

Upgraded Protection: Security for Costs in DIFC Litigation

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The practical effect of the judgment is that it is arguably harder for Claimants to oppose an application for security on certain grounds. Al Tamimi represented the Defendant (the applicant) in this case.

The costs of litigation can be high and the prospect of the winning party not being able to recover its legal expenses makes for a shallow victory. Most common law jurisdictions allow a Defendant to secure a payment into court from a Claimant, as a precondition to being permitted to continue to pursue a claim. The purpose of granting security for costs is to provide costs protection to a Defendant who is forced into litigation at the election of another.

The rules governing the grant of security in DIFC Court litigation are contained in Part 25 of the Rules of the DIFC Courts (“RDC”) and are closely modelled on the English Civil Procedure Rules. Essentially an applicant for security, usually the Defendant in proceedings, must establish that the Claimant’s circumstances fit within one of the conditions set out under RDC 25.102, and, that in all the circumstances of the case it would be just to make an order for security. The latter effectively grants the Court an unfettered discretion as to whether or not it ought to order payment by the Claimant of the security requested. However, satisfying at least one of the RDC 25.102 conditions is a mandatory pre-requisite to the grant of security.

Of the six conditions, the two most frequently relied upon are conditions (1) and (6), which provide:

“(1) the Claimant is resident outside of the UAE

.....

(6) the Claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.”

The conditions reflect the circumstances in which a Defendant may typically be concerned about the prospects of recovering its costs against a Claimant, namely, where the Claimant does not reside in the jurisdiction where litigation is taking place and/or where the Claimant has dissipated assets to ensure that they remain beyond the reach of a Defendant seeking to enforce a costs order made in its favour.

Prior to Adil, it was unclear as to whether Claimants were entitled to rely on their UAE Residence Visas alone to establish that they were resident in the UAE. This meant that Claimants, who ordinarily resided abroad, but who had secured a UAE Residence Visa on the back of previous engagements or business interests within the jurisdiction, could arguably defeat an application for security by relying solely on their UAE Residence Visa as proof of their residence within the UAE, even though they did not actually reside in the UAE. In clarifying the correct approach to be taken, the Court of Appeal in Adil held that a person’s UAE Residence Visa was not determinative of their place of residence and that it was an error to wrongly confuse or conflate a person’s immigration status with the place in which he habitually resided.

In Adil, the Court of Appeal held that the test of residence was not whether a person held a valid UAE

Residence Visa, but rather whether or not they actually resided in the UAE. The question was to be determined by looking at all the facts in the round and not just the basis on which a person was granted leave to enter or remain in the UAE.

Following the decision in Adil, in deciding whether or not a person is resident outside the UAE, the DIFC Courts should take into account a multitude of factors, including a Claimant's length of stay, ties, interests and purpose in the UAE. This clarification is welcome news for Defendants justifiably concerned about the prospect of not being able to recover their costs from an unsuccessful Claimant who has a UAE Residence Visa but who in fact resides outside of the UAE. Such individuals are now more likely to fall within condition (1) of RDC Part 25.102.

The Court of Appeal's interpretation in Adil of condition (6) of RDC Part 25.102 is also of significant practical importance. At first glance condition (6) appears to be targeted at Claimants who sell or transfer their assets with the specific intention of defeating any attempts to enforce against their assets at a time when litigation is already underway or at least in the contemplation of the parties. In Adil, at first instance (CFI-015-2014-3) the Claimant argued that the transfer of the only property he owned in Dubai to his wife some 14 months prior to the commencement of litigation could not amount to a step taken in relation to his assets within the meaning of condition (6) because it was a step taken prior to any litigation being contemplated, let alone commenced. The Court of Appeal rejected this argument and held that condition (6) was drafted in objective terms and was not dependent on the subjective intention of the Claimant.

The Court of Appeal held that in order to fall within condition (6) it was not necessary to show that a Claimant had sold or transferred assets with the specific intention of putting their assets beyond the reach of a particular judgment creditor. In other words, the Court of Appeal held that a Claimant's motive in dealing with his assets was irrelevant for the purposes of condition (6). All that was required to be established was that the Claimant in question took a step in relation to his assets at some point and that the taking of that step made it difficult to enforce a costs award against him.

Once again, this aspect of the judgment is welcome news for Defendants seeking to protect themselves against sophisticated businessmen who choose to make themselves judgment proof well in advance of any litigation, on the assumption that sooner or later they are likely to be involved in litigation with the attendant risks of enforcement.

Notwithstanding the Court of Appeal's clarification, parties should continue to bear in mind that the Court ultimately retains an unfettered discretion to grant an order for security. Accordingly, satisfying one of the conditions under Part 25.102 will not of itself guarantee the grant of an order for security.

Nevertheless the overall result is the strengthening of an important safeguard designed to protect Defendants from the risk of being unable to recover costs from Claimants who do not prevail at trial.