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

AC NETWORK HOLDING LIMITED
First Claimant

AC POOL HOLDING LIMITED
Second Claimant

KHALIL MOHAMED BINLADIN
Third Claimant

DALIA KHALIL BINLADIN
Fourth Claimant

HORIZON LIGHT INVESTMENTS LLC
Fifth Claimant

and

POLYMATH EKAR SPV1
First Defendant

POLYMATH EKAR SPV2
Second Defendant

VILHELM NIKOLAI PAUS HEDBERG
Third Defendant

RAVI NAGESH BHUSARI
Fourth Defendant

ALI HASHEMI
Fifth Defendant

LUX 2 INVCO
Sixth Defendant

CLARA FORMATIONS LIMITED
Seventh Defendant

EKAR HOLDING LIMITED
Eighth Defendant

JUDGMENT OF JUSTICE WILLIAM STONE SBS KC

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Neutral Citation:	[2023] ADGMCFI 0008
Before:	Justice William Stone SBS KC
Decision Date:	7 April 2023
Hearing Dates:	5 – 22 September 2022 inclusive, and 24 and 25 October 2022
Decision:	1. Subject to paragraph 2: a. the Claimants are to have their costs of these proceedings, save and except that as from 1 May 2022 the Claimants are to have 70% of such costs; and b. the Defendants' application for costs is dismissed. 2. As to the applications: a. dated 19 August 2021 and 5 September 2022, there be no order as to costs; b. dated 24 January 2021, the Defendants are to have their costs thereof, save and except that the Claimants are to have their costs of and occasioned by the dismissal of Requests 10, 13, 14 and 15; and c. dated 7 December 2020, 27 April 2021 and 28 July 2021, the Orders made in respect of those applications are varied such that the costs awarded therein are to be subject to detailed assessment and assessed on a standard basis. 3. The costs awarded in paragraphs 1 and 2b. are to be subject to detailed assessment and assessed on a standard basis. 4. Liberty to apply, including for directions for the conduct of such assessment.
Date of Order:	7 April 2023
Catchwords:	Assessment of costs; Without Prejudice communications; Part 18 of the ADGM CPR; Shareholders' dispute.
Cases cited:	Global Energy Horizons v Gray [2021] EWCA Civ 123 Straker v Tudor Rose [2007] EWCA Civ 368 Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 1288 PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288 Garritt-Critchley v Ronnan [2014] EWHC 1774 (Ch).

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Case Number:	ADGMCFI-2020-015
Parties and representation:	Mr David Halpern KC for the Claimants Instructed by Al Tamimi & Company Mr Alan Choo-Choy KC for the First to Sixth and Eighth Defendants Instructed by DLA Piper Middle East LLP

JUDGMENT

1. On 15 November 2022 this Court delivered its judgment on liability and on 7 February 2023 the Court delivered its judgment on quantum.

2. The outcome was that the Claimants obtained judgment on their claim against the First to Fourth Defendants in the sum of USD779,500; with interest to accrue on that sum at the rate of 5% per annum from 27 April 2020 until the date of payment.

3. Costs submissions were filed by the Claimants and the Defendants on 28 February 2023, and reply costs submissions were filed by the parties on 21 March 2023.

4. Various costs permutations are put forward, but the parties remain as resolutely divided as they were at trial: each side seeks their costs of these proceedings, and there also remains outstanding the costs of five interlocutory applications, together with one application to introduce new evidence made on 5 September 2022 at the beginning of the trial.

5. It is evident from submissions of counsel that the Court is not presently in a position fairly to make a summary assessment of the significant amount of costs expended in this case, and thus to issue a costs' judgment in a sum certain. The Court agrees.

6. Accordingly in these circumstances, the Court now adverts to issues of principle raised in the parties' costs submissions, and thereafter, absent agreement thereon, costs will be subject to detailed assessment.

Who was the successful party?

7. The Defendants submit that it is they who have been successful, citing the valuation of the Ekar Holding Limited ("**Ekar**") as found by the Court (USD3 million) against the valuation pressed by the Claimants (USD87,200,000), and the damages awarded to the Claimants (USD779,000, excluding interest) against the claim (USD37,147,200).

8. Hence, the Defendants say that they should be entitled to recover their costs in full, whether assessed on a standard or indemnity basis, or in the alternative, in such proportion that the Court thinks reasonable in the circumstances and in particular having regard to the efforts made by them to compromise or settle this case.

9. The Claimants disagree. They say that they are entitled to their costs, albeit on a standard basis, and that the Defendants' position is contrary to the usual rule that a party who establishes liability and is awarded damages is treated as the successful party, and that the proper way for the Defendants to have protected themselves was by making a Part 18 Offer in a sum at least as great as the eventual award of damages.

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10. The Claimants cite the English Court of Appeal in *Global Energy Horizons v Gray [2021] EWCA Civ 123*, wherein the trial judge had regarded the outcome of the case before him as a draw (because the Claimant had been awarded only 1.6% of the sum claimed), but the Court of Appeal reversed this decision and awarded costs to the Claimant, and made the following observations about Part 36 of the Civil Procedure Rules, the English equivalent of Part 18 of the ADGM Court Procedure Rules ("**CPR**"):

> *"Where a defendant is faced with an exorbitant claim which he wishes to defend vigorously but where he is vulnerable to a finding that he is liable for a much smaller amount, there is a clear process provided by CPR Part 36 which he can follow to protect his position".*

11. In this context reference also is made to *Straker v Tudor Rose [2007] EWCA Civ 368*, a decision of the English Court of Appeal, wherein the Court stated:

> *"Where, particularly in a commercial context, the claim is for money, in deciding who is the successful party, I agree with Longmore LJ when he said in Barnes v Time Talk (UK) Ltd [2003] EWCA Civ 402, para 28 that "the most important thing is to identify the party who is to pay money to the other". In considering whether factors militate against the general rule applying, clear findings are necessary of factors which led to a disapplication of the general rule, eg. if it is said that a successful party 'unreasonably' pursued an allegation so as to deprive that party of what would normally be his order as to costs, there must be a clear finding of which allegation was unreasonably pursued."*

12. This case involved a three-week trial, hard-fought, with liability established by the Claimants, and with the quantum element essentially being determined by the Court's view of the valuation evidence led by the respective expert valuers, resulting in a low pandemic valuation of Ekar, which in turn resulted in a correspondingly low valuation of the respective shareholdings of the Claimants as at the date of contractual breach.

13. True it is that a case in which the Claimants no doubt had entertained high hopes in terms of quantum failed to yield the desired result, but the Court does not accept that the fact of a relatively small recovery should characterise the Claimants as the 'losing' party.

14. The Court also is resistant to the notion that the question of whom is the 'winning party' should be influenced by which side was successful on the most issues arising for decision.

15. Many issues arise in the ebb and flow of a factually-dense first instance case such as this one, and in the Court's view it is not always helpful to enumerate who won what issue; some issues went one way, others the other, but upon the two overarching issues, namely whether the Drag Notice involved a sale to a bona fide purchaser who had made an offer on arm's length terms, and whether the Defendants should succeed on their Counterclaim, the decision on these two issues went in favour of the Claimants, with the result that the Claimants succeeded in obtaining judgment, albeit in a lesser amount than sought, but not in a purely nominal sum.

16. Accordingly, perhaps the most relevant question to be answered is not 'Who was the winner'- which often involves considerations of marginal utility in a costs context – but whether, a monetary judgment having been issued in the Claimants' favour, there is good reason to depart from the well-established principle that costs should follow the event?

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Settlement Attempts

17. At the end of the day this represents the fulcrum of the present costs debate.

18. The Court has been presented with a schedule outlining settlement or compromise offers, commencing on 25 January 2022 and extending to 29 August 2022, the trial of this dispute having commenced on 5 September 2022.

19. The majority of these communications were made on a Without Prejudice Save As To Costs ("**WPSATC**") basis, and at no time was there a 'Part 18 Offer', the effect of which, if accepted, would have entitled the offeree to the sum offered, in addition to its costs assessed on a standard basis up to the date permitted for acceptance.

20. The Defendants assert that the sequence of events in the months leading to trial in September 2022 demonstrated the Claimants' "*failure to engage*" with settlement entreaties in face of their "*inflated demands*". This may be putting it high, but most of the running does appear to have been made by the Defendants.

21. It is evident from the list of settlement exchanges summarised in the Defendants' submissions of 28 February 2023 that throughout, there existed a substantial gulf between the parties in terms of what they thought this case was worth: for example, on 7 July 2022 the Claimants requested the Defendants pay USD11.8 million, and on 24 August 2022 the figure requested was USD7.8 million, whereas by contrast on 19 July 2022 the Defendants offered to pay USD1 million in full and final settlement, which was followed by an offer of 16 August of USD5.828 million, although the latter was girt about with contingencies and uncertainty given that it was to be paid by the earlier of an Ekar 'exit event' or a put option triggered by no later than 16 August 2026.

22. In terms of the schedule of settlement communications, three matters invite particular scrutiny: the 19 July 2022 offer, the offer to mediate, and the early disclosure of the preliminary Report of FTI Consulting.

The July Offer

23. Of these disparate offers it is the Defendants' offer of 19 July 2022 (the "**July Offer**") to pay USD1 million which has attracted the most attention in the respective submissions.

24. The Defendants say that it is accepted that the July Offer was not compliant with the Part 18 regime although this non-compliance was "*purely technical and not substantial*" (in failing to specify an acceptance period of at least 21 days, the consequences of non-acceptance, and whether the offer related to the whole of the Claimants' claims and took account of the Counterclaim), but that this was a consequential offer made in the lead up to trial at a time when the hearing bundle was being finalised and substantial work was commencing on trial preparation, and it had been the Defendants' wish to avoid incurring those costs if possible.

25. In the event, they submit, the Claimants have failed to beat this "*reasonable and proportionate*" offer, even with interest accrued, and consequently the Defendants say that they should be entitled to costs on a standard basis until 27 July 2022, the date of the Claimants' rejection of the July Offer, and on an indemnity basis from 28 July 2022 onwards.

26. The Claimants say that the assertion that the admitted non-compliance of the July Offer was "*purely technical and not substantial*" is disingenuous.

27. They point out that CPR 161(1) states that: "*The general rule is that…where a Part 18 offer is accepted within the relevant period, the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror*, and that it is plain that in the July Offer the

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Defendants were not offering to pay the Claimants' costs to-date in addition to the principal sum of USD1 million.

28. The Claimants submit that by 19 July 2022 their costs amounted to USD1,063.478.33, which was more than the amount for which the Defendants were offering to settle the entire claim, so that if the July Offer had been made under Part 18, the Claimants additionally would have been entitled to their costs on a standard basis and thus, on the assumption that there would have been a 70% recovery, this would have been in or around USD740,000, which would have put the combined figure well above the July Offer as made.

29. The Court agrees: had the July Offer been accepted (and the Claimants were given less than 3 days in which to do so, in contrast to the 21 days permitted under Part 18), it would not even have covered the Claimants' costs to-date, and thus the consequences of non-acceptance cannot be visited upon the Claimants on the basis that the July Offer de facto was a Part 18 offer: to the contrary, it seems evident that the Defendants made a deliberate decision not to make an offer pursuant to Part 18 precisely because of the associated costs' considerations.

The Mediation Offer

30. On 7 April 2022 the Defendants wrote to the Claimants suggesting that the parties attempt to mediate the dispute, but that *"the Claimants once again failed to engage or even acknowledge this letter*".

31. The Defendants say that this clearly was a case where emotion played a part, and it was their desire to attempt to resolve it with the assistance of an independent third party and in a manner which would allow the parties to remain on good terms, hence the suggestion of a mediation, and with this in mind the Defendants say that they had approached three potential mediators to clear conflicts.

32. They submit that the Claimants' failure to engage in mediation was unreasonable, and that there was no good reason why the parties should not have attempted to resolve the dispute in this manner, but instead this approach was ignored.

33. The Defendants refer to case law where unreasonable failure to engage in mediation attracts judicial sanction, herein citing H*alsey v Milton Keynes General NHS Trust [2004] EWCA Civ 1288, PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288 and Garritt-Critchley v Ronnan [2014] EWHC 1774 (Ch)*. Thus, it is argued, if the Defendants are to be awarded costs *qua* successful party, then consequent upon such unreasonable failure to mediate, the level of recoverable costs should be uplifted and costs recovered on an indemnity basis from 28 July 2022.

34. In response, and on the facts, the Claimants submit that in the present case the parties were all experienced businessmen well known to each other and represented by experienced commercial solicitors, that they had engaged in without prejudice negotiations throughout the period, and that in the circumstances it was not unreasonable to decline to agree specifically to a mediation.

35. The Claimants add that it was not unreasonable to decline that particular proposal given that it was made in April 2022, before exchange of expert reports and proper disclosure had been made, and that following the exchange of such reports, there was a flurry of WPSATC offers and counter-offers, but by then the trial was fast approaching. So that if, which is disputed, the Claimants acted unreasonably, it is contended that an appropriate sanction would be to deprive the Claimants of "*a small part*" of their costs.

36. As to legal principle, the Claimants cite reliance by the Defendants on *Halsey, op cit*, and observe that in this area the guiding principles (the '*Halsey principles'*) are set out in the judgment of Dyson LJ (at paras 13 and16):

> *"In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the*

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general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown…that the successful party acted unreasonably in refusing to agree to ADR."

"The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success".

37. In *PGF II SA op cit*., a case in which the Claimant had made a Part 36 offer, subsequently accepted, but had failed to respond to the Defendant's invitation to mediate, Briggs LJ summarised the Halsey principles, and held that "*silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable*", and concluded that where this had occurred, the Court had a discretion to depart from the usual rule as to costs, although this would produce no automatic results in the form of a costs penalty and was an aspect which needed addressing as part of the wider balancing exercise: "*It is plain…that the proper response in any particular case may range between the disallowing of the whole, or only a modest part of, the otherwise successful party's costs.*"

38. Briggs LJ went on to consider whether the Court might go further, and order the otherwise successful party to pay all or part of the unsuccessful party's costs (an aspect not considered in Halsey), and concluded that whilst in principle the Court must have that power, this was a "*draconian*" sanction which "*should be reserved for only the most serious and flagrant failures to engage with ADR*", for example where the Court had encouraged the parties to do so but had been ignored.

39. On the issue of failing to mediate when requested (or even, it seems, to consider mediation, given non-acknowledgment of the request), the Court has reflected on the circumstances, and has borne in mind the Claimants' contention that it was plain that without prejudice discussions were continuing, and that such mediation would have been "*premature*".

40. In practice mediation does not wait until discovery is entirely complete, and the Claimants' contention that expert reports still had not been exchanged runs somewhat hollow given that the Defendants had gone to the trouble of sending the Claimants the preliminary report of FTI Consulting (considered below).

41. Accordingly, the Court has come to the view that to decline mediation was unreasonable in all the circumstances, and thus that the Court has a discretion to reflect this unreasonable conduct in terms of disallowing part of the Claimant's costs.

42. As to the Claimants' collateral argument that even should it be concluded that the Claimants were at fault, "*the Defendants may be even more at fault in failing to make an appropriate (or indeed any) Part 18 offer*", and thus the causative effect of the misconduct was the less, essentially this is a plea in mitigation: if the Defendants chose not to make a Part 18 offer (as was the position in this case), they obviously suffer the consequences of not protecting themselves against the risk of the Claimants winning but recovering a sum far smaller than was being claimed, but this is nothing to the immediate point of whether unreasonably declining to mediate should appropriately be reflected in any costs award.

Preliminary FTI Consulting Report

43. The Defendants say that the without prejudice settlement exchanges conducted between January and August 2022 evidences their efforts to compromise this case at an early stage, and stress that they had appointed FTI Consulting to prepare a preliminary valuation report precisely (the "**FTI Report**") in order to assist with the settlement discussions, which report was disclosed to the Claimants on 1 February

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2022, well in advance of being formally submitted in the proceedings over three months later.

44. They state that this early delivery of the FTI Report was purposely designed to narrow the distance between the parties and to ensure that the Claimants would be aware seven months before trial of the Defendants' case as to the likely value of Ekar, and thus to focus the Claimants' attention upon this key area. However, despite this early insight into the Defendants' position, they say the Claimants chose to ignore this genuine effort to facilitate settlement and had showed no interest in an amicable resolution on reasonable terms and "*elected to maintain their inflated claim*".

45. The Claimants object to reference to the FTI Report, which was enclosed with a without prejudice letter of 1 February 2022, and say that by reason of the 'WP' annotation in the letter in question it is "*improper*" to refer to this, even after judgment, as it was also improper to refer to the first letter in the settlement correspondence sequence, namely that of 25 January 2022 which had proposed a 'drop hands, no order as to costs' resolution, and that the Court should put these letters out of its mind.

46. In principle the Claimants are correct. In *Cutts v Head [1984] Ch 290* the Court of Appeal confirmed that without prejudice communications *simpliciter* were not to be shown to the Court, even after judgment, Oliver LJ therein noting that the court in *Calderbank* had proposed a modification that would permit communications marked "Without Prejudice Save as to Costs" to be shown to the Court after judgment, albeit this was not to be a substitute for situations where a payment into court otherwise would be appropriate. 'Payment in', of course, has been superseded by Part 18 Offers, but the basic principle remains, and remains for good reason.

47. The Court has not looked at either of these initial two letters and nor, for that matter, the FTI Report, but the Court does not understand that the *fact* of the Claimants having been shown the FTI Report is or was at any time disputed: the Court has the impression that it had already been made aware that this had occurred, almost certainly due to reference having been made to this report in the course of the valuation evidence at trial, so that although the without prejudice letter under cover of which this document was sent to the Claimants should not have been exhibited, the Court does not consider this to be good reason why now it should ignore the fact that the Claimants had been accorded early sight of the FTI Report, and hence well knew of the low valuation which was to be ascribed to Ekar by the Defendants' valuer.

Related considerations

48. The Defendants submit that in addition to the issue of settlement offers the Court should take into account three other specific matters related to the Claimants' conduct in these proceedings.

Delayed Election of Remedy

49. The Defendants complain that the Claimants did not elect the remedy of damages until an email sent on 26 September 2022 after the completion of the evidence, that it was known throughout, and certainly by the time of the amendment of the Defence on 14 May 2021, that it would be unlikely that a discretionary order for rectification would be granted absent counter-restitution by the Claimants as a pre-condition to rectification of the share Register, and that in any event there remained the obvious risk that the Court would conclude that rectification would be unjust and inappropriate in the circumstances when the relationship between the parties had completely broken down. It followed that as the result of this lack of clarity the Defendants were put to the wasted time and costs of continuing to advance their arguments against the grant of rectification, and to persist with their counterclaim for counter-restitution, and that this should be recognised in the costs award.

50. True it is that the Claimants did not elect until the Court ordered the Claimants to do so prior to the advent of final submissions at trial, and that for obvious tactical reasons the Claimants held out for as long as possible prior to (finally) being ordered to make the election between remedies, but the Court regards this as part and parcel of the usual run of litigation, and does not regard this as an element which should

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attract any weight within the discretionary 'mix'.

Irrelevant personal claims and attacks

51. It is also said that the Claimants advanced personal claims and attacks against Mr Hashemi, Mr Hedberg and Mr Bhusari, that these were unsubstantiated claims and slurs with no relevance to the issues, and were an unjustified and bad faith attempt to sully the reputations of these individuals, possibly with a view to engineering an out of court settlement.

52. The Court sees no need to list the six matters of which specific complaint is made, and little or no notice was taken of these disparate allegations (save possibly for one, which was tangentially referenced in the Judgment). The allegations in question were matters raised within a legitimately wide-ranging cross examination wherein the Defendants' actions involving the background to, and use of, the 'Drag Notice procedure' were placed under detailed scrutiny. On the facts of this case pointed questions were to be expected, and in the view of the Court the matters now complained of represented part of the cut and thrust of the trial. The Court dismisses the 'bad faith' contention and the corresponding proposition that this aspect should be factored into the costs equation.

Irrelevant allegations of backdating

53. During the trial the wrongful backdating of the Lux CLA and the Debenture came to light. These documents had been discovered without giving notice to the Claimants that the date these documents bore had been deliberately backdated. Although the explanation for this egregious and misguided behaviour was accepted by the Court, the Court did not find it surprising, particularly in the circumstances of this dispute, that the Claimants strongly pursued this matter, although ultimately nothing turned upon it.

54. Conversely it is surprising that strident complaint now should be made about the Claimants' reaction to, and pursuit of, the situation, and that it should be argued that the Claimants should pay the costs of the time thus expended. The contention that "*the Claimants waited until trial in a likely attempt to spear the Defendants and to 'score some points' on a non-issue*" is a proposition which the Court neither accepts nor considers appropriate, and the contention that this event should find a place within the costs evaluation also is rejected.

Position of Mr Hashemi

55. The Claimants submit that in the circumstances of this case an order for costs should be made jointly and severally against Mr Hashemi, the Fifth Defendant, as well as against the First to Fourth Defendants, against whom judgment in damages has issued.

56. In support of this contention the Claimants quote passages from the Judgment demonstrating that Mr Hashemi engineered wrongful service of the Drag Notice and that he did so in bad faith.

57. The Defendants say that nothing turned on the passages from the Judgment quoted by the Claimants, that the Claimants now are clutching at "*evidential straws*" in order to attach costs liability whereas the fact is that the Claimants' attempts to hold Mr Hashemi personally liable in tort failed, and that in so far as the Claimants are seeking to pierce the corporate veil with respect to his roles in 'Lux' and the 'Polymath defendants', on whose behalf he had acted in relation to the Drag Notice, no reasoned basis has been advanced for so doing. In fact, they contend, the specific claims against Mr Hashemi having been dismissed, it is Mr Hashemi who is the successful party as against the Defendants, and thus it is the Claimants who should be paying his costs.

58. The view the Court ultimately has taken is that dismissal of the claims made against Mr Hashemi personally (upon the twin causes of action of inducing breach of contract and unlawful means conspiracy) weighs heavily in the balance, and the Court declines to make an order for costs against Mr Hashemi.

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Interlocutory Applications

59. The costs submissions itemise six interlocutory applications in which the issue of costs remains outstanding:

    a. Claimants' Request for Further Information of the Defence, dated 7 December 2020;

    b. Defendants' Request for Further Information, dated 24 January 2021;

    c. Defendants' Application for permission to amend the Defence and to commence a Counterclaim, dated 27 April 2021;

    d. Claimants' Application for a split trial, dated 28 July 2021;

    e. Claimants' Application for Further Information of Amended Defence and Counterclaim, dated 19 August 2021; and

    f. Defendants' Application (on 5 September 2022 at the commencement of the trial) to file and rely on the Fourth Witness Statement of Mr Hedberg.

60. In summary, dispositive costs orders (absent consequent assessment) were made on items (a), (c) and (d), and accordingly assessment under these heads can be made at the stage of the detailed costs assessment which is to take place.

61. In terms of item (b), costs were reserved, and as to items (e) and (f) it appears that no order relating to costs was made at the time that these matters arose.

62. With regard to item (f), an application made by the Defendants at the outset of the trial, whereby new evidence was sought to be introduced as to the current position of Ekar, in particular Mr Hedberg's observations on the March and July business plans, this was opposed on the basis that the Defendants had given no good reason for, in effect, springing this on the Claimants at the eleventh hour.

63. In the event the Court acceded to the application after some hesitation. That the Defendants now should ask for their costs of this application strikes the Court as unreasonable given that it is they who were asking for the late indulgence; for their part the Claimants say that this should simply be treated as part of the cut and thrust of trial, and does not merit a separate costs order. The Court agrees: as to item (f) there is to be no order as to costs.

64. In terms of item (e), whereby the application for further information of the Amended Defence and Counterclaim met a consensual response, the Court also considers that there should be no order as to costs.

65. As to the remaining item, (b), the Defendants' application of 24 January 2021 for Further Information, the Defendants ask for their costs on the ground that 13 of the 17 requests made were granted by the Court.

66. This is not entirely accurate. On the basis of the Order of 10 February 2021 made on this application, it appears that in response to the 17 separate requests made, 13 were responded to consensually by the Claimants, leaving 4 requests opposed; after considering the contentions of the parties upon these outstanding matters, the Court (at para 13 of that Order) dismissed the application in terms of the 4 contested issues.

67. On this basis it is the Claimants who succeeded on the only matters that provoked argument. The Court is tempted to simplify the matter and to make no order, but in this instance the costs order probably should be bifurcated: accordingly, the Defendants are to have their costs of the application, save and except that the Claimants are to have their costs of and occasioned by argument over the 4 contested issues. This

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will inevitably involve netting-off between the respective bills, and ideally this minor matter should be settled by agreement.

Proportionality

68. Both costs submissions reference the issue of proportionality and reasonableness. However, in the Court's view this aspect best can be addressed when the detailed assessment of costs is conducted.

Conclusion

69. After reflecting at some length on the foregoing matters, in the exercise of its discretion the Court has concluded that the appropriate Order is that, subject to the Court's decision on the interlocutory applications, the Claimants are awarded their costs, save that as from 1 May 2022 recovery is to be limited to 70% only of such costs, and that these costs are to be subject to detailed assessment on a standard basis. Subject to the Court's decision on the interlocutory applications, the Defendants' application for costs is dismissed.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
7 April 2023