ADGM COURTS
محاكم سوق أبوظبي العالمي

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

COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION
BETWEEN

ELNAGGAR & PARTNERS LIMITED
Claimant

and

ABU DHABI GLOBAL MARKET REGISTRATION AUTHORITY
Defendant

JUDGMENT OF JUSTICE WILLIAM STONE SBS KC

Neutral Citation:	[2023] ADGMCFI 0023
Before:	Justice William Stone SBS KC
Decision Date:	12 December 2023
Hearing Date:	5 October 2023
Decision:	1. The Order Nisi be varied such that there is to be a costs order absolute that the Defendant be entitled to 50% of its costs of and incidental to these proceedings, such costs to be summarily assessed if not agreed. 2. Liberty to apply.
Date of Order:	12 December 2023
Catchwords:	Variation of costs order *nisi*; Effect of non-disclosure; Court's discretion to depart from the general rule that costs follow the event; Costs order absolute.
Legislation cited:	Beneficial Ownership and Control Regulations 2022 Beneficial Ownership and Control Regulations 2018 Commercial Licensing Regulations 2015 r.206 of the ADGM Court Procedure Rules 2016
Cases cited:	*R (Al Sweady & Ors) v Secretary of State for Defence* [2009] EWHC 1687 (Admin) R (*Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin)
Case Number:	ADGMCFI-2023-071
Parties and representation:	**Claimant** Mr Hari Krishna of Nimble Legal **Defendant** Mr Patrick Dillon-Malone SC of Clyde & Co LLP

JUDGMENT

Background

1. The Claimant's application to vary the costs order *nisi* made against it on 24 October 2023 (the "**Order *Nisi***") is unusual in scope, given that the basis of the application as now made was intended to underpin a substantive appeal on the merits. This appeal initially was pursued in the application filed on 7 November 2023 (the "**Application**"), wherein the Claimant sought to vary the entirety of the Order issued on 24 October 2023 (the "**October Order**").

2. In the event, after being invited to do so, the Claimant declined to recast the Application pursuant to Rule 206 of the Court Procedure Rules 2016 to seek permission to appeal the October Order – for reasons said

to be "*in the interest of proportionality*" and "*in view of the relatively low amount of the monetary penalty, which the Claimant has already paid*." Consequently, the Claimant now has chosen to limit the Application to vary the Order *Nisi* (the "**Costs Application**").

The Evidence

3. On the costs issue, the sole 'live' issue remaining, four witness statements are in evidence: the fourth and fifth witness statements of Mr Ahmed Elnaggar on behalf of the Claimant, the responsive witness statement of Ms Wicki Andersen on behalf of the Defendant, and the sixth witness statement of Mr Elnaggar in reply.

4. Mr Elnaggar advances one fundamental complaint. That is at no stage throughout these proceedings did he, or his legal representatives, or indeed the Court, have knowledge of the enactment, on 14 December 2022, of the Beneficial Ownership and Control Regulations 2022 (the "**BOCR 2022**"), which only came to the Claimant's attention a week after issuance of the October Order through an announcement on the ADGM website. He says that prior knowledge of the BOCR 2022 would have had a significant bearing on the way the Claimant's case was conducted, including the framing of argument and examination of witnesses during the hearing.

5. Mr Elnaggar pointed out that the BOCR 2022 repeals the Beneficial Ownership and Control Regulations 2018 (the "**BOCR 2018**"), and maintained that it is inconceivable that the Defendant was not aware of this enactment during the proceedings. In particular, he refers to the fact that section 18 of the BOCR 2022 amends the nature of a "*monetary penalty notice*" ("**MPN**") to bring it into line with the requirements of a "*warning notice*" under the Commercial Licensing Regulations 2015 (the "**CLR**"), the result of which is that a MPN must specify a reasonable period of not less than 14 days within which the person to whom the MPN is addressed may make appropriate representations to the Registrar.

6. The Claimant's position is that had it been aware of the existence of this statutory amendment as enacted, not only would it have "*reconsidered its approach to the matter*", but it is "*likely that this would have significantly impacted the Court's analysis of the relevant issues*".

7. In this context, Mr Elnaggar submits that had the Court been made aware of this amendment, the Court would have reconsidered its analysis in paragraph 48 of the judgment which accompanied the October Order (the "**Judgment"**), quoted as follows:

> *"The other aspect of this argument is that within the statutory BOCR scheme there is no equivalent requirement for a 'warning notice'. **Perhaps better would be if there was**, but the legislature has chosen not to include this requirement, and there is not". (emphasis added)*

8. It also follows, says Mr Elnaggar, that had knowledge of this amendment been available, it may not have been considered necessary to find, as the Court did, that the notice requirement had been satisfied by issuance of the "*Principal Findings Record*". Further, Mr Elnaggar avers that it would have been clear from the statutory amendment that the so-called "*extra-statutory*" policy, of which Ms Salman gave evidence, was actually based upon a statute which already had been enacted, although this fact had remained undisclosed during the "*Firm Assessment*" process and throughout the proceedings.

9. Mr Elnaggar maintained that the Defendant's reasons for the delay in publication of the amendment were nothing to the point, and submitted that it was plain that at least by December 2022 deficiencies had been recognised in the BOCR 2018, prompting (via sections 18(7) and 18(8)) the introduction of formal procedures for making written representations in response to a MPN which brought the procedure into line

with like provisions within the CLR; hence it was clear that the "*established process*" which Ms Salman had referenced in evidence as "*extra-statutory*" was not independent of the BOCR 2022, which then was awaiting publication, and of the existence of which the Claimant had been entirely unaware.

10. Accordingly, he submitted, had the Defendant been transparent as to the incoming regulatory change, it may not have proved necessary to have commenced these proceedings at all, since at the time he had been issued with a MPN the only option given to him had been to pay the penalty or to refer the matter to the Court. Hence, as far as he was concerned there was no ADGM regulation or policy in existence providing any detail about the "*established process*" of providing representations in response to a MPN: "*I could not rely on Ms Salman's reference to the so-called "established process" as an alternative to commencing proceedings as neither the MPN nor any published guidance said so*".

11. Mr Elnaggar submitted that in a case such as the present involving suit against a public regulatory authority there was an enhanced duty of candour, described as "*a very high duty…to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide*" (*R (Al Sweady & Ors) v Secretary of State for Defence* [2009] EWHC 1687 (Admin)), and that in the circumstances of these proceedings there had been a demonstrable lack of candour on the part of the Defendant.

12. By contrast, the witness statement of Ms Andersen, on behalf of the Defendant, strongly disputed the existence of any tactical or unfair delay in publication of the BOCR 2022 (which had been enacted by the Board of Directors of ADGM on 14 December 2022) and which she confirmed were not in the public domain and were not in effect at any time before publication on 26 October 2023.

13. Ms Andersen's evidence was that for operational and policy reasons it was decided that the functional requirements in the BOCR 2022 were to be included in the new Enhanced Registry System Portal ("**ERSP**"); however, the go-live date of the ESRP had been delayed due to "*technical reasons*". Consequently, the publication of the BOCR 2022 had been similarly delayed. She confirmed that there had been no decision on the part of the Defendant to keep the enactment of the BOCR 2022 from the Court or from the Claimant, the timing of the publication of the BOCR 2022 was entirely unrelated to the proceedings and the Judgment, and her submission was that in these proceedings evidence of new amendments not yet in force would have "*served no purpose*".

14. As to the suggestion that the Defendant's policy of accepting written representations in mitigation after the imposition of a MPN was based on the already enacted BOCR 2022, Ms Andersen stated that this was "*entirely incorrect*", and that the true position was as stated in the evidence of Ms Salman, and in turn was reflected in the Judgment.

15. In fact, she said, not only had the BOCR 2022 not come into force and did not represent the applicable regulatory regime at the time of the events the subject of these proceedings, but even had this new regime been operative, which it was not, it would not have applied to the Claimant until 26 April 2024, since pursuant to section 26A(1) the BOCR 2022 was not stipulated to take effect for existing ADGM persons (of which the Claimant was one) until six months from the date of publication on 26 October 2023.

16. Accordingly, Ms Andersen submitted that it was unclear on what basis such matters should impact on the Court's costs ruling: argument in this case correctly had related to, and was properly focused upon, the BOCR 2018.

17. Moreover, the Court had found that the provisions then in force in the relevant statutory scheme had been complied with and that the provisions of the CLR relied upon by the Claimant had had no application to the

BOCR 2018. Given that the statutory appeal had been dismissed, Ms Andersen maintained that it was just for the Defendant's costs to be awarded: she therefore asked that the Costs Application be dismissed, and that the Order *Nisi* be made absolute.

Findings

18. Given that there is no application for permission to appeal against the October Order on the merits, the sole issue is whether there is any material before the Court which, in the exercise of the Court's discretion, should justify departure from the general rule that costs follow the event.

19. Mr Elnaggar submits that he believes that it would be unjust for the general rule to apply where, as the Claimant would have it, there has been a clear lack of candour on the part of the Defendant, and that in these circumstances the Court should vary the Order *Nisi* and disallow the Defendant's costs of these proceedings.

20. The Court accepts the Defendant's denial that these proceedings were a factor in the timing of its decision to publish the BOCR 2022, Ms Andersen "*categorically*" affirming that "*neither the issues nor the claim…or indeed the progress of the proceedings themselves*" were relevant to the date of publication of the BOCR 2022. The Court also accepts that the Defendant held the good faith view that in this case "*any evidence about the BOCR 2022 would have served no purpose*". The Court also accepts that the Defendant considered that in the interests of certainty "*changes in regulations [should] be notified to all impacted persons at the same time*" and further that the "*established process*" referenced by Ms Salman and categorised as "*extra-statutory*" was not a function of the forthcoming BOCR 2022 amending the nature of the MPN.

21. That said, in a case wherein the nub of the argument was that the MPN as issued was deficient, and, in common with the warning notice provision within the CLR, should have provided an opportunity to make representations to the Defendant, it is difficult to agree with the submission that the imminent BOCR 2022 (as then enacted but pending publication) was of no consequence in the circumstances of this case.

22. At the very least, those representing the Defendant should have recognised that the BOCR 2022 had the potential to assist the Claimant's argument, and thus its existence ought to have been disclosed, and the Defendant's desire not to permit ad hoc advance publication of new regulations could have been subject to appropriate procedural safeguards being put in place by the Court.

23. Accordingly, the Court's view is that the stance adopted by the Defendant in this regard is difficult to justify and was in error: had, for example, the Judgment been delayed by a week or so, an application to re-open argument (and possibly cross-examination) almost certainly would have been pursued.

24. Whether knowledge of the imminent new regulatory framework would have made any difference to the result is not a matter upon which the Court can (or should) make any observation, although in this regard the Defendant will no doubt say that there would have been no material change in outcome. This is because the new regulatory framework was not yet in force, and in the event would not have had immediate application to the Claimant as an established ADGM person (for which a 6 month transition period had been provided for). Further, the Claimant had failed to act upon Ms Salman's invitation to submit "*extra-statutory*" representations in response to the MPN but instead proceeded to commence this case, and that this was a significant factual matter which was considered material in the Judgment which was delivered.

25. After considering the costs submissions made by the parties, the Court considers that by reason of the Defendant's non-disclosure in relation to the enactment of the BOCR 2022 the Claimant effectively has been deprived of a justifiable line of forensic inquiry.

26. The Court bears in mind the line of English authority to the effect that a public authority is required to draw the court's attention to relevant matters and to identify "*the good, the bad and the ugly*" and that "*public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law*": (R (*Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin).

Conclusion

27. The foregoing considerations are matters which in the Court's view must be placed within the discretionary 'mix', and now are reflected in the final costs order that the Order *Nisi* be varied such that the Defendant be entitled to 50% of its costs of and incidental to these proceedings, such costs to be summarily assessed if not agreed.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
12 December 2023