ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

COURT OF FIRST INSTANCE
CIVIL DIVISION

BETWEEN

ROSEWOOD HOTEL ABU DHABI LLC
CLAIMANT

AND

SKELMORE HOSPITALITY GROUP LTD.
DEFENDANT

JUDGMENT

Neutral Citation:	[2019] ADGMCFI 0009
Before:	His Honour Justice Stone SBS QC
Decision Date:	16 December 2019
Decision:	1. Judgment in favour of the Claimant. 2. The Defendant pay to the Claimant the following sums: a. outstanding Tenant Payments (namely Base Rent, Service Charge and Marketing Charge) in the total amount of AED 1,142,152.41 accrued as at the date of judgment b. late Payment Fee on such Tenant Payments in the amount of AED 172,031.28 accrued as at the date of judgment c. outstanding Direct Utilities payments in the amount of AED 34,469.04 accrued as at the date of judgment d. liquidated damages in the sum of AED 4,729,861.24 accrued as at the date of judgment, and thereafter continuing to accrue at the daily rate of AED 4,383.56 until 31 December 2020 or until valid termination of the Lease or until payment, whichever be the earlier; and e. interest upon the aforesaid sums specified as due and owing as at the date of judgment herein to accrue at the rate of 9% (pursuant to section 39 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 and Practice Direction 2) until payment.
Hearing Date(s):	19 and 20 November 2019
Date of Orders:	16 December 2019
Catchwords:	Lease; Tenant's breach of obligations under Lease; Lessor's recovery of various components of loss under Lease; Bases of calculation of loss
Legislation Cited:	ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015

Cases cited:	Cavendish Square Holding BV v Makdessi and Parking Eye Limited v Beavis, [2015] UKSC 67 Reichman v Beveridge, [2006] EWCA Civ 1659
Case Number:	ADGMCFI-2019-003
Parties and Representation:	Freshfields Bruckhaus Deringer for the Claimant

JUDGMENT:

This Claim

1. This is the judgment of the Court after trial of the claim of the Claimant herein ("Rosewood"), against the Defendant ("Skelmore"), a consulting group established under the laws of the Dubai International Financial Centre which is in the business of operating restaurants in the UAE.

2. Although larded with detail, the broad shape of the case is straightforward: Rosewood pursues Skelmore for breaches of provisions of a lease dated 29 June 2016 whereby Rosewood, a luxury hotel based in Al Maryah Island, Abu Dhabi, leased commercial premises to Skelmore for a period of five years for the purpose of Skelmore operating a fine dining restaurant in the Rosewood Hotel.

3. A certain amount of contested interlocutory activity preceded the hearing of this action: Skelmore made an application to join as 2nd Defendant the Claimant's parent company, Mubadala Development Corporation, an application which was declined by this court in a decision upheld by the Court of Appeal. Subsequently the Claimant applied to strike out a Reply witness statement filed on behalf of Skelmore, which application was allowed in minor part; the judgments issued in each of these applications speak for themselves.

Skelmore's Adjournment Application

4. Throughout these interlocutory exchanges there had been no suggestion that Skelmore would not appear at this trial.

5. To the contrary, on the morning of 18 November 2019, those then acting for Skelmore, Mr Hartridge of LPA Middle East Ltd, specifically had confirmed their intended appearance, following earlier filing of a Skeleton Argument; however, after close of business on the same day, at 6.24pm, a 'Notice of Change of Representation' was filed on the Court's eCourts Platform on behalf of Skelmore: this stated that "The Defendant has authorised LPA Middle

East Ltd to inform the Court that it wishes to change legal representation and will appoint new legal representation as soon as possible".

6. This position was confirmed by email from Mr Hartridge a few minutes later, and at 8.07pm Mr Hartridge emailed the Registry in the following terms: "In view of the Defendant's change of legal representation, the Defendant asks the Court's indulgence to adjourn the hearing tomorrow to enable new counsel, once appointed, to represent the Defendant in these proceedings."

7. Mr Tannous of Freshfields, who has acted throughout on behalf of the Claimant, emailed the Registry at 10.33pm on the same day to indicate that he had indicated to Defendant's counsel that the Claimant opposed the adjournment request, and that he would address the Court on the issue on the following morning.

8. When the trial was called, no representation was present on behalf of the Defendant, and Mr Tannous resisted the possibility of any adjournment, indicating that he was ready to proceed. During his submission he referred to an email earlier received wherein in response to his query, Mr Hartridge had indicated that he would not be calling his client, Mr Kadrie (who had filed a Reply witness statement) at the hearing, nor would he be seeking to cross-examine the Claimant's witnesses.

9. This sudden development was, said Mr Tannous, disrespectful both to the Court and the Claimant, although, rightly in the Court's view, he eschewed requesting strike out of the Defendant's Defence, a course open to him pursuant to the provisions of Rule 174(1)(a) of the ADGM Court Procedure Rules.

10. This eleventh hour non-appearance was regrettable, and in the event the Court declined to accept the fait accompli with which purportedly it was presented, and thus in effect to be suborned into an adjournment.

11. On the assumption that the email of the previous evening constituted an effective adjournment application at all – which in the circumstances was less than clear since there had been simply an email of the preceding evening emanating from a former legal representative – the short point was that there was no-one to move this application on behalf of Skelmore, nor was there evidence to explain how or why this last minute situation had arisen, and as a consequence there was no material upon which the Court properly could exercise a discretion to grant an adjournment.

12. Accordingly, the Court took the view that no case for adjournment had been established, and held that the trial should continue and that the Claimant should proceed with its case.

Primary Facts

13. The Lease of 29 June 2016 was the culmination of negotiations which had taken place between Skelmore, which had expertise in establishing and running restaurants in the region, and representatives of Rosewood and of its parent company, Mubadala Development Corporation ('Mubadala'). The summary of events which follows represents the factual basis upon which the Court has proceeded.

14. For present purposes there is no necessity to delve deeply into historical events; suffice to say that the driving force behind the negotiations was that Rosewood, together with its parent, Mubadala, wished to open an upmarket restaurant sited on its premises in the hope of establishing a revenue stream and enhancing the hotel's reputation and customer appeal, and as a consequence consulted Skelmore, which had expertise in this area and was interested in participating in such venture.

15. The Lease entered into between Rosewood and Skelmore related to a space within the hotel, the 'Catalan Space' as it was termed, within which Skelmore was to construct and operate a restaurant named 'Madison & Park', which was to be a sophisticated mid-price venue with indoor and alfresco dining options, and which, Rosewood anticipated, would attract considerable patronage from guests and visitors moving through the hotel, and hence create the desired increase in consumer spending.

16. From the outset the progress of this enterprise was beset with problems. The email chain attached to the witness statement of Mr Roland Duerr, the Rosewood executive tasked with delivery of the construction and fit-out of the 'Madison & Park' project, provides ample demonstration of the delays which occurred, and the manner in which Rosewood, which was keen to get the restaurant into operation as soon as possible, was met with repeated assurances from Skelmore of intended performance, albeit such assurances were not met; for example, an email dated 6 December 2016 from Mr Omar Kadrie of Skelmore spoke of a review of the work undertaken by Skelmore's interior design company which had resulted in a parting of the ways because "the concept developed was not in line with our vision, and the speed of progress was becoming an issue", and hence a new agency had been retained and was working with the contractor to "ensure that risk of delay is mitigated."

17. This hope did not eventuate, and progress failed to improve: on 18 June 2017, an email from Mr Amin Kadrie to Mr Steven Webster of Mubadala relayed the news that since Skelmore had had a problem with the original contractor and had not been able to reach agreement with contract terms and conditions relating to the Bill of Quantities, Skelmore had lost confidence in that contractor's ability to complete the fit out on time, but that the "good news" was that agreement now had been reached with "a much better and more reliable" contractor, and that whilst "the delay has been both costly and frustrating" nevertheless Mr

Kadrie was "confident that Madison and Park will be completed and opened by October latest".

18. A work plan for the restaurant was sent to Mr Webster later that month, on 26 June 2017, with Mr Omar Kadrie expressing confidence that with the new contractor "we will remain on schedule and produce a superior quality venue", but this did not occur, and by July 2018 it is apparent that thought was being given to breaking the lease: an email of 25 July 2018 from Mr Sharafi of Mubadala to Mr Mostert of Skelmore pointed out that under the terms of the lease Skelmore was required to give a 12 months' notice to terminate, that the earliest time to serve that notice would be December 2018 and that "we will require Skelmore to pay the outstanding amounts based on the date of termination."

19. By this stage delays had arisen not only in terms of work but also in terms of the payment of monies due under the Lease provisions, and Notices of Breach had begun to be issued to Skelmore: on 18 May 2018, for example, the Contract Manager of Mubadala had enclosed such a Notice, and had noted that payment had not been received for outstanding amounts itemized, and further enclosed copies of outstanding utility bills.

20. The upshot was that there was no chance of meeting a designated September 2018 opening date, which had been Skelmore's expressed hope at the beginning of that year: vide the Hocks/Webster email of 25 January 2018.

21. To the contrary, by letter dated 24 April 2018, addressed to Mubadala, Mr Mostert, the CFO of Skelmore, whilst reiterating long term confidence in the Al Maryah Island development, nevertheless stated concerns that the performance of brands, including his own, on the island, was being impacted by "continuous low footfall", and that as there was no indication as to when this situation would correct, he believed that it was not the correct time for the launch of the 'Madison & Park' concept on the island, and requested "a pause of this project and rent until the end of 2018".

22. Thereafter an email dated 31 July 2018 from Mr Mostert of Skelmore to Mr Sharafi of Mubadala sought an amicable resolution of the problem as had arisen, and proposed "settlement in full and final accompanied by termination of the lease agreement", this email identifying the then outstanding rent and utility charges, and requesting a reduction in outstanding service charges; a figure amounting to a total of AED866,494.90 was proposed, against which would be offset the security deposit already paid in the amount of AED200,00, leaving a proposed total payable of AED666,494.60.

23. This settlement proposal was not accepted, and Rosewood continued to send Skelmore Notices of Breach and demands for payment of outstanding amounts due under the Lease. Culmination of the breakdown of commercial relations between the parties probably occurred with a Dispute Notice dated 24 October 2018, which was issued by Mr Duerr of

Rosewood formally seeking resolution of the dispute, which was followed by failed negotiations and subsequently an unsuccessful mediation.

24. Proceedings then were issued: Rosewood filed an Amended Claim on 11 March 2019 asserting breach of contract and claiming the amount of USD1,362,048, to which Skelmore filed its Defence on 21 April 2019, with a Reply thereto filed by Rosewood on 12 May 2019.

Witness Evidence

25. At this hearing two witnesses of fact were called on behalf of Rosewood, namely Mr Roland Duerr and Mr Rama Chandran, whose Witness Statements each were dated 24 September 2019.

26. Mr Duerr, the Managing Director of the Claimant, has extensive professional experience in the hotel industry, and had joined Rosewood about three months after the lease was signed with a brief to ensure delivery by Skelmore of the Madison & Park restaurant in accordance with the Lease.

27. Mr Duerr summarised the significance in the hospitality industry of a strong Food and Beverage ("F&B") offering to the success of any hotel and emphasized that hotels tend to use the F&B programmes as "competitive differentiators" for attracting guests. He stated that Rosewood was confident that Skelmore had developed a restaurant concept that would have been successful, if ultimately implemented, given its originality, price range, and 'fit' within the hotel's overall F&B offering, particularly since it would be situated in a premier space near the lobby affording great visibility to potential guests and visitors.

28. He outlined the history of the progress updates as had been sought from Skelmore by Rosewood and its representatives, and of the Notices of Breach sent in relation to the trading obligations of Skelmore under the Lease.

29. Mr Duerr added that there had been considerable anticipation in Abu Dhabi about the advertised "Spring 2017" opening of this restaurant, and that Skelmore's failure to open the restaurant had caused "significant issues" for Rosewood, which had considerable commercial interest in the success of the project. He noted that whilst the space designated for the restaurant currently was vacant, up until 11 October 2019 it had been utilized as a storage facility for the inventory of Roberto's, another nearby Skelmore restaurant.

30. He also stated that in his view it was difficult to locate suitable tenants able to develop a similar concept to this restaurant, and that this was the reason why the Lease contained a clause regarding Trading Obligations, which was precisely to ensure that tenants did not leave productive spaces vacant.

31. The other witness, Mr Chandran, was called for his accounting expertise. Mr Chandran is the current Director of Finance at the Rosewood Hotel, and his evidential brief was to provide the Court with full particulars of the updated amounts alleged to be due and owing as a consequence of Skelmore's breach of its obligations under the Lease.

32. To this end Mr Chandran produced a detailed document, RC-30A, an updated exhibit which represented the figures said to have accrued under the various heads of claim up to and including 21 November 2019 (the original exhibit RC-30 annexed to Mr Chandran's Witness Statement having contained figures up to 30 September 2019).

33. It is these updated figures which have been the subject of scrutiny in this hearing, and although Skelmore has at no stage challenged the figures put forward by the Claimant, it has contested the basis of certain of these calculations.

34. The Court was impressed with each of these witnesses, and had no hesitation in regarding these gentlemen as having an acute grasp of the case and as witnesses of truth; accordingly the Court is content to proceed with this judgment on the basis of their evidence.

The Heads of Claim

35. The claim as pleaded by the Claimant seeks relief in debt and damages. That which informs each element of this claim, however, is that the Lease of 29 June 2016, the breach of which underpins this claim, remains extant and in force.

36. I accept the contention of Mr Tannous that the lessor, Rosewood, has not terminated the Lease, nor, it seems, has Skelmore moved to invoke the contractual termination provision which requires 12 months' notice after expiry of an initial three-year term, although, as the email correspondence demonstrates, the issue of termination was being actively considered in mid-2018.

37. The heads of claim which are pleaded are six (6) in number. These are those which are described as the 'Tenant Payments' (namely outstanding Base Rent, Service Charges and Marketing Charges), together with claims for Late Payment Fees accruing on the Tenant Payments, plus payment for Direct Utilities on the leased space, and finally the claim for Trading Obligations, which represent liquidated damages for the failure to open the restaurant, and which represents by far the largest element within this claim.

38. In his submissions, Mr Tannous has stated that in terms of the 'Tenant Payments', he seeks only such payments as are due up to and including the date of judgment herein, but that for the liquidated damages element, he wished to pursue payment as it continued to accrue as from the date of judgment until the end of 2020.

39. In terms of the amounts due under each of the heads of claim, two further points require emphasis:
first, whilst the calculation within Mr Chandran's updated RC-30A are calculations of the sums due as at 21 November 2019, then anticipated to have been the final day of this trial, where necessary these calculations have been updated to and including the date of judgment herein by means of a second Witness Statement dated 12 December 2019 from Mr Chandran, and it is these figures (as summarised at paragraph 14 of this further Witness Statement) which are contained within the Order giving effect to this judgment; *second*, that the USD:AED exchange rate that has been employed in all calculations placed before the Court is that of USD1: AED3.672, which the Court has been informed is the official pegged rate of the Dirham against the US dollar.

(i) Base Rent

40. Under Clause 3.1 of the Lease, 'the Tenant shall pay the Landlord the Tenant Payments at all times during the Term whether or not demanded, on the dates that they fall due, in accordance with the provisions of the Lease, and if no date is specified then such sums shall be payable on demand'.

41. Rental of this space was fixed at AED 800,000 per annum pursuant to Clause 1.6.1 of the Lease Particulars (plus VAT accruing as from 1 January 2018) in two equal instalments on the Rent Days of 1 January and 1 July, commencing on 1 January 2017, the 6 months from the date of the lease on 29 June 2016 to 31 December 2016 being a contractual 'fit-out' period during which no rent accrued.

42. Mr Chandran's evidence is that Skelmore has not made payment of the Base Rent in 2019, and has made late payment of the 1 July 2017, 1 January 2018 and 1 July 2018 tranches.

43. After giving credit for Skelmore's payment on December 2018 for the 2017 and 2018 Base Rent accruing as of that date, the total principal sum outstanding, is **AED 837,914.40**.

44. In its Defence, Skelmore offered no defence to the Base Rent claim – in fact, there is no specific pleaded response - and the Court accepts this sum as due and owing.

(ii) Service Charge

45. Service Charge is a Tenant Payment, and pursuant to Clause 3.4 of the Lease, this charge (plus VAT from 1 January 2018) is payable on demand, and is defined as "an amount representing the Due Proportion of the Expenditure", and pursuant to Clauses 9.8 and 1.29 of the Lease Particulars, is subject to a cap of AED 80,000 per annum.

46. The 'Expenditure' of which this Service Charge is a proportion is broadly defined under the Lease, and covers Estate Services set out in Schedule 5 of the Standard Terms; it is intended

to cover the costs of Rosewood's maintenance service contracts, electrical and mechanical repairs, groundskeeping and similar outgoing expenditures incurred in the general upkeep of the hotel.

47. The relevant proportion, which also is broadly defined, is calculated by reference to Gross Leasable Area taken by Skelmore in the hotel, and permits Rosewood to recover sums expended on the hotel's general areas.

48. Rosewood to-date has issued five invoices to Skelmore in relation to Service Charges, none of which have been satisfied, and Skelmore has been reminded of its obligation to pay these charges in several Notices of Breach, together with a Dispute Notice issued in October 2018.

49. In its Defence, Skelmore has asserted that there is a lack of consideration for the Service Charges claimed, and has put the Claimant to strict proof, including reference to the due proportion underpinning the amount claimed.

50. Patently there is no lack of consideration. As Mr Tannous pointed out, Clause 2.1 of the Lease Particulars makes it clear that in consideration for Rosewood leasing the Catalan space to Skelmore, Skelmore would pay Rosewood the Tenant Payments, which include the Service Charge.

51. No other substantive defence is evident from the papers, and there is no specific challenge to the sums due. As to the relevant calculation, Mr Chandran explained that the expenses attributable to Skelmore are pro-rated on the basis of the Gross Leaseable area of the leased premises, namely 370 square metres, as a proportion of Rosewood's total area, namely 93,806 square metres, in order to arrive at a service charge for a particular period; in his submission Mr Tannous pointed out that pro-rating on these terms is in the Defendant's favour, because were the calculation to have been done with reference solely to the actual leased areas within the hotel – which are but a handful – then the amount due and owing under this head would be proportionately significantly greater.

52. Mr Chandran's evidence condescends to detail relating to the history of the invoices for this charge and to the relevant calculations for 2017-2019, which in total produce a sum of **AED 143,658.01**, which figure is accepted by the Court as being due and owing.

(iii) Marketing Charge

53. The third of the 'Tenant Payments', the Marketing Charge, is defined in Clause 1.12 of the Lease Particulars, under which the Marketing Charge is capped at AED 51,800 per annum,

and, pursuant to Clause 3.5, is to be payable in four equal instalments of AED 12,950 each year, commencing on 1 January 2017.

54. Notices of Breach and a Dispute Notice were served on Skelmore regarding payment of this charge, but to no effect.

55. Mr Chandran points out that due to Federal Decree Law No. (8) of 2017 VAT at a rate of 5% was also payable, so that whilst the Marketing Charge for 2017 was AED 51,800, for 2018 it was AED 54,390, and for the first three quarters of 2019 it was AED 40,792.50.

56. There has been no payment by Skelmore of any of these amounts as have fallen due, and Mr Chandran stated that he did not recall any discussions with Skelmore wherein it was alleged that such charges were not due as part of the 'Tenant Payments', nor any suggestion that such charges had been waived.

57. In its Defence, Skelmore puts Rosewood to strict proof, and asserts a lack of consideration.

58. It is difficult to see how absence of consideration arises, given that the Marketing Charge is a 'Tenant Payment' forming part of the consideration for the grant of rights under the Lease.

59. Rosewood has discharged the burden of proving its entitlement, and as this charge is a liquidated sum stated in clear terms in Clause 1.2 of the Lease Particulars, it is an enforceable debt due under the lease, and further particularization is not required.

60. The Court accepts Mr Chandran's quantification, updated to 16 December 2019, of the sum of **AED 160,580.00**.

(iv) Late Payment Fee

61. Pursuant to Clause 4 of the Lease, a Late Payment Fee, which is a form of contractual interest, is payable on all late 'Tenant Payments' at the prescribed rate from the date when payment was due to the date of receipt.

62. Notwithstanding Notices of Breach sent to Skelmore, the evidence is that Skelmore has not yet settled a Late Payment Fee accruing under the Lease.

63. In its Defence the Defendant denies that any Late Payment fee is due and puts the Claimant to proof "of the admissibility and enforceability" of this fee under the applicable law; additionally Skelmore says that in accepting Base Rent due in July 2017 and for 2018, there has been acquiescence and waiver of such right to claim late payment.

64. In response, Mr Tannous asserted that there has neither been waiver nor acquiescence, because in each of its Notices of Breach the Claimant expressly had reserved its rights and

remedies under the Lease, which specifically included the contractual right to recover the Late Payment Fee in relation to Base Rent paid late.

65. He further noted that the Lease provisions make it clear that acceptance of a late payment does not constitute a waiver by Rosewood of its rights to claim a Late Payment fee in relation to that sum, here citing the provisions of Clause 22.1, requiring any lease variation to be in writing and signed by the parties thereto, and also Clause 22.2, which provided that "No concession or other indulgence granted by the Landlord to the Tenant whether in respect of time for payment or otherwise in regard to the terms and conditions of the Lease shall be deemed to be a waiver of its rights and remedies under the Lease."

66. The Court accepts this submission, and also accepts the contention that there is no prohibition within the Applicable Law (which pursuant to the Application of English Law Regulations 2015 is English law) on the application of contractual interest in principle, nor the rate at which it has been charged.

67. As to the calculation of the Late Payment Fee, Mr Chandran's evidence describes in detail the manner of calculation for each late Tenant Payment, which involved taking the contractually prescribed rate of the three month Emirates Interbank Offered Rate (EIBOR) from time to time plus 8%, and applying this cumulative rate to the sums due for the particular periods in question.

68. The precise manner of calculation can be seen by reference to the updated Schedule RC-30A, whereby the late payments on each of the 'Tenant Payments' are meticulously itemized and broken down in terms of applicable dates. In total this accounting exercise, updated to the date of judgment, amounts to **AED 172,031.28**, which amount is accepted as due and owing.

(v) Direct Utilities

69. This claim falls outside the 'Tenant Payments' and is relatively minor and self-contained.

70. The Claimant's submission is that when the Defendant took possession of the leased space, the utility meter readings pertinent to that space were signed off by Skelmore, as lessee, but as a result of the failure to open the restaurant the name of the utility accounts were not formally transferred to Skelmore and remained in the name of the lessor, Rosewood.

71. Pursuant to Clause 5.2.2.2 of the Lease, Skelmore is obliged to pay charges for Direct Utilities, although factually Rosewood directly had settled charges levied by service providers for water, electricity, chilled water (for air conditioning) and gas in relation to the leased premises, whilst Clause 15.2 provided that Skelmore is to reimburse Rosewood for all "expenses, damages or fines incurred or suffered by the Landlord…by reason of any breach, violation or non-performance by the Tenant…of any term, covenant, provision or agreement

of this Lease". Thus it followed, submitted Mr Tannous, that Skelmore is liable to reimburse Rosewood for payments made on Skelmore's behalf in relation to the so-called 'Direct Utilities'.

72. Mr Chandran's evidence detailed the background to and apportionment calculation of these utility charges, and the payment to ADDC, Al Wajeez and Royal Gas on behalf of Skelmore in relation to the leased Catalan space, and confirmed non-payment of the five invoices as issued to Skelmore by Rosewood in the period between 30 May 2018 and 4 August 2019. He noted that these invoices were addressed to 'Roberto's Restaurants and Clubs Ltd', which in itself was a clerical error, Skelmore being the ultimate owner and operator of Roberto's, which is located near the hotel, and thus Mr Chandran concluded that Skelmore necessarily would have received these invoices. He also pointed out that Skelmore had received Notices of Breach and a Dispute Notice in relation to its obligation to reimburse Rosewood in terms of these invoices.

73. Skelmore's pleading in its Defence contains a bare denial of that the Direct Utilities as claimed are due to be reimbursed by Skelmore, and puts the Claimant to strict proof of the sum claimed and of the obligation under the Lease to make any such reimbursement, but advances no substantive argument as to why these utility charges are not payable.

74. The Claimant's evidence in this regard is accepted, the amount owing due and owing under this head is **AED 34,469.04** as at the date of judgment.

(vi) Breach of Trading Obligations

75. This is the most striking element of this claim, not least because of the quantum involved.

76. Clause 7.16.1 provides that from and including the Lease Effective Date, which is 29 June 2016, the Tenant shall "open and keep the Premises open for trade to the general public", whilst Clause 7.16.2 and 7.16.2.1 respectively state:

"If the premises shall not be open for trade in accordance with clause 7.16.1 for any period without proper and reasonable cause approved in advance by the Landlord, then without prejudice to any other remedy of the Landlord:
the Tenant shall pay to the Landlord on demand liquidated and ascertained damages at a rate which is acknowledged and agreed by both Parties to be equal to twice the Base Rent then payable for each day or part day that the Premises are not so open for trade;"…*(emphasis added)*

77. Mr Tannous pointed out that to-date the restaurant has not been opened for trade, and that although Rosewood has issued several Notices of Breach and a Dispute Notice to Skelmore in relation to its Trading Obligations, no payment had been forthcoming, and thus the contractual sum as duly calculated is claimed pursuant to this Clause.

78. In its Defence, Skelmore denied that liquidated damages are due in respect of the "delayed opening" of the Premises for trade, and "notes the contradiction in the provisions of the Lease relating to a fit-out period and the Commencement date on which the Defendant is purportedly required to open the premises for trade". Additionally, the Claimant is put to strict proof that the liquidated damages claimed are a genuine pre-estimate of the damages suffered by the Claimant and proportionate thereto, and of the damages (if any) suffered by the Claimant as a result of the delay in opening the Premises for trade.

79. Of these two lines of defence, the Court considers that the 'contradiction point' has merit, although in his Skeleton Argument Mr Tannous initially had submitted that Skelmore had not alleged that reference to the Lease Effective Date in Clause 7.16.1 was a mistake, that there had been no application to rectify the contract, which was drawn in unambiguous terms and had been entered between two commercial entities, and that therefore Skelmore should be held to its contractual bargain.

80. However, in oral submission Mr Tannous was prepared to see force in the argument that whilst under the Lease Skelmore specifically was accorded six months in which to 'fit-out' the premises, so that the obligation to pay Base Rent did not commence until 1 January 2017, it thus was difficult to assert that a Trading Obligations fee was due and owing within that self-same six month 'fit-out' period.

81. Accordingly, Mr Tannous sensibly did not press his initial position, and made it clear on behalf of his client that he would be prepared to align the claim under this clause with the obligation to pay rent as from 1 January 2017.

82. Nevertheless, he disputed the pleaded suggestion that it was incumbent on Rosewood to establish that the liquidated damages claimed constituted "a genuine pre-estimate of the damage suffered" and that Rosewood needed to prove the damage actually suffered by Skelmore's failure to open the restaurant.

83. His submission was that Skelmore had misunderstood the concept of liquidated damages, and that Rosewood bore no burden of proving its entitlement to liquidated damages beyond establishing the contractual breach giving rise to the such damages, here citing *Chitty, 33rd Ed. at para 26-192* to the effect that "the purpose of the parties in fixing a sum is to facilitate the recovery of damages without the difficulty and expense of proving actual damage."

84. In his Skeleton Argument Mr Tannous also noted that if and in so far as a reference to a "genuine pre-estimate of loss" suggested that Skelmore may have been seeking to establish that the liquidated damages clause was a penalty, and therefore unenforceable, there was no pleading to this effect, and that Skelmore had made no attempt to discharge the burden of establishing that it was a penalty, nor that the reasonableness of the sum claimed, at twice

Base Rent, was "extravagant and unconscionable", herein citing *Cavendish Square Holding BV v Makdessi and Parking Eye Limited v Beavis, [2015], UKSC 67*.

85. Nor, he said, had Skelmore presented any evidence to demonstrate that the contractually-specified damages exceeded "the greatest loss which could conceivably be proved to have followed from the breach" (*vide Chitty, op cit., at para 26-198*), and further observed that, as Mr Duerr's evidence had established, Rosewood had a 'legitimate interest' in the restaurant opening, and that a long-kept vacant space would have (and indeed had had) substantial negative implications for the hotel, so that the failure to open for business, despite repeated reassurances by Skelmore that it would be opened, had triggered what was a valid liquidated damages clause.

86. This claim for liquidated damages is one which the Court has viewed with concern, having reflected not only on the issue of penalty, but also whether there may have been an element of double counting and whether credit should be given for such Base Rent as already had been paid.

87. At the end of the day, however, the difference in specie between Base Rent and Trading Obligations is clear, and in the absence of obvious error it is no part of this Court's function to rewrite nor otherwise to limit the ambit of contractual clauses within an extant Lease entered into at arm's length between commercial parties.

88. In this context the Court accepts the legal submissions of Mr Tannous, and his contention that whilst the claim now mounted under Clause 7.16.2.1 had been contractually expressed as a multiple of Base Rent, it could as easily have been otherwise represented as a fixed sum agreed to reflect the damage claimable under this head.

89. Accordingly, although inter partes argument on the issue would have assisted, in the circumstances this claim for liquidated damages is accepted; the evidence of Mr Chandran specifies the calculation, although his witness statement assumed payment of liquidated damages from 29 June 2016 to the end of that year, which element the Court has declined to order.

90. With the omission of the six month 'fit-out' period, therefore, this leaves sums accruing for breach of the Trading Obligations clause for the period from 1 January 2017 to the date of judgment and continuing thereafter, albeit (unlike his position in the claim for Base Rent), Mr Tannous wishes to pursue this claim up until the end of 2020 only, this concession apparently made on the assumption that upon issuance of Judgment herein the Defendant will forthwith give a 12 month notice of termination of the Lease.

91. It follows from this that the amount of liquidated damages accruing under Clause 7.16.2.1 up to the date of judgment amounts to **AED 4,729,861.24**, and continues to accrue at the rate of **AED 4,383.56** per day until the end of 2020, or until payment if earlier.

The Issue of Mitigation

92. Paragraphs 12 and 13 of Skelmore's Defence assert that the Claimant has taken no action to mitigate its loss as it is required to do by the Applicable Law. The assertion is that the Claimant had begun to claim that the Defendant had been in material breach of its obligations under the Lease as early as February 2017, thus giving the right to terminate, but that during the ensuing two years the Claimant had "failed to mitigate its loss by terminating the Lease or otherwise, and that "even now in these proceedings, the Claimant has given no indication of fulfilling its duty to mitigate but intends to allow such alleged losses to accumulate."

93. In so doing, says the Defendant, the Claimant "has failed to act reasonably and has not discharged its duty to mitigate its alleged losses, rendering such alleged losses unrecoverable against the Defendant."

94. In terms of characterising absence of termination as a failure to mitigate, the Court accepts the submission of Mr Tannous that in the circumstances Rosewood had the right but not the obligation to determine the lease, and that it had every right to insist that Skelmore comply with its contractual obligations, in this regard citing *Reichman v Beveridge, [2006] EWCA Civ 1659*, wherein the defendants had argued that the claimants in that case had failed to mitigate their loss arising from the non-payment of rent by forfeiting the lease and re-letting the property; the Court of Appeal therein affirmed the decision of the trial judge that as the claim of the landlord was in debt, that the rules on mitigation did not apply, and concluded that it was "impossible to say that a tenant could successfully invoke equity in that way."

95. Mr Tannous is also correct when he says that pursuant to Clause 16.6 of the Lease, Skelmore had been entitled to give notice of its intention to terminate since 2018, and that (for reasons which were not apparent) it had failed to exercise that option, so that it should not now be permitted to avoid liability under the Lease simply by suggesting that Rosewood ought to have exercised its right to terminate.

96. He also submitted, and the Court accepts, that claims in debt and liquidated damages are not susceptible to the usual rules on mitigation, noting that *McGregor, 20th Ed. para 16-122* states in terms that "the concept of a duty to mitigate is entirely foreign to a claim for liquidated damages."

97. Accordingly, he was right to say that Rosewood can have been under no 'duty' to mitigate in terms of claims arising under the Lease, save perhaps for the minor claim for reimbursement

of Direct Utilities, although Skelmore has made no attempt to discharge the burden upon it in terms of any such mitigation plea.

Finally

98. The Court regrets absence of oral argument in this case, but at the end of the day it has been able to discern little or no merit in the pleaded Defence of the Defendant, and accordingly Judgment is to follow in terms of the Order herein.

99. As to interest on the sums adjudged due and owing to Rosewood by Skelmore, pursuant to section 39 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 and Practice Direction 2, simple interest is to run on those sums at the rate of 9% per annum until payment.

100. In terms of costs of this action, in principle these must follow the event, but Mr Tannous has asked for the opportunity to make a separate written costs' submission both as to the costs of this hearing and as to reserved costs' order[s] consequent upon the earlier interlocutory applications. In light of the manner in which he framed this application, the Court is content to accede to this course, and accordingly orders that costs' submissions be filed with the Registry within a period of 21 days from the date of judgment herein.

Issued by:

ADGM COURTS
محاكم سوق
أبوظبي العالمي

Linda Fitz-Alan
Registrar, ADGM Courts
16 December 2019