

JUDGMENT SUMMARY

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| Neutral Citation | [2017] ADGMCFI 1 |
| Case Number | ADGMCFI-2017-003 |
| Name of Case | Afkar Capital Limited v Saifallah Fikry |
| Judge | Justice Sir Andrew Smith |
| Date Issued | 26 November 2017 |
| Catchwords | Interim relief. Interim declaration. Exercise of discretion. ADGM Companies Regulations. Board of directors. Notice of resolutions. Appointment of chairman of board. Director's conflict of interest. Minutes of board meeting as evidence of proceedings. |
| Cases Cited | <p>Financial Services Authority v Rourke [2001] EWHC 704 (Ch)</p> <p>Governor & Company of the Bank of Scotland v A Ltd and ors [2001] EWCA Civ 1081</p> <p>La Compagnie de Mayville v Whitley [1896] 1 Ch 788</p> <p>Leisure Data v Bell [1988] FSR 367</p> <p>Rolls Royce plc v Unite the Union [2009] EWCA Civ 387</p> <p>Shepherd Homes v Sandman [1971] Ch 370</p> <p>The National Crime Agency v N & RBS plc [2017] EWCA Civ 253</p> |
| Legislation and Authorities Cited | <p>ADGM Companies Regulations 2015 – Sections 157, 160, 162, 164, 165, 272 and 273</p> <p>ADGM Court Procedure Rules 2016 – Rules 68 and 71(1)</p> <p>ADGM Financial Services Regulatory Authority General Rulebook 2015 – Articles 5.3.1(2), 5.3.2 and 5.3.3</p> <p>English Civil Procedure Rules 1998 – Rule 25.1</p> <p>ADGM Financial Services and Markets Regulations 2015</p> <p>UK Companies Act 2006 – Section 249</p> |

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| <p>Executive Summary</p> | <p>This judgment considered Afkar Capital's ("Afkar") application for interim declarations regarding the validity of certain resolutions passed at its Board meeting. Specifically, Afkar sought confirmation of the appointments of Mr. Abdul Wahab Al Halabi as Afkar's director and Mr. Amine Bentaleb as Afkar's Senior Executive Officer, replacing Mr. Saifallah Mohamed Amin Mahmoud Fikry (the Defendant). Ultimately, the Court refused the application for interim declarations, finding that the balance of convenience and practical utility did not favour granting such relief at that stage.</p> |
| <p>Overall Summary</p> | <p>Background</p> <p>This Abu Dhabi Global Market ("ADGM") Court of First Instance (Commercial & Civil Division) judgment concerns an application by Afkar Capital Limited (the "Company") for interim declarations.</p> <p>The Company was incorporated in the ADGM. It is owned by Afkar Holding Limited ("AH"). AH is owned as to 51% by Equitativa Holding Foundation and as to 49% by Mr. Saifallah Mohamed Amin Mahmoud Fikry (the Defendant). Mr. Sylvain Vieujot and Mr. Fikry were appointed directors of the Company, with Mr. Vieujot as Chairman of the Company. Mr. Fikry also became the Senior Executive Officer ("SEO") of the Company.</p> <p>The Company holds a Financial Services Permission granted by the ADGM Financial Services Regulatory Authority ("FSRA") under the Financial Services and Markets Regulations 2015 and is subject to the ADGM Companies Regulations 2015 (the "Companies Regulations"). Directors have duties under the Companies Regulations, including acting in good faith to promote the Company's success, exercising reasonable care, skill, and diligence, and avoiding conflicts of interest.</p> <p>The background involved a shareholder dispute between Mr. Vieujot and Mr. Fikry, discussions about a buyout, and issues regarding the Company's capital resources and compliance with FSRA requirements.</p> <p>The interim declarations sought related to a Board meeting on 31 July 2017 and two resolutions the Company claimed were passed at the meeting:</p> <ol style="list-style-type: none"> 1. to appoint Mr. Abdul Wahab Al Halabi as a director of the Company. Mr. Fikry abstained from voting on this resolution. The resolution passed with Mr. Vieujot's favourable vote; and 2. to remove Mr. Fikry as SEO of the Company and to appoint Mr. Amine Bentaleb in his place. Mr. Fikry voted against this resolution, but it was passed with the Chairman's casting vote. Both appointments were expressed to be "<i>subject to the approval of the regulator</i>" (the FSRA). <p>Analysis</p> <p>The Company applied for interim declarations under Rule 71(1) of the ADGM Court Procedure Rules 2016, which gives the Court the power to grant interim remedies, including declarations, in the interests of justice. The Court noted that the Court's power to make declarations is</p> |

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| | <p>discretionary. The principles guiding the exercise of this discretion include considering the merits of the claim, where the balance of convenience lies, and whether the interim declaration will be of practical use and effective to deal with a real dilemma.</p> <p>The Company argued that the two resolutions were validly passed by the Board. Mr. Fikry argued that the two resolutions were not validly passed. His objections included: that he was not given prior notice of the proposals, that Mr. Vieujot was not validly appointed chairman of the meeting, and that Mr. Vieujot had a conflict of interest under Article 14 of the Company's Articles of Association and breached his duties, invalidating the resolutions.</p> <p>The Court found no merit in the convening or agenda objections. Regarding the "chairman" defence, the Court noted points for cross-examination but did not reject it as unarguable. For the "conflict of interest" defence, the Court found it properly arguable that Mr. Vieujot had an interest in the appointments, potentially engaging Article 14, particularly considering the dispute background and the argument that the appointments secured/reinforced his control. The conflict defence was deemed to merit consideration at trial and could not be confidently assessed beforehand.</p> <p>On the balance of convenience, the Court accepted Mr. Fikry's submission that it was preferable to maintain the status quo pending trial, which was scheduled only a few months after the hearing. The Court also noted the lack of a cross-undertaking in damages as aggravating the risk of injustice to Mr. Fikry if the declaration were later found unjustified.</p> <p>Regarding practical purpose, the Court was not persuaded a declaration would necessarily resolve the impasse or assist the FSRA or the Companies Registrar. The FSRA is responsible for regulation and the appointments required its approval anyway. Furthermore, Mr. Bentaleb had reportedly expressed reservations about accepting the SEO role until issues were clarified, indicating he was not presently willing to accept.</p> <p>Conclusion</p> <p>For these reasons, the Court concluded that the Company's application for interim declarations should be refused.</p> |
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This statement is not intended to be a substitute for the reasons of the Court or to be used in any later consideration of the Court's reasons.