ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

COURT OF FIRST INSTANCE
CIVIL DIVISION

BETWEEN

AFKAR CAPITAL LIMITED

CLAIMANT

AND

SAIFALLAH MOHAMED AMIN MAHMOUD FIKRY

DEFENDANT

AND

SYLVAIN VIEUJOT

RESPONDENT TO AN APPLICATION FOR COSTS

JUDGMENT OF JUSTICE SIR ANDREW SMITH

ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

Neutral Citation:	[2018] ADGMCFI 2
Before:	Justice Sir Andrew Smith
Decision Date:	2 May 2018
Decision:	1. The Claimant's application is refused. 2. The Claimant to pay the costs incurred by the Defendant of or incidental to the proceedings on or before 7 December 2017 (including the costs of the application for interim declarations). 3. The Defendant's costs be assessed on the standard basis. 4. The Defendant's application that Mr Vieujot be ordered to pay his costs is refused.
Hearing Date(s):	No hearing
Date of Orders:	2 May 2018
Catchwords:	Costs on claimant's discontinuance. Costs order against non-party. Costs on standard or indemnity basis.
Legislation Cited:	ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 ADGM Court Procedure Rules 2016 English Civil Procedure Rules 1998 UK Senior Courts Act
Cases Cited:	Brookes v HSBC Bank plc, [2011] EWCA Civ 354 Deutsche Bank AG v Sebastian Holdings Inc, [2016] EWCA Civ 23 Dymocks v Todd, [2004] UKPC 39 Ghafoor v Cliff, [2006] EWHC 825 (Ch) Messih v McMillan Williams, [2010] EWCA Civ 844 Nelson's Yard v Eziefula, [2013] EWCA (Civ) 235
Case Number:	ADGMCFI-2017-003
Parties and representation:	Curtis, Mallet-Prevost, Colt & Mosle LLP for the Claimant Mr. Farhaz Khan and Mr. Saaman Pourghadiri instructed by Baker McKenzie Habib Al Mulla for the Defendant Mr. Yash Bheeroo for Mr. Sylvain Vieujot

JUDGMENT

Introduction

1. This judgment concerns the costs of litigation brought by Akfar Capital Limited ("the Company") against the defendant, Mr Saifallah Mohamed Amin Mahmoud Fikry. By an application notice dated 18 December 2017, the Company applied for an order that its costs of the action be paid by Mr Fikry, and in the alternative that there be no order as to costs. By an application notice dated 15 January 2018, Mr Fikry applied (i) for an order that his costs be paid in whole or in part by Mr Sylvain Vieujot, a director of the Company, or that they be paid by the Company, and (ii) for an order that in either event his costs be paid on the indemnity basis.

2. I decided the applications on the basis of written submissions and without an oral hearing. I directed this because, although the costs incurred by the parties are no doubt substantial, I considered an oral hearing unnecessary and disproportionate to what I had to decide. The parties either supported this course or at least indicated that they did not object to it.

3. The Company was incorporated in the Abu Dhabi Global Market ("ADGM") Financial Free Zone on 16 December 2015, and is wholly owned by a company incorporated the British Virgin Islands called Afkar Holding Limited, which in turn is owned as to 51% by Equitativa Holding Foundation ("Equitativa"), of which Mr Vieujot is a beneficiary, and as to 49% is owned by Sthenos Holding Limited, of which Mr Fikry is a beneficiary. It is controversial how well its business was doing in 2017, and I am not in a position to take a view about that.

4. Essentially, the litigation concerned a meeting of the Company's board of directors on 31 July 2017 (the "Meeting"), and whether two resolutions (the "Resolutions") were, as the Company maintained and as Mr Fikry disputed, valid. The Resolutions were (i) for the appointment as a director of Mr Abdul Wahab Al Halabi, and (ii) for the removal of Mr Fikry from his position as Senior Executive Officer ("SEO") and his replacement by Mr Amine Bentaleb.

5. I described the background to this litigation in a judgment dated 26 November 2017, in which I refused an application by the Company for interim declarations, and I shall not repeat that description. But I should set out something of the history of the proceedings.

The Proceedings

6. The Company applied to the Court for interim relief on 12 September 2017, and issued these proceedings on 17 September 2017. Originally, it claimed declarations relating to the Meeting. By amended proceedings dated 8 October 2017 the Company sought declarations about the Meeting

and its minutes, including declarations that the Resolutions were valid, and also (i) injunctive relief prohibiting Mr Fikry from representing to the Financial Services Regulatory Authority ("FSRA") of the ADGM or to clients or other third parties that the Resolutions were invalid, and (ii) general damages for breach by Mr Fikry of his duties as a director and the SEO of the Company to promote its success and to act with reasonable care, skill and diligence.

7. On 18 October 2017 I heard an application by the Company for interim declarations. At the end of the hearing, I ruled orally that I refused the application, and I reserved the costs of the application to the trial of the claim or any preliminary issue thereof. I gave the substantive reasons for my decision on the application in a written judgment on 26 November 2017. When giving brief oral reasons for my decision on 18 October 2017 I referred to a requirement of the FSRA that, as a condition of its permission to carry on regulated activities, the Company hold capital of 120% of its "expenditure based capital minimum". It had earlier been recognised by Mr Vieujot and Mr Fikry that in order to meet this requirement, it would need monthly contributions of about $100,000 from its shareholders. I explained that my decision was reached on the basis that capitalisation of the Company would "continue to satisfy" the FSRA, and that, were that position to change, I was "inclined to think that that would be a material change of circumstance that would justify the application being restored". I should emphasise that I indicated that, if the Company renewed its application for interim relief in these circumstances, it might well be entitled to have its applications reconsidered: I did not say, and I gave the Company no reason to think, that a renewed application in those circumstances would necessarily succeed.

8. By a letter dated 30 October 2017, before I delivered my judgment on 26 November 2017, Mr Fikry had resigned as the SEO and as a director of the Company. He wrote "The main reason for this decision, among many others, is that I am unable to manage or grow the company in the current situation, and I am prevented to take any decision as a SEO or director because of Mr Sylvain Vieujot refusal to attend any meeting or sign any written resolutions".

9. On 30 October 2017, the same day as Mr Fikry gave notice of his resignations, the FSRA wrote to Mr Vieujot and to Mr Fikry referring to the Company having been in breach of the requirements of its authorisation to conduct business with regard to maintaining adequate capital. It wrote that it had "serious concerns about the manner in which the business of the [Company] is being conducted, in particular the inability to maintain adequate and appropriate resources, and the two separate breaches of [its] Capital Requirements".

10. On 8 November 2017 Mr Fikry served a defence in the proceedings. He did not bring a counter-claim or an additional claim under rule 51 of the ADGM Court Procedure Rules ("CPR"), although he had earlier indicated that he was minded to do so, and in particular to bring a claim against Mr Vieujot. However, Mr Fikry pleaded in his defence that Mr Vieujot acted in breach of his duties to the

Company: that he had sought to have his own "close associates", Mr Al Halabi and Mr Bentaleb, appointed director and SEO of the Company, and that he had placed pressure on Mr Fikry to force him to agree terms for Mr Vieujot to buy his interest on the Company, to take "de facto control" of the Company and to "marginalise" Mr Fikry. Thus, he had acted "With the improper purpose, motive and intention, in bad faith, and in his own and exclusive interests".

11. The Company served a reply on 27 November 2017.

12. On 26 November 2017 the FSRA notified the Company that it approved the appointment of Mr Al Halabi to "perform the Controlled Function of Licensed Director" (subject to the payment of authorisation fees). However, it stated that it reserved its rights to reassess the application on the final resolution of this litigation or other judicial proceedings concerning the validity of Mr Al Halabi's appointment as a director.

13. On 29 November 2017 I held a Case Management Conference ("CMC"). Among the orders that I made were these:

    (a) An order that by 7 December 2017 the Company serve particulars of the damages that it claimed.

    (b) An order for standard disclosure by 11 December 2017.

    (c) Orders against Mr Fikry and the Company for some specific disclosure by 14 December 2017.

    (d) An order for an expedited trial, to begin (as the parties agreed by way of amendment of my original direction) on 4 February 2018.

    (e) An order that costs of the CMC be in the case.

14. On 7 December 2017 the Company filed and served on Mr Fikry notice that it discontinued the whole of the proceedings.

The evidence

15. The evidence on these applications was by way of witness statements of Mr Vieujot and Mr Fikry, and I also allowed in evidence documents put before me under cover of a letter dated 7 February 2018 from Mr Fikry's lawyers, Baker McKenzie Habib Al Mulla. ("BM"). They were described as a Business Plan and said to have been sent by Mr Vieujot to Mr Fikry on 24 January 2018, together with Mr Fikry's response to it on 29 January 2018.

16. The evidence in the witness statements, in particular that of Mr Fikry, covered in considerable detail and in contentious terms dealings between the parties before and during the proceedings and after they were discontinued. It sometimes amounted to little more than assertion and counter-assertion on questions which I cannot decide on applications of this kind, and which in my judgment I do not need to decide in order to determine the applications.

17. It is convenient to mention here two specific matters about the evidence. The first concerns an issue about who has been paying and is liable for meeting the Company's costs in respect of the proceedings: it is disputed whether the Company's costs have been and are being funded by the Company itself (as Mr Vieujot contended) or by Mr Vieujot (as Mr Fikry contended) or indeed from elsewhere.

18. Mr Vieujot's evidence was clear: he said in a witness statement of 5 February 2018 that, "…while it is for [Mr Fikry] to prove the allegations he makes, I can nonetheless confirm that the legal fees paid so far in relation to this case have been paid by the [Company], through its own accounts. Outstanding and on-going fees will also be continued to be paid by the Company, and not by me. I can confirm that I have not paid and have no intention of paying legal fees incurred by the Company, as this is a liability of the Company, which is responsible for discharging such liabilities".

19. Mr Fikry refuted this: in his witness statement filed on 15 January 2018 he said that in the period before he resigned there was no way that the Company could have paid the legal costs because he authorised no payment to the Company's lawyers, Curtis Mallet-Prevost Colt & Mosle LLP ("Curtis"), and Mr Vieujot was not able to give instructions to the Company's bank without Mr Fikry's authorisation.

20. Mr Fikry also relied on the Business Plan document, to which I have referred. His point was that it made no reference to the Company paying any legal fees or incurring any liabilities for fees in respect of the litigation. In an email of 29 January 2018 sent to Mr Vieujot in response to the Plan, Mr Fikry observed, "I assume that you personally have been financing [the Company's] recent court case, and the further expected cost will be borne by you personally, as there is no provisions [sic] in the document".

21. No reply to that email is in evidence. However, in a witness statement dated 21 February 2018, on which I permitted the Company and Mr Vieujot to rely in order to deal with this point, Mr Vieujot observed firstly that the Business Plan was no more than a draft of a document intended only for the Company's internal management purposes. But secondly, and more importantly, he said that the Plan included a provision for the litigation costs in an entry for $18,140 described as "Advisers fees". This was clearly wrong: this entry showed income to the Company in the year 1 January 2017 to 31 December 2017, and not expenditure by the Company. Mr Vieujot accepted that this evidence was

in error, and in a further witness statement dated 14 March 2018 he said that the legal costs were not reflected in the "Advisers fees" item but in an entry in the Plan for US$687,870 by way of expenditure by the Company and described as "Administrative and other costs".

22. Mr Fikry contended that Mr Vieujot's statement of 14 March 2018 should not be received in evidence because he was "concerned that Mr Vieujot is changing his evidence to suit his case and to respond to the case being submitted on behalf of Mr Fikry". He submitted in the alternative that, if the evidence was received, he should be permitted to cross-examine Mr Vieujot on this and other matters.

23. By an order dated 20 March 2018 I directed that the witness statement of 14 March 2018 be admitted in evidence: I considered it would be contrary to the interests of justice to refuse to allow Mr Vieujot to correct evidence that he professed to be wrong or to disregard his explanation of the correct position. I also refused to direct Mr Vieujot's cross-examination: to my mind it would have been wrong to allow his cross-examination without allowing corresponding cross-examination of Mr Fikry, and it would have been disproportionate to the issue to have an oral hearing of this kind.

24. In my judgment, Mr Fikry has not demonstrated that the Company is not liable for its own costs of the proceedings and Mr Vieujot is responsible for them. After all, there would be no obvious attraction to Mr Vieujot in meeting personally expenses which would otherwise effectively be borne by both parties indirectly interested in the Company. Further, it is not, I think, surprising that Mr Fikry was not privy to the arrangements for instructing lawyers to bring proceedings against him. However, as I shall explain, to my mind this conclusion is not, however, crucial for determining the applications.

25. The background to the second matter is a direction that I made on 14 February 2018 that "Unless in exceptional circumstances the Court otherwise permits, no further evidence will be admitted on the applications for costs". Nevertheless, when submissions in reply were served by Mr Fikry on 18 March 2018 there were attached to them various documents that were not in evidence. In a covering letter BM wrote that the documents "ought to be uncontroversial and the significance of them is explained in the submissions". They did not refer to the direction of 14 February 2018 or claim that there were exceptional circumstances justifying the admission of this further evidence. Curtis replied objecting to the new documents being received and relying on the direction.

26. The controversial documents are said to relate to an issue about whether the parties were providing the Company with sufficient funding to carry on its business and to maintain the capital reserves required by the regulatory authorities, and in particular whether Mr Vieujot or entities associated with him were doing so. This question is, to my mind, of no real relevance to anything that I have to decide. It appears to have exercised the parties for this reason: the Company and Mr Vieujot allege that Mr Fikry "failed to meet his obligations to fund the [Company]" and that he was "not

recapitalising the business". As I shall explain later in my judgment, this itself seems to me a matter of little consequence. However, Mr Fikry contended that the implication of the argument is that Mr Vieujot for his part provided capitalisation funds for the Company, which Mr Fikry disputed. The controversial documents are, as I understand it, directed to providing support for Mr Fikry's contention, but even if I received them in evidence, I would not be able to reach a reliable conclusion about this issue.

27. However that might be, I decline to receive these documents in evidence. Even if I regarded the documents as important, Mr Fikry would need to identify exceptional circumstances in view of the direction of 14 February 2018. Certainly I see no reason to depart from my direction in order to receive evidence of such peripheral relevance and inconclusive value.

The Company's application

28. Rule 172(1) of the CPR provides as follows: "Unless the Court orders otherwise, a claimant who discontinues is liable for the costs which a defendant, against whom the claimant discontinues, incurred on or before the date on which notice of discontinuance was served on that defendant". This reflects rule 38.6(1) of the English Civil Procedure Rules ("ECPR"). In Brookes v HSBC Bank plc, [2011] EWCA Civ 354 (at para 6) Moore-Bick LJ, in a judgment with which the other members of the Court of Appeal agreed, gave this guidance about the application of the rule:

> (1) When a claimant discontinues proceedings, there is a presumption by reason of ECPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position.
>
> (2) The fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so.
>
> (3) However, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption.
>
> (4) The mere fact that a claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption.
>
> (5) If the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances since he brought the proceedings to which he has not himself contributed.

(6) However, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule.

29. Moore-Bick LJ explained that the reason that the Courts will not readily depart from the prima facie rule is, as he put it (loc cit at para 10), that, when a claimant fails in his claim or abandons it, it is "normally unjust to make the defendant bear the costs of proceedings that were forced upon him and which the claimant is unable or unwilling to carry through to judgment". After all, as Patten LJ observed in Messih v McMillan Williams, [2010] EWCA Civ 844, in which a claimant was ordered to pay the costs of defendant solicitors against whom proceedings were discontinued after settlement of the claim by another defendant, a quite usual consequence of the claimant's decision to discontinue is that the Court is not in a position to determine what the outcome of a trial would have been: see para 31. For this reason, a claimant, faced with the burden of displacing the prima facie rule, generally cannot have the Court proceed on the basis that he would likely have succeeded in the litigation if he had not prevented it from being tried.

30. How then does the Company argue here that it should not pay Mr Fikry's costs of the proceedings that it discontinued? In its application notice, it puts its contentions as follows: "… the [Company] was required to take initial action against [Mr Fikry]", and "[his] unreasonable and independent actions following the initiation of the claim namely his sudden resignation from his roles of director and SEO of the [Company], have caused a significant change of circumstances, whereby the [Company] no longer needs to pursue its claim for a resolution". It argued in its written submissions that "the uncooperative and unreasonable conduct of [Mr Fikry] before and after this action commenced, which brought about a change of circumstances rendering the action initially necessary and consequently redundant and academic, constitutes a cogent reason for the Court, in the exercise of its discretion as to costs, to depart from the presumption" in rule 172(1). (I observe that in its notice the Company did not rely on any allegation about Mr Fikry's conduct before the proceedings were brought, but it did so in its submissions. However, Mr Fikry took no point that this was a departure from the application notice, and in these circumstances I shall disregard this.)

31. It is convenient first to consider two points in response to this argument made by Mr Fikry. First, he submitted that it does not recognise all the claims that the Company was making against him, including the claims for injunctive relief and for damages for breach of duty. However, Mr Vieujot's evidence served in support of the application made clear that the Company does not contend that it discontinued because it had obtained everything that it would have if its claims were wholly successful. His evidence was that the Company considered that "two of its principal aims in bringing this case – the appointment of a new management and the appointment of Mr Al Halabi as a director of the Company – [had] been achieved through the voluntary resignation of [Mr Fikry]". He explained

that the Company had taken steps that it considered necessary "to return the Company to a proper state of function and a financially sound footing", and in view of what had been achieved, it did not "wish to devote the resources of the Court or of the [Company] itself to a claim wherein the need to obtain relief had been taken away".

32. Secondly, in submissions made on Mr Fikry's behalf, Mr Farhaz Kahn and Mr Saaman Pourghadiri, who represented him, invited me to reject the Company's case that its reason for discontinuing the proceedings was that, as a result of Mr Fikry's resignations, it had achieved sufficient of its purpose in bringing them. They argued that this contention is inconsistent with the delay between the resignations on 30 October 2017 and the notice of discontinuance given some five or six weeks later on 7 December 2017, shortly before the Company was to give disclosure under the directions that I made on 29 November 2017. They also said that Mr Fikry's resignations did nothing to determine whether the Resolutions were valid, which was the substantive issue in the proceedings. I was invited to infer that the Company served notice of discontinuance because it was concerned that disclosure of communications between Mr Vieujot and his close associates in accordance with my directions on the CMC would reveal his true purposes and motivation around the time of the Meeting, and therefore would undermine the merits of the Company's claim.

33. I am not persuaded by this submission. It is not the Company's case that it had achieved sufficient through the resignations per se and immediately on 30 October 2017. Mr Vieujot's evidence was that they not only directly meant that the position of SEO was vacated, but that they "allowed [Mr Vieujot] as the Chairman to pass a resolution approving Mr Al Halabi's appointment as a director", which appointment was approved by the FSRA only on 26 November 2017. Certainly, as Mr Fikry observed, the FSRA made clear that it might re-assess its approval in light of the outcome of the litigation, but there is no evidence that this possibility troubled the Company. Given that around the end of November 2017 the parties were engaged with the CMC, I cannot attach any significance to the delay in serving notice of discontinuance after the FSRA's notification. As for the submission that the resignations did not resolve the issue about the validity of the Resolutions, I find it readily understandable that the Company saw no reason to pursue litigation in order to resolve that issue as an end in itself, provided that the Company had a board of directors and management that were able to conduct its business. To my mind, there is no proper basis to infer that the Company discontinued the proceedings in order to avoid disclosure: that would be impermissible speculation.

34. However, although I reject these arguments on behalf of Mr Fikry, it does not follow that the Company has made out its case that it would be right not to apply the general rule that a party who discontinues proceedings should pay the costs of the other party. The authorities clearly establish that departure from the rule is not justified simply because the claimant has achieved all or almost all that he was concerned to achieve by bringing the proceedings, or that circumstances have so changed that he

sees no point in pursuing them and regards them as "redundant": see, for example, Nelson's Yard v Eziefula, [2013] EWCA (Civ) 235 at para 31. The Company needs also to make good its contention that circumstances changed as a result of unreasonable conduct on Mr Fikry's part.

35. On the face of it, it is perhaps surprising that the Company should complain about Mr Fikry's decision to resign his positions. Mr Vieujot's evidence was that by the time of the Meeting "it was in the best interests of the Company to secure a change of management and to add experienced voices to the Board of directors … to try to ensure the viability of the Company", and that this became the more necessary after the FSRA had expressed the view (as it did, for example, at a meeting on 17 August 2017) that the Company should consider suspending its operations if no long-term solution was found to its problems, including the dispute between Mr Vieujot and Mr Fikry. Mr Fikry's case is that Mr Vieujot had been seeking to remove him as SEO. Certainly on 18 September 2018 Mr Fikry was sent a letter by Equitativa (Dubai) Limited giving him (or purporting to give him) a month's notice of termination of his employment contract. (The position about Mr Fikry's contract of employment is not clear from the evidence. The termination letter refers to a contract of employment between Equitativa (Dubai) and Mr Fikry dated 24 June 2015 and to Mr Fikry being seconded to the Company pursuant to a Shared Service Agreement between Equitativa (Dubai) Limited and Mr Fikry. In his reply on 19 September 2017 to the notice of termination Mr Fikry disputed this. This curiosity does not matter for present purposes: Mr Fikry relied on the notice as evidence of continuing attempts to remove him as SEO of the Company, and on any view the letter seems to me to provide evidence of that.) I recognise that there is no reason to think that Mr Vieujot or the Company called for Mr Fikry's resignation from the board of the Company, but, as I understand Mr Vieujot's evidence, this apparently facilitated the approval by the FSRA of Mr Al Halabi's appointment.

36. It does not, in my judgment, assist the Company to complain about Mr Fikry's behaviour before the proceedings were brought. I have explained in my judgment of 26 November 2017 (at paras 16ff) the events after the Meeting, and I need not repeat my explanation. Because the proceedings have been discontinued and will not be tried, I am not in a position to form a view as to whether Mr Fikry had good grounds for challenging the validity of the Resolutions. In these circumstances, I cannot say whether he was unreasonable to make his concerns and complaints known to the FSRA. It is true that Mr Fikry could have resigned his offices with the Company before proceedings were brought, and that, had he done so, it is likely that litigation would have been avoided. But it does not follow from this or from his later resignations that he was unreasonable not to resign earlier. The Company complained that Mr Fikry did not himself bring proceedings to challenge the Resolutions despite threatening to do so, but I decline to conclude that he was unreasonable not to commence litigation.

37. There is detailed evidence about the disputes in October 2017 before Mr Fikry resigned his positions. I do not find it easy to follow all the exchanges, and I do not think that it is necessary to examine them

in detail. The exchanges were not only concerned with difficulties in the management of the Company. Mr Fikry also made clear in the exchanges that he was willing to explore ending his venture with Mr Vieujot and in reaching agreement on a buyout, which suggestion had been raised before the Meeting and to which I referred in my judgment of 26 November 2017 (at para 12).

38. Mr Fikry explained in his evidence his case as to what led to his resignations. On 18 October 2017, the day after I had ruled on the Company's interim declaration application, he sent an email to Mr Vieujot stating that he was "open to a reciprocal and fair buyout", and that he was committed to managing the Company. He proposed that there be a board meeting on 23 October 2017, but this proposal came to nothing, apparently after differences developed over the proposed agenda: in particular, Mr Fikry complained about Mr Vieujot insisting that there be consideration about "whether the current acting SEO should continue in that role" and whether the Company should "execute a voluntary undertaking for a cessation of business". Mr Vieujot also made clear that he should be appointed chairman of the meeting and that Mr Al Halabi should attend it.

39. Mr Fikry's concern as a result of these exchanges was, he said, that Mr Vieujot was attempting to "engineer another opportunity at a board meeting to achieve the same things which he had sought to achieve by the contentious 31 July 3017 meeting: take control of [the Company], marginalise [Mr Fikry] and place [him] under pressure to accede to his demands in relation to the disputed shareholder issues and buy-out". Mr Fikry said that he found particularly troubling that it was proposed that consideration be given to the Company ceasing business. He responded, he says, by making clear that he was open to discussions to enter into a buyout agreement to resolve the dispute between shareholders, and proposing on 26 October 2017 that the Board deal with certain urgent regulatory and operational matters by way of written resolutions. However, Mr Vieujot apparently did not agree to this. The Company's Secretary, Ms Maria Alvarez, proposed a board meeting on 2 November 2017, but on terms that were unacceptable to Mr Fikry. Mr Fikry's position is encapsulated in an email that he sent to Mr Vieujot of 4 December 2017, in which he said that Mr Vieujot's behaviour had "conveyed the Company to the point where it was impossible to manage the daily activities and meet its regulatory duties".

40. It is not necessary or appropriate on an application of this kind that I express any concluded view about the merits of the parties' positions in these exchanges. The relevant question here is whether the Company has demonstrated that Mr Fikry was unreasonable to resign in these circumstances. In my judgment, it has not done so. Effectively, for whatever reason, Mr Fikry had, according to his evidence, concluded that, as a result of his dispute with Mr Vieujot, he could not carry out his duties as the Company's SEO and as a director, and in particular could not ensure that the Company could meet its regulatory obligations. I cannot assess whether his concern was justified, but what matters for present purposes is that I see no proper reason to reject Mr Fikry's evidence that this was the

reason for his resignations, and in my judgment, the Company has not shown that Mr Fikry was unreasonable to conclude that it was no longer possible for him properly to manage the Company or remain a director of it.

41. The Company submitted that Mr Fikry gave no warning that he intended to resign. That does not seem to me important: I cannot see what the purpose of a warning would have been, or how the Company's response to a warning might materially have influenced events. Mr Vieujot's evidence was that it meant that the Company needed to appoint an interim SEO, a Ms Racha Alkhawaja, and that there was no "transition period" for transferring management responsibilities. However, on 1 November 2017 Mr Fikry sent an email in which he said that he was "totally available to support [his] replacement in [the Company]" and offered help "during the transition period". In any case, there is no evidence that significant problems were caused to the Company because Mr Fikry did not give warning or notice of his resignations.

42. There is another issue between the parties on this application. As I have said, the Company criticised Mr Fikry for failing to provide the funding that it needed to meet the requirements of the FSRA. Mr Fikry said in his evidence that he continued to provide finance in that on 31 October 2017 he transferred the required amount for capitalising the Company. But Mr Vieujot's evidence is that, after he resigned as SEO and a director, Mr Fikry no longer provided shareholders' funding for the Company, and in particular that, although when the FSRA requested the Company find a longer term resolutions for its continuing capitalisation difficulties Equitativa provided funds of US $255,000, being 51% of the $500,000 that it was thought was required for this purpose, Mr Fikry had not provided corresponding funds. Mr Fikry, for his part, attributed this to unresolved issues about how further finance should be provided.

43. I cannot form any view about the merits of this dispute, and I need not do so. But the Company referred to my observation on 18 October 2017 (see para 7 above), and sought to argue that it could in these circumstances have restored its application for interim relief. However that might be, it did not do so, and it is impossible to say what the outcome would have been had it done so. I do not consider that this point assists the Company.

44. In my judgment, the Company has not demonstrated grounds that would justify me in departing from the prima facie rule that it must pay the costs incurred by Mr Fikry on and before 7 December 2017 in respect of the proceedings that it discontinued. The Company's argument depended on the Court accepting its contention that Mr Fikry acted unreasonably in resigning from his positions with the Company when he did. I consider that it has not shown this.

45. I therefore conclude that the Company should pay the costs incurred by Mr Fikry of or incidental to the proceedings on or before 7 December 2017. I include the costs of the application for interim declarations: I see no proper basis for distinguishing them from other costs of the proceedings.

Mr Fikry's application against Mr Vieujot

46. Mr Fikry's application that his costs should be paid by Mr Vieujot is based on article 49 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the "2015 Regulations"), which provides that "Subject to the provisions of these Regulations or any other ADGM enactment and to court procedure rules, the costs of or incidental to all proceedings in … the Court of First Instance shall be in the discretion of the Court". It goes on to provide that, "The Court shall have full power to determine by whom and to what extent the costs are to be paid, including, without limitation, the power to determine whether costs are to be paid on the standard or indemnity basis". The article is in similar terms to those of section 51 of the English Senior Courts Act and of comparable legislation in other common law jurisdictions.

47. However, as Mr Vieujot observed, the ECPR provide at rule 46.2 that "Where the court is considering whether to exercise its power under section 51 … to make an order in favour or against a person who is not party to proceedings, that person must – (a) be added as a party to the proceedings for the purpose of costs only; and (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further". The notes to the rule set out in the "White Book" (as it is commonly known) explain at 46.2.2 that "where necessary, permission to serve outside the jurisdiction [must be] obtained. It is implicit in the rule or inherent in the court's jurisdiction that, for the purposes of service of process on a non-party joined for the purpose of costs, the court has power to give permission to serve out of the jurisdiction if satisfied that an appropriate case has been made out". The Court Rules of the Dubai International Financial Centre ("DIFC") make similar provision. There is no comparable provision in the rules of this Court.

48. Although Mr Vieujot drew these matters to my attention, it is not clear to me whether or not he challenges the jurisdiction of the Court to make a third party costs order against him. If he does, I reject the challenge. The jurisdiction is conferred by article 49. The absence of a procedural rule comparable with the English rule does not remove or restrict the jurisdiction. No doubt a person against whom an order is sought should be given a reasonable opportunity to attend a hearing for

considering the application against him, but in this case Mr Vieujot was content that the application should be determined without a hearing.

49. Mr Fikry submitted, and Mr Vieujot did not dispute, that this Court should be guided in the exercise of its discretion by the same principles as have been adopted in other jurisdictions. In particular, Mr Fikry relied on the advice of Lord Brown in Dymocks v Todd, [2004] UKPC 39, a decision of the Privy Council on an appeal from New Zealand. That was a case where a party to the litigation was insolvent and unable to pay the costs of a party entitled to recover them. This case is different: Mr Fikry did not contend that the Company is insolvent, but he pointed out that he is a minority (49%) shareholder in Afkar Holdings, and this affects the real impact of any order made in respect of the costs against the Company: that, if his costs are paid by the Company, then the real impact falls as to 49% on him. I did not receive submissions about whether, if I made an order against Mr Vieujot, the Company could reimburse to him any costs that he paid or Mr Vieujot could require it to do so, but I observe that that would apparently defeat any such advantage to Mr Fikry of an order against Mr Vieujot. However that might be, it was not, as I understand it, argued that this consideration taken by itself would justify a costs order against Mr Vieujot: Mr Fikry submitted that it is a relevant consideration for the Court to have in mind when exercising its discretion about costs.

50. Despite this difference, I accept that the Dymocks case and other authorities where a party to the litigation is insolvent provide relevant guidance about when the Court should make a costs order against non-parties. In particular, Mr Fikry relied on this statement of Lord Brown (loc cit at para 29): "... generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. … however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests". It is generally an important consideration where a costs order is sought against the director of a party whether he is properly to be regarded as acting in his own interests rather than those of the party, although in the end, of course, the decision in any case will depend on its peculiar facts.

51. Against this background, Mr Fikry contended that it is just and equitable that the Court should make a costs order against Mr Vieujot. His arguments had these strands:

    (a) That Mr Vieujot controlled how the Company's claim was pursued.

    (b) That Mr Vieujot provided evidence in support of the Company's application for interim declarations.

(c) That Mr Vieujot funded the litigation for the Company.

(d) That Mr Vieujot was warned that Mr Fikry would seek an order for costs against him.

(e) That the litigation was pursued for the benefit of Mr Vieujot, rather than the benefit of the Company.

52. It is not really disputed that Mr Vieujot controlled the Company's claim in the sense that he was responsible for instructing Curtis. This was next to inevitable since he was the only director of the Company other than Mr Fikry and perhaps Mr Al Halabi, whose appointment was contentious. In a letter sent before the proceedings, Curtis wrote on 5 September 2017 to Mr Fikry that they were instructed on behalf of both Mr Vieujot and the Company, to whom together they referred as their "Clients", threatening Mr Fikry that if he continued to obstruct attempts to have the appointment of Mr Al Halabi as a director of the Company approved by the FSRA, their clients would seek an urgent injunction in order to protect the Company from further harm. In the event, of course, proceedings were not brought by Mr Vieujot.

53. Mr Vieujot did indeed give the main evidence relied on by the Company on its application for interim declarations, although Ms Perera and Mr Al Halabi also gave evidence. This seems to me of no real significance to this application: given the nature of the dispute, he was in the best position to do so.

54. It is disputed whether the proceedings have been funded by the Company or by Mr Vieujot. As I have explained, I have concluded that Mr Fikry has not demonstrated that Mr Vieujot, rather than the Company, was responsible for paying its costs. This is not, however, determinative of whether or not a costs order should be made against Mr Vieujot: in Deutsche Bank AG v Sebastian Holdings Inc, [2016] EWCA Civ 23 at para 47 Moore Bick LJ said that the funding of the litigation by the third party was "a factor which may, depending on the circumstances, weigh in favour of making such an order, but no more than that". He went on to say that in that case it was better regarded as one aspect of the relationship between the third party and the defendant that justified the conclusion that the third party was "the real party to the litigation".

55. Mr Vieujot observed that Mr Fikry had in the course of the proceedings, including at the hearing of the application for interim relief on 18 October 2017, said that he had it in mind to join Mr Vieujot as a party in the proceedings. He did not do so when he served his defence, and this threat appeared to have been abandoned. However, Mr Vieujot was warned when the defence was served that Mr Fikry would seek costs against him and the warning was repeated thereafter. In the Deutsche Bank case Moore-Bick LJ referred to the significance of whether the third party has been warned that costs might be sought against him (loc cit at para 30ff): a warning can be a consideration in support of a non-party

costs order, but, of course, its importance will vary from case to case. In my judgment, it is not a matter of great weight here.

56. I take account of these considerations, but to my mind, the crucial question on the application against Mr Vieujot is whether, in exercising his control so as to bring and pursue the litigation, Mr Vieujot was acting in his own interests and with a view to gaining a personal benefit from it, or whether he was acting in what he perceived to be the best interests of the Company. It is his case that after the Meeting, Mr Fikry challenged the validity of the Resolutions and the minutes of the Meeting in communications with the FSRA and others, but failed despite threats to take any steps to bring proceedings to support his claim; and that the impact of this on the Company's business was such that it was compelled to being proceedings to clarify the position.

57. Against this, Mr Fikry contended (as he put it in his witness statement of 15 January 2018) that really the claim was "an extension of the shareholder dispute and contentious buyout by a different means", and that the purpose of the litigation was for Mr Vieujot to "achieve a major tactical advantage over [him] in [their] wider dispute". He argued his case, developed in the interlocutory proceedings on the Company's application for interim declarations and pleaded in the defence, that Mr Vieujot was not acting in the best interests of the Company at the Meeting when proposing the Resolutions. Similarly, in his application notice Mr Fikry put it as follows: that "the purpose and effect of [the] resolutions would be to secure for [Mr Vieujot] a tactical and strategic advantage over [Mr Fikry] in their ongoing shareholder dispute and buy-out negotiations in respect of the [Company] and with the particular motive and intention to (a) place acute and illegitimate stress and pressure on [Mr Fikry] and force him to agree to the buy-out agreement on terms proposed by and favourable to Mr Vieujot; (b) to take de facto control of the [Company]; (c) to marginalise [Mr Fikry]".

58. There is no proper basis, in my judgment, for upholding this contention, or for rejecting the Company's case about why the proceedings were brought. That would amount to accepting Mr Fikry's case about the merits of the claim without a proper evidential basis. Mr Fikry argued that the Company was not compelled to bring proceedings in order to have the FSRA consider giving approval to Mr Al Halabi's appointment as a director, observing that in my judgment on the Company's application for interim relief I said (at para 57) that the FSRA had powers to decide any application made to it and was entitled, if it saw fit, to consider for itself what had happened at the Meeting. But this does not mean that the purpose in bringing the proceedings was not, as Mr Vieujot contended, to minimise damage to the Company resulting from problems caused by the dispute about the validity of the Resolutions, of which the regulatory position was only one aspect.

59. As I understand their submissions, Mr Khan and Mr Pourghadiri did not argue that I should conclude on the evidence that Mr Vieujot was acting in his own and not the Company's interest in having the Company bring the proceedings. However, they contended that, since "Mr Vieujot has chosen to

discontinue the claim, chosen to do so prior to disclosure and chosen to do so prior to subjecting himself to cross-examination", the Court "should proceed on the basis that Mr Fikry would have made out his defence". They relied on the observations of Patten LJ in the Messih case, to which I have referred (at para 29 above).

60. I am unable to accept that argument: the position is not like that which I have considered in relation to the Company's application, where the Company needed to establish its case that I should depart from the prima facie rule under CPR rule 172. Here it is for Mr Fikry to make out his case for a costs order against a third party. After all, the proceedings were discontinued by the Company, rather than by Mr Vieujot. It might be that Mr Vieujot took the decision on behalf of the Company, but Mr Fikry did not argue that it was not taken in the interests of the Company, or in order to benefit the Company.

61. Mr Fikry's notice of application states two (connected) grounds for seeking as order against Mr Vieujot, to which I shall refer as the "control" argument and that "real party" argument. The control argument is put in these terms: that Mr Vieujot "effectively controlled and supported the litigation (including the interim relief application) (i) financially and (ii) by giving evidence, and was doing so with a view to obtaining a personal benefit in the event that it was successful". The real party argument is that Mr Vieujot "was the real party to the litigation and in all events had a very high degree of connection with the litigation such as to justify the Court treating him as if he were the real party (in place of the [Company] …". In my judgment Mr Fikry has not made out either argument, and I refuse the application that Mr Vieujot be ordered to pay Mr Fikry's costs.

The application for costs on the indemnity basis

62. Mr Fikry has applied to have his costs (which are to be paid by the Company) assessed on the indemnity basis. The CPR provide (at rule 197) that, where the Court is to assess the amount of costs, it will assess the costs either on the standard basis or on the indemnity basis. Where the standard basis is adopted, the Court allows only costs that are proportionate to the matters in issue and are reasonably incurred and reasonable in amount, any doubt about reasonableness being resolved in favour of the paying party: see rule 198. Where the indemnity basis is adopted, the recoverable costs are not restricted to those proportionate to the matters in issue. They are restricted to costs reasonably incurred and reasonable in amount, but here any doubt about this is resolved in favour of the paying party: rule 199.

63. The rules reflect English law, which similarly has costs assessed on a standard basis or an indemnity basis. In Ghafoor v Cliff, [2006] EWHC 825 (Ch), David Richards J summarised the position as follows (at para 72): "… while the court has a wide discretion as to whether to order costs on the standard or the indemnity basis, there must be something in the conduct of the proceedings or the circumstances

of the case which takes the case out of the norm in a way that justifies an order for indemnity costs. Where, as in the present case, it is the conduct of the paying party which is relied on, there must be some element on his conduct of the case which deserves some mark of disapproval; unreasonableness of a high degree may be sufficient".

64. In this case, Mr Fikry's application is put on the basis of unreasonable conduct on the part of Mr Vieujot or the Company. The grounds for the application, as stated in his application notice, are that "Mr Vieujot's, alternatively the [Company's], conduct including in bringing the Claim was unreasonableness to a high degree and takes the case out of the norm in a way which deserves a mark of disapproval by the Court". Mr Fikry also referred to the bad faith alleged against Mr Vieujot in the defence and contended that this has been continued by Mr Vieujot in bringing and pursuing the proceedings.

65. In his witness statement Mr Fikry put forward these contentions in support of his application that his costs be assessed on the indemnity basis:

    (a) That Mr Vieujot acted in bad faith at the Meeting with the intention of putting pressure on Mr Fikry to accept his terms for a buyout agreement, and to take control of the Company and its business.

    (b) That Mr Vieujot brought the proceedings in order to have the Court "rubber-stamp" the Resolutions and so enable him to take control of the Company and to influence the regulatory authorities of the ADGM to accept the appointments that he contends were made at the Meeting.

    (c) That the proceedings were discontinued "abruptly" and falsely attributed to Mr Fikry's resignations.

66. I refuse this application for similar reasons for refusing the application against Mr Vieujot. In my judgment, Mr Fikry has not made out any of these allegations: the first two essentially amount to assertions of Mr Fikry's case in the proceedings themselves. It is true that they will not be tried because of the Company's decision to discontinue the proceedings. But again, I reject that submission that I should proceed on a presumption that Mr Fikry's case is correct about factual matters in issue in the litigation. As with the application against Mr Vieujot, the position is different from where the Company sought to displace the prima facie rule about costs on discontinuance, and Mr Fikry cannot be relieved of the burden of justifying his application for costs on the indemnity basis and establishing the factual allegations made in support of it. I have already explained that I am not in a position to reject the Company's explanation for discontinuing the proceedings or to reject its evidence that its decision came about as a result of Mr Fikry's resignations.

67. It was also submitted on behalf of Mr Fikry in support of this application that Mr Vieujot has given untruthful evidence about who and how the lawyers representing the Company were being paid, and that that is "the basis of an inference that he acted in bad faith". I do not think that this complaint is covered by Mr Fikry's application notice, but, in any event, Mr Fikry has not made out his case about how the Company's costs have been funded. Moreover, it has no bearing on how the proceedings were conducted on behalf of the Company or whether the Company is properly to be criticised in that regard.

Conclusions

68. Therefore:

(a) I refuse the Company's application and direct that it pay the costs incurred by Mr Fikry of or incidental to the proceedings on or before 7 December 2017 (including the costs of the application for interim declarations).

(b) I direct that Mr Fikry's costs be assessed on the standard basis.

(c) I refuse Mr Fikry's application that Mr Vieujot be ordered to pay his costs.

Issued by:

ADGM COURTS
محاكم سوق أبوظبي العالمي

Linda Fitz-Alan
Registrar, ADGM Courts
2 May 2018