



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 ON COSTS



Neutral Citation:	[2020] ADGMCFI 0003
Before:	His Honour Justice Stone SBS QC
Decision Date:	16 March 2020
Decision:	The Defendant pay the Claimant's costs assessed in the total sum of AED1,634,788.46.
Date of Orders:	16 March 2020
Catchwords:	Costs; summary assessment; Part 18 settlement offer; proportionality of costs; assessment on standard or indemnity basis
Legislation Cited:	ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015
Case Number:	ADGMCFI-2019-003
Parties and representation:	Freshfields Bruckhaus Deringer for the Claimant Bird & Bird (MEA) LLP for the Defendant

JUDGMENT:

Background

1. On 16 December 2019 this Court handed down its final Judgment and Order in this case, pursuant to which the total amount ordered to be paid to the Claimant as at the judgment date amounted to AED6,078,513.97.
2. Paragraph 3 of that Order stated that submissions as to costs incurred both in the substantive and interlocutory proceedings in this case were to be filed by no later than 6 January 2020.
3. A detailed narrative submission, together with 11 appendices, was filed by the Claimant on 7 January 2020; however the newly-appointed representatives of the Defendant, Bird & Bird (MEA) LLP, requested that the Defendant be permitted to delay its costs submissions pending resolution of the Defendant's applications to the Court of Appeal for, inter alia, permission to appeal the substantive judgment and for a stay of execution.
4. This request was granted on 15 January 2020, it being made clear by the Court that if and in so far as costs submissions were necessary after disposal of the appeal, such submissions would be required "with a bare minimum of further delay".



5. By its Judgment and Order dated 12 February 2020, the appellate court dismissed the Defendant's applications, and by Order of this court dated 13 February 2020 the Defendant was ordered to file its costs submissions by 4.00 pm on 20 February 2020, with the Claimant to file submissions in reply, if any, 7 days later.
6. The Defendant duly filed its costs submissions on 20 February 2020, these submissions following those of the Claimant in encompassing costs relating to the main proceedings and the two interlocutory applications of joinder and strike out respectively.
7. On 27 February 2020 the Defendant further filed supplementary submissions exclusively relating to costs associated with the Claimant's Rule 253 application, this document being in response to the Claimant's Rule 253 Statement of Costs filed on 25 February 2020, the latter having been prepared for hearing of the application held on 25 February 2020.
8. Finally, on 2 March 2020 the Claimant filed its Reply submissions on costs, which encompassed not only its response to the Defendant's submissions of 20 February 2020, but also its reply to the Defendant's supplementary submission of 27 February 2020.

This Judgment

9. This judgment accordingly will make costs' awards under the following heads: first, the costs incurred in the interlocutory proceedings, second, the costs of the substantive proceedings, third, certain extraneous costs, and fourth, costs of the post-judgment Rule 253 proceedings.
10. In terms of governing principle the Court accepts that section 49(1) of the *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015*, and Rules 195 and 198-200 of the *ADGM Court Procedure Rules 2016* provide the relevant framework, and that the award of costs lies solely within the discretion of the Court.
11. Of relevance also is information as now revealed in the Claimant's submissions regarding various settlement offers made by the Claimant to the Defendant; it is also accepted that US dollar figures can be expressed in AED by using the fixed exchange rate of USD1.00:AED 3.672.

Defendant's Primary Objections

12. Prior to adverting to the individual costs categories, the Court notes broad objections raised by the Defendant to the Claimant's costs claims in the following terms:

(a) Conduct of the Defendant's former legal representative

13. The submissions filed by the Defendant make frequent reference to alleged deficiencies in the conduct of the Defendant's former legal representation, the inadequacies of which variously are itemised. The Court has no intention of expressing any view upon the veracity, or otherwise, of these allegations, the thrust of which appears to be that such deficiencies in legal representation have provided the Claimant with ammunition for allegations of improper conduct and/or obstruction, and that "in these extenuating circumstances" these matters should not be permitted to buttress the claim for indemnity costs.
14. For the avoidance of doubt, the Court does not accept this argument: allegations of this nature remain entirely a matter between the Defendant and its former legal advisers, and in terms of the



scale of costs to be awarded the Court rejects any suggestion that such matters are to be elided into the costs' consideration.

(b) Hourly rates and time spent

15. The Defendant is critical both of the hourly rates of the Freshfields' fee earners and of the time spent by these fee earners on the various categories of costs. The submission is that either the Defendant should not be made to pay for any of Rosewood's costs in excess of the indicative hourly rates as set out in ADGM Practice Direction 9 - with the result that the time both of Mr Tannous and Ms Lampe should be significantly reduced so that they are in line with such indicative rates - or alternatively that the Court should reduce all time recorded by Mr Tannous, Ms Lampe and Ms Fahoum to the bottom of their respective hourly bands, and that the lower band should apply to all time recorded by each fee earner.
16. In addition, criticism is leveled at the time spent by the relevant fee earners on the various stages of this case, which is said to be excessive, it being submitted that the Court should reduce the level of costs recoverable by the Claimant in respect of all stages.
17. The Court has reflected on this argument, and in particular the contention that this has been described by the Court as "a relatively straight forward landlord and tenant dispute", and thus should not have attracted the level of costs as now asserted by the successful party.
18. True it is that conceptually this was not a difficult case, but it was made significantly the more problematic by a non-responsive Defendant and by the considerable amount of detail involved in the various claim components, all of which required close and careful attention to, and appropriate marshalling of, the numerous claim details.
19. In all the circumstances of this case the Court does not accept that the costs as now claimed are disproportionate, and thus should be significantly reduced on that basis, as the Defendant alleges; in this regard it appears that Freshfields' professional fees for the main proceedings, in the sum of US\$436,653.30, amount to some 34% under its initial costs' budget for professional fees, excluding disbursements, of US\$659,900.58, such sum excluding any costs associated with the joinder and related permission application and a figure which had been approved by the Court in its Case Management Order dated 25 July 2019.
20. In addition the Court has little difficulty in accepting the hourly rates of the principal fee-earners employed on behalf of the Claimant, and accepts the submission that Freshfields' rates are not 'banded', and that the figures provided for each fee earner represent hourly rates before and after 1 May 2019, after which date the rates were revised upwards as part of the annual rate revision and subsequent to which the preponderance of work in this case was carried out.
21. Finally, the Court perceives no obvious duplication between fee earners (indeed the Defendant makes no such specific allegation), and declines to reduce the hourly rate of Mr Tannous in terms of the Court of Appeal costs' award, which in any event had awarded his time at a rate above the Practice Direction guideline rate, and in circumstances when the issue before the appellate court not only was narrow and discrete but was made on the understanding that Mr Tannous' rates were part of a band, which is not the case in this exercise.



Individual Costs' Categories

(1) Interlocutory Costs

22. There were two interlocutory applications in this case: first, a joinder application mounted by the Defendant, and second, a strike out application taken out by the Claimant in face of the filing by the Defendant of a solitary witness statement in reply.
23. The joinder application, in which the Defendant sought unsuccessfully to join the Claimant's ultimate parent company as second defendant, and thereafter sought to obtain this Court's permission to mount an appeal to the Court of Appeal, ultimately resulted in three separate orders for costs made in favour to the Claimant, of which two were made at First Instance: (1) an order *nisi* by this Court dated 27 May 2019, whereby, once made absolute, the costs of and occasioned by the joinder application were to be to the Claimant, to be assessed if not agreed; and (2) an order dated 14 July 2019, whereby the costs of and occasioned by the permission to appeal application were to be to the Claimant, to be assessed if not agreed. A third costs' order, dated 26 January 2020, was made by the Court of Appeal in relation to the appellate proceedings conducted before that court, and forms no part of this judgment.
24. The Court is informed that the cumulative costs thus arising in the joinder-related applications as were made before it (that is, (1) and (2) above) amounted to a total of USD58,590.80 (USD37,120.10 + USD21,739.70), and that on 17 November 2019 the Claimant had written to the Defendant offering to accept 70% of the cumulative costs relating to the joinder-related applications, an offer which was not accepted.
25. The Court is inclined to assess the costs arising from the joinder application upon a standard basis, and accepts that the benchmark criterion within Rule 198 that costs should only be allowed "which are proportionate to the matters in issue and are reasonably incurred and reasonable in amount" is satisfied within the joinder context.
26. Having reflected on the history and circumstances of this joinder application, the Court now assesses costs awarded under this head in the sum of USD47,087.84, which in mathematical terms represents 80% of the costs as actually incurred by the Claimant in respect of the joinder related cost claims that are before this Court.
27. The strike out application mounted by the Claimant in response to the filing by the Defendant (which hitherto had filed no witness statement in chief) of but a single reply witness statement, resulted in an Order dated 4 November 2019 that the costs of and arising from the application were to be reserved for submission at the conclusion of the trial, which at that stage was just two weeks away.
28. The costs incurred in this strike out application amount to USD12,072.60, and the Claimant submits that it should be awarded this sum in full, a contention with which the Court is unable to agree.
29. In contrast to the joinder application, resistance to which was wholly successful before this Court, albeit until the grant of a stay to enable the Court of Appeal to consider whether to grant permission to appeal, the application to strike out the entirety of the reply witness statement struck the Court as over-ambitious; although the application did have some effect, it succeeded



only in very minor part in terms of the strike out of a single paragraph, a result which in the view of the Court does not merit recovery of the costs sum thus expended by the Claimant.

30. This is but a small element within the entirety of the costs claim, and looking at the matter in the round and in the exercise of its discretion, the Court considers that this merits the award of a sum of but 60% of the costs incurred thereon, namely USD7,243.56.

(2) Costs of the Substantive Proceedings

31. After taking account of the interlocutory costs claimed, the balance of Freshfields' professional fees incurred in these proceedings amounts to USD365,720.90 (ie. USD436,653.30D–USD58,859.80 – USD12,072.60).
32. The Claimant's position is that it must have its costs of this action, which in principle clearly is correct, albeit the submission as now made is that this remaining sum of USD365,720.90 should be paid in full upon an indemnity basis.
33. This plea for indemnity costs is predicated upon what is characterised as “an obstructive approach” by the Defendant to the conduct of this case, relying in particular upon four specific matters: first, the ill-founded application to join Mubadala as second defendant, second, the Defendant's repeated breaches of the Case Management Order, third, the allegedly unreasonable rejection of several Part 18 and other settlement offers, and finally the Defendant's eleventh hour decision not to attend the hearing of this case, purportedly on the basis of an anticipated change in legal representation.
34. As to the Part 18 settlement offers, Part IV of the Claimant's costs submissions provides detail of the efforts made by the Claimant to settle this case in advance of trial. In particular, on 23 May 2019 the Claimant made a Part 18 offer to accept AED4 million (the equivalent of USD1,089,325 at the exchange rate of USD1.00:AED3.672) in settlement of the whole of its claim up to 24 March 2019, the date of service of its Claim Form, an offer which was refused by the Defendant.
35. This Part 18 offer was revisited on 28 July 2019 following issuance of the Case Management Order, but to no effect, and thereafter on 26 September 2019 a without prejudice meeting was held between the parties in which those then acting for the Defendant relayed the Defendant's proposal to settle the entire dispute for AED1 million.
36. On 7 October 2019 the Claimant rejected this counter-offer, and in turn effectively revised downwards its original Part 18 offer such that the sum of AED4 million would be accepted in full and final settlement as at that later date, an offer also rejected by the Defendant on 24 October 2019.
37. Finally, on 18 November 2019, on the day before the commencement of the trial, the Claimant offered to accept AED4.5 million in full and final settlement of all claims arising out of or in connection with the lease. It is said that Mr Hartridge of LPA indicated that the offer would be relayed to his client, but in the event Mr Hartridge emailed later that evening to announce that his firm no longer represented the Defendant.
38. The Claimant's argument is that in the event it has succeeded in its various heads of claim in a sum significantly higher than the various offers earlier made to the Defendant, and thus in light of such good faith attempts to resolve this case without the necessity for hearing – with which



efforts the Defendant declined seriously to engage, its offer of AED1 million being characterized as “derisory” – in the circumstances it would be just if the Court were to exercise its discretion to award the Claimant an indemnity in terms of costs.

39. The Court sees force in this argument, but after reflecting on the case has come to the view that justice best can be done by adopting the Claimant’s alternative submission, which is that if and in so far as its claim for indemnity costs does not succeed, in the circumstances it should be awarded not less than 85% of the legal costs of these proceedings.
40. This alternative contention is accepted. The Court declines to accede to the Defendant’s urgings to interfere with hourly rates and time expended, and looking at the case in the round considers that the costs as now claimed are proportionate, reasonable in amount, and have been reasonably incurred.
41. It follows, therefore, that the Claimant is to have a costs award under this head of USD365,720.90 at 85%, which calculation amounts to USD310,862.76.

(3) Extraneous costs

42. This category consists of a claim for the Court Fee of USD24,310.24, which the Claimant was required to pay in order to mount this case, costs of transportation from Dubai to Abu Dhabi for a witness interview in August 2019 and thereafter for the hearing in the sum of USD381.21, and finally a claim for payment of the Defendant’s share of a mediator’s fee in the amount of USD3,308.42.
43. The Court accepts the claim for the Court Fee and for the transportation disbursement, which total USD24,691.45, but has encountered difficulty with the claim for payment of the Defendant’s half share of the mediation fee of USD6,616.85.
44. There can be little doubt but that this arose in the manner the Claimant now alleges, namely that the parties had agreed to bear their own costs of the mediation, and that the Claimant had settled the fees of the mediator in full, and thus seeks to recoup the Defendant’s share for which it has not been reimbursed.
45. The case before the Court was mounted on the basis of a claim for breach of a lease agreement, and whilst the Claimant made payment of the mediator’s total fee – consequent upon an unsuccessful mediation which had taken place on 18 February 2019 – in substance this represents a collateral claim against the Defendant, either in debt or for breach of a separate mediation agreement. Normally a provision characterising mediation costs as a necessary part of litigation costs, and hence recoverable as such, specifically is contained within the relevant mediation agreement.
46. No such document is appended to the Claimant’s submissions, but since the Defendant takes no recoverability point per se, in the circumstances the Court is prepared as a matter of necessary implication to regard this as a legitimate litigation cost, thereby enabling this sum also to be included within the current costs’ calculation; in this connection the Court sees no merit in the Defendant’s attempt now to revisit and to revise downwards the quantum of the mediation fee to conform to its view of what the mediator should have charged, and accordingly the Court is prepared to accede to the sum claimed of USD3,308.42.



47. Accordingly, under this head of extraneous costs, after some hesitation the Court is prepared to allow the full sum of USD27,999.87.

(4) Costs of the Rule 253 Application

48. The costs here claimed, in the sum of USD69,346.40, initially were to be summarily determined at the conclusion of the Rule 253 hearing, which took place on 25 February 2020. However, by agreement it was decided to absorb this element into the general costs' submissions, which now has occurred.

49. These costs are subject to spirited criticism by the Defendant as being "entirely unnecessary" in circumstances in which all evidence pointed to Skelmore being wholly unable to meet the judgment debt: "far too much time and money have been expended in the pursuit of a judgment debt from a defendant that Rosewood has long known is unable to pay" is the Defendant's argument.

50. Three main points are outlined in the Defendant's supplementary costs' submission dealing with this issue, wherein the Court is requested significantly to reduce the fees recoverable for the application and consequent hearing: these are that the time spent at unreasonable hourly rates is unreasonable and disproportionate, the allegedly "limited success" of the hearing itself, and third, the extravagant attendance of three fee earners at the hearing, coupled with a hearing bundle which was too extensive for an uncontested hearing.

51. The Claimant is unapologetic in terms of its claim for its Rule 253 costs, which are vigorously maintained to be both reasonable and proportionate, and, as was the position with the main proceedings, an award of costs on an indemnity basis is requested. Also provided in its Reply submissions is a useful annex listing the particular work phases of the Rule 253 application, which summary has been of assistance to the Court (and of which the Defendant presumably had had no sight at the time of the submission its own arguments, so that, for example, the alleged charging for the hearing attendance of the trainee solicitor, Ms Pollard, could have been seen to be unfounded, since no such charge was levied).

52. The criticism made of the Claimant for mounting the Rule 253 application in the first place strikes the Court as wholly unjustified, given the particular history of this case, together with the unsatisfied judgment debt and the Claimant's discovery that apparently available assets of the Defendant recently had been moved to other corporate entities, and not overlooking in this context the Defendant's initial opposition to the Rule 253 application on a solely jurisdictional basis.

53. The Court has considered the argument that this post-judgment element of this case was unnecessarily over-resourced, and for the avoidance of doubt rejects the argument that the Defendant's plea of impecuniosity (as to which the Court expresses no view) simply should have been accepted by the Claimant without demur.



54. At the end of the day the costs' position in an application such as this is as much a matter of 'feel' as analysis. In the view of the Court this is not an instance justifying the award of indemnity costs, nor, for that matter, is it a case wherein, as the Claimant would have it, the Court should consider sending "a strong message" to future creditors or debtors: the sole interest of this Court is the fair and unbiased resolution according to law of such disputes as come before it.
55. In these circumstances, in the exercise of its discretion the Court has decided that a fair and just order as to the costs arising from the Rule 253 application is that the Claimant should have 75% of its costs so incurred, which amounts to USD52,009.80.

Overall Conclusion on Costs

56. It follows that the Claimant has succeeded in its costs submissions in the overall amount of USD445,203.83, which sum, converted to AED at the requisite rate of USD1: AED3.672, amounts to AED1,634,788.46, and the Court so orders.



Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
16 March 2020