THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

AEGIS RESOURCES DMCC

Claimant

and

UNION BANK OF INDIA (DIFC BRANCH)

Defendant

ORDER WITH REASONS OF JUSTICE ROGER GILES

UPON reviewing the Defendant's application no. CFI-004-2020/1 filed on 22 November 2020 for permission to call the evidence of an expert witness (the **"Application"**)

AND UPON hearing counsel for the Claimant and counsel for the Defendant at the hearing before Justice Roger Giles on 24 February 2021

AND UPON reviewing the parties' written submissions on costs filed on 14 March 2021

AND UPON reviewing the Court file

IT IS HEREBY ORDERED THAT the Claimant pay the Defendant's costs of the Application from, and including, 22 February 2021 and that the costs of the Application otherwise be costs in the case, the amount(s) to be assessed if not agreed.

Issued by:
Nour Hineidi
Registrar
Date of issue: 21 April 2021
Time: 3pm

SCHEDULE OF REASONS

1. On 24 February 2021 I heard the Application filed by the Defendant for permission to call the evidence of an expert witness. For reasons then given, permission was granted. I indicated a preliminary view that the costs of the Application should be costs in the case. The Claimant was content with that order, but the Defendant was not and requested the opportunity to make submissions. I have received the parties' written submissions.

2. In summary, the Claimant submitted that the Defendant had made its application late, that it had made it contrary to a representation in connection with amendments to its Defence that it would not be calling further evidence, and that until shortly before the hearing it had failed to identify the proposed witness, the area of expertise, or the issues on which it was seeking to call the expert evidence. It submitted that it had reasonably opposed the Application, particularly when consenting to it would have jeopardised the trial date.

3. There is an air of unreality in some of these submissions. As a stated in the reasons given on 24 February 2021, directions given at a CMC allowed the application to be made within eight weeks following the close of witness evidence, and the Defendant's Application was made either on the last day or a week late; the Claimant did not suggest it was prejudiced by the delay of one week, if there was delay. The representation was as to further evidence by reason of the amendments to the Defence, and the expert evidence was not evidence of that kind. When the Claimant first opposed the Application, the trial date had not been appointed, but was fixed during and despite the pendency of the Application. Only in relation to particulars and explanation of the proposed evidence, to which I will return, is there any substance in the Claimant's position.

4. Again in summary, the Defendant submitted that it had applied within time, or if late not materially so, and that it had succeeded in the Application having reasonably invited the Claimant to agree to the calling of the expert witness. Its submissions failed to recognise any deficiency in particularisation and explanation. It said that the ordinary principle was that costs follow the event, and there was nothing to displace it.

5. In my view, for the reasons which follow the ordinary principle is in part displaced.

6. I return to particulars and explanation of the proposed evidence. One of the agreed issues was contributory negligence on the Claimant's part. Despite this, in correspondence concerning the expert evidence the Claimant maintained that the Amended Defence did not adequately allege and particularise contributory negligence. For its part, the Defendant maintained that it did, but made no meaningful attempt to accommodate the Claimant's opposition by clarifying its allegation, or by explaining what evidence it wished to call from the expert and its relevance to the agreed issue. The particularisation was indeed unsatisfactory, but the Claimant also made no meaningful attempt to obtain clarity by requesting further particulars.

7. When the papers were referred to me for the hearing of the Application, I directed that the Defendant particularise the respects in which it

alleged the Claimant was negligent and/or failed to take proper care for the security of its email account (that being the best to be made of the Amended Defence), and provide a statement of the facts to be established by the expert evidence and their relevance.

8. In an application of this kind, it is incumbent on the applicant to outline the proposed evidence and its purpose - often best done by providing the expert report - in order that the opposing party can properly assess its response. Where, through inadequate particularisation, the purpose is obscure, that has particular force. With the Defendant's compliance with the direction, it could be judged whether the evidence was reasonably required to resolve the proceedings; but the Defendant materially contributed to the Claimant's opposition (as it should have appreciated from the direction I gave), and both parties bear the responsibility for the bringing of the Application.

9. It was with this in mind that I indicated the preliminary view above-mentioned. However, I accept that the position changed with the Defendant's compliance with the direction, which it did on 18 February 2021. The Claimant continued to oppose the Application at the hearing, unsuccessfully. Allowing time for the Claimant to consider its position, the Defendant should have the costs of the Application from and including 22 February 2021, but the preceding costs of the Application should be costs in the case.

10. Each party provided a schedule of costs. They do not permit a confident division of the costs before and after 22 February, and in different degrees appear to be excessive for what should have been a simple application. So that the parties may have the opportunity to justify their claimed costs, they should go for assessment.

11. I order that the Claimant pay the Defendant's costs of the Application from and including 22 February 2021 and that the costs of the Application otherwise be costs in the case, the amount(s) to be assessed if not agreed.