC 53.41, and did not identify any grounds or any basis upon which the Amendment Application would cause the Defendant any prejudice, particularly when the proceedings are still at an early stage and the Defendant has not yet pleaded a defence (thereby they are not faced with the issue of amending their statement of defence).

4. Based on the above, the Defendant was directed to file a defence in response to the Claimant's Amended Statement of Case, within 14 days following the date of my Order. The Court's decision was primarily based on the notion that the Defendant has had full knowledge of the

Claimant's proposed amendments which were served on 16 June 2023, thereby there were no reasonable grounds to delay these matters any further

5. The legal issues giving rise to these proceedings will be addressed in detail below, however I first summarise those factual maters which are relevant to the Amendment Application and the Strike Out Application. I have carefully reviewed all submissions of the parties including oral submissions made at the Hearing, and if I omit to reference an argument or an authority that had been relied on this does not mean that it has been overlooked or not considered.

6. This application is a trial of three legal issues which the Court will need to determine:

(i) the true interpretation of RDC 53.41 in the context of reallocation of an SCT Claim to the CFI;

(ii) the Defendant's Strike Out Application and whether it was the most appropriate recourse to the introduced amendments following the transfer of the SCT claim to the CFI; and

(iii) whether the Claimant was required to comply with its procedural conditions prescribed under RDC 18.2 by requesting the Defendant's consent to amend its statement of case, failing that the Court's permission to plead an alternative remedy in light of the Court's assessment of RDC 53.41; and

Background to the Applications

7. The procedural history leading up to the Amendment Application is straightforward and the relevant facts are briefly chronicled as follows:

8. The Claimant is the owner of NT-15-01 situated in Emirates Financial Towers (the "premises"). The Defendant is the tenant of the premises pursuant to a lease agreement dated 1 July 2021. The lease plainly required the Defendant to pay the Claimant annual rent of AED 2,190,000, however the payment terms of the lease were agreed to be varied to take into account the lasting impact of COVID-19 on the Defendant stipulating that the rent would be payable to the Claimant in daily sums of AED 6,000 (the "Lease Amendment"). The Lease Amendment provided that with effect from 1 October 2021, the rent of AED 6,000 was payable for each calendar day and in the event of an outstanding rent exceeding AED 180,000, the Claimant was entitled to terminate the lease with immediate effect and without the Defendant's consent, by virtue of clause 3 of the Lease Amendment.

9. On 29 September 2022, the Claimant issued a notice to terminate the lease due to the Defendant's breach of its payment obligations. Thereby, clause 3 of the addendum was effectively in operation when the Defendant stood over the agreed threshold for termination (denied and rejected by the Defendant).

10. On 4 October 2022, the Claimant issued proceedings against the Defendant before the CFI in DIFC Courts (based on the claim value), the primary claim is founded on the Claimant's contractual entitlement and legal entitlement which developed as a result of non-payment of rent, which meant that the lease is terminated, the Claimant was entitled to vacant possession, outstanding rent, liquidated damages and other related relief. Prior to service of this claim form, the Claimant's legal representation changed

11. On 14 December 2022, the Claimant amended the claim form pursuant to RDC 18.1 (without requiring the permission of the Court and provided that the statement of case has not been served).

12. On 15 December 2022, the amended claim form was served on the Defendant. However, Chief Justice Zaki Azmi transferred the claim to SCT, by virtue of RDC 53.2(4). It remained in the SCLT despite the Claimant's request to transfer it back to CFI by virtue of an order issued by H.E Justice Maha Al Mheiri dated 27 January 2023. As such, the claim was listed for a hearing in the SCLT. The Defendant issued no defence to the claim.

13. On 10 February 2023, the Director of the Defendant, Mr Magdi Elamin ("Mr Elamin") issued a witness statement in response to the Claimant's amended claim stipulating that the payment of AED 1,702,700 with respect to the rent of the premises was paid to the Claimant between 27 February 2022 - 15 September 2022. In Mr Elamin's witness statement, the primary relief sought by the Defendant was that the proceedings before the DIFC Courts should be stayed pending an outcome of a criminal complaint lodged with the Dubai Police.

14. On 2 June 2022, H.E Justice Nassir Al Nasser (the "Judge"), transferred the claim back from SCLT to CFI on the basis that the nature of the claim has become more complex in terms of facts, laws and evidence to the extent that was no longer appropriate for the claim to be heard and determined by the SCLT, relying on RDC 53.41(4) and (7). The Judge also directed that the parties are to file and serve an agreed timetable for the CFI proceedings.

15. On 9 June 2023, the Defendant's solicitors wrote to the Claimant with a proposed timetable of the filing the Claimant's claim form and particulars of claim suggesting that the "Claimant shall file and serve (1) an Amended Claim Form in P7/01 format and (2) Particulars of Claim by 4pm on 12 July 2023". On the same day, the Claimant responded, stating that it would be "in the position to file and serve the Amended Claim Form and Particulars of Claim by 4pm on Friday 16 June 2023".

16. On 13 June 2023, a consent order (the "Consent Order") was issued setting out the agreed timetable between the parties, whereby the Claimant was expected to serve its Claim form and Particulars of Claim by 4pm on 16 June 2023 and the Defendant is to file and serve the Defence within 28 days, no later 14 July 2023, by 4pm.

17. On 16 June 2023, in accordance with the agreed timetable, the Claimant served its claim form and particulars of claim. It is trite that the amendment made to the particulars of claim and claim form include a new remedy whereby the Claimant seeks an order from the Court declaring that the lease was terminated with effect from 5 October 2022 and a new alternative claim for rent arrears which proceeds on the basis that the lease has not been terminated.

18. On 16 July 2023, the Defendant was expected to file its statement of defence in response to the amended claim form, instead, it served its strike out application (the "Strike Out Application") against the amendments introduced in the Claimant's statement of case. The Defendant's draft order expressly sought to dismiss the alternative remedy sought under (i) paragraph 18(a), (ii) paragraph 19 - paragraph 24 and Prayer I of the Claimant's amended particulars of claim.

19. It is undisputed that the Defendant remains in the possession of the premises which are being operated as a restaurant, trading as Crab Market Seafood & Bar in Emirates Financial Towers.

Parties' submissions

20. I now turn to chronicle the parties' submissions in detail, demonstrating the way in which the competing contentions have evolved throughout these proceedings.

21. The Defendant contends that the Claimant's Amendment Application should be dismissed on four grounds (set out below). In reply, the Claimant submits that the Defendant's Strike Out Application is nothing but a mere delay tactic, and it is unjust and disproportionate for the Defendant to withhold their consent or object to the proposed amendments taking into the account the stage the amendments were introduced; the fact that the nature of the amendments could have not prejudiced the Defendant's position as no defence had been filed; and the Claimant's understanding of the procedural effect of RDC 53.41. Thereby, the Claimant submits that when the Court is assessing the validity of the Defendant's Strike Out Application, it ought to be dismissed in its entirety.

22. First, the Defendant submits that the Claimant's reliance on the wording of RDC 53.41 to amend its statement of case without the Defendant's consent or the Court's permission is completely misconceived and wrong. The true meaning and effect of RDC 53.41 is to allow the Court to consider whether the financial value, subject, nature, complexity of the SCT claim make it more suitable for the CFI track. As such, if the Claimant contends that it can amend its claim in whatever way it intends between the transfer of the SCT to CFI then this would ultimately make the Court's task impossible because the Court would not know the value, subject, nature and the complexity of the case. The Defendant finds it difficult to understand why a transfer of an SCT claim to the CFI should permit the Claimant with the opportunity to amend its claim, particularly when that is not the purpose of the transfer.

23. As a result, the Defendant says based on the Claimant's incorrect interpretation of RDC 53.41, their conduct resulted in a "cynical breach" of the procedural requirements prescribed under RDC 18.2. Thereby, granting the Amendment Application would fundamentally undermine the efficacy of RDC 18.2 by sending a message to all litigants that it is permissible to amend the statement of case without consent or the Court's permission because even if the other side objects, the relevant party may seek retrospective permission to apply to amend its case. As such, the retrospective Amendment Application should be dismissed.

24. In reply, the Claimant puts forward that the provision of RDC 53.41 is clear in that following the transfer of an SCT claim to the CFI, it must be progressed as a "fresh claim" meaning that the Claimant is at liberty to file a "fresh" claim as though the case had been newly brought in before the CFI. The effect of the transfer places the Claimant in a position where it would be acceptable to amend or include an alternative remedy in its statement of case as though it was filing a fresh case

25. In support of the Claimant's argument, it draws the distinction between RDC 53.41 and the rules which preceded its introduction, asserting that the old rules, RDC 53.37, only contemplated a transfer from the SCT to the CFI as the extent of the jurisdictional powers granted to the SCT Judge, ".[w]here appropriate, the SCT Judge may order that the small claim be transferred to the Court of First Instance. When deciding whether to do so.". Therefore, the reallocation under the old rules could be distinguished from the current position which expands the reallocation procedure to include the claim "to be progressed as a fresh claim". Consequently, the Claimant submits that the introduction of RDC 53.41 was an obvious effort to depart from the mere transfer of claims, otherwise the wording of "fresh claim" would be of no effect.

26. Thereby, based on the Claimant's understanding of RDC 53.41 and its true effect following the amendments to Part 53, it submits that the issue of RDC 18.2 did not arise, as the necessity to request the Defendant's consent or to file an application to amend never arose in the circumstances of this case.

27. Second, the Defendant argues that even if the Claimant misunderstood the effect and the true meaning of the reallocation procedure under RDC 53.41, any misunderstanding was rectified by its letter of 9 June 2023 wherein the parties were seeking (as required) to agree on the procedural timetable of the case. The Defendant says that their proposed directions contemplated that the Claimant file and serve an "amended" claim form, and by reference to the "amended" claim form it extended only to the filing and serving of the Claimant's original claim form of P53/01, prior to the reallocation order onto a P7/01 format. Thereby, the citation "amended claim form" was not providing consent to introduce a new remedy, rather it was a procedural requirement in which the Claimant was expected to transpose the original content of the claim form onto a new format.

28. In response, the Claimant rejected this argument, asserting that it was nonsensical and misconceived. The original claim form of 14 December 2022 had already been filed in CFI-066-2022 on P7/01 form prior to the Chief Justice's Order of 15 December 2022 directing the Registry to transfer the claim to the SCLT. Further, there had been several factors which compelled the Claimant to believe that the Defendant provided its consent to the submission of an amended claim from and particulars of claim. In support of their submission, the Claimant relies on the original directions proposed by the Defendant granting the Claimant a period of one month to file and serve the original claim form and particulars of claim, arguing that it is irrational and inconsistent with the Defendant's case to submit that it had only anticipated that the Claimant would serve an identical claim, but on in a new format, exclusive of any amendments. The Claimant further submits that in response to the Defendant's letter of 9 June 2023, the Claimant's solicitors stated that it would be filing an "amended claim form" and there had been no objections from the Defendant's solicitor on that proposition, or a reminder requirement to file an application to amend.

29. Third, the Defendant's primary objection to the Amendment Application is founded on the notion that the introduced amendments resulted in an abuse of process whereby the Claimant had used the reallocation procedure of RDC 53.41 in an unlawful manner, contending that the purpose of a transfer from SCT to CFI is simply to ensure that the claim proceeds under the most appropriate procedure and before the most appropriate

tribunal and ought not be construed as an invitation to the Claimant to amend its statement of case. In addition, if the Claimant had misunderstood the true effect and meaning of the reallocation rules under RDC 53.41, the Consent Order plainly provided that the Claimant shall file and serve the Claim Form and Particulars of Claim by 16 June 2023, and did not contain a provision for the Claimant to amend its statement of case.

30. The Claimant submits that the introduced amendments are precisely the type of amendments which the spirit of RDC 18.12 contemplates, that an application to amend should whenever possible be dealt with by way of consent, unless there are substantial grounds which prompt the respondents to object or withhold its consent. Thereby, the Claimant submits that in the absence of any objections on the merits of its alternative remedy, the Court should draw an inference that the Strike Out Application is nothing, but a delay tactic deployed by the Defendant. In support of the Claimant's submission, it relies on its letter of 14 July 2023 where it invited the Defendant to provide its consent to the introduced amendments to avoid a contested hearing, however that invitation had been ignored.

31. Fourth, the Defendant submits that amending a statement of case without the Court's permission or the Defendant's consent is a serious breach and given the "scale of the amendments" introduced in the Claimant's statement of case, the retrospective Application to amend must be dismissed. However, if the Court were to grant the proposed amendments, granting the retrospective permission to amend, the Claimant ought to meet the test for relief from sanctions. In support of the Defendant's submission, it relies on the authority of *Mad Atelier International BV v Manes* [2022] which endorsed and adopted the English Court of Appeal approach in *Dentons v TH White Ltd* [2014] 1 WLR 3926.

32. The Claimant rejects the Defendant's assertion submitting that its primary case remains unchanged and if the Defendant is mainly resisting the Amendment Application based on a non-compliance with the RDC, which was based on an innocent misunderstanding as to the scope of the order that was agreed, the Claimant has taken the required steps to cure it, out of an abundance of caution. The Claimant opposes the Defendant's Strike Out Application asserting that the Court has various case management powers which could be implemented to cure any purported breach which may have been committed, as alleged by the Defendant. Even in the extreme circumstances, the Court should not strike out a valid claim at this stage of the proceedings, particularly when the amendments arose out of the same facts of its primary pleadings.

33. The Claimant further submits that the alternative remedy sought in its amended statement of case was only introduced following the Defendant's submissions at the SCLT hearing. As such, when the case was reallocated to the CFI track, the Claimant pleaded an alternative remedy to its primary claim for termination and liquidated damages, being arrears in rent accruing up to date in respect of which the Defendant does not have a viable defence. Further, the Claimant asserts that the substance of its case has not changed, and its primary claim is identical to its claims form advanced before the SCLT.

Discussion and analysis

The interpretation of RDC 53.41

34. I have set out the parties' submissions above in order to detail the way in which they developed throughout, resulting in a protracted procedural history which gives rise to number of issues advanced by the parties. Those issues can either be excluded from further consideration or dealt with swiftly in this judgment.

35. The starting point for the Court's determination is the question of the objective meaning of RDC 53.41. The answer to this question will ultimately determine whether the Claimant required the Defendant's consent or the Court's permission to introduce an alternative remedy in its statement of case following the issues raised at the SCLT Hearing.

The Claimant contended that by relying on RDC 53.41 they were not required to request the Defendant's consent or the Court's permission to amend their statement of case. I have no hesitation in determining that RDC 53.41 provided the Claimant with the opportunity to file its case as a fresh claim, and was therefore at liberty to file an amended claim as it saw fit, as though it was filing an originating claim before the CFI for the first time. The Defendant's assertion that the term "fresh proceedings" in RDC 53.41 extends only to transposing the content of the claim form from P53/1 to P7/01 is fundamentally wrong and wholly inconsistent with the true intention and meaning of that wording.

36. The decision to transfer an SCT claim to the CFI is ultimately a discretionary one to be exercised at the Judge's own volition. In the context of the re-allocation of SCT claims to CFI pursuant to RDC 53.41, the true meaning of this provision consists of two elements (this being where DIFC Rules depart from the Civil Procedure Rules in England and Wales).

37. First, where appropriate, the assigned SCT Judge may exercise their discretion in transferring the SCT claim to the CFI having considered the factors prescribed under RDC 53.41(1) - (10) in order to determine whether a transfer should be ordered. In those circumstances, when the SCT Judge directs that the proceedings be transferred to the CFI, this will result in the SCT claim being reallocated onto the CFI track as a fresh claim, meaning it will go back to its initial stage as if it had not been tried or heard before an SCT judge (irrespective of whether the case had developed to an extent that the parties attended a consultation, failed to reach a settlement agreement or even attended an SCT hearing).

38. It should be emphasised that the judicial discretion arising from RDC 53.41 is not connected with a formal event, rather the SCT Judge is at liberty to exercise those powers as soon as the claim is assigned to them, thereby permitting the SCT Judge to exercise their reallocation powers prior to a hearing, and at any point when reviewing and considering the facts of the case, or during the SCT hearing as was the circumstances in this case.

39. Second, the meaning of the phrase "fresh claim", which is the main issue of dispute in this case, is to simply provide claimants with the opportunity to amend and replead their case as if they were filing a brand new claim before the CFI. Therefore, "to be progressed as a fresh claim" means once reallocation to the CFI takes effect, the transferred case will begin again and will not proceed at the same stage as it had been on before the SCT, for instance the original SCT claim will not immediately proceed to a CMC or a pre-trial review hearing before the CFI.

40. Based on the above, the Claimant has correctly understood its procedural position in respect of RDC 53.41 and it is my opinion that they properly made use of what was appropriately available to them. As a result, in the context of the Court's interpretation of RDC 53.41 above, the requirements prescribed under RDC 18.2 were not relevant to the Claimant who was at liberty to amend its case pursuant to RDC 53.41. The

Claimant therefore did not require the Defendant's consent or the Court's permission to introduce its amended statement of case.

41. In addition to the Claimant's sound understanding of RDC 53.41, I am satisfied to conclude that the Claimant's conduct was not flawed as there were various indications which prompted the Claimant to believe that the Defendant provided its consent to the submission of an amended claim form and particulars of claim following the reallocation of the SCT claim. My observations on this are three-fold.

42. First, I rely on the language expressed by the Defendant in their exchanges with the Claimant when seeking to agree on the procedural timetable and the original directions proposed by the Defendant granting the Claimant a period of one month to file and serve the claim form and the particulars of claim. One would assume that the Defendant envisaged that the Claimant would be serving a fresh claim form, as otherwise it would appear irrational to grant the Claimant a period of one month simply to transpose their original content from one form to another. As such, the proposed directions are wholly inconsistent with the Defendant's case that RDC 53.41 only involved transferring the original content of the SCT claim to a CFI form.

43. Second, on 9 June 2023, it was clearly indicated by the Claimant's solicitors that it would be filing its *"Amended Claim Form and Particulars of Claim"*. In response to those proposed directions there was no objection or any indication from the Defendant's solicitors that there was an issue with the Claimant filing an application to amend its statement of case, in circumstances where it was clear from those exchanges that an "amended" claim form and particulars of claim were to be filed accordingly

44. Third, it is inconsistent for the Defendant to assert that they had understood and envisaged that the "amended" claim form, which arose from the above exchanges with the Claimant, would only mean transposing the contents of the Claimant's original claim form onto a new format being P7/01, wherein other material factors suggest otherwise, namely the original claim form of 14 December 2022 had already been filed in CFI-066-2022 on P7/01. As such the Court finds it difficult to understand the logic behind the Defendant's contemplation that service of an identical claim form with the same content but onto a different form would be made.

45. Further, even if there had been confusion as to what was intended to be included in the claim form and the particulars of claim, it was a misunderstanding which did not cause the Defendant any prejudice. In fact, the Claimant demonstrated their readiness to rectify any non-compliance to the extent there had been any (but which they did not accept) for the sake of proceeding with their claim without any further delay. In contrast, the Defendant failed to demonstrate any willingness to proceed with this case in good faith or find a common ground with the Claimant to avoid a strike out application or a contested hearing. In compliance with the terms of the Consent Order, the Claimant filed its amended particulars of claim on 16 June 2023 awaiting the Defendant's statement of defence to be filed on 13 July 2023. Between 16 June 2023 and 13 July 2023 there was no communication from the Defendant expressing any objection to the introduced amendments to allow the Claimant to cure what the Defendant later described as a "cynical breach" of the RDC. Instead, the Defendant responded to the Claimant's amendments by filing a Strike Out Application.

46. To say the least it would have been preferable for the Defendant to have demonstrated a degree of willingness to avoid any unnecessary and expensive satellite litigation triggered by its Strike Out Application. As such, and in the absence of an explanation as to why the Defendant failed to communicate with the Claimant prior to issuing its Strike Out Application thereby denying the Claimant any opportunity to justify why it had submitted an amended statement of case, the Court has no other alternative other than to conclude that this was simply a cynical delaying tactic deployed by the Defendant.

Strike Out Application

47. Turning to the Defendant's Strike Out Application. Pursuant to RDC 4.16, the Court may strike out a statement of case if it appears that, (1) it discloses no reasonable grounds for bringing or defending the claim; (2) the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or (3) there has been a failure to comply with a Rule, Practice Direction or Court Order.

48. The court uses the power to strike out a statement of claim sparingly, pursuant to the overriding objective of RDC 1.6 (1) - (4), meaning that the Court should not interfere with the administration of justice unless there is a justifying reason to do so. Strike out orders are an order of last resort. Even where a party's case is defective, or there has been non-compliance with the RDC, the Court will first look to respond to those issues by means of applying other alternative mechanisms to cure or fix any irregularities avoiding strike out orders. This approach is echoed in Article 32(f) and Article 44 of the DIFC Court Law, which grants the Court the jurisdiction to issue an order or provide directions on its own initiative if it deems necessary, therefore, "no proceedings in the DIFC Courts are invalidated by a technical defect or irregularity, unless the DIFC Courts orders otherwise". Thereby, invalidating an otherwise meritorious claim on a technicality is rarely the answer.

49. Nonetheless, where it appears to the Court that a statement of case is in fact an "abuse of the court's process" the court should undoubtedly uphold the private interest in the "finality of litigation and the public interest in the proper administration of justice": *Tinkler v Ferguson and others* [2021] EWCA Civ 18, Peter Jackson LJ.

50. The Defendant sought to strike out the Claimant's proposed amendments in its statement of case pursuant to RDC 4.16 (2) and (3), arguing that the Court's permission had not been sought by the Claimant and such conduct ought to be construed as an abuse of process. The Defendant strongly opposed the Claimant's reliance on RDC 53.41, submitting that it resulted in an inevitable failure to comply with the requirements prescribed under RDC 18.2. Thereby, the Defendant's primary reason in striking out the relevant amendments is based on the notion that the Claimant's flouting of the Consent Order and the DIFC Rules should be met with a strike of the Claimant's introduced amendments.

51. As such, the basis of the Strike Out Application is not founded on the substantive nature or the merits of the amendments included in paragraphs 18 (a), paragraph 19 - 24 and the Prayer I of the Particulars of Claim, instead it is solely advanced on the Claimant's purported failure to comply with RDC 18.2 and the Consent Order.

Abuse of process

52. I will now address the Defendant's specific argument that the conduct of the Claimant amounted to an abuse of process, albeit the foundation

of that argument falls away in light of my earlier findings on the correct interpretation of RDC 53.41.

53. There is no concise definition of the phrase "abuse of process" in the RDC nor Part 3 of the CPR. However, the English High Court in *Attorney General v Barker* [2000] EWHC 453 (Admin) described abuse of process as "using that process for a purpose or in a way significantly different from its ordinary and proper use". In Asturion *Foundation v Alibrahim* [2019] EWHC 274 (Ch), the Court established a two-limb test when assessing strike out applications founded on the notion of abuse of process. The first limb involves the court's determination of whether the claimant's conduct was an abuse of process. The second limb is, if such conduct was an abuse of process, the court has to exercise its discretion as to whether or not to strike out the claim. It is at that second stage that the usual balancing exercise and in particular consideration of proportionality, becomes relevant.

54. In this matter the Claimant adhered to the express terms of the Judge's Consent Order by filing its statement of case to the CFI in accordance with RDC 53.41. Thereby, the Defendant's assertion that the Claimant was required to file a permission to introduce an alternative remedy following the Consent Order is without foundation and must be dismissed.

55. I am satisfied that the Claimant did not use the reallocation process or any other procedural process in any way that is different from the ordinary and proper use that was available to it under RDC 53.41. Parties are at liberty to amend their statement of case at any point prior to its service on any other party, I rely on RDC 18.1 which plainly grants the serving parties the opportunity to amend their statement of case without the consent of the other party and the Court's permission, provided that the statement of case had not yet been served. As such, the requirement which the Claimant would have had to fulfil under RDC 18.2 (consent from the Defendant or the Court's permission) simply did not arise because the only situation in which the Defendant's consent or the Court's permission was required for amendments is if the Claimant's statement of case (claim form and particulars of claim) had already been served on the other side, which is not the case in this application. There has been no violation of the relevant rules nor any non-compliance with the Court's order committed by the Claimant, as alleged by the Defendant.

56. Further, even if the Court were to have agreed with the Defendant's proposition that RDC 53.41 meant that the Claimant was required to file an application for permission to amend its statement of case (a proposition which the Court has rejected above), RDC 18.12 plainly contemplates questions of amendments and consequential amendments to be dealt with by way of consent, meaning that by virtue of RDC 18.12, the Defendant was invited not to withhold its consent, unless there were substantial grounds to object to those amendments.

57. I note that the Defendant was provided with an opportunity to consent to those amendments, I rely on CRS's letter of 14 July 2023 to the Defendant, whereby they invited the Defendant to provide its consent to the alternative remedy sought in the statement of case. The introduced amendments are precisely the type of amendments which respondents are invited to provide their consent to, and in the context of this case the introduced amendments could not have prejudiced the Defendant's position given the fact the Defendant had not filed their defence at that stage and the substance of the entire claim remained unchanged. However, the Defendant ignored the invitation and opportunity to engage and either provide its consent or outline any reasonable grounds upon which it withheld its consent. Presumably, one may deduce, because there was no clear nor justifying reason for the Defendant to withhold its consent to the proposed amendments. Particularly when as set out above the amendments did not affect nor have any impact on the nature of the dispute, the breach that is purported to have occurred and/or the value of the claim.

58. It is unfortunate that the Defendant has made the strong assertion that the Claimant has committed a cynical and fundamental breach of the rules in failing to file an application for permission to amend, whilst plainly failing to comply itself with RDC 18.12 by neither consenting nor providing a substantive ground upon which to object to the nature of the amendment proposed.

59. Given the above, the Strike Out Application is dismissed on the basis that there has not been an abuse of process by the Claimant as pleaded by the Defendant.

Merit of the case

60. Even if the Defendant had sought to rely on the substantive nature of the amendments, I would have dismissed the Strike Out Application.

61. The underlying proceedings concern the Claimant's attempt to reclaim possession of its premises based on the Defendant's purported failure to pay rent due between February 2022 and September 2022. The amendments to the Statement of Case arose following the Defendant's oral submissions at the SCLT Hearing in which it stipulated that it made payments of AED 1.7 million between 27 February 2022 and 15 September 2022, prompting the Claimant to seek alternative damages arising from the terms of the lease.

62. At the outset, the Court should assume that for the purposes of a strike out application the pleaded facts are true, adopting a generous approach when assessing the pleadings particularly when at this stage of the proceedings the Claimant does not have access to all of the evidence pertaining to their pleadings. As such, the Court will not engage in a mini trial at an interlocutory stage of the proceedings particularly in the context of a strike out application on the basis that the power to strike out a pleading relates predominately to the adequacy of the pleading alone, and not with extraneous materials.

63. Further, even if RDC 53.41 was not in play, and from the outset the case had been allocated before the CFI, the danger of the Court adopting a narrow construction would cause an unjustified restriction on the Claimant's right to access a court and justice, particularly when, in this context, the Claimant is seeking to amend its remedies by relying on facts that were raised by the Defendant.

64. The effect of the introduced amendment has not founded a new cause of action, in fact the alternative remedies arise out of the same facts that are already in issue. The Claimant is not attempting to bring new points as means of bringing a further claim but rather is simply adopting points already made by the Defendant in its oral submissions. The cause of action remained the same and the facts relied on were those originally alleged or advanced in the defence.

65. Thereby, I have no hesitation in concluding that the matter must proceed to a full trial with the amended pleadings, with examination of the factual and expert evidence which will be required to determine the live issues. The disputed issues will need to be explored in detail through cross-examination and submissions at trial. These are not matters that could be determined on a strike out application.

Last resort

66. Even if the Defendant's observation is correct and the Claimant failed to comply with RDC 18.2, the power to strike out a valid claim is not exercised frivolously, particularly when the conduct of the Claimant exemplifies its readiness in curing any purported breach.

67. It is pertinent to note that the Court has various powers at its disposal to exercise in cases of non-compliance, and it is often appropriate for the Court to extend time for compliance if the matter can be rectified in a less draconian measure as opposed to striking out a valid claim.

68. Even in the extreme circumstances where parties have participated in fictitious claims of another party, the English Courts have held that although the parties' dishonesty amounted to a serious breach of the overriding objective, it did not affect the Court's ability to have a fair trial of their genuine claims and considering all circumstances, the court held that it was inappropriate to strike out the claim. In dealing with the dishonesty and abuse, the court ordered an indemnity costs order rather than penalising the parties conduct by striking out their claim: *Ul Haq and others v Shah* [2008] EWHC 1896. Indeed, even in most serious breaches, the English Court dealt with abuse of process in a lesser restrictive and draconian method than the Defendant's proposed sanction which is wholly "unjust and disproportionate" in light of RDC 53.41.

Retrospective permission to amend

69. Moving on to the Claimant's Amendment Application, filed out of caution as the Claimant's had understood (correctly) that the formal position in the context of RDC 53.41 was that a formal amendment application was not necessary. The Claimant clearly intended to adhere to any DIFC procedures in anticipation of proceeding with the claim and in an attempt to save the parties time and costs, this is clearly echoed in the Claimant's correspondence of 14 July 2023.

70. The retrospective permission is granted albeit it was not required to be filed by the Claimant by virtue of RDC 53.41.

71. Turning to the Defendant's submission that granting the Claimant's retrospective Amendment Application would send the wrong message that all litigants have an unfettered right to amend their case despite the respondents' objection to their proposed amendment, and without the necessity of the Court's permission in the context of reallocating an SCT claim to the CFI.

72. The wording of RDC 53.41 is clear in the sense that following the transfer of an SCT application, a claimant is liberty to file a fresh claim contemplating that the pleaded issues will not have fully developed at the time an order of reallocation is made under RDC 53.41. Further, the true purpose and objectives of RDC 53.41 when contrasted with RDC 53.37 is clear, the previous position only anticipated a transfer of an SCT claim to the CFI at the time an order of reallocation is granted, whereas RDC 53.41 when introduced was plainly an attempt to widen that interpretation by allowing parties to file their case as a "fresh claim" departing from the restrictive position of RDC 53.37

73. Therefore, it is wholly wrong to assume that the RDC 53.41 should be applied narrowly when it plainly confers a right to parties to file "a fresh claim" if the Court is to adopt a restrictive approach, it would suggest that the amendment to Part 53 and the introduction of the phrase "fresh claim" would otherwise have no effect.

74. To conclude, the Court will not deny the litigants of their unfettered right afforded under RDC 53.41 and it certainly will not apply a narrow construction of the wording "to be progressed as fresh proceedings" when the legislative intention of the amendment to Part 53 had been to extend the reallocation of an SCT claim to include filing a fresh claim in this way, the provision has clearly so provided. It is pertinent to note that the Court's assessment and interpretation of RDC 53.41 is not based on a case-by-case basis, rather this is the true effect of the provision, and the Court will not deprive the RDC from its true purpose and effect.

Conclusion

75. I find the Defendant's case on the issue of amendments to be contradictory and self-serving. The Defendant conveniently contends that the Claimant's conduct is a cynical breach of the fundamental rules of procedure without the slightest observation that their resistance to the Claimant's Amendment Application and their insistence on a contested hearing is precisely the type of conduct which is in breach of the "basic fundamental rules of procedures" particularly when the Court rules expressly invite respondents to agree to such amendments absent of any substantive grounds confirming that those amendments are meritless, which has not been established in any of the submissions made by the Defendant.

Cost

76. The parties are to provide short submissions on costs of no longer than five pages long directing the Court with their submissions.