FMT 21019 and 21020. Dalma Capital Management Limited and Zachary Cefaratti -v- DFSA.

Decision on costs and investigation costs.

1. The DFSA applies for its costs of the proceedings to be paid by the Applicants. It also applies for an order that the Applicants pay its costs of the investigation that led to the issue of the Decision Notices. We deal with each application separately.

Costs of the proceedings.

2. Under Article 31(9) of the Regulatory Law: "*At the conclusion of a proceeding, the FMT may also make an order requiring a party to the proceedings to pay a specified amount, being all or part of the costs of the proceedings, including those of any party.*"

3. This power is given effect by Rules 72 to 76 of the FMT Rules all of which are straightforward. The Regulatory Law and the FMT Rules establish a broad discretion on costs, as we have pointed out in the past. In Al Masah v the DFSA (FMT 19007) we said at paragraph 430: "*The FMT has been given a broad discretion which does not oblige it to adopt either a traditional 'costs follow the event' approach or one set out in a UK or other common law statute. The Tribunal needs to take a flexible approach to deal with the very varied and international range of issues it may have to address. While some cases may merit a 'costs follow the event' approach others may not.*" In Al Masah we said that an applicant's conduct may be relevant in consideration of a costs order where "*[t]he Applicants knew or should have known from the outset that if and when the truth emerged the applications were bound to fail whichever view of the law prevailed.*"

4. **DFSA submissions.** The DFSA submits that the Applicants should pay the costs of the proceedings as the unsuccessful party. It says that it was

successful on the central issue of whether Mr Cefaratti misled it. Further the Applicants knew from the start that they were bound to lose if the truth came out. Once the Tribunal had reached the truth Mr Cefaratti, only at the penalty stage, finally admitted that "*I have reconciled myself with the Tribunal's Decision and I accept the Tribunal's findings. I wish to start this statement with an unequivocal expression of regret and contrition.*"

5. **Applicants' submissions.** The Applicants point to the aspect of the Principle 2 charge on which they were successful. They rely on the fact that the remainder of the Decision was by a majority. They say that the evidence of Mr Allsop should not have been relied on. They contend that the correspondence 'Without Prejudice save as to costs' with its offers to meet substantial penalties shows that the case was not being unreasonably conducted. Finally, they say that as the penalties imposed by the DMC were reduced by us, they should not have to pay the costs of the penalty stage.

6. We have summarised the parties' submissions briefly but bear everything they have said in mind.

7. The Applicants should, in principle, be ordered to pay the costs of the DFSA. They knew from the outset that, if and when the truth emerged, the applications were bound to fail, except as regards one aspect of the Principle 2 charge. Mr Cefaratti knew, and finally admitted, that he and the other Applicant had persistently misled the DFSA. He then, in evidence, misled the Tribunal. The proceedings were unreasonably conducted by the Applicants. That is of course no criticism of their lawyers who were fulfilling their professional duty.

8. While it was sensible for the parties to seek a settlement, the without prejudice correspondence makes no difference. All the offers by the Applicants required the DFSA to accept that the misconduct was not deliberate, a condition that it rightly refused to meet as it would have been untrue. The other aspects of the proposed package were thereupon irrelevant.

9. The Applicants called two outside witnesses in support of their case on the Principle 2 point and those and other aspects of the issue need to be taken into account. That point needs to be kept in perspective however. It was a minor aspect of the overall case - as the reduction of $7,500 in each fine, small sums given the context, illustrates. Further if Mr Cefaratti had been truthful and candid in discussion and interview with the DFSA, as he should have been, the only issue between the parties would have been the fitness of Mr Dean to perform his role. The likelihood is that the matter would have been resolved without the DMC or a reference to this Tribunal or at worst, with a very limited one.

10. There is no reason not to award the costs of the penalty stage. The situation changed following Mr Cefaratti's admissions which were relevant to penalty. The situation might well have been different if the case had been one limited to penalty.

11. As we see it, it was entirely appropriate for Mr Allsop to be called as a witness as the DFSA might well have been criticised had he not been produced.

12. The fact that the Decision was by a majority is irrelevant for three reasons. First a majority decision is as valid as a unanimous one. Secondly the dissenting member did not suggest that Mr Cefaratti had acted honestly or was telling the truth. Thirdly, Mr Cefaratti's admissions at the penalty stage of the case removed any legitimate doubts about the truth of the matter.

13. It follows, in principle, that the proceedings were conducted unreasonably and that the Applicants should pay the administrative and external costs of the DFSA, their internal costs not being claimed. There seems no dispute about the reasonableness of the amount of those external costs. The DFSA has not charged for its employed legal team. The total claimed by the DFSA (AED327,031) will be subject to a small discount to take account of the mitigation points raised so that the order will be that the Applicants pay 85% (i.e., AED277,976) of the amount sought by the DFSA.

Investigation Costs.

14. Article 79(1) of the Regulatory Law states that the DFSA shall pay its investigation costs. This is subject to Article 79(2) which states:

"*Where, as a result of an investigation under Chapter 2 of Part 5, a person is found by:*

(a) the DFSA;

(b) the FMT; or

(c) the Court,

to have contravened a provision of the Law or of the Rules or of any other legislation administered by the DFSA, the FMT or the Court may order, on application brought by the DFSA, that the person pay or reimburse the DFSA in respect of the whole, or a specified part of, the costs and expenses of the investigation, including the remuneration of any officer involved in the investigation."

15. As a result of suspicions that Dalma had provided the DFSA with false and misleading information in its response to regulatory notices dated 23 July 2017, 25 April 2018 and 28 June 2018, the DFSA commenced an investigation on 19 July 2018. It seeks to recover costs from that point relying on the conduct established by this case.

16. The decisions in this case entitle the DFSA to apply for the costs of the investigation. The DFSA acknowledges that it has rarely, if ever, sought to recover its investigation costs under Article 79(2). We take that to be acceptance that it has not made such an application in any previous case.

17. The DFSA submits that this is not a reason for not treating the application on its merits and invites us to be guided by the approach of the Australian Securities and Investments Commission ("ASIC") to similar powers under

section 91 of the Australian Securities and Investments Commission Act 2001. In 2015, ASIC provided guidance as to its approach to ordering payment of its investigation costs, listing factors it will consider before making an order. These include the financial position of the person concerned, the degree of culpability of the person and the degree of cooperation provided to the ASIC investigation where this has significantly reduced its length. The DFSA says that where the Applicants have been found to be deliberately misleading, they cannot claim to have provided any sort of cooperation.

18. The Applicants submit that the DFSA's application is unprecedented. The fact that the DFSA is unable to cite a single previous occasion when it has been awarded investigation costs, even in the most egregious cases, should be a factor weighed by us. It shows that the power should only be exercised in cases where the conduct has been manifestly unreasonable and out of the ordinary.

19. The Applicants point out that the ASIC itself has only rarely used the power and further that the legislative regimes differ. ASIC has also stressed that the power is not intended to be punitive. The Applicants also submit that where costs have been awarded, they have been in cases where the facts are far removed from those in this one. They say that reliance by the DFSA on the ASIC precedent amounts to no more than suggesting, obviously mistakenly, that costs should be awarded because the Applicants can pay them, there was an investigation and they were unsuccessful.

20. The DFSA claims AED342,231 for the time of three of its Enforcement team, during the course of the DFSA's investigation into the Applicants between 2018 to 2020 and the expenses (AED44,146) they incurred on travel and incidentally. The Applicants object to these on three main grounds. First Enforcement staff are a fixed cost resource employed to carry out the regulator's statutory functions and would have been incurred in any event. Secondly the costs in the carrying out of this function, (and more) have already been recovered from the penalties which the Applicants have paid to the DFSA. Thirdly they point to the lack of detail in the calculation

in the amount of time and its costs claimed by the DFSA. They also object to some expenses, for example suggesting that it is unreasonable for them to pay for a business class trip to London to see a witness whom the Applicants say could easily have been interviewed online.

21. The power to award these costs exists. It is not for us to speculate why the DFSA has not invoked it before but it is fair to infer, as the Applicants do, that there must be some good reason why it has taken this unusual course. Once an application is made however it is for the Tribunal or the Court, not the DFSA to decide when, if at all, to make an order. While it is helpful to have been shown the ASIC examples we approach this from first principles, applying the wording of the provision to our Decision,

22. We consider that it is appropriate to make an order in this unusual case. The heart of this case is not, as it usually is, a breach of the rules in the management and conduct of an investment business, revealed by an investigation. It is in the abuse of, and contempt for, the investigation process itself. Hitherto reputable Applicants, who propose to continue to operate within the DIFC subject to the jurisdiction of the DFSA, have deliberately and seriously misled the Regulator about a minor breach of the rules by repeatedly lying to it. As a result, costs were needlessly incurred solely because the Applicants chose not to tell the truth. If there had been truthful responses to the regulatory notices, it is unlikely that there would have been an investigation. At present the cost of this abuse is borne by all the contributors to the DFSA. It is reasonable that the cost should be met by the perpetrators.

23. We do not accept that the cost has been met by the financial penalties imposed. These fines are set having regard to RPP 6 of the Sourcebook which lists many considerations - but not the costs of investigation. That is no doubt why neither party produced data or made arguments about these costs at the penalty stage. As the Decision shows, investigation costs played no part in that exercise. If the costs had been part of the financial penalty process, we would certainly have awarded them. The very existence of Article 79(2) illustrates that the costs are not part of the penalty process.

Fines also have to be set consistently with those in previous cases, so that the level for a future case is broadly foreseeable.

24. In a loose sense any payment by the Applicants to the DFSA might be said to reduce the investigation costs. This is similar to the Applicants' argument that the costs being claimed are largely fixed overhead ones and have not been incurred. We do not accept that argument. A permanent cost of employing investigators to look into wrongdoing is no doubt more efficient, more productive of expertise and cheaper than engaging outside firms. That is no reason not to require wrongdoers to contribute to what is a much cheaper (though more difficult to measure) cost than those of, say, a firm of lawyers or accountants. Further that is what Article 79(2) has in mind as it specifically includes within costs "*the remuneration of any officer involved in the investigation*".

25. We will therefore order the Applicants to contribute to the investigation costs by paying 80% (i.e., AED309,101) of the sum claimed. We reduce the sum to reflect some points made by the Applicants and to avoid unproductive detailed analysis of small items of expenditure.

26. While our decision on the legal and administrative costs is unanimous, that on investigation costs is by a majority. Mr Al Aidarous would not have awarded these given the views he has expressed in the Decision about the investigative process.

David Mackie on behalf of the Tribunal.
28 March 2023.