

JUDGMENT SUMMARY

Neutral Citation	[2018] ADGMCFI 2
Case Number	ADGMCFI-2017-003
Name of Case	Afkar Capital Limited v Saifallah Fikry
Judge	Justice Sir Andrew Smith
Date Issued	2 May 2018
Catchwords	Costs on claimant’s discontinuance. Costs order against non-party. Costs on standard or indemnity basis.
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
Legislation and Authorities Cited	ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 – Article 49 ADGM Court Procedure Rules 2016 – Rules 51, 172(1), 197, 198 and 199 English Civil Procedure Rules 1998 – Rules 38.6 and 46.2 English Senior Courts Act 1981 – Section 51 The Rules of the Dubai International Financial Centre Courts 2014
Executive Summary	This judgment addressed the allocation of legal costs following Afkar Capital Limited’s (“Afkar Capital”) decision to discontinue proceedings against Mr Saifallah Mohamed Amin Mahmoud Fikry. The judgment outlines the background of the dispute concerning the validity of resolutions from Afkar Capital’s board meeting and the subsequent resignation of Mr Fikry as its director and Senior Executive Officer. Ultimately, the Court held that Afkar Capital is responsible for Mr Fikry’s

	costs on a standard basis, while refusing Mr Fikry's request for costs to be paid by Mr Sylvain Vieujot as the director of Afkar Capital.
Overall Summary	Background This Abu Dhabi Global Market (“ADGM”) Court of First Instance (Commercial & Civil Division) concerned applications for costs following the discontinuance of litigation brought by Afkar Capital Limited (“Afkar Capital”) against Mr Saifallah Mohamed Amin Mahmoud Fikry. Mr Sylvain Vieujot, a director of Afkar Capital, was a respondent to an application for costs against him. The underlying litigation stemmed from disputes concerning the validity of resolutions passed at a board meeting on 31 July 2017. These resolutions aimed to appoint a new director and remove Mr Fikry from his role as Senior Executive Officer. Afkar Capital initially sought declarations confirming the resolutions' validity, injunctive relief, and damages. Mr Fikry disputed their validity. Afkar Capital discontinued the entire proceedings on 7 December 2017. Following discontinuance, two cost applications were made: 1. Afkar Capital sought an order that Mr Fikry pay its costs, or alternatively, that there be no order as to costs (“Afkar's Application”); and 2. Mr Fikry sought his costs from Afkar Capital, or in part from Mr Vieujot, and sought an order that his costs be paid on the indemnity basis (“Mr Fikry's Application”). Analysis The Court refused Afkar Capital's Application. It applied the general rule that a claimant who discontinues proceedings is liable for the defendant's costs incurred up to the date of discontinuance (Rule 172(1) of the ADGM Court Procedure Rules 2016). To depart from this Rule, the claimant must show a good reason. Afkar Capital argued that Mr Fikry's resignation created a change in circumstances making the litigation redundant. However, the Court noted that merely achieving aims or facing changed circumstances is insufficient; the claimant must show that the change resulted from the defendant's unreasonable conduct. The Court found Afkar Capital had not demonstrated that Mr Fikry was unreasonable to resign, particularly given his evidence that disputes with Mr Vieujot made it impossible to manage Afkar Capital. Therefore, Afkar Capital was ordered to pay Mr Fikry's costs incurred on or before 7 December 2017. The Court refused Mr Fikry's Application for Mr Vieujot to pay his costs. While acknowledging jurisdiction for third-party costs orders, the Court relied on the principle that such orders against a director require showing they were acting in their own interest rather than the company's interest. Mr Fikry argued that Mr Vieujot controlled and funded the litigation for personal gain and was the “<i>real party</i>”. The Court found no proper basis to conclude that Mr Vieujot was acting solely in his own interest or that the

	litigation was not brought to address damage to Afkar Capital. Mr Fikry had the burden to establish his case against the third party, and the Court found he had not made out his arguments. Finally, the Court refused Mr Fikry's Application for costs on the indemnity basis. Indemnity costs are only awarded where the paying party's conduct takes the case "<i>out of the norm</i>" and deserves disapproval, often requiring a high degree of unreasonableness. Mr Fikry alleged bad faith and improper motives in bringing the proceedings. The Court found these were assertions of Mr Fikry's case that had not been proven, and it could not presume they were true simply because the proceedings were discontinued before trial. Conclusion In conclusion, the Court ordered Afkar Capital to pay Mr Fikry's costs on the standard basis, refusing Mr Fikry's Application for Mr Vieujot to pay costs and for those costs to be assessed on an indemnity basis.
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