In the name of His Highness Sheikh Tamim bin Hamad Al Thani,

Emir of the State of Qatar

IN THE CIVIL AND COMMERCIAL COURT

OF THE QATAR FINANCIAL CENTRE

FIRST INSTANCE CIRCUIT

7 June 2017

CASE NO: 01/2016

HAMMAD SHAWABKEH

Claimant

v

DAMAN HEALTH INSURANCE QATAR LLC

Defendant

JUDGMENT ON COSTS

Members of the Court:

Justice Robertson

Justice Hamilton

Justice Arestis

ORDER

Having accepted jurisdiction in this matter, the Court determines:

1. The reasonable costs in the substantive case are now determined to be QAR 270, 589.35 and the Claimant shall pay that sum to the Defendant; and

2. No costs shall be payable to or by either party in respect of the review.

JUDGMENT

Introduction

1. This is a challenge against a decision of the Registrar, dated 5 March 2017, awarding the Defendant QAR 310,589.35 in costs. By virtue of Article 33.5 of the Court's Regulations and Procedural Rules, decisions made by the Registrar as to costs are susceptible to "review" by the Court.

Procedural Background

2. In a Claim Form, issued by the Registry on behalf of the Court on 20 March 2016, the Claimant commenced proceedings before the Court against the Defendant. He claimed the sum of QAR 617,400.95 from the Defendant pursuant to the terms of a medical insurance policy which covered the Claimant and his wife. The Defendant denied liability and, in due course, the matter was listed for trial.

3. The trial began, before this Court, on the 6 November 2016 and lasted for 3 days. The Claimant, who was unrepresented, gave evidence and a number of witnesses- both expert and lay- were called by the Defendant.

4. In a judgment dated 20 November 2016, this Court dismissed the Claimant's claim and ordered him to pay the Defendant's "reasonable costs in the case, if not agreed such reasonable costs to be assessed by the Registrar."

5. Thereafter, the Claimant sought permission to appeal. Permission to appeal was refused by the Appellate Division (Lord Phillips of Worth Matravers, President, Justices Rajah and Kirkham) in a judgment dated 15 February 2017.

6. As to the issue of costs, the Parties, though given ample time in which to do so, were unable to agree what constituted reasonable costs. There was interchange between the Parties but the Defendant contacted the Registry of the Court on 23 January 2017 informing it that the Parties had been unable to reach agreement as to the issue of costs and requested that the timetable for the filing and service of submissions as to costs- previously imposed by the Registrar but later suspended by him at the request of the Parties- be "reinstated".

7. The same day the Registrar notified the Parties that the timetable had been reinstated. In accordance with that timetable, the Defendant filed and served its Schedule of Costs and accompanying submissions on 2 February 2017. The Claimant, having been granted an extension of time by the Registrar, filed and served his response on 16 February 2017. The Defendant filed and served a reply on 23 February 2017 which, in addition to responding to points raised by the Claimant, also sought to answer specific

questions raised by the Registrar. The Claimant filed and served a response to the reply on 28 February 2017.

8. The Registrar invited submission from the Parties as to whether or not an oral hearing was necessary in order to determine the matter of costs. The Claimant requested that he be permitted to make submissions in person at a hearing. The Defendant argued that such an approach was "disproportionate" and that the matter should be determined on the basis of written submissions alone. For reasons which he gave at paragraph 8 of his decision, the Registrar concluded that it was unnecessary to hold a hearing and proceeded to determine the matter on the basis of written submissions alone.

9. Of the QAR 720,162.87 claimed, in his decision dated 5 March 2017, the Registrar awarded the Defendant QAR 310,589.35. The Registrar gave the Parties 14 days in which to seek a review of his decision before the Court.

10. Neither Party sought to challenge the decision of the Registrar within the 14 day period. However, on 21 March 2017 the Claimant sought an extension of time in which to do so. The Court granted an extension (during which time either- or both-Parties could file and serve such a challenge) until 4pm on 30 March 2017.

11. The Claimant formally requested a review of the Registrar's decision on 26 March 2017.The defendant has not challenged any aspect of the Registrar's assessment.

12. On 2 April 2017 the Court issued Directions as to what was required of the Parties on a Review. It directed that, by no later than 16 April 2017, the Claimant was to file and serve, in bullet-point form, the specific findings of the Registrar's Costs Assessment

which he sought to challenge, along with a summary of his reasons in support of the challenge. The Defendant was directed to file and serve, in like form, a response 14 days thereafter.

13. In accordance with the Directions, on 16 April 2017 the Claimant filed and served his challenge. The Defendant filed and served its response on 30 April 2017. In it the Defendant maintained the stance that an oral hearing was not necessary

14. The Defendant subsequently advised that it would not participate in a Review hearing, a possibility which had been recognised by the Court.

15. We concluded that because there were new issues of principle and practice which needed to be articulated there should be a hearing.

16. Before turning to the specific factual circumstances of this case we consider the scope of the review which the Court undertakes, what is meant by "reasonable" costs in this context and whether it is mandatory for the Registrar to conduct an oral hearing in reaching an assessment. The following comments must be read in the context of Article 4 of the Regulations and Procedural Rules ("the Rules") which provides:

> *"4.1 The overriding objective of the Court is to deal with all cases justly.*
>
> *4.2 The Court must seek to give effect to the overriding objective when it exercises its functions and powers given by the QFC Law, including under these Regulations and Procedural Rules and under QFC Regulations.*
>
> *4.3 Dealing with cases justly includes, so far as practicable:*

4.3.1 ensuring that litigation before the Court takes place expeditiously and effectively, using appropriately no more resources of the Court and the parties than is necessary;

4.3.2 ensuring that the parties are on an equal footing;

4.3.3 dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues, facts and arguments, and to the financial position of each party; and

4.3.4 making appropriate use of information technology.

4.4 It is the duty of the Court to deal with all cases in accordance with the overriding objective.

4.5 It is the duty of the parties to any case before the Court to assist the Court in determining that case in accordance with the overriding objective."

Scope of Review

17. Rule 33.5 of the Rules provides that where the amount of costs has not been agreed between the parties "the necessary assessment will be made by the Registrar, subject to review if necessary by the Judge". The Claimant has challenged the Registrar's assessment of costs. It is accordingly incumbent upon the Court to consider at the outset the scope of its jurisdiction to entertain such a challenge, a matter which does not appear previously to have been addressed by the Court. The expression used in the Rules is "review", not "appeal". That choice of language points to the jurisdiction not

being, ordinarily at least, one of re-assessment of the Registrar's detailed assessment of costs but of considering whether the Registrar has erred in principle or in some other fundamental respect in his assessment. The Registrar, as an officer of the Court, is best placed to assess what by way of costs are appropriately to be met by the paying party and in what amount. In making such an assessment he is vested with a wide discretion. It is only if it is demonstrated by the aggrieved party that he has failed to exercise that discretion or has misdirected himself in the exercise of it that the Court would be justified in interfering with his assessment. This approach to a court's function in reviewing an assessment of costs made by one of its officials is consistent with practice elsewhere. When it was put to him the Claimant accepted that this was the correct approach.

Reasonable

18. The Rules are silent as to the criteria against which the Registrar should make his assessment. Nor is there any prescribed scale of fees as found in some jurisdictions. This case is not concerned with recovery of costs on an indemnity basis but with what is reasonable on a party and party basis.

19. In this case the Registrar has, at paragraphs 9-12 of his Costs Assessment, identified the principles which he has applied in making his assessment. He says:

> *"The Court's Regulations and Procedural Rules do not provide a great deal of guidance when it comes to the issue of how costs are to be assessed. Instead, Article 33.1 gives the Court a very wide discretion as to the types of order it can make. In this case, the Court has ordered that the "reasonable costs" incurred by the*

Defendant- as the successful party- are recoverable from the Claimant.

How is the issue of reasonableness to be approached? In my judgment, in order to be recoverable costs must be both reasonably incurred and reasonable in amount. If they are not then they are unlikely to be recoverable.

I have identified the following (non-exhaustive) list of factors which will ordinarily fall to be considered when assessing whether or not costs have been reasonably incurred by a party and, if they have, whether they are also reasonable in amount:

(a) Proportionality;
(b) The conduct of the parties (both before and during the proceedings);
(c) Efforts made to try and resolve the dispute without recourse to litigation (for example through Alternative Dispute Resolution);
(d) Whether any reasonable settlement offers were made and rejected; and
(e) The extent to which the party seeking to recover costs has been successful.

When considering the proportionality factor, the following (again non-exhaustive) factors are likely to fall to be considered:

(a) In monetary or property claims, the amount or value involved;
(b) The importance of the matter(s) raised to the parties;
(c) The complexity of the matter(s);
(d) The difficulty or novelty of any particular point(s) raised;
(e) The time spent on the case;
(f) The manner in which work on the case was undertaken; and

(g) The appropriate use of resources by the parties including, where appropriate, the use of available information and communications technology.

20. The Court is satisfied that these principles, adopted by the Registrar, are sound and approves them recognising, as the Registrar did, that the factors identified are non-exhaustive. Again, when put to him, the Claimant had no objection to the principles or to the factors which the Registrar had identified as appropriate to his task of making an assessment of "reasonable" costs.

Mandatory Hearing

21. The Claimant complains that he was not afforded an oral hearing by the Registrar. The Rules do not prescribe any specific procedure to be followed in relation to a costs assessment; nor is there any established practice in that respect. In these circumstances, the Court is satisfied that, in the matter of the procedure to be adopted in a particular case as in the making of the assessment itself, a wide discretion is to be afforded to the Registrar. In some courts, where the parties or their legal representatives are commonly based locally, it may be mandatorily established, by rules or by practice, that there be an oral hearing before the official or officials making the assessment; this may be both practicable and efficient, including efficient in minimising the costs involved in ancillary procedures such as an assessment of costs. But in this Court, where one (and potentially both) of the parties and any legal representatives may reside or have their establishment outside the jurisdiction it may be disproportionate to have a procedural arrangement which requires in every case attendance by a party or its legal representative before the Registrar. There may, of course, be some cases in which a fair assessment cannot be made without an oral

hearing. But that will depend on the particular circumstances. It is only if the Registrar has fundamentally misdirected himself in confining submissions on costs to written argument that the Court would be justified in interfering with his assessment on that ground.

22. The Claimant accepted before us that an oral hearing before the Registrar was not mandatory in all cases but maintained that the Registrar should have afforded him such a hearing because he was an unrepresented litigant and because the costs claimed by the Defendant were unreasonable. But the circumstance that a party is not legally represented does not, as a general rule, mean that he should be afforded an oral hearing. Such a party can, unless there are special circumstances, make his submissions as readily in writing as orally. In this case the Registrar, at paragraph 8 of his Costs Assessment, concluded that an oral hearing was unnecessary. He added: "The written submissions are, for the most part, clear and I am able to discern both parties' positions as to the various issues involved. A hearing would only escalate the already substantial amount of costs which are being claimed and in the circumstances of this case...I do not consider it to be in the interests of justice to allow that to happen." We see no misdirection in that approach. Nor can the circumstance that a party claims that the costs sought by his opponent are unreasonable justify, as a general rule, there being an oral hearing before the Registrar. In all the circumstances we are satisfied that the Registrar did not misdirect himself in deciding that the submissions made to him (which in the event were two sets of submissions by each of the parties) should be confined to submissions in writing. Further, it may be observed that the Claimant was, for the reasons expressed in paragraph 15 above, afforded an oral hearing by the Court. Subject possibly to one matter (to which we shall return-

see paragraph 30), the Claimant did not at that hearing advance matters orally which were not adequately expressed in his various written submissions.

General Observation

23. Litigants of limited means, including litigants in person, should not be deterred from seeking access to the Court because of an apprehension that, if they lose, they will be made liable to pay excessive costs incurred by their opponent. Likewise, any attempt by a litigant of substantial means to inflate its costs with a view to exerting pressure on an opponent of much lesser means should be actively discouraged by the Court. That said, the general rule is that the unsuccessful party should pay the costs of the successful party (Article 33.2 of the Rules). In this case the Court ordered that the unsuccessful Claimant pay "the Defendant's reasonable costs in the case". For the reasons explained fully in his Costs Assessment, the Registrar substantially reduced the costs claimed by the Defendant: the total costs claimed were QAR 720,162.87, the total costs allowed QAR 310,589.35. The reduction was accordingly in total about 56%. The amount claimed in the action was QAR 617,400.95.

The Circumstances of the Case

24. While the Defendant submitted to the Court a written response to the Claimant's challenge for review, it did not there, or otherwise, challenge any of the restrictions which the Registrar had made to its claimed costs. Consequently, we have not in this review considered these aspects.

25. As stated above, this Court has no prescribed scale of fees recoverable on an assessment. The Registrar took, as the starting point for his assessment of the element of the fees claimed in respect of the services of the solicitors, Pinsent Masons LLP,

the rates stated to have been charged to the Defendant by that firm. The hourly rates for the various members of staff, legal and paralegal, were set out in a Schedule to the Defendant's Submissions on Costs, together with the hours stated to have been spent by each such member of staff in work on this case. The two members of staff who, according to the Schedule, spent by far the largest number of hours on it were Mr Tom McDonnell, an "Associate" or "Senior Lawyer" apparently in the Dubai office (207.9 hours), and Mr Roger Phillips, "Legal Director" apparently in the Qatar office (114.9 hours). The total number of hours said to have been spent by staff at Pinsent Masons LLP on the case was 389.1, the total amount chargeable for these services, applying various rates for particular members of staff, being QAR 681,950.00. The Defendant in its Submission on Costs restricted that element of its claim to QAR 500,077.10, being the amount, it was said, Pinsent Masons LLP had invoiced to it and which it had actually paid. The Registrar rightly recognised that the maximum which the Defendant could claim against the Claimant by way of its costs for the services of Pinsent Masons LLP was the amount which had actually been charged to the Defendant by that firm, any discount from its chargeable fees being a matter solely between the Defendant and the firm.

26. The Claimant maintained that the Registrar took the wrong starting point. As to the matter of hourly rates there could, in the judgment of the Court, have been a difficulty in the Registrar taking as his starting point the rates used by the particular firm of lawyers engaged by the party claiming recovery of costs from its opponent. These may be extravagant, or markedly out of line with those which would have been charged by other firms providing equivalent services. But, in this case, that difficulty is avoided by regard being had to rates actually charged by another firm of lawyers

who had a role, albeit a limited role, in this case. The Claimant himself at one stage engaged the services of Jumah Nasser Al-Kaabi Law Firm, based in Doha. In the event, that firm only provided limited services- a total of 15 hours provided by various members of staff, with a total charged of QAR 24,500. The Claimant did not engage that firm to act further for him. He told us that that was, for among other reasons, because he could not afford their services for later stages in the case. But what is significant is that the hourly rate charged by that firm for the services of a "Sr. Legal Consultant" was QAR 2,000, a higher rate than for Mr McDonnell (between QAR 1,550 and QAR 1,865) and not much lower than for Mr Phillips (QAR 2,300). The Claimant told us that the documentation showing the rates charged by Jumah Nasser Al-Kaabi Law Firm was before the Registrar. In these circumstances it cannot be said that the hourly rates used by the Registrar were plainly wrong.

27. The Claimant maintained further that the number of hours appearing in Pinsent Masons LLP's Schedule (389.1) was extravagant, reliance being placed on the number of hours (15) which Jumah Nasser Al-Kaabi Law Firm had charged for. But, the latter firm was only marginally engaged in work on this case. There is no basis on which the Court could conclude that the number of hours in Pinsent Masons LLP's Schedule was manifestly extravagant for work on this case. It should also be borne in mind that the fees invoiced to the client (and used by the Registrar), being the product of the rates and the hours, were significantly less than the total value appearing in the Schedule.

28. The Claimant also maintained that the amount of costs assessed was extravagant having regard to "the market" in Qatar. He stated that the market cost for litigation

services in Qatar was a maximum of 5% (and ordinarily between 1% and 2%) of the value of the claim in issue. But, there was no material before the Registrar nor is there before the Court which would allow any such "market" cost to be taken into account.

29. For these reasons this Court sees no ground for interfering with the Registrar's assessment of the costs with respect to the services of Pinsent Masons LLP. These costs were substantially discounted by him, the amount allowed in this respect, being, for various reasons given by him, reduced by 55%.

30. More radically, the Claimant maintained that the figures in the bills of costs claimed by the Defendant were "fictitious" in the sense that there was no proof that the Defendant had actually paid its lawyers the amounts in question. There was, he said, an absence of proof of payment; there were no receipts. This basic challenge was not properly focused in any of the written submissions made by the Claimant. It emerged, at least with clarity, only for the first time at the oral hearing before this Court. Insofar as it seeks to import any dishonesty on the part of the Defendant (or its lawyers) the Court rejects it without hesitation. There is no proper foundation for such a serious allegation. In any event, it is misconceived. What the successful Defendant is entitled to recover from the unsuccessful Claimant is not restricted to what it has proved it has actually paid by way of costs. It is sufficient that the Defendant is legally liable to its lawyers for those costs.

31. In his written submission to the Court the Claimant maintained that the "Defendant had its own employed legal advisors, and didn't require to hire any more". At the oral hearing it emerged that the legal advisers referred to were in–house lawyers with whom the Claimant had had email correspondence at early stages of his claim.

Nothing is known about the legal experience or seniority of the legal advisers referred to. In particular, it is unknown whether they had any experience of conducting contentious litigation. There is no warrant for the proposition that the Defendant was, in the circumstances of this dispute, disabled from engaging outside lawyers to conduct the litigation on its behalf and from including their charges in its claim for costs.

32. The Claimant told us that he approached this Court on the basis that, in contrast to the local Qatari courts, it was "free". This Court's services are indeed free in the sense that no court fees are payable for litigating before it. But, that does not mean that an unsuccessful litigant, in appropriate circumstances, may not be made liable to his successful opponent in costs. Article 33.2 of the Rules (which are published and readily available) provides:

> *"The general rule shall be that the unsuccessful party pays the costs of the successful party. However, the Court can make a different order if it considers that the circumstances are appropriate."*

The rationale of the general rule is that, the Court having found that a party has failed in its claim (or in its defence), the successful party has unnecessarily incurred costs and so should, to some extent at least, be reimbursed. The rule may be otherwise in some other jurisdictions. But so long as Article 33.2 remains a rule of this Court, it must be applied.

33. The Registrar also included in his award costs incurred in respect of Counsel's fees and outlays, fees and outlays incurred in respect of a medical witness (Professor Waxman) and certain other disbursements. Subject to paragraph 35 below, no material issue arises before this Court in relation to these last disbursements. As to Professor Waxman, the Registrar in his assessment substantially reduced the amount recoverable from the Claimant (from QAR 60,898.38 to QAR 28,829.26). Again, subject to paragraph 35 below, the Court finds no sufficient ground for interfering with the restricted sum.

34. As to Counsel's fees and outlays, the Registrar again substantially reduced the amounts recoverable. Subject to what follows, the Court finds no reason to interfere with that assessment. The Registrar in this context referred to *Case No 2 of 2016; Khalid Abusleibah v Qatar Financial Centre Authority*, a decision of the First Instance Circuit of the Court issued on 28 June 2016. The Registrar distinguished the circumstances of that case from those of the present (the former was a much simpler case, involving no oral testimony). For the reasons he gave, the distinction was justified.

35. However, there is one aspect of his treatment of Counsel's fees and of the remaining fees and disbursements which the Court finds troubling. In assessing the fees recoverable with respect to Pinsent Masons LLP, the Registrar restricted these in two broad respects: first, in respect of two matters ((a) the charges for preparing the trial bundle of documents and (b) the charges for the number of the Defendant's lawyers who attended the hearing) and, second, in respect of two issues ((i) the issue of whether the Claimant and his wife had travelled to America with prior knowledge of her medical condition and (ii) the issue of whether there had been timeous notification

of the claim). In the second of these broad respects the Defendant had failed, on the evidence, to satisfy the Court that the contentions it raised were made out, although it had ultimately been successful in resisting the claim as a whole. The elements on which it had failed had occupied time and involved costs. The Court is of the view that, in the interests of consistency, this discounting of fees, which is not challenged in respect of the solicitors' fees, should also have been applied to those of Counsel, to those of Professor Waxman and to the other disbursements. The nature of this ground for modifying the recoverable costs is such that it should be applied to all the costs. This inconsistency is a matter which, in the judgment of the Court, is open to correction on a review. Doing the best it can and applying a broad brush, the Court considers that a further discount of QAR 40,000 is appropriate. An order is made accordingly.

36. In the course of the hearing before us the Claimant made reference to a figure in respect of costs which was the subject of discussions between the parties in relation to a possible settlement. That figure is not one which should have been disclosed to the Court and cannot be taken into account by it.

37. In this case an oral hearing in the review took place before the Court. That was for the reasons stated in paragraph 15 above. These circumstances are exceptional. Ordinarily, the Court may find it can deal with any review of an assessment of costs solely on the papers.

By the Court,

Justice Bruce Robertson

Representation:

For the Claimant: The Claimant appeared at the oral hearing in person and was not represented.

For the Defendant: Written submissions were filed on behalf of the Defendant (by Pinsent Masons LLP, Dubai) but the Defendant did not attend the hearing and was not represented.