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 0003
Before:	Justice Sir Andrew Smith
Decision Date:	11 March 2024
Decision:	1. On the application of the Twelfth Defendant, the Claimants (i) shall pay AED 300,000 to the Twelfth Defendant on account of costs, and (ii) shall provide security for the Twelfth Defendant's costs in the sum of AED 1 million. 2. If the Claimants do not make the payment on account and provide the security ordered, their claim against the Twelfth Defendant shall be struck out. 3. The Claimants shall pay the Twelfth Defendant costs of his application in the sum of AED 300,000. 4. There be no order on the application of the Fourth Defendant, save that there be liberty to apply. 5. The Fourth Defendant shall pay the Claimants' costs in the sum of US$16,500. 6. The Sixth Defendant shall pay the Claimants' costs in the sum of US$12,500.
Hearing Date:	1 March 2024
Date of Order:	To be drafted by the legal representatives of the Twelfth Defendant to give effect to this Judgment.
Catchwords:	Security for costs. Statutory test of "reason to believe" unable to pay costs. Whether "just" to order security for costs. Whether claims will be "stifled". Delay in making applications. Assessment of costs on the standard basis.
Cases cited:	Global Private Investments RSC Ltd v Global Aerospace Underwriting Managers Ltd, [2021] ADGMCFI 0005 Sarpd Oil International v Addax Energy, [2016] EWCA 120 Jirehouse Capital v Beller, [2008] EWCA 908 Re Unisoft (No 2), [1993] BCLC 532, 534 Longstaff International v Baker Mackenzie, [2004] EWHC 1852 (Ch) Dena Technology (Thailand) Ltd v Dena Technology Ltd, [2014] EWHC 616 (Comm) Keary Developments Ltd v Tarmac Constructions Ltd, [1995] 3 All ER 534 Goldtrail Travel Ltd v Onur Air Taşimacilik AŞ, [2017] UKSC 17 Al-Koronky v Rime-Life Entertainment Group Ltd, [2005] EWHC 1688 Hotel Portfolio II UK Ltd v Ruhan, [2020] EWHC 233 (Comm) Re Bennet Invest Ltd, [2015] EWHC 1582 Pisante v Logothetis, [2020] EWHC 3332 (Comm) Gama Aviation (UK) Ltd v Taleveras Petroleum Trading DMCC, [2019] EWCA Civ 119 Monde Petroleum v Westernzagros Ltd, [2015] EWHC 67
Legislation cited	ADGM Court Procedure Rules
Case Number:	ADGMCFI-2022-265

Parties and representation:	Mr Patrick Dillon-Malone SC and Mr William Prasifka instructed by Clyde & Co LLP for the Claimants Dr Beat Ammann of About Law GmbH for the Second Defendant Mr Paul Bonham Hughes, instructed by DLA Piper Middle East LLP for the Fourth and Sixth Defendants Dr Clemens Daburon of Daburon & Partners Legal Consultants LLP for the Fifth Defendant Mr Jeremy Richmond KC and Mr Benjamin Joseph instructed by Fichte & Co Legal Consultancy LLC for the Twelfth Defendant

JUDGMENT

The Applications

1. By an order of 31 January 2024, I directed a hearing of the following applications:

   a. an application of the Twelfth Defendant, Ahmed Yousef Abdulla Hussain Khouri, filed on 18 December 2023, to which I shall refer as the "**Khouri Security Application**";

   b. an application of the Fourth Defendant, First Fund Management Limited ("**FFM**") and the Sixth Defendant, Paresh Chandrasen Khiara, filed on 12 January 2024, to which I shall refer as the "**FFM Application**"; and

   c. an application of the Claimants, Union Properties PJSC (**"UP**") and UPP Capital Investment Co LLC ("**Capital**"), its wholly owned subsidiary, filed on 23 January 2024, to which I shall refer as the "**Extension of Time Application**".

2. By the Extension of Time Application, the Claimants sought an extension of time to serve the Claim Form and other documents on the First, Second and Fifth Defendants. However, they have since learned that these defendants had already been served with the proceedings in Switzerland by the Swiss authorities, and indeed on 24 January 2024, the Second Defendant, Thomas Pierre Trinkler, and the Fifth Defendant, Jorg Klar, filed acknowledgments of service. Accordingly, the Claimants do not pursue the Extension of Time Application.

3. Further, by an email to the Court of 19 February 2024, the Legal Representatives of the Fourth and Sixth Defendants, DLA Piper Middle East LLP ("**DLA**"), wrote that Mr Khiara was "*withdrawing*" his application, and that it would no longer be pursued on his behalf. Mr Khiara's application is live only with regard to costs.

4. Accordingly, the substantive applications before me are the Khouri Security Application, and the FFM Application (the "**Applications**").

5. By notice of his Security Application, Mr Khouri sought an order that the Claimants pay into Court as security for his costs (i) the sum of AED 440,000 that, it is said, is "*likely to be assessed and/or awarded to [him] imminently*", and (ii) the sum of AED 4,120,812.50 in respect of costs up to and including the trial; and that, in default of the provision of the security, the Claimants be refused permission to amend their Particulars of Claim, as they seek to do by an application for permission of 8 December 2023 (the "**Amendment Application**"), that their claim be struck out, and that there be judgment on the claim for Mr Khouri, together with costs. Mr Khouri also sought an order for payment of the sum of AED 375,000 in accordance with my order of 10 October 2023, but the Claimants have now paid that sum, albeit late.

6. The Khouri Security Application is supported by a witness statement dated 18 December 2023 made by Mr Alessandro Tricoli of Fichte & Co Legal Consultancy, Mr Khouri's legal representatives. It is

opposed by the Claimants, who rely on a witness statement dated 12 January 2024 of Mr Nils Eric de Wolff of Clyde & Co, the Claimants' legal representatives. Mr Tricoli responded with a further witness statement of 19 January 2024.

7. By its notice of application, FFM sought orders that the Claimants pay it US$ 69,196.55, and pay into Court by way of security for costs US$ 1.5 million in respect of costs up to and including the trial; and (like Mr Khouri) that, in default of payment and the provision of the security, the Amendment Application be refused, their claim be struck out and there be judgment on the claim for FFM, together with costs.

8. The FFM Application is supported by a witness statement dated 12 January 2023 made by Mr Andrew Mackenzie of DLA. It is opposed by the Claimants, who rely on a witness statement of Mr de Wolff dated 5 February 2024.

9. On 29 February 2024, the Claimants filed further evidence in opposition to the applications of Mr Khouri and FFM by way of a witness statement of Mr Fadi Saba, the Chief Legal Officer of UP. Although I recognise that some of the matters about which Mr Saba gives evidence are recent, the evidence was regrettably late. However, neither Mr Khouri nor FFM argued that I should disregard it, and I treat it as being in evidence.

10. Mr Khouri's representatives also relied on another document, a press release by UP dated 13 February 2024, in which it said that the Tenth Defendant, Mr Khalifa Alhammadi, members of his family and others had defaulted on a Settlement Agreement (the "**Settlement**") that had been reached with UP and "*have continued to default on paying the agreed monthly amounts despite being notified several times*". The Press Release continued that UP had served notice of default and would enforce the provisions of the Settlement, including selling real estate of those in default. The Press Release was not formally proved by Mr Khouri, but the Claimants did not object to me receiving it and treating it as being in evidence, and I do so.

11. At the hearing, Mr Khouri was represented by Mr Jeremy Richmond KC and Mr Benjamin Joseph, FFM was represented by Mr Paul Bonner Hughes, and the Claimants by Mr Patrick Dillon-Malone SC and Mr William Prasifka.

The Court Procedure Rules and Practice Directions

12. Rule 75 of the ADGM Court Procedure Rules ("**CPR**") is headed "*Security for Costs*", and it provides as follows: "*A defendant to any claim may apply for security for costs under the conditions set out in any relevant practice direction …*", and the Court may order security "*if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order*". If an order for security is made, it must specify its amount and direct how and within what time it must be given.

13. ADGM Courts Practice Direction 7, Applications ("**PD7**") similarly provides at paragraph 7.29 that the Court may order that security for costs be provided if it is satisfied that, having regard to all the circumstances of the case, it is just to do so. It goes on to provide at paragraph 7.30 as follows: "*Without limiting paragraph 7.29, the Court may (but is not obliged to) conclude that it would be just to order security for costs if it is satisfied*" of one (or more) of six conditions. The conditions include if the Court is satisfied that "*the claimant is a company or other body (whether incorporated inside or outside ADGM) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*"; PD 7.30(b).

14. The Applicants also rely on CPR rule 8 and rule 11. Rule 8 provides as follows:

"(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 overriding objective of these Rules as set out in Rule 2(2).

(2) When the Court makes an order, it may make it subject to conditions, including a condition to pay a sum of money into Court; and must specify the consequences of failure to comply with the order or a condition. …".

15. Rule 11 provides: "… *(2) Where any provision in these Rules or any relevant practice direction or 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*".

The Proceedings

16. As I explained in my judgment in this case of 24 April 2024, *[2023] ADGMCFI 0006*, these proceedings were brought by UP and Capital on 14 November 2022 against thirteen defendants. 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*".

17. On 15 November 2022, on the Claimants' application, I made freezing orders and proprietary injunctions against nine of the defendants and six other respondents. The Claimants gave a cross-undertaking (the "**Cross-Undertaking**") in the conventional terms: "*If the Court later finds loss caused to any of the Respondents, and decides that the particular Respondent should be compensated for that loss, the Applicants will comply with any order that the Court may make*". By orders of 6 December 2022, 21 December 2022, 7 February 2023 and 9 February 2023, I extended the orders and injunctions to 9 May 2023.

18. On 6 February 2023, Mr Khouri made an application (the "**Jurisdiction Application**") in which he challenged the jurisdiction of the Court to entertain the claims against him. On 3 March 2023, he made an application (the "**Discharge Application**") for the freezing order and proprietary injunction against him to be discharged. I heard these applications on 29 and 30 March 2023. By my judgment of 24 April 2023, I rejected his challenge to the jurisdiction, and (subject to a qualification that is irrelevant for present purposes) I refused the application to discharge the freezing order (although I discharged the proprietary injunction).

19. On 9 May 2023 (the "**Fourth Return Date**"), I declined to continue the orders and injunctions, for reasons that I explained in my judgment of 23 May 2023, *[2023] ADGMCFI 0011*. The essential reason for my decision was that, on the evidence that had then become available, I was not satisfied that the Claimants had shown a sufficient risk of dissipation to justify the freezing orders. I also concluded that it was not just to continue the proprietary injunctions. I criticised the Claimants for not making proper disclosure at the hearing on 29 and 30 March 2023 in respect of a settlement in principle (albeit it was not yet legally binding) of claims against the defendants who were party to the later Settlement.

20. After a hearing on 10 October 2023 of the so-called Consequential Applications, I made these orders about the costs:

    a. I ordered, inter alia, that the Claimants (i) pay Mr Khouri, FFM and Mr Khiara their costs of and incidental to the hearing of the Fourth Return Date and an associated application for disclosure and a procedural extension (the "**Disclosure Application**"), and (ii) pay Mr Khouri his costs of the Discharge and the Jurisdiction Applications and the so-called "**Further Information Application**".

    b. I summarily assessed Mr Khouri's costs of the Discharge Application, the Jurisdiction Application and the Further Information Application, and ordered the Claimants to pay him AED 375,000 within 14 days of the order.

c. I ordered that the costs of FFM and Mr Khiara of the Fourth Return Date and the Disclosure Application be subject to a detailed assessment (unless agreed).

d. I also ordered that the Claimants make payments to Mr Khouri of two thirds of his costs of the Consequential Applications, and to FFM and Mr Khiara of a quarter of their costs of them, subject in both cases to detailed assessment (unless agreed).

21. On 24 October 2023, the Claimants applied for permission to appeal against my order on the Consequential Applications and for a stay of it. By order of 30 October 2023, I refused permission to appeal and a stay. I gave liberty to apply with regard to costs. The application for permission and a stay was not renewed to the Court of Appeal.

22. On 8 December 2023, the Claimants made the Amendment Application to amend their Particulars of Claim, which is pending.

23. On 9 January 2024, Mr Khouri applied for a detailed assessment of his costs as ordered on 10 October 2023, annexing to it his bill of costs; and the Claimants filed a notice of dispute dated 6 February 2024.

24. On 12 January 2024, FFM and Mr Khiari applied for a detailed assessment of their costs; and the Claimants filed a notice of dispute dated 12 February 2024.

Is there "reason to believe that [the Claimants] will be unable to pay [Mr Khouri's and FFM's] costs"?

25. As I observed in *Global Private Investments RSC Ltd v Global Aerospace Underwriting Managers Ltd*, [2021] ADGMCFI 0005 (at para 3), "*The ADGM regime does not require that one of the conditions in paragraph 7.30 be satisfied if an order for security is to be made: the purpose of the paragraph is to exemplify circumstances in which it might, but not necessarily will, be just to order security for costs. In this, it differs from the procedural rules about security for costs in some other jurisdictions, including those in the English Civil Procedure Rules at rule 25.13, which requires not only that the Court be satisfied of the justice of making an order but also that one of the specified 'gateway' conditions be met. … one implication of this difference is that some care is required when considering English authorities, which are often concerned primarily whether a gateway condition is satisfied. That said, the conditions in paragraph 7.30, including [that at paragraph 7.30(b)], echo the gateway conditions in the English rules, and the English authorities provide helpful indications as to how this Court should exercise its power under rule 75*".

26. Mr Khouri and FFM submit that there is reason to believe that the Claimants will be unable to pay the costs that they have been ordered to pay and further costs if ordered to do so. Although it is neither a necessary nor a sufficient condition for the orders that they seek, it is convenient to consider this submission next.

27. The authorities provide guidance about the proper approach to the meaning of PD 7.30(b), and I repeat two points that I made in the *Global Private Investments RSC* case (cit sup) at para 19. First, the question is not about whether or not it has been shown that the Claimants will be unable to pay an adverse costs order. It has sometimes been said that a "*real risk*" that a claimant will be unable to pay must be shown, and certainly it is not enough that the Court is left in some doubt about a claimant's ability to pay the defendant's costs: see *Sarpd Oil International v Addax Energy*, [2016] EWCA 120 at para 13. However, the statutory test is simply whether there is "*reason to believe*" that it will not be able to do so, and there is danger in glossing it: see *Jirehouse Capital v Beller*, [2008] EWCA 908 at para 38.

28. Secondly, the question is about whether a claimant will be able to meet a costs order if and when it is made and required to be met: see *Re Unisoft (No 2),* [1993] BCLC 532, 534. Because the condition is concerned with the position which may pertain when an order is made, the nature of any potentially available assets, in particular whether or not they are liquid, is properly taken into account. In *Longstaff*

International v Baker Mackenzie, [2004] EWHC 1852 (Ch) Park J said, at para 17, that *"[the Claimant], I imagine, could pay in the end, but the nature of its asset position is such that it could not pay with any degree of promptness*". Thus, a claimant will not necessarily be able to refute a contention that the condition is satisfied by demonstrating that it is in a healthy assets position, although this might be relevant in deciding whether, on balance, it is just to order security.

29. Mr Richmond identified powerful reasons that the Court should conclude that the condition in PD 7.30(b) is satisfied in the case of the Claimants. (None of the parties drew any distinction between UP and Capital with regard to their respective abilities to pay costs orders, or indeed on other questions arising on these applications. This was clearly realistic: in reality, the question is whether UP would be able to meet adverse costs orders.)

30. First, he observed that the Claimants did not pay the sum of AED 375,000, which I ordered on 10 October 2023 be paid to Mr Khouri within 14 days, until 11 January 2024. It is clear from Mr Saba's witness statement of 24 October 2023 made in support of the Claimants' application for a stay when seeking permission to appeal that the Claimants were well aware of their obligation to pay. They did not apply for an extension of time to do so after their applications for permission to appeal and a stay were refused on 30 October 2023, nor did they ask Mr Khouri for an extension of time. The Claimants have not attempted to explain this in evidence or submissions (nor have they apologised for breaching the Court order), but Mr Saba stated in his evidence that the Claimants would not wish "*inadvertently*" to be in breach of the Court's order, and I infer from that that they would likewise not deliberately be in breach. The payment was eventually made by way of a banker's cheque, and the source of the funds for the payment is not apparent. I was urged by Mr Dillon-Mallone that the Claimants did not deliberately refuse to pay the costs, and I am prepared to assume that this is so. I therefore proceed on the basis that they were probably unable to pay the sum due to Mr Khouri promptly, and this is, to my mind, a reason to believe that they might similarly be unable to pay any future costs orders promptly. I add, however, that, if the Claimants had funds to make the payment as ordered and chose not to do so, this would not affect the conclusions that I have reached about their ability to pay further adverse costs orders promptly.

31. Secondly, the inference that the Claimants were unable to pay the order of 10 October 2023 is supported by evidence in Mr Saba's witness statement of 24 October 2023. He said that the Claimants would "*face a real struggle in trying to comply with [the order of 10 October 2023] and/or make any other payments pursuant to a detailed assessment if so ordered. Numerous other creditors are owed substantial sums in connection with the claims advanced by them as a result of the wrongdoing perpetrated on the Claimants in respect of which they now seek redress against, among others, the Defendants in these proceedings*". In his recent statement of 29 February 2024, Mr Saba said "*the majority of the outstanding legal claims*" had been "*successfully resolved*", but there is no evidence that the position has changed with regard to the Claimants being able to pay adverse costs orders promptly. Indeed, in his witness statement of 12 January 2024, Mr Wolff, referring to the difficulties that the Claimants would face in providing security for costs, said this: "*were the Court to make an order for security for costs (likely resulting in other defendants filing similar applications), the Claimants (who are in the midst of a business restructuring programme) would have no source of finance available to them that would enable them to finance such order(s), thereby stifling their chances of bring to genuine claim*".

32. Thirdly, UP's interim condensed statement of its financial position at 30 September 2023 shows that, at that date, while UP had total assets of some AED 3.9 billion and total liabilities of some AED 1.9 billion, its current liabilities, AED 1.53 billion, exceeded its current assets of some AED 443 million. The statement was not audited, but UP's auditors, Grant Thornton, provided a report dated 1 November 2023, in which they said that they had reviewed the statement and explained "*Our responsibility is to express a conclusion on the interim condensed consolidated financial statements based on our review*". Under the heading, "*Material uncertainty related to going concern*", Grant Thornton referred to a General Assembly that UP held on 17 April 2023 in order to vote on whether to dissolve the Company or to continue the business with a restructuring plan; and to the decision so to continue. They said this: "*We draw attention to note 3 of [the Statement], which states that as at September 30, 2023, the Group had accumulated losses of AED 2,863 million, which exceeds 50% of*

its issued share capital; furthermore, the current liabilities exceed current assets by AED 1,086 million as at that date. These conditions indicate the existence of a material uncertainty that may cast significant doubt on the Group's ability to continue as a going concern. As per article 39 of the UAE Federal Law No (32) of 2021, the management of the Group has prepared a short and medium strategy plan, which was approved by the shareholders to financially support the Group and its operations for the foreseeable future. On this basis, the interim condensed consolidated financial statements are prepared on a going concern assumption. Our conclusion is not modified in respect of this matter".

33. How do the Claimants' respond to these points? The thrust of Mr Dillon-Mallone's argument was that, while the Group had been adversely affected by claims resulting from "*the legacy of business malpractice*", its asset position is sound, and a re-structuring programme is now in place and being implemented. There is, therefore, "*every reason to believe that [UP's] financial standing will only continue to improve in line with its 'short and medium strategy plan' over 3 to 5 years, which was initiated in 2022, and no reason to believe that the Claimants will not be able to meet the costs of the litigation by the time that they might be required to do so*". Moreover, it was said, the Claimants are parties to the Settlement, and the Claimants are expected to receive under it payments of AED 620 million in total.

34. I do not find this response convincing. First, while I acknowledge that UP appears to have net assets of some AED 2 billion, they are largely illiquid. Over AED 3 billion of its (non-current) assets comprised investment properties. There is no good reason to believe that they will be available to pay promptly either the costs orders that have already been made against the Claimants, nor any adverse costs orders made after trial or otherwise later in the proceedings.

35. With regard to the re-structuring programme, it was argued that the financial statement for the period to 30 September 2023 shows that the Group's "*financial standing has dramatically improved, in line with [its] restructuring programme initiated in late 2021*", and reference was made to accumulated profit in the period of some AED 37.4 million, and growth in revenue and a gross profit increase of 55%. However, as Mr Richmond pointed out, the accumulated profit is to be compared with a recorded total accumulated loss of AED 2.883 billion, and the growth in revenue and gross profit do not take account of associated liabilities. It is not enough for the Claimants to express optimism about the re-structuring programme. The fact remains that, although when reporting on UP's accounts for the year ended 31 December 2022, Grant Thornton did not similarly qualify its report, in its report of 1 November 2023, notwithstanding the restructuring plan, it did so by reference to "*the existence of a material uncertainty that may cast significant doubt on the Group's ability to continue as a going concern*". Further, even assuming that the programme is eventually successful, this does not in itself indicate that liquid funds will be available to pay adverse costs order by the time that they might come due.

36. The submission referring to funds from the Settlement was advanced without reference to the UP's press release of 13 February 2024, which states that sums due under it are not being paid. The Claimants should not have presented this submission without making the Court aware of this. The history of non-disclosure in relation to the Settlement makes the omission the more remarkable. In any case, there is no evidence that any funds from the Settlement would have been available to meet costs orders.

37. In his witness statement of 29 February 2024, Mr Saba said that UP has "*successfully sold over AED 500 million worth of land*", and has received offers of over AED1.2 billion for other assets. It was argued that the sale proceeds will provide means to meet any costs that the Claimants are ordered to pay. However, Mr Saba's evidence does not say this, and again the Claimants' evidence is incomplete: there is no evidence about whether there were or are charges or mortgages over the assets that were sold or are being sold: the statement of the 9 months' period to 30 September 2023 provides no information about charges or mortgages over UP's property, but the accounts for the year ended 31 December 2022 refer to bank loans being secured by, inter alia, registered mortgages of land and properties with a value of some AED 1.5 billion. Nor is there evidence of how any proceeds of the disposals will be deployed.

38. Finally, Mr Dillon-Malone asserted in his submissions that UP "*has substantial cash now*" and "*liquid assets which are very substantial*". He referred to the financial statement to 30 September 2023 recording sums of cash in hand and cash at the bank. However, as Mr Richmond observed, there is again no evidence about whether they are subject to some form of debenture. In any case, if these funds were likely to be available to meet adverse costs orders, I cannot believe that they would not have been referred to in the Claimants' evidence.

39. I conclude that there is reason to believe that the Claimants will be unable to pay costs awarded to Mr Khouri and FFM and any future adverse orders that might be made. The evidence that the Claimants have put forward is not sufficient and is too vague to refute the arguments advanced by Mr Richmond.

The merits of the claims against Mr Khouri and FFM

40. Against this background, I come to the question whether, having regard to this conclusion, it is just to order security for costs. The Claimants argue that they are the victims of a fraud, that Mr Khouri and FFM are "*centrally implicated*" in that fraud, and that their losses and cash-flow difficulties result from that fraud. I accept that the Claimants have a strong case that they were subjected to a major fraud. Mr Khouri and FFM dispute that they were party to it.

41. There might be more room for argument about whether or to what extent this is the cause of the Claimants' financial difficulties. Mr de Wolff put in evidence a form dated 2 November 2023 and signed by Mr Amer Khansaheb, UP's Managing Director, that listed the "*main reasons for accumulated losses*", and said that they were mainly a product of significant provisioning in respect of six matters. They include an item that apparently relates to the alleged fraud: "*Losses and impairment from financial instruments at FVTPL amounting to AED 337 million*", but also five other matters, including "*fair value*" losses from investment properties of over AED 3 billion.

42. On applications of this kind, the Courts are not generally drawn into an examination or assessment of the merits of the claim: unless "*it can clearly be demonstrated that there is a high degree of probability of success or failure*": see, for example, *Dena Technology (Thailand) Ltd v Dena Technology Ltd*, [2014] EWHC 616 (Comm) at para 7; the *Global Private Investments RSC case* (cit sup) at para 4. With regard to Mr Khouri, it was not argued on his behalf that the case against him is so likely to fail that I should take account of the merits in determining his application. The Claimants submitted that he has not "*put forward any defence to these proceedings*", but he has explained the nature of his defence in interlocutory witness statements. I am not persuaded that the case against him is so strong that the merits of the case should weigh against him.

43. FFM did not argue that the merits of the claim against it should be taken into account in its favour on its application. It has pleaded a defence, but, as the Claimants pointed out, it is an uninformative document, comprising little more than a mixture of non-admissions and denials, and advancing no positive case in reply to the Claimants' allegations. FFM was incorporated in March 2018, shortly before the dealings which give rise to the claim, and was de-registered with effect from September 2021, shortly before investigations into the impugned dealings. The Claimants argue that it "*served no useful purpose other than to operate as a sham company .... to conceal a fraud*". I asked Mr Bonner Hughes for what purpose FFM might have been brought into being and then de-registered, and no explanation was forthcoming. I shall return to this later in my judgment.

"Stifling" the claims

44. As I have said, in his evidence in response to Mr Khouri's application, Mr de Wolff said that "*were the Court to make an order for security for costs (likely resulting in other defendants filing similar applications), the Claimants … would have no source of funding available to finance such order(s) thereby stifling their chances of bringing a genuine claim* ...". In his evidence in reply to the applications of FFM and Mr Khiara, Mr de Wolff extrapolated from the sums sought by way of security in the applications to suppose that the Claimants might be required to provide security of around AED 40 million, and said that this would stifle the claim.

45. I cannot accept this reasoning. It supposes that all eleven defendants against whom the proceedings are pursued (the proceedings having been abandoned against the third defendant and the eleventh defendant) will successfully apply for security in comparable amounts. There is no reason to suppose this: for example, Mr Khiara has abandoned his application, and the Claimants are seeking judgment in default against four other defendants, Ms Amna Alhammadi, Mr Dahi Almansoori, Mr Khalifa Alhammadi, and Mr Hassan Al Mulla. It is a matter of speculation whether other defendants will apply for security, and if so whether their applications will succeed. All that can be said with certainly is that other defendants have not so far joined Mr Khouri and FFM in making and pursuing applications.

46. In any case, I would reject the argument that there is reason to suppose that the orders that Mr Khouri and FFM seek would stifle the claims against them (or the claims in the proceedings more generally). I find this suggestion difficult to reconcile with the Claimants' contention that they would be able to pay adverse costs orders.

47. Of course, the Courts are wary of allowing applications to be used oppressively, so as to drive a claimant to abandon the claim: *Keary Developments Ltd v Tarmac Constructions Ltd*, [1995] 3 All ER 534, 539 and *Aquila Design GRB Products Ltd v Cornhill Insurance plc*, [1988] BCLC 134, 137. However, the burden is upon a claimant to establish, on the balance of probabilities, that it does not have resources, or access to resources, which would enable it to provide security of ordered to do so: *Goldtrail Travel Ltd v Onur Air Taşimacilik AŞ*, [2017] UKSC 17. Further, the Court will generally expect "*full, frank, clear and unequivocal evidence*" before it concludes that an order for security will stifle a claim: see *Al-Koronky v Rime-Life Entertainment Group Ltd*, [2005] EWHC 1688 at para 31, and *Hotel Portfolio II UK Ltd v Ruhan*, [2020] EWHC 233 (Comm) at para 18.

48. The Claimants in this case have not presented such evidence: for example, they have not explained the source of their funds for the litigation to date: according to schedules of their costs and disbursements that the Claimants presented in support of an application for costs against Mr Khouri, by 14 July 2023 they had incurred costs of some US$ 645,000 in respect of the proceedings against him, and this sum does not include their costs against other defendants, nor the costs of the Fourth Return Date, nor costs incurred since the schedules were drawn up.

49. Nor does the evidence refer to third-party sources of finance that might be available to the Claimants. Mr Saba referred in his evidence of 29 February 2024 to "*restrictions*" placed on UP under arrangements reached with third party lenders, which would "*prevent UP from securing further funding*", but he declined to explain the position further on the grounds that details of the arrangements are confidential. He does not say that this prevents the Claimants from sharing with the Court the nature of the restrictions, nor does he suggest that the Claimants have sought the consent of the lenders to allow them to be candid with the Court.

50. Mr Saba also said that the Claimants would need consent from UP's shareholders to obtain "*further substantial funding*". He asserts that there is a "*real risk that such request will not be approved*". interpret the expression *"substantial funding*" to refer to potential security of some AED 40 million, but whether or not that is so, there is no evidence that the views of shareholders have been sought, or the basis of the suggestion that there is a "*real risk*" that they might not approve a request.

51. In my judgment, the Claimants have not proved, on the balance of probabilities, that the orders sought by Mr Khouri and FFM would stifle the claims.

Delay

52. The Claimants also argued that Mr Khouri and FFM are late in applying for security, citing authority that "*Delay in making the application is one of the circumstances to which the court will have regard when exercising the discretion to order security*": *Re Bennet Invest Ltd, [2015] EWHC 1582* at para 28. Although the proceedings were brought on 14 November 2022, they have progressed regrettably slowly, and pleadings are not yet closed. Further, one matter triggering at least Mr Khouri's application

is the Claimants' breach of the order of 10 October 2023. There has been no relevant delay on the part of the Applicants.

Further considerations upon which the Applicants rely

53. Mr Khouri and FFM relied upon other considerations in support of their submissions that it is just to make the orders that they seek. I can deal with them briefly, because they do not affect the conclusions that I have reached.

54. First, the Applicants refer to the Claimants' conduct of these proceedings, citing, in particular, (i) the Court's refusal of the Claimants' application to extend the freezing orders against the Defendants, after concluding that they had not complied with their duty to make full and frank disclosure; (ii) the Court's previous criticisms of the Claimants' pleading, which has led to the application to amend it; and (iii) the slow progress of the proceedings. These matters are not directly related to whether security for costs should be provided, and I consider them of little significance to what I have to decide.

55. Next, the Applicants refer to the failure of the Claimants to disclose to the Court that they allege that the counterparties to the Settlement have not complied with it. I agree that this should have been disclosed, but again this failure does not seem to me of great relevance to my decision on the applications.

Mr Khouri's applications for security

56. At the hearing, Mr Richmond pursued Mr Khouri's application for security in respect of costs up to and including the trial in the sum of AED 4,120,812.50, as stated in the notice of application. He did not, of course, pursue the application for the AED 375,000, which had been awarded on 10 October 2023, but which the Claimants have now paid, albeit late.

57. As for the application for security in the sum of AED 440,000, Mr Tricoli explained in his evidence that it represents (i) AED 360,000, which is about 80% of the two thirds of the costs awarded to Mr Khouri by the order of 10 October 2023 and subject to detailed assessment; and (ii) AED 80,000, which is about 80% of his costs of responding to the Claimants' application for permission to appeal and a stay.

58. With regard to the costs awarded on 10 October 2023, Mr Khouri has submitted for assessment costs of AED 671,583.50. The two thirds that Mr Khouri was awarded would be some AED 448,000. In addition, he claims the costs of AED 23,100, which he says he incurred in trying to agree his costs with the Claimants and in applying for a detailed assessment. The costs have not yet been assessed, but the Claimants have accepted in their Notice of Dispute, costs of some AED 200,000. Mr Richmond submitted that, in these circumstances, it would be appropriate to order a payment on account of these costs in the sum of AED 376,658 (being some 80% of the total of AED 448,000 and AED 23,100). Alternatively, he submitted that there should be an order for a payment on account of AED 133,333, being two thirds of the AED 200,000, the amount of the costs which the Claimants do not oppose in their Notice of Dispute. Mr Dillon-Malone did not object to Mr Richmond seeking an order for a payment on account, although it is not included in the Application Notice, and he accepted that there should be an order in respect of the costs that are not opposed.

59. As for the security of AED 80,000, this amount represents about 80% of the sum of AED 99,487.50, which, according to Mr Tricoli, is the amount of the costs incurred by Mr Khouri in considering and commenting on the Claimants' applications for permission to appeal against the order of 10 October 2023 and the application for a stay. The sum of AED 99,487.50 comprises AED 45,100 by way of the fees of Fichte & Co and AED 54,387.50 by way of fees for leading and junior counsel.

60. The sum of AED 4,120,812.50 is calculated as follows: Mr Tricoli put in evidence an estimate of Mr Khouri's costs up to and including the trial in the total sum of AED 5,886,875, being AED 1,695,000 in respect of the fees of Fichte & Co and AED 4,191,475 in respect of counsel's fees. The estimate did not include any other disbursements, any fees relating to any expert evidence or any fees for

interlocutory applications, including any applications relating to specific disclosure. The security sought represents 70% of estimated costs of AED 5,886,875.

61. In addition, Mr Richmond, sought security in respect of the sum of AED 284,456, which is said to represent 80% of Mr Khouri's costs of the hearings on 21 December 2022, in the sum of AED 184,925, and on 7 February 2023, in the sum of AED 170,654. By the order of 10 October 2023, I made no order in respect of the costs of these hearings, save that I gave liberty to the parties to restore the matter to apply for the costs of them. The matter has not yet been restored by any party: my intention was that an application for these costs might properly be made in light of the outcome of the trial.

62. I am satisfied that I should order a payment on account in respect of the costs awarded on 10 October 2023, which are subject to a detailed assessment, in an amount that is, on a conservative estimate, the minimum amount that Mr Khouri is likely to recover. My assessment is necessarily somewhat a matter of impression, and I determine that the payment on account should be in the sum of AED 300,000.

63. I also conclude that, in view of the risk that the Claimants might be unable to pay an adverse costs award and taking account of the other considerations to which I have referred, it is just that there be an order that the Claimants provide security for costs that Mr Khouri has incurred, including those awarded by the order of 10 October 2023, and for some of his future costs.

64. I must therefore assess the appropriate amount of that security. When making an assessment of this kind, as Henshaw J observed in *Pisante v Logothetis,* [2020] EWHC 3332 (Comm) at para 88, the Court approaches the evidence of quantum "*on a robust basis and applying a broad brush*"; and, while sometimes it will apply an overall percentage discount to schedules of costs, here again there is no "*hard and fast rule*" as to the amount of any discount.

65. As for the costs that comprised the application for security of AED 480,000, I consider that the calculation on the basis that there should be security in the amount of 80% of the relevant costs to be too generous to Mr Khouri, and consider 70% of the costs a more appropriate basis for this assessment. This would indicate security of some AED 330,000. However, from this there must be deducted the amount of the payment on account, and therefore this part of the security calculation to my mind justifies security of only some AED 30,000.

66. I come to the application for AED 4.120,812.50. This is based on a calculation of the costs to trial, and so on Mr Tricoli's assessment of those fees in the amount of AED 5,886,875. Any assessment of future costs is necessarily speculative, but here the assessment is unusually uncertain because it is being made when only three defences have been pleaded, and because applications for judgment in default are pending, and it is not known how many defendants will participate in the trial and the preparations for it. I have concluded that it would not be just in these circumstances for me to attempt an assessment of the appropriate security beyond the completion of disclosure, and that any assessment of further security is better left until it can be made on a firmer basis. Drawing on Mr Tricoli's estimate of the costs relating to the preparation of a defence, the review of a reply, the preparation of a list of issues and standard disclosure and making an allowance for a case management conference, I would put those costs at about AED 1 million. Making an appropriate percentage discount, this would indicate security in the order of AED 700,000 in respect of costs to the completion of standard disclosure would be just.

67. I accept Mr Richmond's argument that the calculation of the amount of security should also have regard to costs that Mr Khouri incurred in respect of the hearings on 21 December 2022 and 7 February 2023.

68. Overall, and adopting the broad approach appropriate for an assessment of this kind, I have decided that the Claimants should provide security in the sum of AED 1 million in respect of these costs including Mr Khouri's future costs of the proceedings to the end of standard disclosure; and that, if advised, Mr Khouri should be permitted to restore his application to seek further security in respect of

future costs thereafter, at a case management conference or at some appropriate stage in the proceedings, for determination either orally or on paper.

The Consequences of Failure to Comply

69. Mr Khouri applies for an order that, if the Claimants do not make payment or provide security as ordered, the Claimants should be refused permission to amend the particulars of claim in any event (and regardless of whether otherwise permission should be granted). I am not in a position to make such an order on these applications: the question whether the pleading is amended affects not only the applicants and the Claimants, but other Defendants who are not before the Court on these applications and who might wish the amendments to be made in order for the case against them to be set out more clearly. In any event, it would not be appropriate to make a decision about whether a condition should be attached to any condition at a separate hearing before the application for permission is heard.

70. However that might be, I do not consider that an order of that kind would be appropriate or just. I accept that the Court has power under CPR rule 8 and CPR rule 11 to attach to permission to amend a condition that a payment be made to another party or into Court. In support of an argument for a similar sanction in respect of the orders sought by FFM, Mr Bonner Hughes cited the judgment of Males LJ in *Gama Aviation (UK) Ltd v Taleveras Petroleum Trading DMCC*, [2019] EWCA Civ 119, who (at para 56) said that, in some circumstances, the Court can properly impose a condition, such as a payment into Court, upon the grant of a permission, but emphasised that it is always necessary to identify the purpose of the condition and to ensure that it "*represents a proportionate and effective means of achieving that purpose*". To my mind, it would not be proportionate to attach to orders designed to protect only the Applicants in respect of costs, a condition that the amendment of the Claimants' pleading against all the Defendants.

71. It was argued that a condition of this kind would be justified in view of the Cross-Undertaking. Neither Mr Khouri's application notice nor that of FFM covered this argument, and in any case, the imposition of a condition of this kind falls well outside the contemplation of the Cross-Undertaking.

72. Mr Khouri also seeks an order that, if the Claimants fail to comply with the orders for (i) the payment on account of costs and (ii) the provision of security, then "*a. The Claim shall be struck out without further order; and b. On production by [Mr Khouri] of evidence of default, there be judgment for [Mr Khouri] without further order with the costs of the claim to be subject to a detailed assessment if not agreed*". It is not unusual to attach to orders for security for costs a sanction for failure to comply: otherwise, delay in the provision of security can undermine its purpose. In many circumstances, it suffices to provide for a stay, but I am persuaded that, in view of the Claimants' past non-compliance with regard to costs, I should make an order for the claim against them to be struck out: to my mind, this is proportionate to the need to make the orders against the Claimants effective. The Claimants have liberty to apply for an extension of time if they have grounds to do so.

Form of Security for Mr Khouri's costs

73. In Mr de Wolff's statement of 5 February 2024, the Claimants suggested that, if security is ordered, it might be provided in the form of corporate guarantee from a company such as ServeU LLC, which Mr Fada described in his statement of 29 February 2024 as "*a private UAE based facilities management company*". Although Mr Fada stated that ServeU LLC is "*cash rich*", with contracts from about 60 contracts that "*bring in*" revenue of some AED 317 million annually, and has an operating profit of some AED 346 million annually, the Claimants have not put in evidence any accounts or other documentary evidence to support Mr Fada's statement. I am not persuaded that a corporate guarantee of this kind would provide satisfactory security.

74. For reasons that Popplewell J explained in *Monde Petroleum v Westernzagros Ltd,* [2015] EWHC 67 (Comm) at para 61, it is conventional to order security to be given either by payment into Court or by provision of a guarantee from a first class bank. I order that the security for costs be so given, unless the Claimants and Mr Khouri agree upon another form.

Time for payment and provision of security for Mr Khouri's costs

75. In view of the sanction that I attach to non-compliance, I shall give the Claimants longer than normal to make the payment on account and to provide security for costs, and order that they do so within 28 days of this order.

The FFM Application

76. I come to the FFM Application. The sum of US$ 69,196.55 is said by Mr Mackenzie to be the amount of the costs of FFM and Mr Khiara in respect of the application heard on 9 May 2024 and the Disclosure Application, which they were awarded by the order of 10 October 2023. The sum of US$ 1.5 million is said by Mr Mackenzie to be his estimate of the costs that will be incurred by FFM and Mr Khiara up to and including the trial of these proceedings. FFM has not provided a separate amount of FFM's costs for the hearings, nor a separate estimate of its own costs to trial.

77. Mr Bonner Hughes first submitted that the Court should exercise its powers under CPR r.8 or under CPR r.11 to order that, if the Claimants are permitted to amend their pleading, the permission be subject to conditions (i) that they pay the costs of both FFM and Mr Khiara in the sum of US$ 69,196.55 and (ii) that they provide security for FFM's costs in the sum of US$ 750,000. I have already explained that I do not consider it appropriate to impose a condition of this kind on any permission to amend. I add that, if I were otherwise minded to order a condition of the kind that FFM invite, I see no reason that it should relate to payment of Mr Khiara's, as well as FFM's costs. Further, I understand that the sum of US$ 69,196.55 represents the full amount of the costs incurred, no discount being applied. If I were ordering a payment on account, it would have been for only a proportion of the costs claimed.

78. However, the FFM Application faces a more fundamental objection. If FFM seeks a payment on account pending that assessment, it should have provided proper evidence of its own costs. It has not done so, and has given no reason for not doing so. I am not prepared to order a payment on account by making assumptions about the part of the shared costs that are FFM's responsibility.

79. The position is similar with regard to the costs to trial. There is no evidence about what part of the shared costs relate to the claim against FFM, about its disclosure or as to what evidence it might call at trial. There is no evidence about whether it assumes separate representation for FFM and Mr Khiara at trial. In short, there is no proper basis for making an assessment about the proper amount of any security, and no explanation as to why proper material was not before the Court.

80. I shall therefore make no order on the FFM Application, except as regards the costs of the application itself. I shall give FFM liberty to restore it. If it is restored, it might be relevant to consider not only any evidence of the costs incurred by FFM alone, but also whether FFM have by then given any indication of the nature of any answer to the claims against it beyond its uninformative pleading.

Costs of the Applications

81. Finally, I come the costs of the Khouri Application, of the FFM Application and of Mr Khiara's abandoned application. No application has been made in respect of the costs of the Extension of Time Application, which was not pursued by the Claimants.

82. The Court has jurisdiction to make such order as it considers just: see CPR r.195. The starting is that generally costs follow the event.

83. In my judgment, Mr Khouri is to be considered the successful party on his application. However, he has not been wholly successful in that I decline to order security in respect of his costs up to the trial. I order that the Claimants pay him 90% of his costs.

84. I shall summarily assess them on the standard basis. Mr Khouri has submitted a schedule of costs in the total of AED 486,336.25. This compromises solicitors' fees in the sum of AED 177,625, Counsels' fees of AED 306,826.25 and Court fees of AED 1,885.

85. The Claimants argue that the fees are "*grossly excessive*" and should be much reduced on assessment. First, they observe that Mr Khouri's costs are high in comparison with the costs that they incurred and far exceed what FFM claims to have spent on its application. This is so, but I find comparison between parties' costs schedules of limited assistance in cases of this kind. As is pointed out on Mr Khouri's behalf, there are explanations for the different amounts of the costs incurred: for example, unlike the Claimants, Mr Khouri's advisors were unfamiliar with the Claimants' financial statements, and at the hearing, the lead was taken by Mr Khouri's lawyers rather than FFM's.

86. However, the Claimants make more specific observations about Mr Khouri's costs, and I see some force in their points that (i) the hours expended by his solicitors appear high, and (ii) the costs include fees of two counsel, including a KC. Of course, Mr Khouri was entitled so to conduct his application, but to my mind, for the purposes of assessment on the standard basis the result is that the fees are both unreasonably high, and disproportionate to an application of this kind.

87. The Court necessarily takes a broad brush approach to assessing recoverable costs on a summary assessment. I assess the recoverable costs at about AED 330,000, representing solicitors' fees of some AED 150,000 and counsels' fees and Court fees of AED 180,000. I therefore determine that the Claimants should pay Mr Khouri's costs in the sum of AED 300,000, being roughly 90% of AED 330,000.

88. I consider that the Claimants are to be regarded as the successful party on the FFM Application, FFM has not been granted any of the relief that it sought. FFM submits that, nevertheless, costs should not follow the event in view of the conduct of the Claimants, including (i) the failure of the Claimants to engage in correspondence with FFM to agree the costs awarded on 10 October 2023; (ii) their failure to pay costs awarded to Mr Khouri on 10 October 2023; and (iii) their application for permission to amend their pleading, stating that any prejudice resulting from an amendment could be compensated by an award of costs.

89. I am not persuaded that the second or third of these points bears upon the FFM Application or is relevant to who should bear the costs of it. I accept the first point, and mark it by determining that the Claimants should recover from FFM only 75% of their costs of the FFM Application.

90. I shall assess the costs summarily on the standard basis. The claimants seek costs in the sum of US$ 22,753.92. FFM makes only minor complaints about the level of these fees. Having considered those points, I assess costs at US$ 22,000 and award the Claimants costs of US$ 16,500.

91. The Claimants also seek an order that Mr Khiara pay costs relating to the application that he did not pursue. I have considered DLA's comments objecting to this, but do not find them convincing: they do not answer the essential point that Mr Khiara embarked upon an application, and, for a reason that has not been explained, then abandoned it. I consider that Mr Khiara should pay these costs of the Claimants and I shall assess them summarily on the standard basis.

92. The Claimants have submitted a schedule of costs in the sum of US$ 17,535.47. I have considered the points about the quantum of costs made by DLA. In my judgment, the Claimants have not shown that costs of more than US$ 12,500 were reasonably incurred and were proportionate, and I assess the recoverable costs in that amount.

93. I should be grateful if Mr Khouri's representatives would submit a draft order to give effect to this judgment.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
11 March 2024