



ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

COURT OF FIRST INSTANCE
CIVIL DIVISION

BETWEEN

AFKAR CAPITAL LIMITED

CLAIMANT

AND

SAIFALLAH MOHAMED AMIN MAHMOUD FIKRY

DEFENDANT

JUDGMENT OF JUSTICE SIR ANDREW SMITH



ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

Neutral Citation:	[2017] ADGMCFI 1
Before:	Justice Sir Andrew Smith
Decision Date:	26 November 2017
Decision:	The Claimant's application for interim declarations is refused.
Hearing Date(s):	18 October 2017
Date of Orders:	18 October 2017
Date of Judgment:	26 November 2017
Catchwords:	Interim relief, interim declaration, exercise of discretion. ADGM Companies Regulations, board of directors, notice of resolutions, appointment of chairman of board, director's conflict of interest, minutes of board meeting as evidence of proceedings.
Legislation Cited:	ADGM Companies Regulations 2015 ADGM Court Procedure Rules 2016 ADGM Financial Services Regulatory Authority General Rulebook 2015 English Civil Procedure Rules 1998 Financial Services and Markets Regulations 2015 UK Companies Act, 2006
Cases Cited:	Financial Services Authority v Rourke, [2001] EWHC 704 (Ch) Governor & Company of the Bank of Scotland v A Ltd and ors, [2001] EWCA Civ 1081 La Compagnie de Mayville v Whitley, [1896] 1 Ch 788 Leisure Data v Bell, [1988] FSR 367 Rolls Royce plc v Unite the Union, [2009] EWCA Civ 387 Shepherd Homes v Sandman, [1971] Ch 370 The National Crime Agency v N & RBS plc, [2017] EWCA Civ 253
Case Number:	ADGMCFI-2017-003
Parties and representation:	Mr. Yash Bheroo instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP for the Claimant/ Applicant to the application Mr. Farhaz Khan instructed by Baker McKenzie Habib Al Mulla for the Defendant/ Respondent to the application



JUDGMENT

Introduction

1. On 18 October 2017, I heard an application made by Afkar Capital Limited (the “Company”) for interim declarations. The respondent was Saifallah Mohamed Amin Mahmoud Fikry. I ruled orally that I refuse the application, and, giving brief reasons to indicate the basis for my decision, I said that I would give fuller reasons later. I took this course because, on the one hand, the parties’ arguments merited more detailed reasons than I could give in an ex tempore judgment, whereas, on the other hand, I wished to give directions for the future conduct of the action so that the matter might come to trial without unnecessary delay. These are my fuller reasons for refusing the application.
2. The Company was incorporated in the Abu Dhabi Global Market (“ADGM”) Financial Free Zone on 16 December 2015. It is owned by Afkar Holding Limited (“AH”), a company incorporated in the British Virgin Islands. AH is owned as to 51% by Equitativa Holding Foundation (“Equitativa”) and as to 49% by Mr Fikry. Equitativa is a foundation of which a Mr Sylvain Vieujot is a beneficiary. On 16 December 2015, the day that the Company was incorporated, by a Shareholders’ Resolution Mr Vieujot and Mr Fikry were appointed to be directors, and it was also resolved that Mr Vieujot be Chairman of the Company. Mr Fikry became the Senior Executive Officer (“SEO”). On 24 May 2017, Ms Maria Perera Alvarez, who is Senior Legal Counsel of the Equitativa Group, was appointed to be the Company Secretary. After the hearing, I learned that on 30 October 2017 Mr Fikry resigned as director and SEO of the Company, but it was not foreshadowed at the hearing that he would or might do so, and so this had no bearing on my decision or my reasons for it.
3. Being incorporated in ADGM, the Company is subject to the ADGM Companies Regulations. I was referred to provisions about the “general duties” that a director owes to a company set out in sections 160 and following, including:
 - (1) The duty set out in section 162 that a director “must act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to (a) the likely consequences of any decision in the long term, ... (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company”.
 - (2) The duty to exercise the reasonable care, skill and diligence, stated in section 164.
 - (3) The duty to avoid conflicts of interest set out in section 165, which provides:

“(1) A director of a company must not act on behalf of a company, or exercise any of his powers as a director, in relation to any matter in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

“(2) This applies in particular to the exploitation of any property, information or opportunity ...”.



4. The Regulations, by section 157, also make provision that, within 14 days of a person becoming a director, a company must notify the Registrar of the change and the date on which it occurred.
5. The Articles of Association of the Company included the following provisions about decision-making by the directors:
 - (1) Article 11, which provides that the quorum for a directors' meeting should be not less than two, and, unless otherwise fixed (and in this case it was not), should be two; and that no proposal should be voted on at an inquorate meeting except one to call another meeting.
 - (2) Article 12, which provides that "The directors may appoint a chairman to chair their meetings".
 - (3) Article 13, which provides that "If the votes cast for and against a proposal are equal, the chairman or other director chairing the meeting has a casting vote", unless in accordance with the articles he is not to be counted as participating in the decision-making process for quorum or voting purposes.
 - (4) Article 14, which deals with conflicts of interest and which I set out below (at para 45).
 - (5) Article 17, which deals with the appointment of directors and provides that a person may be so appointed by ordinary resolution or by a decision of the directors.
6. The Company carries on business as an asset manager, and holds a Financial Services Permission ("FSP") granted by the ADGM Financial Services Regulatory Authority (the "FSRA") under the Financial Services and Markets Regulations 2015. As an Authorised Person, it is entitled to conduct regulated activities by way of managing a collective investment fund, managing assets, arranging deals in investment and advising on investments and credit. Under the regulations, the FSRA can make rules prescribing "Threshold Conditions" that Authorised Persons are to satisfy as a condition of obtaining and maintaining the FSP required to carry on specified businesses; and the FSRA can stipulate requirements about having adequate and appropriate resources, including financial resources. Further, under article 5.3.1(2) of the ADGM Financial Services Regulatory Authority General Rulebook, the "Performance of Controlled Functions [in these circumstances] are subject to approval by the Regulator". By articles 5.3.2 and 5.3.3 Directors and Senior Executive Officers of the Authorised Persons have Controlled Functions, and Mr Vieujot and Mr Fikry have been given approval.
7. The declarations that the Company seeks on this application concern a meeting of the board of the Company on 31 July 2017, and in particular two resolutions that the Company claims were passed at the meeting. The Company relies on what they say are minutes of the meeting drafted by Ms Perera and signed by Mr Vieujot as chairman of the meeting. (For convenience, in this judgment I shall refer to "resolutions" without prejudice to Mr Fikry's contention that they were not validly passed, and to the "minutes" without prejudice to issues about their true standing.) According to the minutes:



- (1) “Mr Vieujoyot expressed that he would propose to have Mr Abdul Wahab Al Halabi named as Director of the Company, Mr Fikry opposed the proposal, and questioned whether it could be included for voting, as it was not circulated in the agenda prior to the meeting.

Mr Fikry abstained from voting on the above resolution.

The above resolution was passed with the favourable vote of Mr Vieujoyot as Director and Chairman and it is THEREFORE RESOLVED that Mr Abdul Wahab is appointed Director of the Company, subject to approval of the regulator”.

- (2) “Both Directors agreed that the current situation was not sustainable. Mr Vieujoyot expressed that the management of the Company was not currently satisfactory and, and [sic] it was therefore, in the best interest of the Company to replace the current CEO. Mr Vieujoyot believed that Mr Amine Bentaleb qualified for such position.

In view of the above, it is resolved that Mr Fikry be removed as CEO and Mr Amine Bentaleb be appointed CEO of the Company, subject to the approval of the regulator.

Mr Fikry voted against the above resolution but the resolution was passed with the Chairman’s casting vote”.

It will be observed that the resolutions appointing Mr Al Halabi as a director of the Company and appointing Mr Amine Bentaleb as the CEO in place of Mr Fikry were expressed to be “subject to the approval of the regulator”. There was no dispute before me that this referred to approval of the FSRA to the appointments.

8. Apparently both Mr Al Halabi and Mr Bentaleb have some connection with Mr Vieujoyot. Mr Al Halabi is the Equitativa Group’s Chief Investment Officer. According to Mr Fikry, and this has not been disputed, Mr Bentaleb is a close friend of Mr Vieujoyot, who was previously associated with General Pension and Social Security Authority, which was a major shareholder in one of Mr Vieujoyot’s interests.

9. The interim declarations that the Company sought in its amended application were these:

“(a) There was a meeting of the Board of Directors of [the Company] on 31 July 2017.

(b) At the meeting, Mr Sylvain Vieujoyot, Director and Chairman of Afkar Capital, was appointed as the Chairman of the Meeting.

(c) The Minutes of dated [sic] 31 July 2017 and signed by Mr Sylvain Vieujoyot, as Chairman and Director, and Ms Perera, as Secretary, are to be treated as evidence of the proceedings at the Meeting ...

(d) The resolution to appoint Mr Abdul Wahab Al Halabi as a director of [the Company] is valid and is deemed to have taken place.



(e) The resolution to remove Mr Seif Fikry as the Senior Executive Officer of [the Company] and to appoint Mr Amine Bentaleb in his place as the Senior Executive Officer of [the Company] is valid and deemed to have taken place”.

At the hearing before me, Mr Yash Bheeroo, who represented the Company, made clear that the essence of the application was that the Court should make the last two declarations: the others really reflect steps in the argument for these two.

10. Mr Fikry disputes that the resolutions referred to in the last two declarations were validly passed by the Board. His case is that the meeting on 31 July 2017 “started in chaotic manner” (as he put it in his witness statement), he had not been given prior notice of the proposal to appoint Mr Al Halabi as a director, and, while the agenda included an item about changing the CEO, he had not been given notice of a proposal that Mr Bentaleb be the new appointee. He also disputes that Mr Vieujot was appointed chairman of the meeting.

Background to the meeting

11. Apparently, the Company was authorised to carry on business in January 2016 and launched its first product in June 2016. It is controversial how well its business was doing in the first half of 2017. Mr Vieujot describes its financial state as “precarious”, and the Company pleads that it had faced “severe financial and operational difficulties ... over the past twelve months”. According to Mr Fikry, it has one of the most successful exchange-traded funds in the Middle East and North Africa. I am not in a position to form any view about that, and I need not do so. However that may be, at a board meeting of the Company on 26 April 2017, Mr Vieujot and Mr Fikry resolved to approve a business plan and budget of the Company for 2017-2018. It observed that the Company was subject to a requirement of the FSRA that it hold capital of 120% of its “expenditure based capital minimum”, and that as of 31 March 2017 it had funds in excess of that. However, monthly running costs were said to be approximately \$100,000 and it was recognised that the Company would need capital injections of between \$100,000 and \$110,000 per month from April to December 2017. The implication was that the funds would be contributed by Mr Vieujot, or Equitativa, and Mr Fikry proportionately to their indirect interests in the Company.
12. According to Mr Fikry, in June 2017 Mr Vieujot suggested to him that they should dissolve their venture, and they began to discuss a buyout agreement.
13. On 2 July 2017 the Company’s Compliance Officer, Mr Anup Cherian, wrote to the FSRA that the capital resources had fallen beneath the required level. The FSRA replied with a request that it be kept updated about the Company’s position. Later that day in an exchange of emails between Mr Fikry and Equitativa, Mr Fikry asked why Equitativa had not transferred funds so that the capital requirement could be met, and Equitativa responded that it believed that there was no breach of the regulatory requirement and therefore no current need for recapitalisation, writing “If you chose to report a breach to the regulator, this is your prerogative”.
14. On 6 July 2017 Mr Fikry wrote to the FSRA about recapitalisation. He reported that he had contributed his share of the required funds, but that Equitativa considered that recapitalisation was not required. He said that in those circumstances he would have his share repaid, but asked the FSRA for advice whether the capital resources of the Company did meet the requirement. Mr



Viewjot responded that the recapitalisation needed to be considered in the context of continuing discussions about the future ownership of AH. On 9 July 2017 Mr Fikry wrote to Mr Viewjot suggesting that they “discuss the Buyout as a shareholder matter between us without involving the regulator and ... in a way [that] protects the business of Afkar Capital and guarantee full compliance with ADGM regulations during the transitional period”.

15. On 19 July 2017 the FSRA had a meeting with Mr Viewjot and Mr Fikry. There is dispute in the evidence about quite what was said, but that is unimportant for present purposes. After the meeting, on 20 July 2017 the FSRA wrote to Mr Viewjot and Mr Fikry confirming that it had been advised at the meeting that there was a shareholder dispute and there was discussion of a shareholder buyout. It required information by 3 August 2017 about the “Capital Requirements breach” and the dispute between the shareholders.

After the meeting

16. This was the background against which the board meeting of 31 July 2017 took place. After it, Mr Fikry wrote to Mr Viewjot in apparently friendly terms, thanking him for his time that day and without any suggestion that the board meeting had been acrimonious.
17. Ms Perera sent Mr Fikry draft minutes of the meeting on 1 August 2017. Mr Fikry complained about their accuracy. Ms Perera accepted some of his objections: for example, in the first draft it was said that the resolution that Mr Al Halabi be appointed director was passed by the casting vote of Mr Viewjot as chairman, but in revised minutes sent to Mr Fikry and Mr Fikry on 3 August 2017 she corrected this, acknowledging that Mr Fikry had not voted on the resolution and so no casting vote was used. She rejected other objections: in particular,
- (1) Mr Fikry objected to the minute that “Mr Viewjot was invited to serve as the Chairman of the meeting” that “I myself never invited Sylvain Viewjot to chair the meeting, and hereby confirm my refusal of the appointment of Sylvain Viewjot as chairman of the meeting for clear conflict of interest and non disclosed interests in the points added by him to the minutes (sic)”. Ms Perera responded that “Sylvain was clearly appointed Chairman at the beginning of the meeting and no objections to this appointment were raised at that time”.
 - (2) Mr Fikry objected that “Sylvain Viewjot has clear conflict of interest and duties in voting on the appointment of Abdul Wahab Al Halabi, because the latter is the group chief investment officer of Equitativa which is owned by Sylvain Viewjot”. Ms Perera responded that “neither at the meeting nor in the minutes was Abdul Wahib represented as an Independent Director, The minutes clearly state that Abdul Wahib is the Group’s Chief Investment Officer”.
 - (3) Similarly Mr Fikry objected that Mr Viewjot had a conflict of interest and duties in voting on the appointment of Mr Bentaleb, and Ms Perera replied that “There is no requirement for a proposed SEO to be a stranger to the proposing director, quite the opposite” and that the appointment was solely on the basis of Mr Bentaleb’s “professional background and proven track record”.



- (4) Mr Fikry objected that “Although Sylvain Vieujot has no casting vote as he is not appointed Chairman of the meeting, no such casting vote was used or discussed during the meeting”. Ms Perera responded that Mr Vieujot was “very clearly appointed Chairman of the meeting at the beginning of the meeting and would therefore have had a casting vote as per articles of association of the Company”.
18. The FSRA had, as I have said, requested information by 3 August 2017 about the Company’s capital reserves and about the dispute between the shareholders, and Mr Fikry wrote that day. He said that the Company still did not have the required capital reserves, attributing this to Equitativa failing to sign the necessary board resolutions, confirming that he had been committed to pay his “part of the monthly capitalization to meet the capital requirements”. He gave an account of the dispute and buyout discussions, stating that he had accepted most, but not all, of Mr Vieujot’s requirements. With regard to the meeting on 31 July 2017, Mr Fikry wrote this: “... on the 31st July the directors of [the Company] had a directors meeting in which [Mr Vieujot] appointed himself as a chairman, invited one of his employees to the meeting and used casting vote to appoint him as a director, also to appoint another prospect employee as CEO and removing me as the CEO in the same way”. (The statement that Mr Vieujot used his casting vote to have Mr Al Halabi appointed as a director is strange: it was common ground before me that no casting vote was used on this resolution, and Mr Fikry had required that it be corrected in the minutes.)
19. On 7 August 2017 the FSRA wrote to both Mr Vieujot and Mr Fikry urging them to “resolve any outstanding issues in an orderly and timely manner”.
20. On 10 August 2017 Mr Vieujot wrote to the FSRA that Mr Al Halabi had been appointed to the board of the Company, attaching a completed application form dated 6 August 2017 for him to be given Approved Status to become a director and also the revised minutes of the meeting of 31 July 2017. He said that he had signed them “as the Chairman of Afkar Capital Limited”. Later that day, Mr Fikry wrote to the FSRA, repeating that he considered resolutions at the meeting of 31 July 2017, including the appointment of Mr Al Halabi as a director, to be “null and void”. He gave these reasons: that the proposal to appoint him was not on the agenda for the meeting or referred to as “such type of topics to be discussed during the meeting”; and that Mr Al Halabi was an employee of Equitativa, which Mr Vieujot owned, but despite a “clear conflict of interest”, Mr Vieujot invited Mr Al Halabi to the meeting and then cast the only vote on his appointment. He maintained that the appointment “went beyond the rights of a director and without keeping an eye on the director’s duties” under statute. He also said that a chairman “does not have unfettered discretion to use the second vote”, but “must act in good faith in this regard”.
21. On 13 August 2017 the FSRA asked Mr Vieujot and Mr Fikry to attend a meeting on 17 August 2017 “to discuss all matters relating to this case”. At the meeting, as it appears from Mr Vieujot’s evidence (and Mr Fikry apparently accepts this), the FSRA pointed out that no application to appoint Mr Al Halabi had been submitted to the Registration Authority of ADGM through its restricted website. It asked that this be done and that it receive an updated report after two weeks. The FSRA also said that the Company should consider suspending its operations if no long-term solution was found.
22. Accordingly, on 20 August 2017, Mr Vieujot instructed Mr Cherian, who had access to the portal to the restricted website, to notify the Registration Authority of Mr Al Halabi’s appointment,



unless he had already done so. He attached a copy of the revised minutes which were signed by Mr Vieujot, but not by Mr Fikry. On 28 August 2017 Mr Cherian submitted to the Registration Authority an application to notify the appointment of Mr Al Halabi. However, in the meantime, on 21 August 2017 Mr Fikry had written to the FSRA that Mr Cherian had asked him why he had not signed the revised minute, and explained that the board had not resolved to appoint Mr Al Halabi. He said that therefore he did not “accept changes to the registry” and that he would be “filing the suitable lawsuit to challenge such invalid resolution and the required provisional measures to prevent the registration of such invalid resolution”.

23. On 28 August 2017 Mr Vieujot sent to Mr Fikry (i) a resolution of the Company that Mr Al Habibi’s appointment as a director, Mr Fikry’s removal as SEO and Mr Bentaleb’s appointment be ratified by AH, as the Company’s sole shareholder, and that the Company take the steps necessary for having this registered with “the relevant authorities”; and (ii) a resolution of AH (the “Ratification Resolution”) ratifying these decisions and authorising Mr Vieujot or any other director to sign the Ratification Resolution. Mr Vieujot had signed a copy of them, and also sent a copy of Ratification Resolution for Mr Fikry to sign, and he requested Mr Cherian or Mr Fikry to send them to the FSRA “for their information”. Mr Fikry on 29 August 2017 declined to do so, describing both the resolutions of 31 July 2017 and the Ratification Resolution as “invalid”.
24. On 4 September 2017 Mr Fikry wrote to the FSRA referring to the meeting on 17 August 2017, and the request for updated information about the shareholders’ dispute after 14 days. He said that he would “keep doing [his] best as a director and the SEO to protect [the Company] and [his] shareholder rights ... and try solving the shareholder dispute through a fair buyout”; but he alleged that Mr Vieujot had the “single goal ... to take over the control of [the Company] by force and regardless of protecting [the Company] and its business”. He said that he “was left with no option but to appoint Baker and McKenzie to take the proper legal proceedings ...”. He also alleged that Mr Vieujot had delayed holding a board meeting. (He had requested a board meeting, but on 28 August 2017 Mr Vieujot told him that he was out of the country, and that, while he agreed to a board meeting “at the earliest”, he suggested a meeting on 5 September 2017, which, as Mr Fikry observed, was after the Company were due to update the FSRA.)
25. On 6 September 2017, the Registration Authority returned to Mr Cherian the notification application submitted on 28 August 2017. The Authority observed that only one director had signed the minutes, and requested the following (and other) information: a copy of the notice of the board meeting; confirmation that the directors had disclosed conflicts of interest and that “their participation in the meeting was valid for the decision making process for quorum or voting purposes”; and evidence of Mr Fikry voting for Mr Vieujot’s appointment as chairman of the meeting. Mr Bheeroo observed that these points reflect complaints raised by Mr Fikry. The Authority also sought confirmation that the FSRA had approved Mr Al Halabi’s appointment, the resolution being that the appointment was subject to this approval being given.
26. In the meanwhile, on 5 September 2017 Curtis, Mallet-Prevost, Colt & Mosle LLP had written to Mr Fikry on behalf of the Company and Mr Vieujot, describing the objections to the validity of the resolutions at the meeting on 31 July 2017 as being “without any basis” and alleging that Mr Fikry sought to obstruct proper notification to the Registration Authority and the FSRA. They



threatened to seek an injunction unless Mr Fikry undertook by the next day to permit the notifications.

27. On 6 September 2017 Baker McKenzie Habib Al Mulla replied on behalf of Mr Fikry. They said that there were “numerous issues” about the validity of the resolutions, and “the conduct of Mr Vieujot generally in carrying out his fiduciary duties as director of the Company”; they denied that Mr Fikry was obstructing proper processes, and said that he had sought to ensure that the dispute was resolved “in accordance with the applicable regulations”; and they concluded that, unless the dispute was resolved by agreement, Mr Fikry intended “to take all necessary legal actions in support of his rights as director and SEO of the Company”.

The application for interim declarations

28. The Company brought these proceedings on 12 September 2017, and applied for an interim declaration. It contends that the dispute between Mr Vieujot and Mr Fikry has created an impasse in which the FSRA and the Registration Authority feel unable, or are unwilling, to act so as to enable the Company to proceed with the changes made and resolutions passed on 31 July 2017. The registration of the appointments and the regulatory applications have, it is said, stalled as a result of Mr Fikry’s obstructive conduct, and consequently the Company is suffering serious damage. As Mr Bheeroo put it, a declaration would assist in removing the “logjam”.
29. Under rule 71(1) of the ADGM Court Procedure Rules (“CPR”) the Court has power to grant “such interim remedies as are necessary in the interests of justice”, including a remedy by way of an interim declaration. This reflects a comparable power, introduced in 1998 and embodied in rule 25.1 of the English Civil Procedure Rules, which provides that the court may grant a declaration by way of an interim remedy. Previously, the English courts (although not all other common law jurisdictions) had rejected as “a contradiction in terms” the idea that a declaration might be made on an interim basis, but it has now been recognised that its effect will be at least to provide the parties and others with a degree of assurance as to the legal basis on which they should make decisions pending trial. Indeed, as I read para 89 of the judgment of Hamblen LJ in *The National Crime Agency v N & RBS plc*, [2017] EWCA Civ 253, with which other members of the Court agreed, he accepted the submission, recited at loc cit para 85, that, whilst it is provisional in nature, actions done whilst the declaration is in force will enjoy its protection for all time. Such a declaration would be, as he put it at para 88, “in determinative rather than advisory terms”.
30. The power of the court to make a declaration, whether final or interim, is discretionary. Both parties before me cited English authorities about the exercise of the discretion. Thus, Mr Bheeroo cited the judgment of Neuberger J in *Financial Services Authority v Rourke*, [2001] EWHC 704 (Ch), in which he said, “It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve any useful purpose and whether there are any other special reasons why or why not the court should grant the declaration”. In *Rolls Royce plc v Unite the Union*, [2009] EWCA Civ 387 (at para 120) Aikens LJ, having identified other applicable principles, said that, if they were satisfied, the court must ask whether a declaration is “the most effective way of resolving the issues raised”. These cases were about granting declarations as final relief, and I know of no comparable statement of the principles that guide the court’s decision whether to



grant an interim declaration, but to my mind these statements of principle are equally applicable here. Further, in *Governor & Company of the Bank of Scotland v A Ltd and ors*, [2001] EWCA Civ 1081, at para 46, Lord Woolf CJ, giving the judgment of the Court of Appeal, said that, “The Court’s powers [to grant interim declarations] are discretionary and only to be used where there is a real dilemma which required their intervention”.

31. Thus, it was not disputed before me that:

- (1) When deciding whether to make an interim declaration it is proper for the court to consider the merits of the claim and its prospect of succeeding at trial.
- (2) The court must also consider where the balance of convenience lies. What is the balance between the injustice to the applicant if he is refused relief to which he establishes at trial he was entitled, and the injustice to the respondent if he is subjected on an interim basis to relief that is shown at trial to be unjustified?
- (3) The court must also consider whether an interim declaration will be of practical use and effective to deal with a dilemma that warrants the court’s intervention.

The merits of the Company’s claim

32. The Company submitted that Mr Fikry has not advanced any real argument that the resolutions of 31 July 2017 are not valid and effective. Mr Farhaz Khan, who represented Mr Fikry, on the other hand, argued that the application should be refused because the Court should not grant an interim declaration unless it has a high degree of assurance about the merits of the claim, and in this case the merits of the claim cannot be assessed with such confidence before disclosure and cross-examination.

33. The submission that a high degree of assurance is required in this case before granting an interim declaration is based on the judgment of Hamblen LJ in the *National Crime Agency* case, but Hamblen LJ did not say that the court always needs to be so satisfied before making an interim declaration. He said (*loc cit* at para 89) that “... the most appropriate evidential threshold in a case such as the present is the high degree of assurance that is generally required before mandatory injunctive relief will be granted”. He was speaking of a case which raised questions whether a bank would be in breach of the criminal law if it made certain payments and did not make disclosure to the National Crime Agency. Hamblen LJ continued, “The need for a close consideration of the merits is particularly important in a case in which the grant of interim declaratory relief is likely to be determinative of the issue, as in this case. The relevant potentially criminal acts here were the carrying out of the specified transactions and/or failing to make prior disclosure. Once the monies had been irrevocably paid over without further disclosure under the protection of the interim declaration there could be no criminal liability”. Thus, a high degree of assurance was required in a case where the declaration might result in permanent immunity from criminal liability. (The term “high degree of assurance” derives from the principle that in cases of mandatory injunctions courts require this assurance that “at the trial it will appear that the injunction was rightly granted”, which was enunciated by Megarry J in *Shepherd Homes v Sandman*, [1971] Ch 370. But here too the court was only stating a general principle, and sometimes the practical realities of the situation and relative weight of respective risk that



injustice may result from a decision one way or the other will justify a mandatory injunction without such assurance: see *Leisure Data v Bell*, [1988] FSR 367 per Dillon LJ.)

34. This case does not concern criminal liability, and so it is readily distinguishable from that considered by Hamblen LJ. However, Mr Khan submitted that here an interim declaration in the terms sought by the Company effectively would pass control of the Company to Mr Vieujot and decide the issue between the parties, and he submitted that Hamblen LJ made clear that a strong case has to be shown where the interim relief is likely to determine the real issue between the parties. I see force in that submission: while the issue here might not demand the high degree of assurance required in cases involving criminal liability, I accept that it is incumbent on the Company to demonstrate that at the trial it is likely to appear that the interim declaration was warranted.
35. Mr Bheeroo submitted that Mr Fikry had advanced no plausible argument that the resolutions were not valid. Mr Khan responded that the Company has not applied for summary judgment under CPR rule 68 on the grounds that Mr Fikry has no real prospect of successfully defending the claim, but this is essentially a forensic point that does not provide a persuasive answer to Mr Bheeroo's submission. Mr Bheeroo identified four arguments advanced by Mr Fikry in correspondence before these proceedings were brought, in his evidence and in submissions made on his behalf by Mr Khan:
- (1) That the meeting on 31 July 2017 was not validly convened (the "convening" defence);
 - (2) That the resolutions were not included on an agenda for the meeting, and Mr Fikry was given no notice of them (the "agenda" defence);
 - (3) That Mr Vieujot was not appointed chairman of the meeting (the "chairman" defence); and
 - (4) That the resolutions were not validly passed because Mr Vieujot had a conflict of interest and was not acting bona fide in the interest of the company when he voted for the resolutions (the "conflict" defence).

Mr Bheeroo submitted that on examination none has any merit, and none has any realistic prospect of appearing more persuasive at trial after disclosure and cross-examination.

36. I accept that there is nothing in the convening defence or the agenda defence, and Mr Khan did not support them in his oral submissions. There is no evidence to support the claim that the meeting was not validly convened. Nothing in the Company Regulations or the Articles of Association of the Company requires that an agenda identifies the business to be conducted at a board meeting, and authority establishes that in these circumstances this is not a legal requirement: see *La Compagnie de Mayville v Whitley*, [1896] 1 Ch 788 at p.805 per Kay LJ.
37. What of the chairman defence? The Company submits that at the start of the meeting Ms Perera invited Mr Vieujot to take the chair, as she, Mr Vieujot and Mr Al Halabi all state in their evidence. Mr Fikry responded that there was no discussion about the appointment of a chairman, and that, since article 12 of the Articles of Association provides that the chairman of a meeting is to be



appointed by the directors, Mr Vieujot could not be validly appointed chairman by Ms Perera or at her invitation. I accept that is so, but in my judgment an appointment by the directors does not require an express decision by them: if Ms Perera clearly announced that she understood that Mr Vieujot would (again) be acting as chairman and Mr Vieujot and Mr Fikry did not demur, I am inclined to think that by acquiescence with Ms Perera's proposal the directors would be regarded as having made an appointment in accordance with article 12. The position would be the clearer if Mr Vieujot purported to exercise a casting vote on the resolution to appoint Mr Bentaleb as SEO in place of Mr Fikry, and no objection was raised to this.

38. Moreover, the Company submitted that, when the evidence is examined carefully, there is overwhelming corroboration that Mr Vieujot was duly appointed to be chairman of the meeting. First, it invoked sections 272 and 273 of the Companies Regulations, which reflects section 249 of the UK Companies Act, 2006. Section 272 provides (inter alia) that "Every company must cause minutes of all proceedings at meetings of its directors to be recorded". Section 273 provides that:
- "(1) Minutes recorded in accordance with section 272 ..., if purporting to be authenticated by the chairman of the meeting ..., are evidence of the proceedings at the meeting.
- (2) Where minutes have been made in accordance with that section of the proceedings of a meeting of directors, then, until the contrary is proved –
- (a) the meeting is deemed duly held and convened,
 - (b) all proceedings at the meeting are deemed to have duly taken place, and
 - (c) all appointments at the meeting are deemed valid".
39. It was not suggested that the minutes were not made in accordance with section 272, and they record that Mr Vieujot was the Chairman of the meeting: they state "Mr Vieujot was invited to serve as Chairman of the meeting and Maria Perera was appointed as the Secretary to take minutes of the meeting". They also refer to the resolution to remove Mr Fikry as SEO and to appoint Mr Bentaleb being passed "with the Chairman's casting vote". I therefore accept that, as the Company argued, under section 273 of the Companies Regulations prima facie Mr Vieujot was appointed as chairman.
40. Secondly, there is no dispute that Mr Vieujot had acted as chairman at all previous board meetings of the Company without objection. Nor is it disputed that he is Chairman of the Company, and it might be thought that against this background he would naturally be expected to act as chairman of meetings of the board. Mr Bheeroo did not argue that these matters are in themselves enough to infer that by some sort of implication the directors appointed him chairman of the meeting on 31 July 2017, but it would certainly explain why the appointment involved no real discussion.
41. Thirdly, Mr Bheeroo examined what Mr Fikry said about this matter after the meeting, and submitted that his position has not been consistent. Initially after the meeting, when commenting on the first draft of the minutes sent to him by Ms Perera, his response to the statement that Mr Vieujot was invited to serve as chairman was that he had not invited him to do so: his denial is consistent, it is said, with Ms Perera having invited Mr Vieujot to serve. Then in his email to the



FSRA of 3 August 2017 Mr Fikry wrote that Mr Vieujot had “appointed himself as chairman”. On 10 August 2017, he wrote to the FSRA that “a chairman does not have unfettered discretion to use the second vote” and “must act in good faith in this regard”, but did not deny that Mr Vieujot was appointed chairman. Thus, it is submitted, before his witness statement, Mr Fikry advanced three different arguments about this, but none of them was that, as he now maintains, there was no discussion of the appointment of a chairman.

42. The Company has certainly identified points about which Mr Fikry might properly be cross-examined at a trial, and since he might be so questioned, I shall not comment upon the points individually. It suffices to say that I do not consider them so powerful as to exclude all real prospect of Mr Fikry’s evidence being correct, and I see some force in his observation that he would not have agreed to Mr Vieujot being chairman knowing that he could use a casting vote to make appointments as he proposed. I add this with regard to the evidence that the resolution about the change of CEO was passed on Mr Vieujot’s casting vote: this might, as I have already indicated, provide the Company with further support on this issue, but the force of the point depends on how the voting was carried out, and, understandably on an application of this kind, the evidence about this was inconclusive. As I have said, in his email to Ms Perera of 1 August 2017 Mr Fikry said that no casting vote was used or discussed at the meeting, and Ms Perera’s response does not specifically refer to a casting vote being used separately from the initial voting. I note that in his email to the FSRA of 10 August 2017 Mr Vieujot had signed the minutes in his capacity as Chairman of the Company, rather than because he had been appointed chairman of the meeting.
43. However, although I am not persuaded to reject Mr Fikry’s chairman defence as unarguable, this is of limited assistance to him: it does not assist him with regard to the resolution to appoint Mr Al Halabi, and Mr Bheeroo particularly pressed for a declaration about this. Here Mr Fikry has to rely on the conflict defence. It was put in three ways:
- (1) That Mr Vieujot was interested in the resolutions so as to engage article 14 of Articles of Association, and therefore he is not to be counted as participating in the decisions.
 - (2) That Mr Vieujot had a conflict of interest under section 165 the Companies Regulations, which invalidates the resolutions.
 - (3) That at the meeting on 31 July 2017 Mr Vieujot acted in breach of his duty of good faith and other duties as a director of the Company, and therefore the resolutions are invalidated.
44. I shall deal with the second and third points only briefly: I need not consider them at length in view of my conclusion about article 14, and, since they might be the subject of further litigation, my provisional views after only short argument would not be of value and might embarrass. It suffices to say that I am not presently persuaded that, even if Mr Vieujot acted in breach of his duties under the Companies Regulations or his duty at common law, this would either vitiate the resolutions or confer any rights on Mr Fikry, either as a director of the Company or as a shareholder of AH. I add that Mr Khan said that the allegations might feature in counterclaims, but to my mind that is of little, if any, relevance to my decision whether to grant the Company’s application for interim declarations.



45. Article 14 provides (as far as is material) as follows:

“(1) If a proposed decision of the directors is concerned with an actual or proposed transaction or arrangement with the company in which a director is interested, that director is not to be counted as participating in the decision-making for quorum or voting purposes.

(2) But if paragraph (3) applies, a director who is interested in an actual or proposed transaction or arrangement with the company is to be counted as participating in the decision-making for quorum or voting.

(3) This paragraph applies when –

(a) ...

(b) the director’s interest cannot reasonably be regarded as likely to give rise to a conflict of interest ...”.

It is worthy of mention that the article does not provide that disclosure of an interest in arrangements would mean that the provision of article 14 did not apply or that the director’s participation then counted.

46. Mr Fikry’s argument based on article 14 therefore raises three questions:

(1) Were the appointments of Mr Al Halabi and Mr Bentaleb “actual or proposed transaction(s) or arrangement(s) with” the Company within the meaning of section 14(1)?

(2) If so, were they transactions or arrangements in which Mr Vieujot was “interested”?

(3) If so, could Mr Vieujot’s interest reasonably be regarded as likely to give rise to a conflict of interest?

47. Mr Khan submitted that the answer to each question is “yes” and therefore Mr Vieujot’s votes on the resolutions were not to be counted, and so neither was passed. Mr Bheeroo submitted that an article of this kind is directed to a situation in which a company is considering a commercial contract (or arrangement) with another company or business with which a director has an involvement: with such situations as, for example, “where a tender has been awarded to a director’s other company or the director receives an incentive for procuring board approval for a contract”. Clearly these are examples of arrangements falling under article 14, but the wording of the article does not limit it to such obvious cases of a conflict of interest and might well, as it seems to me, cover an appointment of a director or a senior employee, such as an SEO.

48. With regard to the second and third points, Mr Vieujot’s evidence was that he voted for Mr Al Halabi’s appointment because he “is an experienced individual who holds a position as director in numerous financial services entities and [he believes] will add a very experienced voice to the Board”, and his appointment “enhances proper corporate governance and is in the best interests of [the Company], as it allows the Board to have an additional director who is not an ultimate shareholder of the Company”. He described Mr Bentaleb as well qualified for the position of SEO,



with “experience in asset management companies, having worked in both Abu Dhabi and in capital markets for many years” and being “familiar with the business of [the Company]”. No evidence contradicts this. Mr Bheeroo therefore argued that Mr Halabi and Mr Benzaleb have experience and qualifications that justify their appointments. He also argued that they were not disqualified from appointment because they had previously worked for Equitativa and with Mr Vieujot, nor was Mr Vieujot disqualified thereby from proposing their appointments: it is usual for directors to propose for such positions people known to them and with whom they have previously worked.

49. To my mind, those observations do not meet Mr Khan’s argument. The question is not whether the appointments of Mr Halabi and Mr Bentaleb might properly have been made. It is whether Mr Vieujot should have been counted as participating in the decision in view of article 14: whether he was interested in the proposed appointments and if so, whether the interest can reasonably have been regarded as giving rise to a conflict of interests. Here, Mr Fikry’s argument was that the appointments must be considered against the background of his dispute with Mr Vieujot, the proposed buy-out and the state of their negotiations. In my judgment, this is properly arguable, and it is also properly arguable Mr Vieujot had an interest in the appointments in that they secured (or reinforced) his control of the company. I acknowledge that, as Mr Bheeroo submitted that, if appointed, both Mr Al Halabi and Mr Bheeroo would owe duties to the Company, and that it should not be assumed that they would be mere “puppets” of Mr Vieujot. But Mr Fikry is entitled to respond that, the duties notwithstanding, it was helpful to Mr Vieujot to have a sympathetic fellow-director and a sympathetic SEO. He is also entitled to ask why, if the real purpose of the appointments was to advance the interest of the Company, he was not given notice of the proposed appointments before the board meeting: the Company’s evidence does not engage with this. Mr Fikry’s evidence was that at the meeting he was “in effect ambushed by Mr Vieujot, having had no opportunity to consider the proposed appointments in advance”, and that allegation has not yet been convincingly answered.
50. I conclude that the conflict defence merits consideration at trial, and cannot be confidently assessed before trial.

The “balance of convenience”

51. The Company argued that it would suffer serious damage if the appointments were not recognised because it could not engage with and manage its financial problems, and that the matter was urgent not least because it required monthly capital injection to meet the conditions of its FSP. This argument assumes that interim declarations will be effective to have the authorities recognise and approve the appointments, and I shall come back to that.
52. Mr Khan submitted that the Company can carry on business and maintain its business without the appointments being recognised. He said the Company is seeking relief that would radically alter the balance of power on its board, marginalise Mr Fikry and alter the management and direction of the Company at an early state in its development. He submitted that it better maintains the status quo to refuse the application, and that pending trial the Company can be run according to written resolutions of the two directors.



53. I accept Mr Khan's submission about this. After all, the Company's claims are scheduled for trial in January 2018, only some three or four months after the hearing of the application for interim relief. It seems to me preferable to maintain the position as Mr Khan contends for this short period: in my judgment, this better maintains the balance of justice between the parties and the balance of convenience.
54. Another consideration to my mind supports this view: when an application for an interim injunction is granted, the applicant is commonly (although not invariably) required to give a cross-undertaking to pay damages to compensate the respondent if it later appears that the injunction should not have been made. I know of no case, and counsel were unable to refer me to a case, in which the applicant for an interim declaration has been required to give such a cross-undertaking, and Mr Bheeroo told me that no cross-undertaking is offered in this case. This aggravates the risk that, if an interim declaration is made and it later appears to be unjustified, injustice will be done to Mr Fikry.

Would an interim declaration have a practical purpose and resolve a dilemma that warrants the Court's intervention?

55. The courts do not make interim (or indeed final) declarations which serve no practical purpose. The Company argued that the declaration would serve a practical purpose and assist to resolve a genuine problem because it would provide a clear basis on which the FSRA and the Companies Registrar could act and would enable or encourage them to approve and register the appointments. Thus, it would be help to resolve the impasse that has been brought about by Mr Fikry's obstructive conduct. (I observe in passing that in fact the impasse has now apparently been resolved by Mr Fikry's resignation.) The argument seems to me to make assumptions that are not self-apparent or supported by evidence.
56. In particular, the regulation and supervision of a business such as the Company is the responsibility of the FSRA, and indeed the resolutions made the appointments subject to the FSRA's approval. There is no indication or suggestion that the FSRA has looked for, or would welcome, the Court's assistance in discharging its duties in this case. I am not persuaded that it would help the FSRA to grant the application or that it needs encouragement to carry out its role.
57. But it goes further than that. I see no reason that, if it sees fit, the FSRA should not consider what happened at the meeting of 31 July 2017 when deciding any applications relating to the Company and otherwise supervising, and discharging its duties about, the Company, its officers and its business. The FSRA is responsible for making its own assessment of that in so far as it considers it needs to do so. In doing so, it might properly consider information and representations made by Mr Fikry: there was no suggestion that Mr Fikry should be restrained from communicating with the FSRA or that the FSRA should not receive and form its own view about them. Nor is there any indication or suggestion that the FSRA has not been exercising its legal powers and carrying out its legal duties properly. In these circumstances, it is not for the court to interfere with the FSRA in making such assessments, reaching its decisions and carrying out the duties entrusted to it. Nor should the Court give the appearance of doing so.



58. The argument that it would assist the Companies Registrar, or the Registration Authority, to act on the application to register Mr Halabi's appointment, takes the matter no further. The appointment was subject to the approval of the FSRA, and it has not been explained what the Registrar might be expected to do unless and until that approval is given. The Authority raised this point in its communication of 6 September 2017.
59. As far as the resolution to appoint Mr Bentaleb is concerned, there is another reason that I refuse an interim declaration. No application has been made to the FSRA that his appointment be approved, and Mr Vieujot's evidence is that he has "expressed reservations about joining the Company once he learned that a current director is obstructing the decisions made by the Board", and that he "asked to be appointed only once these issues have been clarified". It appears, therefore, that Mr Bentaleb is not presently willing to accept the appointment: this in itself to my mind answers the argument that an interim declaration will resolve the impasse about his appointment.

The minutes

60. But this does not dispose of the application. The Company also contended that because of section 273 of the Companies Regulations the appointments recorded in the minutes are deemed valid unless and until the contrary is proved; and that I should make interim declarations to this effect: notwithstanding Mr Fikry's challenge to the appointments, their invalidity has not (or at least not yet) been proved.
61. I can deal with this submission briefly by reference to the reasons that I have already explained. In my judgment, if I am right that the balance of convenience falls against making interim declarations that the appointments are valid, equally it falls against making interim declarations that they are deemed to be valid. And, if I am right that declarations that the appointments are valid would not be effective to resolve a dilemma that the parties face, to my mind it follows a fortiori that declarations that they are deemed to be valid would not be so effective.

Conclusion

62. For these reasons, I concluded that the Company's application for interim declarations should be refused.
63. I am grateful to the legal representatives of both parties for their assistance on this application. The papers were presented in perfect order, and the standard of submissions on both sides was most impressive.



Linda Fitz-Alan
Registrar, ADGM Courts
Issued: 26 November 2017