ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Khalifa bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

COURT OF FIRST INSTANCE
CIVIL DIVISION

BETWEEN

ERIK RUBINGH
CLAIMANT

AND

VELOQX RSC LIMITED
DEFENDANT

JUDGMENT

Neutral Citation:	[2020] ADGMCFI 0005
Before:	His Honour Justice Sir Michael Burton GBE
Decision Date:	13 July 2020
Decision:	1. Judgment for the Claimant in the sum of US$1 million. 2. Interest on the judgment sum at 2% per annum from 14 days after the date of termination of the Claimant's employment, i.e. 14 days from 21 April 2020 until the date of judgment in the amount of US$ 3,780.82. 3. Interest upon the aforesaid sums specified as due and owing as at the date of judgment herein to accrue at the rate of 9% per annum (pursuant to section 39 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 and Practice Direction 4) until payment. 4. Claimant's cost submissions to be filed and served by no later than 4.00 pm on 20 July 2020. 5. Defendant's cost submissions to be filed and served by no later than 4.00 pm on 27 July 2020. 6. Claimant's reply cost submissions (if any) to be filed and served by no later than 4.00 pm on 29 July 2020.
Hearing Date:	9 July 2020
Date of Orders:	13 July 2020
Catchwords:	Application for summary judgment; termination of employment; pre-contractual negotiations; entire agreement; whether amendment required to claim before summary judgment can be given; no arguable defence; compensation.
Legislation Cited:	*ADGM Employment Regulations 2019 (Compensation Awards and Limits) Rules 2019* *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015*
Case Number:	ADGMCFI-2020–005
Parties and representation:	***For the Claimant:*** Mr. Stephen Doherty of Counsel, instructed by Addleshaw Goddard (Middle East) LLP (Mr. Ben Brown and Mr. Yannick Ramsamy) ***For the Defendant:*** Mr. Timothy Killen of Counsel, instructed by Al Tamimi & Company (Mr. Ivor McGettigan)

JUDGMENT:

1. This has been the hearing of an application for summary judgment by the Claimant in respect of his claim against the Defendant company, for the sum of US$1 million (alternatively for an order that leave to defend be given only conditional upon payment into court of the full sum claimed). Mr Doherty has appeared for the Claimant and Mr Killen for the Defendant.

2. The Claimant was employed by another company, BMO Global Asset Management ("BMO"), when he was invited to join the Defendant as Head of Factor Investments. He made it clear that if he were to accept such job he would need to be recompensed, because he would be giving up his accrued right to US$1.5 million in respect of unvested BMO shares if he left BMO to join the Defendant. In a series of emails in February 2019 there was a full discussion of this, and the Claimant made it quite clear that he would only give up his job with BMO and join the Defendant if that were guaranteed, and Mr Ellahi, the Defendant's director, agreed to this. Allowing for the fact that the US$1.5 million would have been subject to tax, the arrangement that was made was for payment of US$1million over three years, US$333K in each of March 2020, 2021 and 2022, and that if the Defendant terminated the Claimant's employment before that date then the whole US$1M would be due: indeed there was the further express provision that if the Defendant decided not to take the Claimant on after the Claimant had terminated his employment with BMO he would still receive the US$1M. This agreement was then set out in the Defendant's offer letter dated 19 March 2019. Mr Ellahi sent an email dated 11 March 2019, attaching the offer letter and the draft employment contract, stating "*both are legally binding and the offer letter is referred to in the contract itself. All commercial terms are as per what we agreed*."

3. The offer letter records, after referring to the enclosed Employment Contract and setting out details of the Claimant's bonus, the following:

> *"We are pleased to advise that upon signing of your contract, you will also receive a novation of your current vested shares amounting to USD 1 million. This payment will be fully made out in three tranches of USD 333,000 over a period of three years from the date of your effective employment with the Company. To illustrate, should your commencement date be September 2019, the amount of USD 333,000 will be paid out on September 2020, 2021 and 2022. Using this example, in the event that the Company decides to terminate your position at any time before the end of September 2022, the Company agrees to pay upfront the remaining outstanding amount that would be owing to you out of the USD 1 million total."*

4. The Employment Contract dated 19 March 2019, of even date with the offer letter, contains provisions as to salary and allowances, and provides in Clause 4 as follows: –

> *"4.1. The Employee's employment will be probationary for a period of three months from the Commencement Date. During this time, the Employee may be dismissed at any time with immediate effect without cause.....*
>
> *4.2. Clause 4.1 above shall operate independently of the USD $1 million agreement that the Company has agreed to pay the Employee, which will come into effect upon the Employee's Commencement Date. For the avoidance of doubt, the aforementioned USD $1 million agreement is subject to the termination of the Employee's position on the Company's part and not the Employee's own decision to terminate."*

5. The "*USD $1 million agreement*", which I shall call the *"$1m Agreement",* is not otherwise particularised in the Employment Contract, but it is obviously the agreement set out in the offer letter of even date.

6. The $1m Agreement is also referred to in Clause 16 of the Employment Contract: –

"16.8. If the Employee's employment is terminated by reason of the liquidation of the Company for the purpose of reconstruction and/or amalgamation or as part of any arrangement for the amalgamation, reorganisation, reconstruction and/or transfer of the Company not involving liquidation, the Employee shall have no claim against the Company in respect of the termination of the Employee's employment by reason of such reconstruction, reorganisation, transfer, liquidation, and/or amalgamation.

16.9. Clause 16.8 above shall have no effect on Clause 4.2 with regard to the USD $1million that the Company has agreed to pay the Employee should the Company decide to terminate his position. To reiterate, the aforementioned agreement in Clause 4.2 will only take effect upon the Employee's Commencement Date."

7. There was an Entire Agreement clause included at Clause 19, whereby "*This Contract supersedes all previous agreements and arrangements (if any) between the Company and the Employee relating to his employment by the Company ..*".

8. Under the March Employment Contract, the Claimant commenced employment on 20 September 2019 (being six months from the date of signing), and in December all employees of the Defendant received a letter dated 9 December 2019, which commenced:

"Subject to the specific amendment and agreement set forth in this Amendment of Employment Contract Letter, we write to confirm that your Employment Contract shall remain in full force and effect without modification.

We refer to your Employment Contract and are writing to you to notify amendments to your Employment Contract with [the Defendant] pursuant to the enactment of new ADGM Regulations.

Pursuant to terms and conditions set out in your Employment Contract, your Employment with [the Defendant] shall comply at all time with the laws, regulations and rules applicable in Abu Dhabi Global Market. As such, the Board of Directors of the Abu Dhabi Global Market, in its exercise of its power under Article 6(1) Law No.4 of 2013, has enacted, on 16 October 2019, the Employment Regulations 2019 (the "Rules") to be effective on 1 January 2020. Accordingly, to ensure compliance of all of [the Defendant's] Employees with the ADGM Employment Regulations, the terms and conditions of your Employment have been amended by law as described hereinafter."

and concluded:

"*This letter is solely for the purpose of notifying you of amendments to your contract of employment due to a change of law and applicability of new ADGM regulations. As such, all amendments described above are applicable to your Employment Contract on the Effective Date, by law and therefore does not require[d] your agreement."*

9. The Claimant's Employment Contract dated 9 December 2019, enclosed with that letter, contained the various legal or technical amendments described at some length in the letter. It also expressly recorded a commencement date of 19 September 2019 and it introduced a definition for "*Contract of Employment*" *("this written contract of employment that includes the terms and conditions as set out hereinafter").* Otherwise there was no material change from the March Contract, except for the omission of Clause 16.9 set out above. There is no evidence from the Defendant suggesting that this was an amendment agreed with the Claimant. There are some references in Mr Ellahi's witness statement of 1 July 2020, in opposition to the Claimant's application, at paragraph 25 to 28, to which I shall refer below.

10. By letter dated 21 April 2020 the Defendant gave notice (180 days by way of payment in lieu of notice) terminating the Claimant's employment. It gave no reason for such termination, simply

stating "*in accordance with clause 16 of your contract, the Company has decided to terminate your employment*": there was no reference to termination being "*by reason of reconstruction, reorganisation, transfer, liquidation and or amalgamation*" (which I shall hereafter abbreviate as "reconstruction etc."), though Mr Ellahi explains in his witness statement, at paragraph 35, that:

> *"The Defendant has ceased all activity in the UAE, and will commence the liquidation process as soon as possible. The Defendant considers that it has paid all termination entitlements in full to its terminated employees, and I can confirm that the decision to liquidate the company is not related to the Claimant's claim."*

11. The sums due to the Claimant under the Employment Contract (but not under the $1m Agreement) were paid in full.

12. Mr Doherty on behalf of the Claimant submits that there is no answer to the Claimant's claim. I have been referred by both Counsel to a number of well-known authorities on the issue of the grant of summary judgment, which I have well in mind.

13. The Defendant set out a number of different defences to the Claimant's claim, not all of which were pursued before me:

    a. an issue as to pre-contractual negotiations/entire agreement;
    b. a pleading point by reference to the fact that the December Employment Agreement is not referred to in the Particulars of Claim;
    c. the payment is submitted to have been a discretionary one;
    d. a construction of Clause 4.2:
    e. reliance on (the absence of) Clause 16.9, and construction of 16.8;
    f. an assertion, pleaded in paragraph 13 of the Defence that "*to the extent that the said deferred entitlement would follow the BMO structure, the Defendant denies that it would become immediately payable as a lump sum in the event ...that his contract of employment was terminated*";
    g. a suggestion that there was an overpayment included in the termination payments, not raised in correspondence or pleaded as a set off or counterclaim.

    The last two matters were, rightly, not pursued before me.

Pre-contractual negotiations/entire agreement

14. Mr Killen relied upon the well-known authorities as to pre-contractual negotiations such as to preclude reliance by the Claimant upon the exchange of emails referred to above. However, in this case those emails were all one way and resulted in the agreement set out in the offer letter, which was of contractual effect *independently* of the Employment Contract, as I have described above. As for the Entire Agreement clause, contained in both the March and December Employment Contracts, that is of no relevance in the light of the express reference in clause 4.2 of both Contracts to the existence of the $1m Agreement (as further recognised in Clause 16.9 of the March Contract). The new definition of Contract of employment in the December Contract adds nothing, given the survival of the reference to the independent $1m Agreement in Clause 4.2.

Pleading

15. Mr Killen points out that the Particulars of Claim do not refer to the December Contract at all, and submits that there would need to be an amendment before the Claimant can pursue his claim. At best this would be, as Mr Killen effectively acknowledged, a technicality. I am satisfied however that the claim is made pursuant to the $1m Agreement in the offer letter, and does not need to be pleaded by reference to clause 4.2 of either the March or December Contracts.

Discretion

16. Mr Killen submits that the $1 million was discretionary, because it was an "*additional benefit*", which, by virtue of Clause 6.7.2 of both Employment Contracts was "*offered by the company on a purely discretionary basis*." He points out that the offer letter began by providing for a bonus, which was expressed to be discretionary. But quite apart from the fact that reference to the bonus does not assist, because that is separately provided for in Clause 6.6 of the Employment Agreement, the offer letter, after addressing the bonus, goes on to deal quite separately with the $1m Agreement, as set out above, in terms which make it entirely clear that it was not discretionary. The whole purpose of the agreement was to give the Claimant absolute comfort that he could leave BMO and give up his $1.5 million rights.

Clause 4.2

17. Mr Killen refers to the fact that Clause 4.2 is contained in the Employment Contracts under the heading for Clause 4 "Probationary Period", and develops an argument on that basis. This is derived from paragraph 28 of Mr Ellahi's witness statement:

> *". ..the sole reference to US $ 1 million in the Updated Employment Contract is in the probation clause at Clause 4.2. ... Clause 4.2 of the Updated Employment Contract was included at Mr Rubingh's verbal request on the basis that Mr Rubingh was still in his probationary period in December 2019 and he did not want the Updated Employment Contract to impact on his probationary period. I recall that Mr Rubingh was concerned that the probationary period might not be included in the calculation of his first year of employment, or that a contract with a different date could affect the first anniversary of employment, thus delaying the date on which the first tranche would be payable, and hence the inclusion of Clause 4.2 in the Updated Employment Contract. However, nowhere in the Updated Employment Contract is there mention of payment prior to the first anniversary of employment, of a payment structure, or payment timings, and the Defendant's position is that there is no contractual entitlement to the US $1 million in the present circumstances claimed, or at all. I am in fact quite surprised that Mr Rubingh is making this claim, as I had thought that, as is set out in the Updated Employment Contract it is all very clear. "*

18. This needs a good deal of reconstruction in order to found an argument. The fundamental flaw in it is that clause 4.2 was of course already contained in the March Contract and cannot have been "*included*" in the December Contract for the reasons given by Mr Ellahi. His interpretation would need to be adjusted, as Mr Killen accepted, by reading the word "*retention*" for the word "*inclusion*". The suggestion by Mr Ellahi makes no sense at all, given that it was not a new provision in December and that the probationary period at that stage had only a few days to run (three days if the 7 day notice required by Clause 4.1 were taken into account). It is quite clear why Clause 4.2 was included (for the avoidance of doubt) in both Contracts. Clause 4.1 provides that during the probationary period the Claimant's employment can be terminated without cause, and Clause 4.2 records that this would have no effect on his (independent) $1m Agreement. The $1m Agreement remains as contained in the offer letter.

The absence of Clause 16.9

19. Again, Mr Ellahi gives an explanation for what Mr Doherty suggests to have been most likely a drafting error, in paragraph 27 of his witness statement:

> *"At the meeting Mr Rubingh did not question this amendment in the Updated Employment Contract, and I wouldn't have expected him to, as I had always understood it to be uncontroversial that once Mr Rubingh had started with us, he accepted that he had no claim whatsoever against the Defendant in respect of a termination for restructuring, reorganisation or liquidation reasons."*

20. It is manifest that this was not something which was "*always understood to be uncontroversial*", given that clause 16.9 was included in the March Contract, so what has to be suggested is that there was some reason for its having in some way become uncontroversial by December, which seems wholly unlikely. Again, Mr Ellahi's argumentation appears fanciful. The suggestion of such a drastic amendment in any event is inconsistent with the emollient terms of the cover letter of 19 December, explaining amendments so insignificant and technical that they do not even require agreement.

21. The question is whether in any event clause 16.9 in fact made any difference. Mr Doherty submits that it was clearly only included for the avoidance of doubt, and Clause 16.8 could not even without it have had any effect, however construed, upon the $1m Agreement which was expressly agreed by the offer letter and preserved by clause 4.2.

22. Without Clause 16.9, Mr Killen submits that Clause 16.8 does impact upon the Claimant's rights under the $1m Agreement. He submits that the clause should be construed so that in the event of a termination of the Claimant's employment by reason of reconstruction etc. the Claimant should have no claim under that Agreement. The first question would be whether the termination of his employment in April 2020 was in fact a termination by reason of reconstruction etc., when the termination letter did not say so, but described the termination as "*pursuant to clause 16*" (the ordinary notice provision). But, that apart, if Mr Killen is right that Clause 16.8 falls to be construed that on a reconstruction etc any claim against the Company by a dismissed employee is barred, it would be both inconsistent with any relevant statutory and insolvency law and not what happened in this case, because all the employees, including the Claimant, save for his $ 1 million, were paid in full.

23. Even if this was a termination by reason of reconstruction etc., this is a question of construction of clause 16.8 (absent the avoidance of doubt provision in Clause 16.9). I am satisfied that it does not mean that in the event of reconstruction etc., any claim by an employee for breach of contract against the Defendant employer is of no effect, for unpaid salary, notice period, sick pay, holiday pay, unpaid expenses. If it has any meaning it may be that the employee would be prevented from making a claim against the company by reason of such reconstruction etc, e.g. a claim for unfair dismissal or redundancy or for damages in respect of his demotion or the otherwise deleterious effect upon his employment. On any basis I am entirely satisfied that the clause cannot affect the Claimant's entitlement under the $1m Agreement any more than it would affect any other claim he might have for example for unrepaid loans to the company.

Leave to defend

24. Mr Killen submits, in paragraph 61 of his Skeleton, that for the Claimant to be granted summary judgment would require the court to dismiss out of hand the Defendant's factual evidence. Apart from Mr Ellahi's suggestions in paragraph 27 and 28 of his witness statement, to which I have referred, and by which, for the reasons I have given, I am entirely unpersuaded, there is no relevant factual dispute. The position as to the pre-contractual correspondence, so far as relevant at all, is actually clear and in any event is fully and accurately recorded in the offer letter.

25. Mr Killen at my invitation submitted that if, contrary to all his submissions, I found the defence shadowy or insubstantial, I could and should make an order for payment into court, and suggested a period of 14 days for such payment to be made. However, I am entirely satisfied that there is no arguable defence, by reference to the various arguments put forward, no real as opposed to fanciful, indeed no, prospect of success. Therefore, I grant judgment for the $1 million.

Employment Regulations and interest

26. The Claimant has sought compensation pursuant to s. 3(2) of the *ADGM Employment Regulations 2019 (Compensation awards and limits) Rules 2019* of the ADGM. He has alleged no loss suffered (other than interest) and I am satisfied that the provision is one for compensation, and not by way of a penalty. The remedy is in my discretion. I am satisfied that the appropriate compensation is an

award of interest at 2% per annum commencing 14 days after the termination, namely 14 days from 21 April 2020 until the date of judgment (69 days), in the amount of US$ 3,780.82.

27. Thereafter, interest upon the aforesaid sums specified as due and owing as at the date of judgment herein is to accrue at the rate of 9% per annum (pursuant to section 39 of the *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* and Practice Direction 4) until payment.

Costs

28. In terms of the costs of these proceedings, including any reserved costs, in principle these must follow the event. I shall assess them summarily in the absence of agreement. Accordingly, the Claimant's cost submissions are to be filed and served within a period of 7 days from the date of the judgment herein; the Defendant's cost submissions are to be filed and served within a further period of 7 days; and the Claimant's reply cost submissions (if any) are to be filed and served within a further period of 2 days.

Issued by:

ADGM COURTS
محاكم سوق
أبوظبي العالمي

Linda Fitz-Alan
Registrar, ADGM Courts
13 July 2020