



**ABU DHABI GLOBAL MARKET COURTS**  
**محاكم سوق أبوظبي العالمي**

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**COURT OF FIRST INSTANCE**  
**CIVIL DIVISION**

**BETWEEN**

**ROSEWOOD HOTEL ABU DHABI LLC**  
**CLAIMANT**

**AND**

**SKELMORE HOSPITALITY GROUP LTD.**  
**DEFENDANT**

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**JUDGMENT ON CLAIMANT'S APPLICATION**  
**TO STRIKE OUT REPLY WITNESS STATEMENT**

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<b>Neutral Citation:</b>	[2019] ADGMCFI 0008
<b>Before:</b>	His Honour Justice Stone SBS QC
<b>Decision Date:</b>	4 November 2019
<b>Decision:</b>	<ol style="list-style-type: none"><li>1. The Application be allowed in part, and that the final sentence of paragraph 8 of the Reply Witness Statement of Mr Emain Kadrie on behalf of the Defendant be hereby struck out, and is to be excluded from evidence.</li><li>2. That the costs of and arising from the Application be reserved for submission at the conclusion of the trial of this action commencing on 19 November 2019.</li></ol>
<b>Hearing Date(s):</b>	No hearing
<b>Date of Orders:</b>	4 November 2019
<b>Catchwords:</b>	Strike out application; witness statement
<b>Legislation Cited:</b>	ADGM Court Procedure Rules, rr 92 and 100 UK Civil Procedure Rules, r 32(1)
<b>Case Number:</b>	ADGMCFI-2019-003
<b>Parties and Representation:</b>	Freshfields Bruckhaus Deringer for the Claimant/ Applicant to the Application LPA (Middle East) Limited for the Defendant/ Respondent to the Application

## JUDGMENT:

### *The Application*

1. On 24 October 2019 the Claimant in this action (“Rosewood”) filed an application (“Application”) that all or certain parts of the Reply Witness Statement of Mr Emain Kadrie dated 15 October 2019 be struck out pursuant to ADGM Court Procedure Rules 92 and 100.
2. The Application, in letter form signed by the solicitors acting for the Claimant, Freshfields Bruckhaus Deringer, rehearsed the procedural history to-date, examined the aspects of the statement to which exception was taken, and submitted that the Court should exercise its power under Rule 92 to control the evidence by striking out all, or part, of the statement of Mr Kadrie.



3. An Order of the Court required a response on behalf of the Defendant on 3 November 2019. However, no such response has been forthcoming, and hence there was no necessity for any reply thereto.
4. This application has come late in the procedural day, given that the trial of this action, set down for 3 days, is due to be called on Tuesday 19 November 2019, so that time is of the essence, and there has been no opportunity to entertain oral submissions on the point which would have assisted.

### **Background**

5. This is an action for breach of a lease dated 29 June 2016 and entered into between the Claimant and the Defendant, under which the Defendant was to lease a space in the Rosewood Hotel, Abu Dhabi; the Claimant says that the Defendant failed to make divers payments coming due under the terms of that lease, and to open a restaurant designated for that leased space. The details are many, but in broad shape the case is a relatively straightforward landlord and tenant dispute.
6. The Claimant filed its Amended Claim and Particulars of Claim on 7 March 2019 seeking payment from the Defendant for various sums allegedly due under the lease, including liquidated damages for the failure to open the restaurant within the leased space.
7. This was followed by the Defendant filing its Defence on 21 April 2019, which on its face did little more than defend the claim by denials and by allegations that the monies sought were not due at law; thereafter the Claimant filed its Reply on 12 May 2019.
8. The Defence as filed made reference (at para 14) to a reservation of right “to amend and complete” its Defence “should its Application to join Mubadala as a party be approved”.
9. This application for joinder of Mubadala Investment Company – subsequently amended to Mubadala Development Company - as 2nd defendant to this action was mounted on 21 April 2019, and was contested by Rosewood, and was dismissed by this Court for the reasons outlined in its Judgment dated 27 May 2019. Subsequently, the Defendant made an application for permission to appeal, which was dismissed, as was a further application to the Court of Appeal filed on 24 July 2019, the judgments of each Court detailing the reasons for such dismissal.
10. The upshot of this extended joinder application was that the present action was ordered to proceed in its current form, albeit in its judgments on what came to be referred to as the ‘joinder issue’, this Court had noted that it remained open to the Defendant to pursue any claim it considered it had against Mubadala Development Company in a separate action, which, if thought appropriate, could be applied to be heard at the same time as the present action on the lease.
11. No proceedings have been issued against Mubadala Development Company, and the present action has proceeded in normal course.



12. On 24 July 2019 the parties filed an Agreed List of Issues, and agreed directions for the filing of witness statements of fact (there being no application for expert evidence in this case), and on 25 July 2019 this Court ordered that the parties file witness statements of fact on 22 September 2019, and reply witness statements of fact by 10 October 2019.
13. At the Defendant's request an extension was agreed, so that the date for the initial round of witness statements was amended to 24 September 2019, on which date the Claimant filed two witness statements, those of Mr Roland Duerr and Mr Rama Chandran.
14. At that time the Defendant wrote to the Claimant stating that "on reflection" the Defendant would not be submitting witness statements "as its defence is primarily of a legal nature rather than factual." Nevertheless, on 15 October 2019 the Defendant filed the Reply Witness Statement the subject of the current Application.
15. Mr Kadrie's statement is brief, being no more than 8 paragraphs, of which the opening 3 paragraphs are purely formal.
16. Paragraphs 4-6 sound primarily to the personnel, including Mubadala personnel, involved in the discussions leading to the execution of the lease, whilst paragraph 7 makes further reference to the project manager who is said to have been unaware of the discussions with Mubadala, and notes specifically that the Defendant "did have the intention of moving forward with the restaurant, once the economic situation allowed for the project". The final paragraph, paragraph 8, refutes the damage claimed to have been done to the Defendant, makes further reference to background discussions with Mr Duerr's predecessor, which had resulted in the search for a third party restaurant operator, notes that the premises in the Rosewood Hotel the subject of the lease had been empty for a year, and concludes with an observation about assurances on the part of Mubadala absent which the lease would not have been signed.
17. Appendix 4 to the Application has set out the 8 paragraphs in full, and has indicated therein the redactions as now sought.

### ***Decision***

18. This Court accepts that it has the power to control the evidence admitted in any lis with which it is seized, and in this context accepts the relevance and applicability of Rule 92 of the ADGM Court Procedure Rules. Rule 92 (1) provides for directions by the Court as to the issues on which it requires evidence, the nature of the evidence which it requires to decide those issues and the way in which the evidence is to be placed before the Court, whilst sub-rule (2) provides that the Court may use its power under this rule to exclude evidence that would otherwise be admissible, and sub-rule (3) provides that the Court may limit cross-examination; also accepted is the correlation of Rule 92 with Rule 32(1) of the English Civil Procedure Rules, and the accumulated English jurisprudence thereunder.



19. The thrust of the Application is that this Reply Witness Statement was filed late and absent explanation, that it contains “mostly irrelevant statements bearing no relation whatever to the Parties’ pleaded cases or the issues in dispute” and represents an attempt to introduce new issues at a late stage of the process.
20. If and in so far as the Claimant takes the point on the late filing as in itself constituting a basis for exclusion, the Court declines to found its decision on a purely temporal basis, notwithstanding the lack of explanation for failure to meet the agreed extended filing deadline; nor is any point taken that since the Defendant opted not to file a primary witness statement, it thus was not open to the Defendant to ignore directions for the filing of evidence, and, without leave, simply to file a reply statement.
21. For present purposes, more salient is the Claimant’s contention that this Reply Witness Statement represents an attempt to circumvent the Court’s decision on the joinder application - wherein leave to join Mubadala Development Company as 2nd Defendant was refused, but the possibility recognised that the Defendant may wish to proceed against Mubadala Development Company by separate action - by seeking to introduce in reply arguments relating to its conduct which, if not objected to, potentially impacted upon the contractual relationship under the lease between the parties.
22. Hence the Claimant’s contention that either the Reply witness statement be struck in its entirety, or in the alternative that those parts of the statement as identified in Appendix 4 should be excluded.
23. Regarded in isolation this Reply Witness Statement is something of an oddity, emerging late in the day with no primary witness statement having been filed, and apparently bearing no correlation to the existing ‘live’ issues in this case.
24. There is no counterclaim against the Claimant, and the focus on pre-lease negotiations with Mubadala Development Company, which is not a party to this action, bears no relation to the Defendant’s pleading in answer to the particular heads of the Claimant’s claim, and can have resonance only in context of the arguments but peripherally raised in the now-rejected application to join Mubadala Development Company as 2nd defendant to the present action.
25. Viewed thus, it might be thought that this witness statement was not something sufficient to engender undue concern, although the Court sees some force in the complaint that it was considered necessary to mount this Application on the basis that in its pre-trial preparation in what otherwise is a relatively straightforward landlord and tenant dispute, the Claimant should not have to be burdened with “having to determine whether, and if so, how, to address the evidence presented in the Reply Statement.”
26. The Claimant contends either that this Reply Witness Statement be struck in its entirety, or in the alternative those parts of the statement identified in Appendix 4 to the Application.
27. On reflection, the Court has taken the view that the extensive redactions indicated in Appendix 4 over-egg this particular pudding, and that in the circumstances the relevant guiding principle must be to make it clear that on the present state of the pleadings – which have stood unamended since the date of filing – it is not open to the Defendant to advance



any hitherto unpleaded contention to the effect that negotiations with, or alleged assurances from, Mubadala Development Company have or could have resulted either in significant modification of any substantive contractual obligation or even avoidance of the lease itself, which is the executed document the alleged breaches of which founds the present claim.

28. Accordingly, in the exercise of its discretion the Court has concluded that the part of the Reply Witness Statement which in the circumstances it is appropriate to strike out, and which therefore now is to be excluded from the evidence from Mr Kadrie, is the final sentence of paragraph 8, which reads thus:

*“If the Defendant had not been assured by Mubadala’s representatives of the support expected from Mubadala, as a result of their investments in ADGM, the Defendant would not even have signed the lease.”*

29. It follows that the Claimant’s Application has succeeded, albeit in restricted part, and on the issue of costs arising the Court will hear the parties at the conclusion of the forthcoming hearing, which is set down for three days commencing on 19 November 2019.

Issued by:



Linda Fitz-Alan  
Registrar, ADGM Courts  
4 November 2019