ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION
BETWEEN

ELNAGGAR & PARTNERS LIMITED
Claimant

and

ABU DHABI GLOBAL MARKET REGISTRATION AUTHORITY
Defendant

JUDGMENT OF JUSTICE WILLIAM STONE SBS KC

Neutral Citation:	[2023] ADGMCFI 0019
Before:	Justice William Stone SBS KC
Decision Date:	24 October 2023
Hearing Date:	5 October 2023
Decision:	1. These proceedings be dismissed. 2. There be an order *nisi* that costs of and incidental to the proceedings be to the Defendant: a. such costs to be summarily assessed in the absence of agreement between the parties, and b. the order to become absolute, in the absence of any application to vary the terms of the Order filed by no later than 4.00 pm on 7 November 2023.
Date of Order:	24 October 2023
Catchwords:	Statutory appeal. Record of beneficial owners. Monetary Penalty Notice. Principal Findings Record. Compliance with sections 2 and 3 of the Beneficial Ownership and Control Regulations. Whether decision made was wrong in law or is in excess of jurisdiction.
Legislation cited:	Beneficial Ownership and Control Regulations 2018 Commercial Licensing Regulations 2015 ADGM Courts Regulations 2015
Cases cited:	*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223
Case Number:	ADGMCFI-2023-071
Parties and representation:	**Claimant** Mr Hari Krishna of Nimble Legal **Defendant** Mr Patrick Dillon-Malone SC of Clyde & Co LLP

JUDGMENT

Background

1. This is a statutory appeal brought by the Claimant (the "**Company**"), an 'ADGM Licensed Person', against the Defendant, the Abu Dhabi Global Market Registration Authority (the "**RA**"). The appeal arises from the decision by the RA on 13 April 2023 to issue a "*Monetary Penalty Notice*" (the "**MPN**") to the Company for its failure to comply with sections 2 and 3 of the Beneficial Ownership and Control Regulations 2018 ('**BOCR**'), referred to in this judgment as the "**Decision**".

2. Jurisdiction for the appeal is founded in section 25(1) of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the "**Courts Regulations**"), which states:

"Any order, judgment, decision or procedure made by any Global Market's Authority may be appealed against or questioned by any interested party, or by any party to the proceedings, on the grounds that it is wrong in law or is in excess of jurisdiction by applying to the Commercial and Civil Division of the Court of First Instance."

3. Section 25 of the Courts Regulations is to be read together with Rule 230(A) of the ADGM Court Procedure Rules 2016 (the "**CPR**"): CPR 230A(2) reflects the permissible grounds for appeal set out in section 25(1) of the Courts Regulations and Rule 230A(3) mandates that any appeal is to be brought using the Rule 30 procedure, which is the procedure used in this case.

4. These provisions are supplemented within sections 19(7) and 19(8) of the BOCR, which state as follows:

> *"(7) A person, who receives a monetary penalty notice under this section may refer to the Court for review of –*
>
> *(a) the issue of the monetary penalty notice;*
> *(b) the amount of the fine specified in the notice*
>
> *(8) Court Procedure Rules may make provision for any reference to the Court under subsection (7)."*

5. Accordingly, the appeal is to be determined on the basis of whether the Decision was wrong in law or is in excess of jurisdiction.

BOCR: Relevant Provisions

6. The BOCR, which was enacted on 17 April 2018 and came into force on 17 October 2018, has as its descriptive title "*Regulations to make provision for beneficial ownership and control systems for legal entities registered in the Abu Dhabi Global Market*."

7. The RA's position is that the provisions directly in issue in this case relate to the *internal* record keeping of the Company (sections 2 and 3 of the BOCR), and *not* the corresponding statutory requirement to submit such record to the "*Registrar who may use the contents of such record when establishing the Register...*" (sections 4 and 5 of the BOCR). The Claimant disagrees and avers that compliance with sections 4 and 5 of the BOCR constitutes compliance with sections 2 and 3.

8. Under the heading "*Record of beneficial owners*", section 2(1) of the BOCR provides that *"Each ADGM Person must keep a record of the required particulars of its beneficial owners in a record referred to in these Regulations as the "**record of beneficial owners**",* the required particulars being set out in section 2(5). Section 3(1) provides that *"An ADGM Person must take reasonable steps to ensure that the particulars recorded in its record of beneficial owners are true, accurate, complete and up to date".*

9. In turn, section 4 refers to the necessity within one month of the establishment of its own record of beneficial owners for each ADGM Person to submit *"a true, accurate, complete and up-to-date copy of its record of beneficial owners to the Registrar"*. Section 5 provides that within 15 days of an amendment or change of such record, the Registrar must be correspondingly notified.

The Monetary Penalty Notice

10. The MPN cited the failure of the Company to comply with sections 2 and 3 of the BOCR, and stated that pursuant to section 19 of the BOCR, the Company was required to pay the specified fine of USD 5,000 by no later than 13 May 2023.

11. The MPN records that on 24 May 2022 the RA had informed the Company that it was conducting an assessment of its compliance with specified areas of ADGM's commercial legislation, and that one of those areas was "*compliance with BOCR 2018*".

12. The MPN states that pursuant to such assessment, the Company had submitted to the RA a copy of its "*Record of Beneficial Ownership*" which was annexed to the MPN and had been submitted to the RA on 15 June 2022 (the "**June 2022 RBO**"). The MPN records that the June 2022 RBO: (i) did not include five particulars (itemised at a-e) as required under section 2 of the BOCR, and (ii) further, that the record included only one beneficial owner (Mr Ahmed Elnaggar), whereas the RA's "*record based on filing made*" by the Company to the RA had included two additional beneficial owners (Ms Hannah Elnaggar and Mr Zidane Elnaggar).

13. Accordingly, based on these facts, the RA concluded that the Company had failed to comply with sections 2 and 3 of the BOCR and that within the confines of a "*level 7 fine*" (whereby the maximum was not to exceed USD25,000), a fine of USD5000 was to be imposed.

The Evidence

14. Three witnesses provided witness statements in this case and were subject to cross examination at the hearing: Mr Ahmed Elnaggar, the founder of the Company, and two employees of the RA, namely Mr Collin Wu, Section Head of the RA's Monitoring Section, and Ms Ruqaya Salman, Acting Head of the RA's Enforcement Section.

15. The primary factual events which have taken place are not in dispute (albeit certain inferences arising therefrom may be), nor is there any suggestion in the papers or assertion in the oral evidence that this is a case involving allegations of lack of *bona fides* or of improper commercial activity on the part of the Company or of Mr Elnaggar personally.

Background Facts

16. The background facts giving rise to this appeal are in relatively short compass.

17. The Company was incorporated and registered in the ADGM as a private company limited by shares, and was licensed to conduct the activities of a 'Company Service Provider and Legal Consultancy' (the "**CSP**"): as such it is an 'ADGM Licensed Person' and subject to supervision by the RA.

18. On 12 April 2021, the ADGM's CSP framework came into force, the purpose of which was to ensure a robust regulatory regime for the provision of company services in ADGM. In light of the introduction of this framework, and the greater regulatory requirements placed on CSPs as a result, the decision was made to assess certain CSPs to monitor compliance: as Mr Wu noted, the RA did not have the resources to monitor every CSP for the period 2022-2023, and so a number, including the Company, were selected.

19. On 24 May 2022, a "*Firm Assessment Letter*" (the "**FAL**") was issued to the Company (in addition to a number of other selected CSPs). This letter followed the RA's standard template, identified the scope of the assessment, and highlighted the requirement to provide documents and information pursuant to section 29 of the Commercial Licensing Regulations 2015 ("the "**CLR**"). The FAL specifically confirmed that the assessment would cover compliance in terms of the Company's "*Record of Beneficial Ownership*", and a copy of this document (together with other documents and information) was required to be provided to the RA by 15 June 2022.

20. On 15 June 2022, the Company sent to the RA documents and information in response to the FAL including the June 2022 RBO. This document showed (incorrectly) that Mr Ahmed Elnaggar was the sole beneficial owner of the Company: it is this document which has been responsible for a significant degree of confusion and debate in this case, and has been referenced in argument by Mr Dillon-Malone SC for the RA as "*the centrally relevant document*".

21. The evidence from Mr Wu, which the Court accepts, is that on review of the material supplied by the Company in response to the FAL, he had noticed that the June 2022 RBO, which had disclosed Mr Elnaggar as the sole beneficial owner of the Company, differed from an earlier online registry filing which had stated that there were four beneficial owners of the Company, and that this discrepancy warranted clarification.

22. On 23 November 2022, Mr Wu sent an email to the Company to schedule a monitoring assessment meeting to discuss the matters arising from review of the documents provided by the Company: this, he said, was a standard part of the RA's supervisory assessment process, was designed to raise any preliminary findings, and to provide 'Licensed Persons' with the opportunity to provide further explanation or responses to such findings.

23. The monitoring assessment meeting took place by videoconference on 30 November 2022 (the "**November Meeting**") and was attended by representatives of the RA and the Company. Two separate matters (amongst it appears many other matters) were discussed at this meeting: first, the beneficial ownership record of one of Mr Elnaggar's clients, Valley Water, and thereafter the Company's own beneficial ownership record. It is common ground that Mr Wu informed Mr Elnaggar at the November Meeting that the Company would receive a letter in mid-December setting out the remediation expected by the RA which would follow an email referencing outstanding items which appeared not to have been provided.

24. At this meeting it is not disputed that Mr Wu raised the fact that the June 2022 RBO provided by the Claimant did not fully comply with the particulars required under section 2 of the BOCR, and also raised the discrepancy between the particulars noted on the June 2022 RBO and the particulars as appeared in the online registry filings. It is also not in dispute that at the November Meeting, Mr Elnaggar acknowledged the preliminary findings and issues of concern to the RA and stated that they should be clarified, and did not then provide any further explanation or clarification of the June 2022 RBO.

25. On 20 December 2022, the RA issued, via the Company, an "*Assessment Closure Letter & Remediation Plan*" to Valley Water requiring that entity to provide updated corporate registers. The Company provided those documents to the RA on 19 January 2023. However, no such letter was issued to the Company itself.

26. Subsequently on 14 March 2023, the RA emailed the Company a document titled "*CSP Assessment – Principal Findings Record*" (the "**PFR**"), which required the Company to respond with its planned actions to 13 "*findings*" by 28 March 2023. Finding no. 5 in the PFR relates to the Company's "*Record of beneficial owners*" and records that: "*The firm's record does not fully comply with the required particulars as per the regulations…Furthermore the record and a BO chart provided only discloses Mr Ahmed Elnaggar as 100% BO via Elnaggar Family Foundation. Online registry records confirm the Foundation, but notes that there are three BOs supported by confirmation form dated 24 Oct 2022, not one BO.*" In the PFR, the RA also made observations regarding the Company's compliance in respect of its "*Register of members*" and "*Register of Directors*".

27. On 17 March 2023, Mr Wu referred the matter to the RA Enforcement Section for further consideration. In his evidence, he noted that during the nine month period which had elapsed from the time of submission of the June 2022 RBO, the Company had failed to update that record or to clarify the discrepancy between that document and the Company's online registry filings.

28. On 28 March 2023, the Company returned the completed PFR signed by Mr Elnaggar, in which Mr Elnaggar responded: "*The firm is in the process of updating this register*". The PFR template (as signed by the Company) also contained the following acknowledgment: "*ELNAGGAR & PARTNERS LIMITED acknowledges the findings and undertakes to complete the planned actions without delay. The firm understands that the Registration Authority reserves the right to require the firm to provide evidence of*

completed actions and refer matters of non-compliance for enforcement action without further notice."

29. On 13 April 2023, the MPN was issued which contains the Decision.

30. On 19 April 2023, Mr Elnaggar sent an email to the RA on behalf of the Claimant to explain that the June 2022 UBO was out-of-date and had been submitted to the RA as the result of "*an administrative mistake*". Mr Elnaggar's email noted that the Company's record of beneficial owners on the RA portal had been updated and correct since April 2022. Mr Elnaggar went on to detail the relevant sequence of events and the change in the beneficial ownership of the Company between April and October 2022 and requested a call to discuss.

31. On 26 April 2023, Ms Salman, whose evidence the Court also accepts, responded by email. She noted that the MPN was founded both on a lack of required particulars and that "*the Elnaggar BO Record did not include details of the two beneficial owners that were appointed in April 2022 and filed with the RA*". Ms Salman also invited Mr Elnaggar, if he so wished, "*to submit further representations to the RA*" by way of a "*written response addressing Elnaggar's failure to comply with sections 2 and 3 of Part 1 of BOCR (keep record of beneficial owners up-to-date)*."

32. Mr Elnaggar responded by email the same day emphasising that the June 2022 UBO had been sent by mistake and that in the circumstances a penalty of USD 5000 was "*quite an aggravation*" and requested a meeting. Ms Salman responded by email later that same day stating that: Mr Elnaggar had been provided with an opportunity to meet with the RA Monitoring team on 30 November 2022 in which Mr Elnaggar's feedback had been sought in relation to the "*Elnaggar UBO Record*"; the recording of that meeting had been reviewed in addition to all other correspondence including the written response from the Company on 28 March 2023 (which the Court takes to be the PFR, as signed and returned); and that based on this material the "*UBO record was not up to date during the assessment period*".

33. This email (the last communication between the parties prior to the commencement of these proceedings on 15 May 2023) concluded with Ms Salman stating that she would appreciate if "*the established process of providing any additional response or representations in response to the Penalty Notice is followed*", and that such representations be provided in writing.

Relief Sought

34. The Claimant seeks an order that: (i) the Decision be quashed; and (ii) that the Decision be substituted with the Court's own decision confirming that the Company complied with the BOCR on the relevant date.

35. Alternatively, the Claimant seeks an order that the MPN be remitted to the RA with a direction to reconsider the matter and to reach a decision in accordance with the findings of the Court; and that the RA pay the costs of this appeal.

The Issues

36. Mr Krishna acknowledged that in this appeal he had the burden of establishing that, by imposing the fine pursuant to the MPN, the RA acted either in error of law or had acted in excess of jurisdiction. Mr Krishna accepted, at least implicitly, that unless this statutory benchmark is satisfied, this appeal does not succeed. In attempting to discharge this burden, Mr Krishna spread his net wide, and that which follows represents a summary of the points variously advanced in support of his client.

(1) Relevant date for determining compliance with the BOCR

37. The Particulars of Claim assert that although the PFR was issued in March 2023, with the MPN following in April 2023, nevertheless the relevant date for determining the Company's compliance with the BOCR is 15 June 2022, being the date upon which the Company provided its response to the FAL.

38. The Court rejects this proposition, and accepts the RA's case that the period for assessing compliance ran from issuance of the FAL on 24 May 2022 through to the conclusion of the assessment process, in this instance upon the issuance of the MPN on 13 April 2023. The Company was accorded opportunities throughout the assessment process to explain to the RA the discrepancies that had been identified (in terms both of the required particulars and the correct identity of the beneficial owners), but for some reason this did not occur.

39. The view of the Court is that the RA was entitled to have regard to the entirety of the evidence during that period, and to act accordingly.

(2) Procedural error on the part of the RA: Absence of 'Warning Notice'

40. It is asserted that the imposition of the MPN represented an error in law as the procedure adopted by the RA did not comply with the requirement inherent in section 17(2) of the BOCR, which provides as follows:

> *"It is a defence for an ADGM Person, charged with failing to comply with a duty imposed on him under these Regulations or any rules made under these Regulations, to prove that the ADGM Person took all reasonable steps to attempt to comply with the duty".*

41. Mr Krishna argued that the RA was in clear breach of this requirement. He said that at the November Meeting, Mr Elnaggar had been promised a "*closure letter*" anticipated to arrive in mid-December 2022 that would set out the expected remedial actions in respect of the Company's corporate registers, but no such letter was issued (albeit that Valley Water had received such a letter consequent upon the matters discussed in the November Meeting.)

42. Instead, what had happened, Mr Krishna said, was that in April 2023 the RA's Enforcement Section had issued the MPN, which contained no provision for the Company to make any representations, let alone to invoke its right under section 17(2) to prove the steps it took to comply with its duties under the BOCR.

43. At first blush this appears an attractive point. In his evidence Mr Wu accepted that Mr Elnaggar was informed at the meeting that a "*closure letter*" was to be forthcoming, and that as a matter of fact one had not been sent. However, he indicated in cross-examination that there had been a change of policy, "*we had enhanced our process*" and instead, a PFR had been sent to the Company.

44. As to the PFR, Mr Krishna acknowledged its existence but dismissed its significance, observing that this document as issued by the RA's Monitoring Section simply reserved the RA's right to seek evidence of completed actions and to refer matters of non-compliance for enforcement action.

45. The PFR itself is a not insubstantial document, and a response from the Company was required by 28 March 2023. The detailed findings of the RA are in tabular form, and item 5, headed "*Record of beneficial owners*" covers two areas: first, the statement that "*The firm's record does not fully comply with the required particulars as per the regulations*"; and second, that "*the record and a BO chart provided only discloses Mr Ahmed Elnaggar as 100% BO via Elnaggar Family Foundation*" whereas "*online registry records confirm the Foundation, but notes that there are three BOs supported by confirmation form dated 24 Oct 2022, not just one BO*". In answer thereto, and in the box entitled "*Firm planned action*", appears the statement "*The firm is in the process of updating this register*", which (whatever now is said as to its meaning) seems to the Court clearly to mean, as Mr Dillon-Malone suggests, that this must be a reference to the internal record of beneficial owners of the Company – in context it cannot mean anything else.

46. As noted above, the final box at the bottom of the PFR template reads: "*ELNAGGAR & PARTNERS LIMITED acknowledges the findings and undertakes to complete the planned actions without delay. The firm understands that the Registration Authority reserves the right to require the firm to provide evidence of completed actions and refer matters of non-compliance for enforcement action without further notice*."

47. This document, as completed, bears the signature of Mr Elnaggar and is dated 28 March 2023. True it is that it was not a 'warning notice' (as that term is described in the CLR) as such, but the reality is that the Company was left in little doubt as to what was concerning the RA, why, and what needed to be done to cure the defects, pending which enforcement action loomed.

48. The other aspect of this argument is that within the statutory BOCR scheme there is no equivalent requirement for a 'warning notice'. Perhaps better would be if there was, but the legislature has chosen not to include this requirement, and there is not.

49. Mr Krishna recognised this difficulty and sought comfort in the CLR and suggested that the provisions regarding warning notices can be construed as applying, *pari passu*, to the BOCR., The provisions that Mr Krishna seeks to rely on are contained in "*Part 4: Enforcement*" of the CLR. Section 41(2) of the CLR states that:

> "*If the Registrar considers that a person has committed a contravention of an enactment or subordinate legislation, it may impose a fine of an amount not exceeding the maximum specified for such contravention in the relevant enactment or subordinate legislation*."

50. Section 43(1) of the CLR mandates that if the Registrar proposes to impose a fine on a person under section 41, it must give that person a 'warning notice'. Section 43(2) states that: "*A warning notice about a proposal to impose a fine must state the amount of the fine*". Additional requirements in relation to warning notices are set out in section 47 including that the warning notice "*must specify a reasonable period (which may not be less than 14 days) within which the person to whom* [the notice] *is given may make representations to the Registrar*."

51. Mr Krishna sought to rely on section 41(2) of the CLR, the effect of his submission being that the generic term "*an enactment*" can be extended to legislation not yet in existence at the time CLR was enacted. He buttressed his submission under this head by pointing to the word "*charged*" in the opening sentence of section 17(2) of the BOCR, and the implication arising from the use of that term.

52. On the latter point, true it is that the word "*charged*" is redolent with criminal law implication, where there are strict requirements to enable preparation of a defence, but this must be construed in context. This case involves the issue of a fine for administrative infraction of the BOCR. The RA's preliminary findings were set out in detail in the PFR, and in this circumstance the Court regards this term as connoting no more than any person being seized with an allegation of any such infraction: or, put another way, the PFR constituted a 'charge' for the purposes of this statute.

53. On the broader construction submission, the Court is unpersuaded by Mr Krishna's submission to incorporate, by reference to section 41(2), the warning notice provisions of the CLR into the separate legislative regime under the BOCR. The CLR predates the BOCR by three years, so that the latter statute is not only later but more specific. Accepted principles of statutory construction do not warrant importing regulations under general provisions of the CLR into subsequent and particular regulations such as the BOCR, which are silent on the matters Mr Krishna now argues should be included by, in effect, a process of necessary implication. It seems tolerably clear that the regulations respectively enacted in the CLR and in the BOCR represent particular sets of regulations for specified purposes, and that as a matter of construction the alleged breach of either set of regulations is to be considered within the confines of each set of regulations.

54. The Court recognises that in offering the Company an opportunity to make written representations consequent upon imposition of the MPN – an opportunity that Mr Elnaggar did not take up – that the RA was acting extra-statutorily. However, the fact that the RA chose not similarly to act extra-statutorily in provision of a 'warning notice' prior to imposition of the MPN does not invalidate what in fact was done.

55. In the Court's view, what in fact was done by the RA, in particular via the PFR, to bring what was perceived to be an internal BOCR discrepancy to the attention of the Company was more than sufficient to preclude any broad 'natural justice' argument over and above the requirement of the BOCR.

56. Mr Dillon-Malone submitted in closing argument that the facts speak for themselves, and with this the Court agrees. In the relevant assessment period, the Company had had ample opportunity to clarify the matters which had been concerning the RA in terms of the BOCR record. Perhaps the most surprising aspect of this case is that it was not until Mr Elnaggar's post-MPN email on 19 April 2023 that the explanation of "*administrative mistake*" first was proffered to the RA, and even then Mr Elnaggar eschewed the opportunity formally to make written representations in response to Ms Salman's invitation.

57. The Court appreciates that at this stage Mr Elnaggar may have been feeling frustrated that his email explanation was not immediately accepted, and that his request first for a call and then for a meeting to discuss what by then had occurred was not acceded to. However, to decline the invitation to make formal written representations (which may well have led to reduction by the RA in the amount of the fine levied) and immediately to institute this action was perhaps a step too far in the circumstances.

58. It follows from the foregoing that the Court declines to accept the Company's submission that in acting as it did the RA was guilty of procedural error and/ or that the Decision was wrong in law or that in acting in the way that it did the RA had deprived the Company of the opportunity to raise a section 17(2) statutory defence. To the contrary, the facts are that issuance of the MPN took place 10 months after the original submission of the erroneous June 2022 RBO, and at no point during the intervening assessment process was the RA informed that the erroneous document had been sent by mistake, or provided adequate explanation or clarification of the deficiencies which the RA had identified and about which it was concerned.

(3) A true and correct BOCR record otherwise available

59. A theme in this appeal on behalf of the Company is that a true and correct record of beneficial owners had been filed with the RA on its online portal as of April 2022, and that at the time of the Defendant's request for documents in May 2022 this was the relevant record of beneficial owners; moreover the Company had kept its record of beneficial owners up to date and had notified the RA of all the changes through its portal.

60. In response, the RA says that this document was not brought to its attention by the Company at any stage during the assessment process as reflecting the correct position (as it then was), nor was it mentioned and nor was any representation made in terms of a correct record having already been separately filed. To the contrary, on 15 June 2022 the Company had sent in what admittedly was a non-compliant and erroneous record of its beneficial owners, and the Court considers that in the circumstances the RA was entitled to consider, and thereafter to conclude, that there had been a failure to maintain an up-to-date record. Accordingly, the Court finds that the April 22 filing does not have the consequence that the decision of the RA to issue the MPN was rendered wrong in law (or was issued in excess of jurisdiction).

61. The argument about the April 2022 filing renders it the more surprising that the erroneous submission of the June 2022 RBO was not immediately identified as such by Mr Elnaggar, and that it was not until almost a year later, on 19 April 2023, before the "*administrative mistake*" (as it turned out to be) was identified.

62. It also strikes the Court as unreasonable to expect the RA, which oversees the administration of over 6,000 companies in the ADGM, unilaterally to investigate its data base in order to attempt to understand what would have taken the Company, which was responsible for the mistake in the first place, no more than a timely email to clarify. Accordingly, in the context of the present debate this point gains little traction.

(4) Compliance with filing under BOCR sections 4 and 5 in itself conclusive of compliance with sections 2 and 3

63. As a concomitant to the submission under (3) above, Mr Krishna suggests that compliance by his client of the duty under sections 4 and 5 of the BOCR *ex hypothesi* must mean that there has been compliance under sections 2 and 3.

64. With respect, the Court cannot see how this can or should be the case. The legislature has imposed distinct duties within the statutory framework of the BOCR, sections 2 and 3 relating to the quality of internal record keeping, and sections 4 and 5 dealing with the responsibility properly to file on the RA's portal. If correct, this submission would imply that a section 4 and 5 filing constitutes the entire obligation, and that once completed the RA necessarily must accept that there has been compliance with sections 2 and 3, and cannot inquire further as to the Company's own record of beneficial owners or seek to enforce the separate obligations thereunder. This argument strikes the Court as ambitious and misconceived: in principle the fact that there has been a correct filing on the portal subsequent to submission of an erroneous document cannot be conclusive of the duty separately imposed by the legislature under sections 2 and 3.

65. Accordingly, this point similarly is rejected.

(5) Excess of jurisdiction

66. The Court has difficulty in identifying precisely where the submissions as to errors of law end and those relating to the RA acting in excess of jurisdiction begin: perhaps the true position is that there is substantial factual overlap.

67. In any event, and giving the Company's argument a fair wind, this proposition appears grounded in the argument that the RA's assessment in this matter was misplaced and unreasonable, and that such assessment was based on a document erroneously submitted as opposed to a document (or documents) which had been separately (and correctly) filed.

68. Thus it is variously said (albeit with differing degrees of emphasis) that in the circumstances: (i) the RA took account of an irrelevant consideration (namely the June 2022 RBO); (ii) the RA failed to take into account a relevant consideration (namely, the correct April 2022 filing); (iii) the RA erroneously sought to compare the June 2022 RBO with the position documented on the RA's register as at October 2022 (by which time the position with the Company's ultimate beneficial owners had in any event changed); (iv) the RA's decision was irrational in law; (v) the RA acted in a discriminatory manner and in breach of a legitimate procedural expectation of the Company; and/ or (vi) the RA unlawfully and wrongly fettered its discretion by application of a blanket policy and giving effect to a pre-determined outcome.

69. The Court rejects each of these arguments. The allegation that in its actions and/ or in exercising its discretion the RA took account of irrelevant matters or conversely failed to take account of relevant considerations is rejected for the reasons otherwise dealt with in the earlier part of this judgment.

70. In relation to the comparison drawn in the Decision, while the Decision appears to compare the June 2022 RBO with the position documented on the RA's register as of October 2022, that does not invalidate the Decision. The June 2022 RBO was inconsistent with what was recorded on the RA's register between the period April to October 2022. Furthermore, the basis for the Decision was two-fold: first, the June 2022 RBO did not include the required particulars (para. 8); and second, there was a discrepancy in the beneficial owners of the Company (para. 9).

71. There is no indication on the evidence of any fixed 'blanket policy' far less a pre-determined outcome on the part of the RA, which, it must be said, went out of its way to obtain the clarification it sought in terms of the erroneous June 2022 RBO, and thus the Court is unable to identify any wrongful fettering of administrative discretion.

72. Breach of legitimate procedural expectation in part refers to the fact that Mr Elnaggar was told by Mr Wu in the November Meeting that a "*closure letter*" would be sent to him in December 2022, and as a matter of fact there was no such letter. This point may have had more force absent the PFR, which subsequently was sent, and was detailed in its descriptions of the information the RA was seeking. This was a document which Mr Elnaggar (on behalf of the Company) completed, signed and remitted to the RA. By his signature, Mr Elnaggar specifically acknowledged the findings in the PFR and undertook to complete the planned actions without delay, so that he cannot now be heard to say that he had misapprehended what was required. Furthermore, by his signature he also indicated that he understood the RA's right to require evidence of completed actions and to refer matters of non-compliance for enforcement action without further notice.

73. The Court does not accept that the Company suffered actionable causative harm by the absence of the promised "*closure letter*", nor is it accepted that on the evidence before the Court that the RA acted in a discriminatory manner. The Court understands that when Mr Elnaggar met with Mr Wu in November 2022 that part of that interview concerned the activities of one of the Company's clients, Valley Water, that that company had received a letter of the type Mr Wu had said would be sent to the Company, and that Mr Elnaggar had been anticipating similar action. However, it seems to the Court that this is as far as it goes in light of the content of the PFR. Nor is the Court sympathetic to any suggestion that Mr Elnaggar had made incorrect assumptions as a consequence of his interaction with the RA. Mr Elnaggar is an impressive individual, a lawyer, and clearly intelligent.

74. Complaint is also made on the papers that the Company was unfairly selected for monitoring and assessment, and also that the Company was treated unfairly by the RA following the decision to impose the MPN. The Court can see nothing in this point. Mr Wu made it clear that the Company was selected in accordance with the RA's objective 'risk-based' criteria, and the Court has no reason to doubt that evidence. Ms Salman explained that the RA had a policy of requiring written representations directed to mitigation, that this had been explained to Mr Elnaggar, and that she was ready to consider any such representations he might choose to make. No evidence has been led to justify any submission of discriminatory treatment, and to be fair Mr Krishna avoided this in oral submission. In principle, the Court is resistant to discrimination arguments in terms of the treatment which may have been meted out to other companies, and is in no position to speculate about why the RA did or did not adopt a particular procedural course in other situations: the RA regulates, and unless there is clear evidence of legal administrative error resulting in unfairness to the regulated person the Court will be loath to interfere.

75. As to irrationality, or what is colloquially termed "Wednesbury unreasonableness" (in the sense that no reasonable person acting reasonably could have made the decision in question, after the celebrated decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), the Court sees no evidence of that on the evidence in the present case, and the point likewise is rejected.

(6) The alleged 'Portal Representation'

76. It is suggested on behalf of the Company that the pro forma statement on the RA's portal relating to the filing of the record of beneficial owners that the record as lodged "*is accepted as filed as true, accurate and complete and up-to-date based on requirements contained in the provisions of ADGM Beneficial Ownership and Control Regulations*" amounts to a representation by or on behalf of the RA that there had been compliance with sections 2 and 3 of the BOCR.

77. The Court fails to see the logic of this assertion, and rejects the idea of any such representation arising on behalf of the RA. To the contrary, the clear purpose of this language is to emphasise that the company filing the record bears primary responsibility to ensure that the record as filed as to beneficial ownership and the particulars attached thereto are true, accurate and up-to-date. With respect, the Court fails to understand how this could be considered otherwise.

Conclusion

78. On the evidence in this case, it cannot reasonably be said that the RA did not fairly investigate in this case or denied the Company the opportunity to make representations: on the facts, quite the opposite is the case.

79. After considering the totality of the evidence, the Court holds that this appeal fails, and must be dismissed.

80. There will be judgment accordingly. As to costs, these must be in the case, and the Court makes an order *nisi* to this effect.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
24 October 2023

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