ADGM COURTS
محاكم سوق أبوظبي العالمي

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

UNION PROPERTIES P.J.S.C
First Claimant/ Applicant

UPP CAPITAL INVESTMENT CO. L.L.C.
Second Claimant/ Applicant

and

TRINKLER & PARTNERS LTD
First Defendant/ Respondent

THOMAS PIERRE TRINKLER
Second Defendant/ Respondent

~~**PATRICK ALBERT HELD**~~
~~Third Defendant/ Respondent~~

FIRST FUND MANAGEMENT LIMITED
Fourth Defendant/ Respondent

JORG KLAR
Fifth Defendant/ Respondent

PARESH CHANDRASEN KHIARA
Sixth Defendant/ Respondent

AMNA HASAN ALI SALEH ALHAMMADI
Seventh Defendant/ Respondent

DAHI YOUSEF AHMED ABDULLA ALMANSOORI
Eighth Defendant/ Respondent

NASER BUTTI OMAIR YOUSEF ALMHEIRI
Ninth Defendant

KHALIFA HASAN ALI SALEH ALHAMMADI
Tenth Defendant/ Respondent

~~**STEFAN DUBACH**~~
~~Eleventh Defendant/ Respondent~~

AHMED YOUSEF ABDULLA HUSSAIN KHOURI
Twelfth Defendant/ Respondent

HASSAN ASHOOR AL MULLA
Thirteenth Defendant/ Respondent

BLUE ROCK INVESTMENTS L.L.C
Fourteenth Respondent

DANA MIDDLE EAST INVESTMENT L.L.C
Fifteenth Respondent

MOHAMED HASAN ALI SALEH ALHAMMADI
Sixteenth Respondent

~~**ISLAND FALCON PROPERTY MANAGEMENT L.L.C**~~
~~Seventeenth Respondent~~

ISLAND FALCON INVESTMENTS L.L.C
Eighteenth Respondent

TEXTURE GLOBAL INVESTMENT LIMITED
Nineteenth Respondent

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2024] ADGMCFI 0004
Before:	Justice Sir Andrew Smith
Decision Date:	9 May 2024
Decision:	1. The Application to vary the March Order is refused. 2. Extension of time of 14 days from this order is granted to the Claimants to provide security for the costs of the Twelfth Defendant by way of payment into Court (or in some other form to which Mr Khouri agrees). 3. Any applications as to the costs of the applications must be made within 21 days of the order.
Hearing Date:	2 May 2024
Date of Order:	To be drafted by Counsel
Catchwords:	Form of application to the Court. Security for costs by way of a bank guarantee. Variation of Court order.
Cases cited:	Rosengrens v Safe Deposit Centres Ltd, [1984] 1 WLR 1334 Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies), [2012] EWCA Civ 518 Recovery Partners GB Ltd v Rukhadze, [2018] EWHC 95 Oak Cash & Carry Ltd v British Gas Trading Ltd, [2016] WCA Civ 153 Union Properties P.J.S.C. and another v Trinkler & Partners Ltd and others, [2024] ADGMCFI 0003 Union Properties P.J.S.C. and another v Trinkler & Partners Ltd and others, [2023] ADGMCFI 0009 Union Properties P.J.S.C. and another v Trinkler & Partners Ltd and others, [2023] ADGMCFI 0011
Legislation cited	ADGM Court Procedure Rules
Case Number:	ADGMCFI-2022-265
Parties and representation:	Mr William Prasifka, Clyde & Co LLP for the Claimants Dr Beat Ammann, About Law GmbH for the Second Defendant Mr Aamir Sheikh, DLA Piper Middle East LLP for the Fourth, Sixth and Eighth Defendants Dr Clemens Daburon, Daburon & Partners Legal Consultants LLP for the Fifth Defendant Mr Riaz Hussain KC, instructed by Hend Al Ktebi, Advocates & Legal Consultants for the Ninth Defendant Mr Benjamin Joseph, instructed by Fichte & Co Legal Consultancy LLC for the Twelfth Defendant

JUDGMENT

Introduction

1. This is my judgment upon an application by the Claimants, Union Properties PJSC ("**UP**") and its wholly-owned subsidiary, UPP Capital Investment Co LLC ("**Capital**"), to vary an order that I made on 11 March 2024 (the "**March Order**"), or alternatively for further time to comply with it or to provide satisfactory security for the costs of the Twelfth Defendant, Mr Ahmed Yousef Abdulla Hussain Khouri. My reasons for the March Order are given in a judgment of the same date, [2024] ADGMCFI 0003 (the "**March Judgment**").

2. In the March Judgment, I set out something of the protracted history of these proceedings, and explained that they were brought by UP and Capital on 14 November 2022 against thirteen defendants, and that the claim form describes their complaint as follows:

> "*In outline, the Claimants allege that a fraud was perpetrated against them resulting in the unlawful and unauthorised use of AED 320,712,867.84 to purchase 391,789,341 units of P-Notes (or Participation Notes), the great majority of the proceeds of which were misappropriated. The Claimants' case is that the Tenth Defendant, Khalifa Alhammadi, is the controlling mind of this fraud, and that he has operated with the assistance of and/or through persons and entities controlled by them or acting at their direction, in particular the other Defendants*".

3. The claim is for over AED 300 million. It has been discontinued against two defendants, and judgment has been entered in default against four of them. It continues against Mr Khouri, subject to the questions now before me, and six other defendants.

The March Order

4. By paragraph 1 of the March Order, which I made after a hearing on 1 March 2024 (the **"March Hearing**"), I ordered that by 4.00 pm on 8 April 2024, the Claimants should pay Mr Khouri the sum of AED 300,000 on account of costs awarded to him by an order dated 10 October 2023 (the "**October Order**"), that are the subject of a detailed assessment; and that they should provide security for Mr Khouri's incurred and future costs to the completion of disclosure in the sum of AED 1 million "(*in the form of (i) payment into Court or (ii) the provision of a first-class bank guarantee in a form acceptable to the Twelfth Defendant and agreed to by the Twelfth Defendant before its provision by the Claimants to the Twelfth Defendant, or alternatively, (iii) security in any other form agreed by the Twelfth Defendant, though the Twelfth Defendant shall have no obligation to accept security in an alternative form)*".

5. Paragraph 2 of the March Order provided that:

> "*If the Claimants fail to comply with paragraph 1 above:*
>
> a. *the Claimants' claim against the Twelfth Defendant shall be struck out without further order, and;*
>
> b. *on production by the Twelfth Defendant of evidence of default, there shall be Judgment for the Twelfth Defendant without further order with costs of the claim to be the subject of a detailed assessment if not agreed*".

6. Paragraph 3 of the March Order provided that the Claimants should pay Mr Khouri's costs of his application for security for costs, summarily assessed in the sum of AED 300,000, by 4.00 pm on 25 March 2024.

7. Paragraph 8 of the March Order provided for "*Liberty generally to apply*". In the March Judgment, I said that the Claimants should have liberty to apply for an extension of time "*if they have grounds to do so*: para 72.

8. In the same paragraph 72 of the March Judgment, I explained that, in deciding that the claim against Mr Khouri should be struck out, rather than stayed, if the Claimants were in breach of the order for security, I had regard to the "*Claimants' non-compliance with regard to costs*", a reference to their failure to comply with the October Order: see below.

9. At the March Hearing, I had told the Claimants that I "*might well*" order security and that I had "*in mind a 14 day period*", and had warned them that they should be prepared to provide it promptly. Mr Khouri had applied for security in the sum of AED 4,120,812.50: the Claimants therefore were aware from 1 March 2024 that they were likely to be required to provide security for Mr Khouri's costs in a substantial sum and to have limited time to do so. Nevertheless, the evidence indicates that they took no steps to arrange security by way of a bank guarantee until 21 March 2024.

10. In the event, the March Order allowed the Claimants 28 days to provide security. I explained at paragraph 75 of the March Judgment that I gave them this longer period *"[i]n view of the sanction that I attach to non-compliance*".

The Applications

11. By an email to the Court Registry dated 5 April 2024, the Claimants' solicitors, Clyde & Co, requested "*a short extension to 22 April 2024*" for the Claimants to provide security to Mr Khouri by way of a bank guarantee. Friday 5 April 2024 was the last working day before 8 April 2024, the deadline stipulated in the March Order for providing security. However, on 1 April 2024, the United Arab Emirates (the "**UAE**") Government had declared that all public and provide offices in the Emirates would close for the week of 8 April 2024 to mark Eid Al-Fitr. The ADGM Court Procedure Rules 2016 (**CPR**") provide that when the "*period specified for doing any act at the registry ends on a day on which the office is closed, that act shall be in time if done on the next day on which the registry is open*": CPR r.7(5).

12. In their submissions, the Claimants described the request in the email of 5 April 2024 as an "*application*", contending that an application for an extension of time may be made by email to the Court. I do not accept that: the CPR provide that "… *a party who wishes to apply to the Court for orders must file an application notice together with any witness statement evidence in support*": CPR r.64(1).

13. In the email of 5 April 2024, Clyde & Co said that a cheque for the AED 300,000 to be paid under paragraph 1 of the March Order had been provided to Mr Khouri earlier that day, and explained the position about security as follows: that a "*draft first-class bank guarantee from Dubai Islamic Bank ("**DIB**")"* was provided to Fichte & Co, who act for Mr Khouri, on 1 April 2024, and Fichte & Co responded on 2 April 2024 *"seeking substantial amendments*". Clyde & Co said that the Claimants had asked the DIB to agree to Mr Khouri's proposed changes, and that they were "*under review*" by DIB.

14. It was said by Clyde & Co that the extension that they sought was "*necessitated in large part by the significant amendments sought by*" Mr Khouri, but that is, at best, not the full picture. As I have said, the Claimants first went about requesting a bank guarantee from DIB only on 21 March 2024. They communicated with Fichte & Co about providing security in this form only on 1 April 2024, after Fichte & Co had sent an email on 29 March 2024 reminding them of the deadline under the March Order for paying AED 300,000 and the provision of security. Fichte & Co responded about the terms of a bank guarantee the next day. Although Clyde & Co's email of 5 April 2024 said that Mr Khouri sought "*substantial*", "*significant*" and "*extensive*" amendments to DIB's standard wording (and indeed they have subsequently said that he sought a "*complete rewrite*" of its terms), this was not a complaint that Clyde & Co made in response to Fichte & Co. To my mind, the changes proposed by Fichte & Co were moderate and each was properly explained on 2 April 2024.

15. The Claimants' request to the Court was made only after Fichte & Co had again written to Clyde & Co on 5 April 2024 about compliance with the March Order, saying (and it has not been disputed) that, while under CPR r.7(5) the Claimants had until 15 April 2024 to provide security by paying funds into Court, the deadline of 8 April 2024 remained in force for security by way of a bank guarantee.

16. In response to Clyde & Co's email, Fichte & Co sent an email to the Court Registry later on 5 April 2024. They observed that the Claimants appeared to be seeking "*a retrospective extension of time for compliance with the Court Order for security for costs of 11 March 2024*". They asked to be allowed until 17 April 2024 to answer the request because Mr Alessandro Tricoli, the Partner dealing with these proceedings, was to be abroad until 15 April 2024.

17. In a witness statement of 17 April 2024, Mr Tricoli contended that the Claimants should be refused an extension of time in view of the serious nature of their failure to provide security as ordered, their previous non-compliance with the CPR in these proceedings, and considerations of fairness and efficiency.

18. On 23 April 2024, the Claimants filed a formal application (the "**Application**"), in which it sought a direction that *"[t]he Draft Bank Guarantee, in its current form, is an appropriate form of security*", and that the Claimants should "*furnish a duly executed copy of the Draft Bank Guarantee in the sum of AED 1 million, to* [*Mr Khouri] within 7 days of the Order*". It also sought, apparently as alternative relief, that the Claimants should have 14 days from the date of the order to provide *"an alternative form of security*". The Application was supported by a witness statement of Mr Nils de Wolff, a solicitor with Clyde & Co. He observed that Mr Tricoli's evidence did not "*allude to any prejudice that would be suffered by [Mr Khouri] in the event that the bank guarantee would only become available from 22 April 2024*". He also said that on 22 April 2024, after some delay occasioned by the flooding in Dubai on 16 and 17 April 2024, DIB had "*responded … to say that it would not accept any changes to its standard form guarantees, attaching two alternative forms of standard wording (for fixed validity or auto renewable validity)*". Mr de Wolff exhibited to his statement both forms of DIB's standard wording, without indicating how they would be completed: in particular, whether the applicant for the guarantee, whose liability was covered, was to be UP or Capital or (as would surely be the natural inference) both of them.

19. When I saw the Application, it was unclear to me what relief was sought: in particular, whether the expression, "*[t]he Draft Bank Guarantee, in its current form*" referred to the form proposed by the Claimants on 1 April 2024 or one of DIB's standard forms; and if the latter, which standard form and how the Claimants proposed that it be completed. When this was drawn to their attention by the Court, Clyde & Co responded by email on 24 April 2024 that it was intended to refer to "*one of [DIB's] standard wordings*", which response was described as a "*clarification*" of the order sought. Clyde & Co attached to their email "*a populated auto renewable term bank guarantee in an amount of AED 1 million*", which was "*subject only to execution by the Bank*".

20. The email made clear that the Claimants were no longer seeking the relief sought in the application of 23 April 2024 in respect of a "*Draft Guarantee in its current form*", and by an order of 24 April 2024, I refused the application in that respect. I directed that, if the Claimants sought permission to amend the application, or wished to apply for further relief, it should do so by 4.00 pm on 25 April 2025. In my reasons for this order, I said that I did not regard the email of 24 April 2024 as providing "*clarification*" of the application, but as requesting a different order.

21. On 25 April 2024, the Claimants gave notice of an Amended Application, supported by a further witness statement of Mr de Wolff. It sought a variation of the March Order so as to provide that the security be "*in the form of (i) payment into Court or (ii) the provision of a first-class bank guarantee in a form acceptable to the Twelfth Defendant or the Court, or alternatively, (iii) security in any other form agreed by the Twelfth Defendant, though the Twelfth Defendant shall have no obligation to accept security in an alternative form*". It also sought an order that DIB's standard form guarantee, as included in an exhibit to Mr Wolff's statement is "*an acceptable form of bank guarantee and provides adequate security for [Mr Khouri's] costs*". In the alternative, it sought a further 14 days from the date of the order "*to provide an alternative form of security acceptable to [Mr Khouri] or the Court*".

The parties' submissions in outline

22. At a hearing on 2 May 2024, I heard submissions on the Claimants' amended application notice filed on 25 April 2024 (the "**Amended Application**") from Mr William Prasifka on behalf of the Claimants, and from Mr Benjamin Joseph for Mr Khouri.

23. Mr Prasifka acknowledged that the Claimants had not met the deadline for the provision of security under the March Order. However, in outline summary, he submitted that they have always intended to meet the deadline, and that their exchanges with DIB were delayed first by the closures to mark Eid-al-Fitr and then by flooding in Dubai and elsewhere in the UAE. He submitted that it would be disproportionate and incompatible with the overriding objective of the CPR (that the system of civil justice in the ADGM be accessible, fair and efficient: CPR r.2(2)) to dismiss the claim against Mr Khouri, particularly given that "*there would be no question about the security's adequacy*".

24. Mr Joseph submitted that in view of the Claimants' breach of the order for security for costs in the March Order and its provision about non-compliance, the Claimants can pursue their claim against Mr Khouri only if (i) they are relieved of the consequences of their breach and (ii) the March Order is varied and they are given more time to comply with it; and that both applications should be refused. He emphasised that the Claimants would have avoided breach of the March Order if they had provided security by paying money into the Court.

The application to adduce further evidence

25. The guarantee that was proposed by the Claimants in their Amended Application, was to be addressed to Mr Khouri, and would provide for payment upon receipt by DIB of "*your first demand*". It required that "[*y]our demand for payment must state that the applicant Ms. Union Properties has failed to fulfil his contractual obligations*". It also provided that "*[t]his Guarantee shall be governed by and constructed in accordance with UAE laws under jurisdiction of UAE competent Courts*". On reading the draft order proposed by the Claimants in the Amended Application, I advised the Claimants that I would require assistance *inter alia* on two points, namely (i) whether the reference to a failure to comply with "*contractual obligations*" was said to include a failure to comply with a Court order to pay costs, and (ii) whether the DIB acknowledged that the expression "*UAE competent Courts*" includes the ADGM Courts. These seemed potential problems with using DIB's standard wording. The evidence of Mr de Wolff in his statement of 25 April 2024 was that "*despite numerous and urgent requests made by the Claimants of [DIB], on 22 April 2024 the Bank stated that it would not accept any changes to its standard wording*".

26. In his submissions, Mr Prasifka argued that these points did not detract from the adequacy of the proposed bank guarantee as security. With regard to the question whether the bank guarantee would cover liability resulting not from a contract but from a Court order, he relied on an email from DIB's "*CB dept*" (which I take to be its Corporate Banking Department ("**CBD**")) to the Claimants dated 22 April 2024 in which it is said, "*Pls note our [Guarantees] department has … advised that since this is a financial [guarantee] related to a court case you may use any one of the attached standard original text formats (for fixed validity or auto renewable validity) with no changes*". He submitted that the expression "*UAE competent Courts*" was to be understood to include the ADGM Courts, but in any case, Mr Khouri would not be prejudiced if he had to enforce the guarantee in another UAE jurisdiction.

27. For reasons that I shall explain, I do not consider that these responses answer the points satisfactorily. However that might be, during the hearing Mr Prasifka sought to adduce new evidence by way of another email from DIB dated 2 May 2024 (the "**2 May email**"). It had not previously been seen by Mr Khouri or his representatives: indeed, it was sent to the Claimants' representatives after the hearing had started. It is (or purports to be) an email to the Claimants in which DIB's CBD said this:

> "*Ref below emails and our discussion with legal, they have suggested as following:*

a. *whether the reference to a failure to comply with 'contractual obligations' in the third paragraph of the proposed guarantee (copy attached) is said to include a failure to comply with a Court order to pay costs, and*
*DIB: We can add with contractual obligations "**and/or any appropriate order for payment issued by court of competent jurisdiction**"*

b. *whether the expression 'UAE competent Courts' includes the ADGM Courts*
*DIB: We can add after UAE competent Courts '**including but not limited to the Courts of ADGM**'.*

I told Mr Prasifka that, if the 2 May email was to be put in evidence, it would have to be exhibited to a witness statement, as it now has been.

28. Against this background, Mr Joseph, sensibly, raised no objection to the 2 May email being admitted into evidence, but asked that the evidence put it into context in terms of the chain of emails from which it is extracted, and whether the changes suggested were subject of other, and if so what, approvals within DIB.

The Re-Amended Application

29. At the hearing, I observed that the bank guarantee proposed by the Claimants would not provide adequate security: it would secure the liability for costs only of UP and would not cover any liability of Capital. I rather expected the Claimants to respond by offering to provide a guarantee to cover Capital's liability in similar terms to that for UP (or to ask DIB to amend the terms of the guarantee proposed for UP to cover Capital), but they did not do so. They took the position that security for the costs of UP alone is adequate. Mr Khouri did not accept that.

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30. At the end of the hearing, I said that I considered that the form of bank guarantee then proposed would not provide adequate security, and that otherwise I would reserve my decision.

31. On 6 May 2024, the Claimants filed and served a re-amended version of their application (the "**Re-Amended Application")**, together with a further witness statement of Mr de Wolff dated 3 May 2024 (the "**3 May Statement**"). It sought the same variation of the March Order as the Amended Application, and also an order that a DIB guarantee in the terms of one of two alternative drafts exhibited by Mr de Wolff "*is an acceptable form of bank guarantee and provides adequate security for [Mr Khouri's] costs*". In the alternative, if a bank guarantee in neither form was adequate, the Claimants asked for 21 days from the date of the order to provide security "*in the form of payment into Court or in any other form acceptable to [Mr Khouri] or the Court*".

32. Mr de Wolff exhibited to the 3 May statement the 2 May email, together with an email from UP sent less than an hour earlier, which asked the questions set out in the 2 May email. He also exhibited a further exchange of emails between UP and DIB after the hearing. UP wrote that "*as an outcome from today court hearing there's one final point, that the judge has asked to be formally confirmed in writing from DIB: … that DIB is 'happy' with the wording DIB proposed below*", and the email then set out the contents of the 2 May email. (I had not, in fact, asked for confirmation during the hearing that DIB provide any such "*formal confirmation*": the author of the email must have been misinformed or misunderstood something said at the hearing.) On 3 May 2024, DIB's CBD responded, "*[w]e are fine with the wording provided in the email below*".

33. At the end of the 3 May statement, Mr de Wolff referred to the point that I raised at the hearing about the proposed guarantee not covering Capital's liability for Mr Khouri's costs. He said that the Claimants were awaiting confirmation from DIB whether they would agree to provide a guarantee with wording to cover this, describing this as "*a possible further refinement to the Amended DIB Bank Guarantee*".

34. I therefore accept the 2 May email as evidence, but when considering its significance, I keep in mind Mr Khouri's request for context: in particular, the 2 May email was said to be written with reference to

"below emails" (emphasis added), but the 3 May statement exhibits only UP's email to which it immediately responded.

35. On 8 May 2024, Mr Khouri filed and served short submissions by Mr Joseph in response to the Re-Amended Application.

36. I did not consider it necessary to restore the hearing to consider the Re-Amended Application, and no party requested that I should do so.

The Court's jurisdiction to grant the Claimants' applications

37. Mr Khouri does not dispute the Court's jurisdiction to grant the Claimants' applications. By CPR r.8(1), the Court may "*make any order, give any direction or take any step it considers appropriate for the purpose of managing the proceedings and furthering the objective of these Rules as set out in Rule 2(2)*", which is, as I have said, that the system of civil justice in the ADGM be accessible, fair and efficient. More specifically relevant to the question whether the Claimants should be relieved of the consequences of non-compliance with the March Order, CPR r.11(2) provides that *"[w]here any provision of … any … Court order is not complied with, the Court may give whatever directions appear appropriate, having regard to the seriousness of the non-compliance and generally to the circumstances of the case*". With regard to the application to vary the March Order, CPR r.8(5) provides that *"[a] power under these rules … to make an order includes a power to vary or revoke the order*".

38. In some respects, these provisions reflect provisions of the English Civil Procedure Rules (the "**ECPR**"), and in particular CPR r.8(5) is in the same terms as EHCR r.3.1(7). However, there are differences between the two regimes: in particular:

    a. ECPR r.3.9 is a specific rule about relief from sanctions and requires the Court, on such applications, to "*consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need – (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and order*"; and

    b. The overriding objective of the ECPR, to which the Court must seek to give effect when exercising any power under them, is stated to be enable the Court "*to deal with a case justly and at proportionate cost"* (CPR r1(1), and that is said to include "*so far as practicable … enforcing compliance with… orders*" (CPR r.1.1(2)(f).

39. English decisions, which were cited by both Mr Prasifka and Mr Joseph, can still provide useful guidance to this Court, but, when considering them, it is important to keep in mind the differences between the rules, including the stated overall objectives, of the two regimes.

The Questions for Consideration

40. It seems to me that the Amended Application and the Re-Amended Application give rise to these questions:

    a. Whether, in view of the Claimants' acknowledged non-compliance, the Claimants' claim against Mr Khouri is struck out under the March Order, or whether the Claimants should be relieved of the consequence of their non-compliance, and given more time to provide security for Mr Khouri's costs.

    b. If the claim against Mr Khouri is not struck out, whether, as the Claimants seek, the terms of the March Order should be varied.

    c. If the terms of the March Order are varied as the Claimants seek, whether the security by way of a Bank Guarantee of DIB, as proposed by the Claimants, would provide adequate and satisfactory security for Mr Khouri's costs.

41. I have set out these issues in what is, to my mind, a logical order, but the relevant considerations for each overlap, and I shall take according to convenience, rather than strict logic.

Would security by way of a bank guarantee given by DIB, such as proposed by the Claimants, provide satisfactory security for Mr Khouri's costs?

42. The starting point of Mr Prasifka's argument is that the Court should accept that a bank guarantee from DIB provides satisfactory security for Mr Khouri's costs: see the judgment of Parker LJ in *Rosengrens v Safe Deposit Centres Ltd,* [1984] 1 WLR 1334, in which he said (at p.1337) that "*So long as the opposite party is adequately protected, it is right and proper that the security should be given in a way which is the least disadvantageous to the party giving that security*", and "*So long as it is adequate, then the form of it is a matter which is immaterial*". In this case, it is not suggested that DIB is not a suitable bank to provide a guarantee by way of security: Mr Khouri's objections are about the proposed terms.

43. In my judgment, the terms of the guarantee proposed by the Claimants in the Amended Application would not provide satisfactory security for Mr Khouri's costs. The most obvious reason is that it would require him to make a demand stating that there has been a contractual breach, and it is little comfort to Mr Khouri that, in an email to which he was not party, DIB has said that the wording might be used when the guarantee is "*related to a court case*". He should be able to rely on the wording of the guarantee itself.

44. As for the term that the guarantee would be subject to the jurisdiction of "*UAE competent Courts*", for my part, I would accept Mr Prasifka's submission that the expression is properly to be interpreted as including this ADGM Court. However, that is not a complete answer to Mr Khouri's concern. My experience in this Court in other cases warns me that this interpretation might be disputed. It is readily understandable that Mr Khouri objects to the prospect, if he needs to enforce the guarantee, of either risking a jurisdictional dispute or having to bring proceedings in another jurisdiction.

45. Another concern raised by Mr Joseph is whether the proposed guarantee would respond to multiple demands in the event that the Court makes more than one costs order in Mr Khouri's favour against the Claimants or one of them. I see nothing in this point: the proposed wording includes the following, which clearly contemplates that partial demands are covered: "*Guarantor's maximum liability hereunder shall not in any event exceed AED1,000,000. Any partial demand paid under this guarantee shall be reduced from the guarantee amount accordingly*".

46. However, there is another reason that the guarantee proposed in the Amended Application would not provide adequate security: it would secure the liability for costs only of UP and would not cover any liability of Capital. If costs are awarded against the Claimants, the order would likely provide for joint and several liability, but that is not certain. In any case, the March Order provided for security for the liability of both Claimants, and there is no application to vary that aspect of the order.

47. When I asked about this during the hearing, I rather expected the Claimants to respond by offering to provide a guarantee to cover Capital's liability in similar terms to that for UP (or to ask DIB to amend the terms of the guarantee proposed for UP to cover Capital), but they did not do so. They took the position that security for the costs of UP alone is adequate. Mr Khouri did not accept that, and neither do I.

48. What of the proposals in the Re-Amended Application? A guarantee incorporating only the changes from the standard wording that the CBD suggested in the 2 May email would still not provide adequate security because the liability of Capital would not be covered. However, if I were considering Mr Khouri's application for security afresh, I would accept that such a guarantee with what Mr de Wolff called "*a possible further refinement to the Amended DIB Bank Guarantee"* to include Capital's liability (a "**Refined Guarantee**") would be satisfactory. In view of the March Order, however, this is not the end of the matter: it leads to the other two questions that I have identified.

Should the March Order be varied?

49. In his judgment in *Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies),* [2012] EWCA Civ 518, Rix LJ carefully examined the authorities about when the English Court will use its power under ECPR r. 3.1(7) to vary an order. He observed (at para 39) that, leaving aside final orders, while there is not, and should not be, *"an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise*", nevertheless "*the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated*". However, Rix LJ also made clear in para 40 of his judgment that the position is different where, as here, an order provides for liberty to apply: then the order expressly recognises that circumstances may so develop that it is necessary or desirable to revisit an order, and it is, as Rix LJ put it, "*commonplace*" to do so. In my judgment, this Court should adopt a similar approach to the exercise of its power under CPR r.8(5).

50. Thus, as Mr Prasifka submitted, the Claimants are entitled to invoke the liberty to apply in the March Order, and to argue that circumstances have so developed that its provisions should be re-visited. That said, a liberty to apply does not completely override the considerations that underlie the restrictive approach to re-visiting an order in the absence of such a provision: namely, "*considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal*": *Tibbles,* (cit sup) at para 39.

51. I therefore accept Mr Joseph's submission that the Claimants' application to vary the March Order does not simply turn on whether they now offer a form of security that is adequate or satisfactory but not within the terms of the March Order. He drew to my attention the decision of Mr Nicholas Vineall QC (sitting as a High Court Judge) in *Recovery Partners GB Ltd v Rukhadze, [2018] EWHC 95*. In that case, security had been provided by way of an undertaking of a party's solicitors to hold funds to the order of the Court, and an application was made that the solicitors be released from the undertaking upon the provision of security by way of legal expenses insurance. The Judge said that, had he been considering the position *de novo*, he would have regarded this security as adequate, albeit less favourable to the secured party than the solicitors' undertaking, but considered that other factors were material to an application to vary an order. He continued, at para 42, as follows:

> *In my view, and remembering that the burden is on the party seeking release from an undertaking, the factors which might be material on an application of the present type, …, include the following:*
>
> *(a) how long the old security has been in place and whether the costs which it secured have already been incurred;*
>
> *(b) the extent of the difference (if any) between the quality of the old security and the quality of the new security;*
>
> *(c) the strength of the explanation given for the [applicant']s change of position;*
>
> *(d) in particular, whether or not, and if so to what extent, declining to permit the change would cause hardship or prejudice to the [applicant] or inhibit its ability to pursue its claim".*

The Judge was not, of course, seeking to identify all potentially material considerations.

52. I agree with Mr Joseph that the position here about varying the March Order is analogous. He conveniently marshalled his arguments by reference to these four considerations.

53. First, he argued that the fact that security had not been put in place at all, in breach of the March Order, weighed against the application to vary the order. I am not persuaded that there is much in this point. However, it is relevant that the security that was ordered is, in part, for costs that have already been incurred: they remain unsecured because of the breach.

54. As for the second consideration, Mr Joseph submitted that the security now proposed by the Claimants is of a lower quality than that contemplated in the March Order. For the reasons that I have explained, I consider that the form of guarantee proposed in the Amended Application would provide security of distinctly lower quality, and that guarantee incorporating the amendments contemplated in the 2 May email would also be inadequate. I shall come later whether there is satisfactory evidence that the Claimants are likely to be able to provide a Refined Guarantee.

55. As for the explanation for the Claimants seeking to vary the March Order and the question of prejudice, Mr Joseph observed that it is for the Claimants to justify a variation and to show that their Claim would be inhibited without one or other prejudice. He submitted that they have not done so, because they have not explained in their evidence why they did not comply with the March Order by paying money into the Court. There is no evidence, nor have the Claimants submitted, that they could not have done so, or that to do so it would cause them difficulty or hardship: hence, Mr Khouri invites the inference that "*this is a commercial choice, to prefer a bank guarantee over payment into Court, and there is a deliberate breach of the Court's order, which is an 'unless' order*".

56. I consider these arguments, taken together, to be persuasive. To my mind, the essential question in this case is whether the Claimants have shown that, if the March Order is varied, they could promptly provide satisfactory security so as to be able to pursue their claim against Mr Khouri, whereas without a variation, they could not do so. They have not established that they could not provide security by making a payment into the Court: and nor, in my judgment, have the Claimants shown that that they could promptly provide satisfactory security if the March Order is varied as they seek in the alternative in the Re-Amended Application. First, the 2 May email and the other emails that Mr de Wolff has exhibited to the 3 May statement are from DIB's CBD, apparently after discussion with its Legal Department, but its email of 22 April 2024 indicates that approval of its Guarantees Department would be required, and, as far as the evidence goes, that department has been unwilling to depart from DIB's standard wording. This is apparently why Mr de Wolff gave evidence that DIB would not accept any changes. Secondly, there is no evidence about whether DIB would provide a Refined Guarantee: not even the CBD has approved that.

57. I refuse the application to make the variation to the March Order that the Claimants seek.

Should the Claimants be relieved of the consequence of non-compliance with the March Order, or should the Claimants be given more time to provide security for Mr Khouri's costs?

58. I come to the question whether the claim against Mr Khouri should remain struck out, as paragraph 2 of the March Order provides, or whether the Claimants should be relieved of the consequences of their non-compliance with the requirement for security in paragraph 1. Here, CPR r.11(2) specifically requires me to consider the "*seriousness of the non-compliance*", and Mr Khouri argues that the breach is particularly serious for these reasons:

    a. First, it is a breach of an order with which the Claimants were, as the March Judgment said, allowed longer to comply because of the sanction for non-compliance attached to it.

    b. Secondly, the Claimants failed to comply with the March Order despite being warned at the March Hearing that security was likely to be ordered.

    c. The Claimants did not make a proper application for an extension of the time for compliance until after they were in breach of the March Order, and emailed the Court to request an extension only after they had been reminded of the deadline by Mr Khouri's representatives.

    d. Next, again Mr Joseph emphasised that the Claimants have not explained why, when it became apparent that they could not comply with the March Order by provision of a bank guarantee by the 8 March 2024 deadline, they did not pay money into Court.

    e. Fifthly, and remarkably the Claimants have not proffered an apology for breach of the March Order, although at the hearing on 2 May 2024, the Court adjourned in order, *inter alia*, to allow

Mr Prasifka to take instructions about this. He did not proffer and apology when the Court reconvened, nor did Mr de Wolff do so in the 3 May statement.

59. Under CPR r.11(4), the Court must also have regard "*generally to the circumstances of the case*", and Mr Joseph had other arguments that the Claimants should not be granted relief from the sanction of having their claim struck out against Mr Khouri for further reasons. First, he cited the judgment of Jackson LJ in *Oak Cash & Carry Ltd v British Gas Trading Ltd, [2016] WCA Civ 153*, who said, at para 41, "*The very fact that X has failed to comply with an unless order (as opposed to an 'ordinary' order) is undoubtedly a pointer towards seriousness and significance*". I am not impressed by that point: that observation was made in the context of the different provisions of the ECPR: here it is because the March Order was an "*unless*" order that the jurisdiction of CPR 11(2) is engaged in the first place.

60. Next, Mr Joseph referred to what he described as *"the Claimants' unsatisfactory, disorderly approach to seeking relief, which has obviously significantly increased the costs of responding*". I have much sympathy with that submission, and I can well understand why Mr Khouri finds it provoking that he has had to incur (unsecured) costs in responding to the moving target of the Claimants' different proposals. Attempting to introduce some order and efficiency into the matter efficiently, the Court has been driven to respond to both the Application and the Amended Application by drawing obvious deficiencies in them to the attention of the Claimants' representatives. Even so, the Claimants have needed to seek further amendments to their application after the hearing was concluded. In the end, however, I am not persuaded that in itself this is a powerful reason to refuse relief under CPR 11(2).

61. I see more force in Mr Joseph's other point: that the Court should have regard to previous failures on the part of the Claimants to comply with Court orders and its duties to the Court in the course of these proceedings. By way of example only:

    a. The Claimants failed to comply with their duty of disclosure, and as a result I declined to continue the worldwide freezing order that the Claimants had been granted: see my judgments of 24 April 2023, [2023] ADGMCFI 0009, at para 113 and of 9 May 2023, [2023] ADGMCFI 0011.

    b. In breach of the October Order that the Claimants pay Mr Khouri AED 375,000 within 14 days, they paid this sum only on 11 January 2024. As I said in the March Judgment at para 30, the Claimants have neither explained nor apologised for their breach.

    c. The Claimants did not pay Mr Khouri the sum of AED 300,000 by 25 March 2024. They paid it by a cheque delivered of 26 March 2024 and cleared on 27 March 2024. Again, there has been no explanation or apology. Although the payment was only a little late, it is further evidence of a casual attitude on the part of the Claimants towards the Court's time limits.

62. Mr Joseph submitted, and Mr Prasifka did not dispute, that on an application of this kind, the Court can properly take account of past failings. I accept that this consideration is a material argument against relieving the Claimants of the sanction for failing to provide security before the deadline expired.

63. Against these considerations, I must weigh the Claimants' argument that it would be disproportionate to prevent them from pursuing their claim against Mr Khouri. Their allegation is that they were the victim of a major fraud to which Mr Khouri was party, and their claim is for over AED 300 million. Mr Khouri has, on previous applications, argued that the Claimants have not pleaded a persuasive case that he was party to the fraud, and I have criticised the Claimants' pleading generally for being "*confused and confusing*": see my judgment of 24 April 2023, [2023] ADGMCFI 0009 at para 21. However, I have concluded that the Claimants have shown a good arguable case against him: see [2023] ADGMCFI 0009 at para 34. Mr Prasifka submitted that, in all the circumstances, justice requires that the Claimants be given more time to provide security: at the end of the hearing, he summarised the Claimants' position as being: (i) that the proposed guarantee from DIB is adequate; (ii) that, if the Court rejects that submission, it should direct that "*a bank guarantee in a particular form*" would be adequate security; (iii) that, if the Court concludes that no form of bank guarantee suffices, then the Claimants should be permitted to provide security by way of a manager's cheque; and finally, (iv) if

their other submissions are rejected, they should be permitted to provide security by way of a payment into Court. He asked that the Claimants be given 21 days to provide such further security.

Conclusion

64. A guarantee in the terms that DIB's CBD has indicated might be issued would not be adequate, and in any case there is not satisfactory evidence either that DIB's Guarantee Department would agree to approve the amendments to the standard wording to which the CBD's emails refer, or that DIB would agree to a further change to cover Capital's liability and provide a Refined Guarantee. In my judgment, the time has passed for risking further delay to the provision of security while the Claimants try to procure a satisfactory bank guarantee. In any case, I have rejected the application to vary the March Order so as to dispense with the requirement that Mr Khouri agree to the terms of any bank guarantee, and there appears no realistic prospect that he would do so. The suggestion of security by way of a manager's cheque came out of the blue at the very end of the hearing, and it is not supported by any evidence: it would be wrong to entertain this vague and last-minute proposal.

65. I have found it more difficult to decide whether to allow the Claimants more time to provide security by way of a payment into Court. Certainly, in view of their response to the March Order and the history of this litigation more generally, they could have no complaint if full effect were given to the March Order so that their claim against Mr Khouri remains struck out. In the end, however, and despite Mr Joseph's well-presented and impressive submissions, I have decided that justice and the overall objective of the CPR require that the Claimants be given a last chance to provide security by way of payment into Court (or in some other form if Mr Khouri agrees). Such security in the sum of AED 1,000,000 is to be provided within 14 days of this order: this is the period of the extension that the Claimants sought in the Amended Application, and although at the end of the hearing, without notice to Mr Khouri or the Court, Mr Prasifka asked for a further 21 days, no good reason has been given why the Claimants should have longer than they had previously sought .

66. Any applications as to the costs of these applications must be made within 21 days of the order, and will be decided on paper, unless otherwise ordered.

67. I should be grateful if Mr Joseph would draft an order to give effect to this judgment and seek the agreement of the Claimants' representatives to its terms.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
9 May 2024