THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) THAMER ABDULAZIZ ALBULAIHID
(2) MOUSTAFA EL SAYED ABDULGHANI EL SHAFAEI

Claimants

and

(1) NASSER SHEHATA
(2) HEALTH INSIGHTS FZ-LLC
(3) HEALTH INSIGHTS ASIA (L) BHD

Defendants

ORDER WITH REASONS OF JUSTICE RENE LE MIERE

UPON the Part 8 Claim Form dated 23 October 2023 (the "Claim" or "Claim Form")

AND UPON the Order with Reasons of Justice Le Miere dated 15 May 2024 (the "Order")

AND UPON the parties' submissions on costs in accordance with paragraph 6 of the Order

AND PURSUANT TO the Rules of the DIFC Courts (the "RDC")

IT IS HEREBY ORDERED THAT:

1. The First Defendant shall pay the Claimants 50% of their costs of the Part 8 proceedings to and including 15 April 2024.

2. The Claimants' costs shall be assessed on the standard basis and be subject to detailed assessment by the Registrar unless agreed.

3. Within 14 days of the issue of this Order, the First Defendant shall pay the Claimants USD 65,000 on account of costs.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 16 July 2024
At: 10am

SCHEDULE OF REASONS

SUMMARY

1. The First Defendant, Mr Shehata, is a minority shareholder of the Second Defendant, Health Insights FZ LLC ("Health Insights Dubai") and was registered as its general manager.

2. Mr Shehata established the Third Defendant, Health Insights Malaysia (L) BHD ("Health Insights Malaysia"), in Malaysia. He is the sole shareholder and director of the company.

3. Health Insights Dubai and Health Insights Malaysia made an agreement dated 19 December 2021 which provides that Health Insights assigned its proprietary rights in the intellectual property of Medica CloudCare software to Health Insights Malaysia for USD 500,000 (the "Agreement").

4. The Claimants are the other shareholders and directors of Health Insights Dubai.

5. There was a directors' meeting on 16 May 2023. Mr Shehata declined to attend the meeting. The Claimants resolved to remove Mr Shehata as general manager (the "Removal Resolution"). The Dubai Development Authority (the "DDA") informed the Claimants that the change of general manager be submitted through the DDA's online portal. The Claimants were unable to access the online portal because only Mr Shehata had the log in details.

6. A DDA officer had earlier informed the Claimants that the resolution must be signed by all the directors.

7. The Claimants say that the resolution is not required to be signed by all the directors. It is not necessary for Mr Shehata to sign the resolution or attend the meeting. A simple majority of directors was required for a quorate meeting. The meeting was quorate, and the vote was unanimous.

8. The Claimants issued these proceedings as a Part 8 claim on 23 October 2023 for:

(1) an order and/or declaration that Mr Shehata has been or should be removed as general manager and replaced by the Second Claimant, Mr. El Shafaei (the "Removal Claim"), and

(2) an Order setting aside the Agreement and ordering Mr Shehata to account to Health Insights Dubai for the profits resulting from the Agreement (the "Set Aside Claim").

9. The First and Second Defendants filed an acknowledgment of service in which, amongst other things, they:

(1) disputed the Claim;

(2) asserted the Court does not have jurisdiction to validate or confirm the Removal Resolution; and

(3) asserted the Part 8 procedure should not be used because there is a substantial dispute of fact, and the claim should continue as a Part 7 claim.

10. Health Insights Malaysia did not respond to the claim.

11. On 15 May 2024, after a hearing on 15 April 2024, the Court ordered:

(1) It is declared that:

a) At a meeting of the Board of directors of the Second Defendant on 16 May 2023, the directors validly passed resolutions in accordance with the DCC Private Companies Regulations 2016 and Articles of Association of the company that:

1. Mr. Moustafa Elsayed Abdulghani Elshafaei be appointed as the Company's General Manager (the "New General Manager") with effect from 16 May 2023 (the "Effective Date"); and

2. the New General Manager shall replace the existing General Manager Mr. Naser Mohamed Ibrahim Shehata (the "Previous General Manager") with effect from the Effective Date.

(2) It is ordered that:

a) The Claimants' claim that the agreement dated 19 December 2021 between the Second Defendant and the Third Defendant be set aside and the First Defendant account to the Second Defendant for the profits resulting from the agreement (the "Set Aside claim") shall continue as if the Claimants had not used the Part 8 procedure.

12. The Court also made directions for the future conduct of the proceedings.

13. The Court directed the parties to file a minute of proposed orders and submissions in relation to costs.

14. For the reasons that follow, the Court will make the following orders in relation to costs:

(1) The First Defendant shall pay the Claimants 50% of their costs of the Part 8 proceedings to and including 15 April 2024 to be subject of a detailed assessment by the Registrar on the standard basis unless agreed.

(2) The First Defendant shall pay the Claimants USD 65,000 on account of costs.

The Part 8 proceedings

15. The Claimants issued these proceedings as a Part 8 claim on 23 October 2023.

16. The Part 8 claim form contains two distinct claims, for:

(1) an order and/or declaration that Mr Shehata has been or should be removed as general manager and replaced by the Second Claimant, Mr. El Shafaei (the Removal claim), and

(2) an order setting aside the Agreement and ordering Mr Shehata to account to Health Insights Dubai for the profits resulting from the Agreement (the Set Aside claim).

17. The Complainants incurred costs in bringing these proceedings, drawing the Part 8 claim form and a witness statement of Mr Albulahid.

18. The Claimants made two unsuccessful applications for substituted service. They are to bear the costs of those applications.

19. The Complainants served the claim form and witness statement by personal service on the First and Second Defendants on 14 January 2024. The Part 8 claim was listed for hearing on 1 March 2024. The Claimants incurred costs in relation to a skeleton argument and preparing for the hearing, including briefing counsel.

20. The Part 8 claim came on for hearing on 1 March 2024. The First Defendant appeared, disputed that the Defendants had been served, said he needed time to instruct lawyers, and requested an adjournment of the hearing of the claim. The Court was unable to determine whether the claim form had been properly served on the Defendants on 14 January 2024. The Court joined the Third Defendant to the proceedings, directed that all Defendants be served by email, and adjourned the hearing of the claim to a date to be fixed.

21. The Court reserved the costs of that hearing because the Court was not able to determine whether the claim form was properly served on the Defendants on 14 January 2024.

22. The Defendants were served by email on 4 March 2024.

23. The First and Second Defendants filed an acknowledgement of service on 19 March 2024. They stated they intend to defend the claim. They further contended that the Part 8 claim be "reallocated" to Part 7 because there will be a significant dispute of facts.

24. The Court set down the Part 8 claim for hearing on 15 April 2024 and directed that at the hearing the Court would consider the following matters:

(1) Should the Court order the claim or any part or parts of the claim to continue as if the Claimants had not used the Part 8 procedure?

(2) If the Court orders the claim or any part or parts of the claim to continue as if the Claimants had not used the Part 8 procedure, should the Court order the case be adjourned to a case management conference on a date to be fixed by the Court Registry and to be conducted as if the case was a Part 7 claim?

(3) Should the Court make any order sought by the Claimants in their claim form?

(4) Should the Court make any other or different order?

25. The Claimants filed a further skeleton argument and a witness statement by the First Claimant, Mr. Albulahid, and exhibits on 9 April 2024.

26. The Court directed that the Defendants file a skeleton argument and any evidence upon which they intended to rely at the Hearing by 11 April 2024. The Defendants filed a skeleton argument and a witness statement and exhibits of the First Defendant, Mr Shehata, on 11 April 2024.

Issues

27. The Claimants' Part 8 claim was heard on 15 April 2024 (the "Hearing"). At the Hearing the parties addressed the following broad issues:

(1) Should the Removal Claim be determined under the Part 8 Procedure (the "Removal Part 8 issue")?

(2) Should the Court declare that the Removal Resolution was validly passed in accordance with the DCC Private Companies Regulations 2016 and Articles of Association of the company (the "Removal Declaration issue")?

(3) Should the Set Aside claim be decided under the Part 8 Procedure, or should it continue as if the Claimants had not used the Part 8 Procedure (the "Set Aside Part 8 issue")?

Parties' positions at Hearing

Removal Part 8 issue

28. The Defendants submitted, and the Claimants denied, that the Part 8 procedure should not be used because there is a substantial dispute of fact, and the claim should continue as a Part 7 claim.

Removal Declaration issue

29. The Claimants submitted, and the Defendants denied, that the Court should declare and/or order that Mr Shehata has been or should be removed as general manager and replaced by the Second Claimant, Mr. El Shafaei.

Set Aside Part 8 issue

30. The Claimants submitted that the Court should make an order setting aside the Agreement and ordering Mr Shehata to account to Health Insights Dubai for the profits resulting from the Agreement. The Defendants submitted that the Part 8 procedure should not be used because there is a substantial dispute of fact, and the claim should continue as a Part 7 claim.

Court decision

31. The Court determined the Removal Part 8 and Removal Declaration issues in favour of the Claimants.

32. The Removal Claim succeeded, and the Court declared that the Removal Resolution was validly passed in accordance with the DCC Private Companies Regulations 2016 and Articles of Association of the company.

33. The Court determined the Set Aside Part 8 issue in favour of the Defendants. The Court ordered that the Set Aside claim should not be decided under the Part 8 Procedure and should continue as if the Claimants had not used the Part 8 Procedure.

34. In relation to costs, the Court said that the outcome of the Hearing, the Claimant's Removal claim, and the Defendant's resistance to the determination of the Set Aside claim as a Part 8 claim, was mixed and accordingly the parties should make submissions in relation to costs.

Claimants' costs submissions

35. The Claimants seek the following orders:

(1) The First and Third Defendant shall pay Claimants' costs of the hearing of 15 April 2024, to be assessed if not agreed.

(2) Subject to paragraph (1) above, the First Defendant shall pay the Claimants' costs of the Removal Claim, to be assessed if not agreed.

(3) The First and Third Defendant shall, within 14 days, make a payment on account of the costs referred to at paragraphs (1) and (2) above

in the sum of USD 126,000.

36. The Claimants submit as follows:

(1) The Removal Claim succeeded entirely. The costs of Removal Claim should therefore follow the event.

(2) The Second Defendant should be neutral on the Removal Claim. It has no interest in which person is its general manager. The real controversy was between the shareholders. The company was joined to ensure that it was bound by and took the benefit of the Court's decision. The Second Defendant should not be liable for any of the costs of that claim. To order otherwise would be to permit the First Defendant to fund personal litigation from the company.

(3) The costs of the Hearing are distinct and can be distinctly identified.

(4) The Claimants were successful in respect of the Removal Part 8 issue and the Removal declaration issue.

(5) The Defendants succeeded on the Set Aside Part 8 issue. However, the Claimants should nevertheless be entitled to their costs of the Hearing for the following reasons:

a) Given the Defendants resistance on the Removal Part 8 issue and the Removal Declaration issue, it would have been necessary to convene the Hearing in any event.

b) By the time the Defendants explained their position in respect of the Set Aside Part 8 issue, it was too late to avoid any costs of the Hearing.

c) The issue of controversy in respect of the Set Aside Part 8 issue was whether there were substantial disputes of fact relevant to the question of whether the Agreement should be set aside. Contrary to the Rules, the Defendants did not serve their evidence until 11 April 2024, during the Eid holiday, and after the service of skeleton arguments. The Defendants then produced a bundle of 1,230 pages, with approximately 1,000 pages of new material. At that stage, it was not possible for the Claimants to take instructions before Sunday 14 April 2024. In any event, as a result of The Defendants' conduct, all of Claimants costs of the Hearing had been incurred.

d) The Court indulged the Defendants by allowing them to rely on evidence produced materially late. However, the Defendants should bear the costs consequences of their conduct.

e) For the reasons explained, the company should not however bear those costs.

Defendants' costs submissions

37. The Defendants seek orders that:

(1) the Claimants pay the Defendants costs of the Hearing seeking reallocation to Part 7; or alternatively

(2) costs shall be costs in the case.

38. The Defendants submit the following:

(1) The Defendants were the successful party.

(2) The Claimants inappropriately brought a claim under Part 8, which the Defendants had little choice but to challenge. The Defendants succeeded in having the bulk of the claim, in respect of which it told the Claimants from the outset involved disputed facts, reallocated to the appropriate track.

(3) The Claimants succeeded on a discrete question of law, but it was reasonable for the Defendants to approach the issue in relation to the claim as a whole and not seek to separate out portions of the claim.

(4) The conduct of the Claimants in maintaining their position that there were no aspects of its claim that involved substantial disputes of fact was not reasonable. The Claimants improperly refused to engage with an obvious problem with its case - that there were substantial disputes of fact.

(5) The bulk of time and cost was incurred addressing disputed factual issues, which the Judge determined were legitimate issues that needed to be determined under Part 7. The Claimants failed on those issues.

The Rules

39. The Court has discretion as to whether costs are payable by one party to another, the amount of those costs; and when they are to be paid: RDC 38.6.

40. If the Court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the Court may make a different order: RDC 38.7.

41. In deciding what order (if any) to make about costs, the Court must have regard to all the circumstances, including the conduct of all the parties and whether a party has succeeded on part of his case, even if he has not been wholly successful: RDC 38.8.

42. RDC 38.10 provides that the orders which the Court may make include an order that a party must pay:

(1) a proportion of another party's costs;

(3) costs from or until a certain date only;

(5) costs relating to particular steps taken in the proceedings;

(6) costs relating only to a distinct part of the proceedings.

Discussion

43. RDC 38.6 (1) provides that the court has discretion whether to make an order that costs are payable by one party to another. In this case, it is right and just that the Court should make a costs order.

44. The Court must make an order that reflects the overall justice of the case. The Rules provide that if the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party: RDC 38.7.

45. The general rule is sometimes expressed as costs follow the event. The general rule applies to the costs of the case and to the costs of interlocutory applications. That is, the event may be the case, or it may be an interlocutory application. The first question is: in relation to what does the court consider who was the successful party, or put another way what is the event which costs are to follow?

46. The only claim or application which the Court has considered is the Part 8 claim brought by the Claimants. The claim came on for hearing on 1 March and again on 15 April 2024. The Defendants resisted the relief claimed by the Claimants by, amongst other things, submitting that the Court should exercise its power to order the claim to continue as if the Claimants had not used the Part 8 procedure. The Defendants did not make an application under Part 23.

47. The case is not concluded but a distinct phase of the case has concluded. The Court has determined the Removal claim under the Part 8 procedure. The Set Aside claim remains to be determined and will be determined under the Part 7 procedure. The Court can and should determine who is the successful party in the phase of the case that has been heard, that is the Claimants' claim under the Part 8 procedure for declaratory relief in respect of the Removal Resolution and their claim to set aside the Agreement and require the First Defendant to account for any benefit realised.

48. The question of who is the `successful party' for the purposes of the general rule should be determined by reference to that phase of the case as a whole.

49. The question of who the successful party is, is not a technical term but a result in real life, it is a matter for the exercise of common sense: *Bank of Credit and Commerce International SA v Ali* (No. 4) [1999] 11 WLUK 116, 149 NLJ 1222.

50. In the main judgment I described the outcome as mixed. The question is, which, if any, party has been successful? The parties' arguments descend to the procedural complexities of the case and the conduct of the parties in order to draw from them logically the success for which they contend. In my judgment, this aspect of the case is much more broadly based. I have to look to see what was it that the Claimants were claiming and what was it the Defendants were claiming, and then look to see what the result was.

51. The Claimants were claiming a declaration that the Removal Resolution was valid, that the First Defendant had been removed as general manager and the Second Claimant had been appointed general manager of the Second Defendant. The Claimants also claimed that the Agreement should be set aside, and the First Defendant should account to the Second Defendant for benefits realised.

52. The Defendants asserted that the claim should fail. They failed on their defence of the Removal Claim. In relation to the Set Aside claim, the Court has not decided the claim and has ordered that that claim continue under the Part 7 procedure.

53. The Claimants have obtained one of their claims, whereas the other claim has not been determined. On this basis, the Claimants could properly be regarded as the successful party for costs purposes.

54. The Court may, of course, depart from the general rule, but it remains appropriate to give `real weight' to the overall success of the winning party: *Scholes Windows v Magnet Limited* (No. 2) [2000] ECDR 266 at 268.

55. Under the Rules, if the court decides to make an order about costs at all, the general rule is that the unsuccessful party will pay the costs of the successful party, but the court may make a different order. So, the question is whether costs should follow the event. In principle, in my view they should.

56. The question then is whether there should be a discount from 100 per cent to represent those parts of this phase of the case in which the Claimants failed. In my judgment there should be. The Claimants failed on a substantial part of their case - that the Set Aside claim should be decided under the Part 8 procedure. Significant amounts of time and costs were spent on that argument.

57. In that circumstance, the Court might make an issues-based order. However, there are two reasons why that is undesirable.

58. First, whilst the parties achieved mixed success in relation to the issues I have identified, the Claimants have succeeded in establishing one of the two claims in their claim form and have obtained the relief they sought in relation to that claim. The other claim is continuing. The costs orders should reflect the success the Claimants have achieved.

59. Secondly, in this case an issues based order would create significant difficulty in assessing the costs to which each party would be entitled. The assessment would have to decide what to do with any overlapping "common costs". For example, should the Defendants pay all or two thirds or some other proportion of the court fees. The Claimants briefed counsel for the Hearing. Should the counsel fee for the Hearing be divided up depending upon the proportion of time spent on each issue or should it be split in some other way? And what about the solicitor's time spent on

documents that relate to all the issues? "Common costs" such as these have their own body of case law going back to *Medway Oil and Storage Company Limited; v Continental Contractors Limited* [1929] AC 88, and with their own sub-divisions into "specific common costs" and "non-specific" common costs. It is difficult to apportion the costs of the Hearing between the issues on which the Claimants succeeded and that on which they failed because substantial time was taken up with submissions that related to both the Removal Claim and the Set Aside Claim and to the Removal, Removal Part 8 and Set Aside Part 8 issues.

Claimants should have 50% of their costs

60. RDC 38.11 provides that where the Court would otherwise consider making an order under Rule 38.10(6) that a party must pay costs relating only to a distinct part of the proceedings, it must instead, if practicable, make an order under paragraph 38.10(1) that a party must pay a proportion of another party's costs; or 38.10(3) that a party must pay costs from or until a certain date only.

61. Substantial justice is done by awarding the Claimants 50% of their costs of the Part 8 proceedings to date, apart from the unsuccessful applications for substituted service. That reflects that they have been wholly successful and obtained final relief in the Removal claim and succeeded in two of the issues argued at the Hearing.

62. The Defendants are the unsuccessful party in relation to one of the two claims in the proceedings. The other claim remains to be determined. They failed on two of the issues argued at the Hearing. Requiring them to pay only 50% of the Claimants' costs adequately reflects the success the Defendants achieved in relation to the Set Aside Part 8 issue which leaves the Set Aside claim to be decided.

63. In my judgment it is therefore right to discount the costs that the Defendants must pay to the Claimants by 50 per cent.

Costs should be paid by First Defendant

64. The Claimants submit that its costs should be paid by the First and Third Defendants. The real controversy in relation to the Removal claim was between the shareholders. The Second Defendant was joined to ensure that it was bound by and took the benefit of the Court's decision. The Second Defendant should not bear the costs of the Defendants unsuccessfully resisting the Removal claim and the Removal Part 8 and Removal declaration issues.

65. The Third Defendant did not file an acknowledgement of service before the Hearing and had no interest in the Removal Claim. It was joined because of its interest in the Set Aside Claim.

66. The Claimants' costs should be paid by the First Defendant.

Detailed assessment

67. The Claimants have incurred costs of USD 266,076. That is a substantial amount for Part 8 proceedings which proceeded only to a one day hearing following a short, adjourned hearing.

68. I am not satisfied that the costs statements filed by the Claimants are sufficiently detailed for me to properly assess whether the costs incurred by the Claimants were proportionately and reasonably incurred; and were proportionate and reasonable in amount.

69. I will therefore order that the Claimants' costs be assessed on the standard basis and be subject to detailed assessment by the Registrar unless agreed.

Costs on account

70. The Claimants seek an order that the First Defendant pay USD 126,000 on account of costs.

71. Practice Direction 5 of 2014 provides that where the Court has ordered a party to pay costs subject to detailed assessment unless agreed, it will order 50% of the amount claimed in the statement of costs to be paid on account before the costs are assessed, unless the Court sees fit to order otherwise.

72. "Cashflow is the lifeblood of business" is a common maxim. This applies in the legal profession as much as anywhere else. Practice Direction 5 of 2014 reflects a presumption that the Court will make an order for a reasonable sum on account. There has to be a good reason not to make an order. There is no good reason in this case.

73. The key consideration is to ensure the receiving party is not overpaid pending assessment.

74. I have decided to award the Claimants 50% of their costs of the Part 8 proceedings.

75. I will order the First Defendant to pay the Claimants USD 65,000 on account of costs, which is approximately 25% of the costs incurred by the Claimants.