Claim No. CFI 029/2018
Claim No. CA 005/2022
Claim No. CA 006/2022

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

THE INDUSTRIAL GROUP LTD

Claimant

and

ABDELAZIM EL SHIKH EL FADIL HAMID

Defendant

ORDER WITH REASONS OF REGISTRAR AYESHA BIN KALBAN

UPON considering the Order with Reasons of Justice Sir Richard Field dated 17 June 2022 and 10 March 2023 issued in Claim CFI-029-2018 (the "CFI Orders"), and the Order with Reasons of the Court of Appeal dated 30 November 2022 issued in Claim CA-005-2022 (the "Court of Appeal Order") (the "Orders")

AND UPON considering the Defendant's (1) Bill of Costs dated 3 July 2023; and (2) Points of Dispute dated 24 July 2023; and the Claimant's Reply to Points of Dispute dated 8 September 2023 and the attachments thereto

AND UPON considering the Claimant's (1) Bills of Costs in respect of the CFI Order dated 17 June 2022 and the Court of Appeal Order; and (2) Points of Dispute dated 24 July 2023; and the Claimant's Response to Defendant's Points of Dispute dated 8 September 2023

AND UPON hearing Mr Roger Bowden on behalf of the Defendant and Mr David True on behalf of the Claimant at the Costs Assessment Hearing held on 11 October 2023

IT IS HEREBY ORDERED THAT:

1. The Claimant shall pay the Defendant the amount of USD 29,164.08 in respect of the Orders.

2. The Claimant shall pay the Defendant the amount of USD 37,984.21 in respect of costs incurred in these costs assessment proceedings.

Issued By:
Hayley Norton
Assistant Registrar
Date of issue: 30 October 2023
At: 2pm

SCHEDULE OF REASONS

Introduction

1. The parties appeared before me at a hearing on 11 October 2023 (the "Hearing") to determine the level of costs that each party is entitled to and to make an award of costs to one of the parties after having set off the smaller of the sums against the larger sum. These costs arise from two orders:

(a) the Order of Justice Sir Richard Field in the Court of First Instance, dated 17 June 2022 (the "CFI Costs Order"); and

(b) the Order of the Court of Appeal, dated 30 November 2022 (the "Court of Appeal Costs Order").

2. I must also consider the Order of Justice Sir Richard Field, dated 10 March 2023 which sets out the percentage apportionment of costs in respect of the claims dealt with in the Court of First Instance proceedings (the "CFI Costs Apportionment Order").

3. Prior to the Hearing, I reviewed each of the parties' respective bundles, including their Bills of Costs, Points of Dispute and any responses. I also read the Orders listed above and the corresponding judgments. I do not propose to refer to every point made by the parties. The fact that I may omit reference to some argument or authority does not mean that it has been overlooked. Mr David True appeared on behalf of the Claimant ("TIG") and Mr Roger Bowden appeared on behalf of the Defendant ("Mr Hamid").

4. Although this is a detailed assessment of costs, the parties did not insist that I analyse each time entry in the Bills of Costs and were content for me to take a broader approach having regard to the relevant documents, arguments, and legal principles.

The Court of First Instance and Court of Appeal proceedings

5. I will not set out the extensive factual background of this case as it is unnecessary for the purposes of what I am being asked to determine, save for noting that Mr Hamid brought claims, by way of a counterclaim, falling within two distinct categories. In the first category, he brought claims relating to the termination of his employment, being claims for notice pay, end of service gratuity, accrued vacation and a statutory penalty under Article 18 of the 2005 DIFC Employment Law (the "Employment Claims"). In the second category, he claimed damages for the tort of abuse of process and for malicious prosecution (the "Tort Claims").

6. Mr Hamid was successful in the Employment Claims and unsuccessful in the Tort Claims following a hearing in front of Justice Sir Richard Field and judgment dated 6 April 2022 (the "CFI Judgment"). Both parties subsequently appealed the CFI Judgment and the appeals were heard by the Court of Appeal on 23 June 2022 with judgment issued on 20 September 2022 (the "Appeal Judgment"). Both appeals were dismissed.

7. In respect of the principle of costs following both the CFI Judgment and the Appeal Judgment, subsequent judgments have been issued by the Court of First Instance and the Court of Appeal. They determine how costs arising from the CFI Judgment and the Appeal Judgment are to be allocated. The following extracts from these judgments (largely taken from the Defendant's Points of Dispute for Costs, dated 24 July 2023) are relevant to the principles that I need to apply in making my assessment of costs:

Court of Appeal Costs decision dated 30 November 2022 (the "Appeal Costs Judgment")

> "4. In all the circumstances, the Court awards TIG 2/3 of its costs of the Appeals before this Court, to be subject to detailed Assessment by the Registrar if not agreed. In the Court's judgment, that award properly reflects TIG's success on the Appeals. No further adjustment is called for as to the precise times taken up by the issues advanced before us. The Court is additionally mindful of the observations in the Judgment as to TIG's conduct, not requiring further elaboration here."

Court of First Instance decision dated 17 June 2022 (the "CFI Costs Judgment")

> "16. I am of the opinion that the Defendant is entitled to the reasonable costs he incurred in bringing his employment claims including his successful opposition to the Claimant's case that he had been dismissed for cause. His notice pay claim was for a sum calculated on the basis that his notice period was 90 days. The Court rejected this claim but awarded him a sum based on a notice period of 30 days. In these circumstances, I nonetheless think it appropriate to award him his costs for this claim (which will be small) since he recovered an award based on 30 days and was overall the successful party on the other employment claims and on the dismissal with cause issue.
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> 17. In my judgment, the aforementioned costs should be assessed on the indemnity basis. I say this because I regard the conduct of the Claimant and HPA (this latter entity being the Claimant's appointed expert and representative in the investigation conducted by the Dubai Police) in which the Claimant attempted to have the Defendant prosecuted for embezzlement, as highly reprehensible. This conduct is part and parcel of, and closely related to, the conduct referred to in paragraph 117 of the judgment and includes: (i) the attempt to obtain a passport confiscation order on the ex parte application made on 23 April 2019 (judgment paras 23 - 27); (ii) the filing of the criminal complaint against the Defendant with the Dubai police alleging that the Defendant had dishonestly embezzled large sums of money belonging to the Claimant which led to many hours of interrogation when in fact the Claimant was in possession of many documents that showed to a considerable extent that the Defendant was entitled to receive the sums that were transferred to his bank account (judgment para 37); (iii) the deployment of the cynically one- sided HPA report in seeking to persuade the police in an unbalanced, partial way to charge the Defendant with embezzlement (judgment, paras 42, 43 & 65); (iv) persuading the police to confiscate the Defendant's passport and have his visa revoked which had a devasting effect on the Defendant's family life and his prospects for employment (judgment, para 77); (v) deployment of HPA's further submissions on 8 April 2019 (judgment, para 68); and the refusal to accept the court appointed expert's report (judgment para 71).
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> 18. In my opinion, the fact that there was no order for costs in respect of the ex parte application for a passport order is no reason for not including this conduct in justifying an order for indemnity costs. The Defendant was not party to those proceedings and the court making the costs order was in no position to assess the emptiness of the extravagant claims in the evidence that the Defendant had acted dishonestly. It is also my view that the evidence on how the Defendant was treated by the Claimant (who must accept responsibility for the conduct of HPA) was relevant to the dismissal with cause issue at the same time that it was also relevant to the Defendant's tort claims.
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> 19. In my judgment, the Defendant must pay the reasonable costs of the Claimant incurred in resisting the Defendant's tort claims. It will therefore be for the Registrar to determine what these reasonable costs are and to set off the smaller of the sums that result from the assessments of the Defendant's costs and the Plaintiff's costs against the larger of the sum that results from these assessments."

Court of First Instance decision dated 10 March 2023 (on application to split costs between the Employment Claims and the Tort Claims) (the "CFI Apportionment Judgment")

> "23. ..in my judgment the legal basis of the Tort Claims raised serious and difficult issues of law and Mr. Hamid's submissions evidenced significantly less work and thought than did TIG's submissions which exhibited a deep and profoundly thoughtful analysis of the legal position.
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> 24. Stepping back and considering the question against the background of: (i) the extensive evidential overlap of the evidence relating to the Tort Claims and the evidence relating to the Dismissal with Cause and indemnity costs issues; (ii) the very small amount of time taken up at the trial in hearing submissions pertaining to the Tort Claims; (iii) the significance of the Tort Claims in terms of the quantum of damages sought be recovered under these claims; and (iv) the care and effort it is to be inferred was spent by the team representing TIG, including in particular Mr. Montagu-Smith KC, in producing the Claimant's submissions in opposition to the Tort Claims, I conclude that the outer limit of the proportion of TIG's total reasonable costs represented by the costs dealing with the Tort Claims is 35%. Precisely what costs are to be awarded to TIG in respect of their opposition to the Tort Claims within this parameter will be a matter for the Registrar."

Allocation of costs following judgments

8. In light of the above judgments, costs should be allocated as follows:

(a) Mr Hamid is entitled to *at least* 65% of his costs in respect of the proceedings in the Court of First Instance to reflect his success on the

Employment Claims (to be assessed on the indemnity basis);

(b) TIG is entitled to a *maximum* of 35% of its costs in respect the proceedings in the Court of First Instance to reflect its success on the Tort Claims (to be assessed on the standard basis);

(c) TIG is entitled to two thirds of its costs in respect of the Court of Appeal proceedings (to be assessed on the standard basis); and

(d) Mr Hamid is not entitled to any of his costs in respect of the Court of Appeal proceedings.

Relevant legal principles

9. Part 38 of the Rules of the DIFC Courts ("RDC") govern the legal principles that I am to adopt and the difference between assessing costs on the standard basis and the indemnity basis. In *Al Khorafi v Bank Sarasin* [2009] CFI 026 (30 October 2014) at [15], Deputy Chief Justice Chadwick broadly set out the distinction between the standard and indemnity bases:

> ".put shortly, on a standard basis assessment it is for the receiving party to satisfy the Court that the costs claimed were reasonably incurred and reasonable in amount, whereas on an indemnity basis it is for the paying party to satisfy the Court that the costs claimed were not reasonably incurred or not reasonable in amount. The burden of proof differed in that respect in the two cases and in practice is found normally to result in an award on an indemnity basis which is some considerable degree higher than an award on a standard basis assessment."

10. I note that in the commentary to the RDC at 38.7(1) the above extract includes reference to a usual percentage difference of 60% between costs assessed on the standard basis compared to the indemnity basis. However, there is no such reference in the final version of the published judgment and therefore I follow the above wording as opposed to the commentary in the RDC.

11. In *Kazakhstan Kagazy PLC v Zhunus* [2015] EWHC 404 (Comm), Mr Justice Legatt stated at [13] that:

> "In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party."

12. Parties are accordingly free to choose whatever legal representation they so wish but cannot expect to recover all their costs if they choose to spend above and beyond the lowest amount that they reasonably could have been expected to spend to conduct and present their case proficiently.

Issues to be determined

13. At the Hearing before me, Mr Bowden and Mr True agreed that the apportionment of 65% and 35% to the Employment Claims and the Tort Claims respectively should be adopted by me, which I accepted. Accordingly, Mr Hamid is entitled to 65% of his costs and TIG to 35% of its costs in respect of the Court of First Instance proceedings. These costs should be assessed on the indemnity basis for Mr Hamid and on the standard basis for TIG.

14. There is no dispute between the parties that I should award TIG two thirds of its costs in respect of the Court of Appeal proceedings subject to the tests of proportionality and reasonableness. TIG had raised concerns in its Points of Dispute regarding the lack of detail in Mr Hamid's Bill of Costs. However, this point was not pursued with any real vigour by Mr True during the Hearing and I do not consider Mr Hamid's Bill of Costs to be insufficiently detailed such as that I cannot make reasoned findings on it.

15. The issues therefore that remain in dispute between the parties are in respect of the Court of First Instance costs and are:

(a) Does the award of costs on the indemnity basis automatically entitle Mr Hamid to recover 100% of the 65% to which he is entitled of his costs as set out in his Bill of Costs without any further reductions?

(b) In the CFI Apportionment Judgment, did Justice Sir Richard Field determine the issue of the proportionality of TIG's costs such that I am only required to look at whether TIG's costs were reasonably incurred and reasonable in amount?

Award of costs and reasons

16. Dealing with the first issue, there is no general rule or principle that an award of costs on the indemnity basis entitles a party to all their costs claimed. Such costs still need to be reasonably incurred and reasonable in amount (RDC 38.17). Any doubt about whether such costs were reasonably incurred or reasonable in amount will be resolved in favour of the receiving party (RDC 38.19).

17. Considering the Defendant's Bill of Costs and the Claimant's Points of Dispute, I use my discretion to reduce Mr Hamid's claimed costs for the Court of First Instance proceedings by 20%. Mr Hamid's total costs for the Court of First Instance proceedings are USD 370,759.80. A discretionary reduction of 20% brings these costs to USD 296,607.84 and 65% of this is USD 192,795.10.

18. Turning to the second issue, it is argued on behalf of TIG that Justice Sir Richard Field has already determined the issue of proportionality in respect of its costs in the Court of First Instance proceedings. It relies on the following extract from paragraph 24 of the CFI Apportionment Judgment:

"I conclude that the outer limit of the proportion of TIG's total reasonable costs represented by the costs dealing with the Tort Claims is 35%."

19. At paragraph 8 of the Claimant's Response to the Defendant's Points of Dispute dated 8 September 2023, it states:

"The fact that the Court has imposed a limit of 35% on the reasonable costs to be awarded to the Claimant is an acceptance that the Court considers 35% to be a proportionate level of costs to be awarded to the Claimant. If the Court had not considered a figure of 35% to be proportionate, it would have imposed a lower percentage."

20. This argument was maintained by Mr True in his oral submissions. He argued that Justice Sir Richard Field, being the trial judge, and being aware of the legal representation that TIG had during proceedings, determined the issue of proportionality of TIG's costs. I, respectfully, disagree. Although it is correct that Justice Sir Richard Field only mentioned TIG's *"reasonable"* costs, I do not take this to mean that he had determined the issue of proportionality. Rather, Justice Sir Richard Field was considering what proportion of TIG's total costs could appropriately be allocated to the Tort Claims, taking into account various factors such as the amount of time taken up in trial on dealing with these claims and the amount of time it is to be inferred that TIG's legal representatives spent in preparing for these claims.

21. Had Justice Sir Richard Field been determining the issue of proportionality I consider that he would have expressly stated as such. I further take into account the CFI Costs Judgment that was issued prior to the CFI Apportionment Judgment. At paragraph 19, Justice Sir Richard Field stated:

"In my judgment, the Defendant must pay the reasonable costs of the Claimant incurred in resisting the Defendant's tort claims."

22. There has been no suggestion that the omission of *"proportionality"* in this judgment was Justice Sir Richard Field determining the issue. I therefore consider that I can and should still apply both the tests of reasonableness and proportionality to TIG's costs and TIG will be awarded 35% of its costs that were both reasonable and proportionate in amount and reasonably and proportionately incurred. However, for the reasons set out below, the inclusion of proportionality in my judgment does not materially change the amount that will be awarded to TIG as I do not find that its reasonable costs were disproportionate.

23. In respect of reasonableness, I note that TIG used a major international law firm and senior leading counsel. It was not strictly necessary to do so, and more economical options could have been adopted by TIG without putting them at risk of being unable to conduct and present their case proficiently. In line with *Kazakhstan Kagazy v Zhunus*, Mr Hamid should not be expected to pay fully for this service. On this basis, there ought to be a reduction in TIG's allowed costs. Once again, applying a percentage reduction and having in mind that I am to resolve any doubt in favour of the paying party, being Mr Hamid, I apply a reduction of 35% to TIG's costs.

24. Turning to the issue of proportionality, which I am entitled to consider for the reasons stated above, I do not find that TIG's reasonable costs (applying the 35% reduction) are disproportionate to the matters in issue (RDC 38.18(1)). When determining the issue of proportionality, I have taken into account the factors under RDC 1.6(3), being: the amount of money involved; the importance of the case; the complexity of the issues; and the financial position of each party.

25. Applying the 35% reduction, TIG's total costs for the Court of First Instance proceedings come to USD 296,201.25. 35% of this figure is USD 103,670.48.

TIG's Court of Appeal costs

26. TIG is entitled to two thirds of its costs in the Court of Appeal proceedings. TIG maintained the same legal representatives for these proceedings and therefore I apply the same reasoning and reduction as above. I assess TIG's costs on the standard basis and take into account both the principles of reasonableness and proportionality. I therefore reduce TIG's Court of Appeal costs by 35%, which amounts to USD 89,940.81. Two thirds of these costs are USD 59,960.54, which is what TIG is entitled to.

The net position, applying set-off

27. Mr Hamid is entitled to recover $192,795.10 in respect of the Court of First Instance proceedings, as stated in paragraph 17 above. TIG is entitled to recover USD 103,670.48 in respect of the Court of First Instance proceedings (paragraph 25) and USD 59,960.54 in respect of the Court of Appeal proceedings (paragraph 26), coming to a total of USD163,631.02.

28. Setting off the lower sum due to TIG (USD 163,631.02) against the higher sum due to Mr Hamid (USD 192,795.10), Mr Hamid is awarded USD 29,164.08.

Cost of the Costs Assessment and Hearing

29. In light of the above and that Mr Hamid will be awarded a sum in respect of his costs, I also award him his costs of these assessment proceedings, to be assessed on the standard basis.

30. In assessing these costs, the same legal principles apply. As costs are to be assessed on the standard basis, I must consider both reasonableness and proportionality. I have looked at the most recent Statement of Costs submitted on behalf of Mr Hamid dated 12 October 2023. I consider the total sought of AED 232,526.88 to be excessive and disproportionate in the circumstances. I note Mr Bowden appears to have done almost entirely all the work himself, including spending 37 hours working on drafting documents, at a rate of AED 2,500 per hour. This is unreasonable as more work could have been done by lower fee earners. I also note that Mr Hamid's costs are roughly six times the amount of TIG's costs.

31. Taking into account the above, I use my discretion to reduce Mr Hamid's costs by 40%. Mr Hamid is therefore awarded AED 139,497.12.