

In the name of His Highness Sheikh Hamad bin Khalifa Al-Thani,
Emir of the State of Qatar

IN THE CIVIL AND COMMERCIAL COURT

OF THE QATAR FINANCIAL CENTRE

9 December 2010

CASE NO: 01/2010

IN THE MATTER OF THE

WINDING UP OF AL MAL BANK LLC

TAMIR E OMARA

v.

AL MAL BANK LLC (IN LIQUIDATION)

JUDGMENT ON COSTS

Members of the Court:

Justice Dohmann

Justice Lord Cullen

Justice Sackville

ORDERS

The Court **DETERMINES** that:

1. The Bank pay the Applicant's costs of the wrongful dismissal proceedings determined by the Court on 7 June 2010.
2. The Applicant's costs of the referred proceedings determined by the Court on 16 August 2010 be paid out of the assets of the Bank in the winding up.
3. The Applicant's costs referred to in Order 2 be treated as costs and expenses properly incurred by the Liquidators for the purposes of art 91(2)(B) of the *Insolvency Regulations*.
4. The Applicant's own costs recoverable in the wrongful dismissal proceedings are limited to his photocopying expenses.
5. The Applicant's costs recoverable in the wrongful dismissal proceedings include the fees of Mr de Lacy QC in the sum of £28,000.
6. The Applicant's costs recoverable in the wrongful dismissal proceedings include 75% only of Ms van der Croats' reasonable fees and travel and accommodation expenses.
7. The Applicant's costs recoverable in the referred proceedings include the fees of Mr de Lacy QC assessed at £6,500.

JUDGMENT

THE COURT:

1. Mr Tamir Omara (*“the Applicant”*) has applied for costs orders in his favour in two sets of proceedings in which he has been involved. In this judgment we address his claims for costs orders. We also determine some general issues relating to the assessment of costs pursuant to the orders that we consider should be made. If more detailed questions of quantification remain, we would expect them to be referred to the Registrar of the Court.

BACKGROUND

2. By Particulars of Claim dated 15 April 2010, the Applicant commenced proceedings against the Al Mal Bank LLC (*“Bank”*) claiming a declaration that his employment with the Bank had been unlawfully terminated on 24 December 2009 (*“wrongful dismissal proceedings”*). The Applicant also claimed damages in respect of sums allegedly due to him under his contract of employment; loss of future income; and injury to his feelings and pain and suffering attributable to his wrongful dismissal.
3. On 31 May 2010, the Court dismissed an application by the Applicant in the wrongful dismissal proceedings for summary judgment against the Bank. On that date, the Court decided that the case should go to trial on 5 June 2010 on the question of whether the Applicant had been unlawfully dismissed by the Bank. The hearing duly took place on 5 June 2010.
4. On 6 June 2010, on the application of a creditor of the Bank, the Court made an order for the winding up of the Bank: *Diener v Al Mal Bank LLC* (Case No 002/2010).
5. On 7 June 2010, this Court delivered a judgment in the wrongful dismissal proceedings in favour of the Applicant. The Court declared that the dismissal of the Applicant by the Bank was unlawful: *Tamir Omara v Al Mal Bank LLC*

(Case No 001/2010). In the judgment, the Court made directions for the parties to file written submissions for the further conduct of the proceedings. The Court also drew attention to art 82(1) of the *QFC Insolvency Regulations* (No 5 of 2005) ("*Insolvency Regulations*"), which provides that, where a winding up order has been made, no action or proceeding shall be proceeded with against the company except by leave of the Court.

6. The Court subsequently directed the Liquidators to adjudicate on the Applicant's claims for damages or compensation. The Liquidators carried out the adjudication directed by the Court. However, they were uncertain as to whether a sum of QR 19,500 claimed by the Applicant as a bonus was due to him under his contract of employment. The Liquidators accordingly referred questions to the Court pursuant to art 95(1) of the *Insolvency Regulations* ("*referred proceedings*").
7. The Court received written submissions from the Liquidators and from the Applicant in the referred proceedings and heard brief oral argument on 12 August 2010. In a judgment delivered on 16 August 2010, the Court determined that the Applicant was entitled to payment of the sum of QR 19,000 as the "*two months (special payment) bonus*" referred to in Section 5.2 of the Bank's HR Policies & Procedures Manual: *In the Matter of Al Mal Bank LLC (In Liquidation); Tamir Omara v Al Mal Bank* (Case No 006/2010).

THE COSTS APPLICATIONS

8. The Applicant filed submissions on 22 September 2010, seeking orders that the Bank pay his costs in relation to:
 - (a) the wrongful dismissal proceedings; and
 - (b) the referred proceedings.
9. The Applicant contended that costs should follow the event and that, as he had succeeded in both proceedings, costs orders should be made in his

favour. He submitted that no allowance should be made for the Bank's success on the summary judgment application in the wrongful dismissal proceedings because the Bank had been unprepared to proceed on that day (31 May 2010) and, in any event, he had ultimately succeeded in his claim for declaratory relief. The Applicant also claimed that costs should be allowed on an indemnity basis, including a generous allowance for the time the Applicant himself devoted to his claims.

10. In submissions dated 30 September 2010, the Liquidators responded to the Applicant's contentions. Among other responses, the Liquidators stated that they would require evidence to support the costs claimed by the Applicant in both proceedings.
11. On 14 October 2010, the Court made the following direction:

"Mr Tamir Omara has made an application for costs and the liquidators have replied among other matters on 30th September and have said that they would need to see vouchers, fee notes and so forth in support of the costs that are claimed. That request appears to us to be reasonable and should be complied with."

On 19 and 25 November 2010 Mr Omara's representatives subsequently provided further material in response to the Court's direction and in response to the Liquidators' further submissions dated 10 November 2010.

REASONING

Costs Orders

12. The Liquidators do not dispute that the Court should order that the Bank pay the Applicant's costs of the wrongful dismissal proceedings. Nor do the Liquidators suggest that the Applicant should be deprived of any of his costs in the wrongful dismissal proceedings because he failed to persuade the Court to grant summary judgment in his favour. In any event, we do not think it appropriate to deprive the Applicant of any of his costs for that reason. The

summary judgment application did not take up substantial court time and did not require the parties to duplicate the work required for the hearing on the merits. Accordingly, the Applicant is entitled to an order that the Bank pay his costs of the wrongful dismissal claim.

13. The Liquidators also do not dispute that the Applicant is entitled to an order for the payment of his costs in the referred proceedings. Such an order should therefore be made.

The Applicant's Own Costs

14. The Applicant seeks a very large sum in respect of the time he claims to have devoted to "*case preparation*" and other forms of preparation for the hearing of the wrongful dismissal proceedings. He claims QR 312,000, based on a calculation of 185 hours case preparation at a notional rate of QR 1,600 per hour, and a further 16 hours of "*witness statement preparation*" at QR 1,000 per hour.
15. No cogent basis has been put forward by the Applicant for this extravagant claim. It has not been explained why it was necessary or appropriate for him to spend 201 hours in preparing his case. Nor has any basis been shown as to why the Bank or its creditors should pay the Applicant QR 1,000 or more per hour for the time he devoted to preparations.
16. In any event, where an Applicant is represented by senior and junior counsel, as occurred in the present case, a costs order in favour of the Applicant would not ordinarily include any component for his or her own time. It is not necessary to determine whether, in some circumstances, a modest allowance might be made for the time necessarily devoted to a case by an unrepresented litigant. It is enough to say that no such allowance should be made in this case.

17. The Applicant is, however, entitled to claim QR 696 claimed by him as expenses incurred in photocopying documents in connection with the wrongful dismissal proceedings.

Senior Counsel's Fees

18. Mr de Lacy QC has provided evidence of his letter of engagement in the wrongful dismissal proceedings and of the basis on which he calculated his fees. In our view, the fees charged by Mr de Lacy were reasonable. Accordingly, the costs order in the wrongful dismissal proceedings should be taken to include Mr de Lacy's fees of £28,000.
19. We consider that it is reasonable to allow Mr de Lacy the sum of £6,500 for his fees in relation to the referred proceedings. It follows that the costs order in favour of the Applicant in these proceedings should be taken to include his fees, assessed at £6,500.
20. Subject to verification (which appears to have been provided), the respective costs orders also should be regarded as covering Mr de Lacy's reasonable travel and accommodation expenses.

Junior Counsel's Fees and Expenses

21. In principle, reasonable fees charged by junior counsel (Ms van der Craats) and her reasonable travel expenses are covered by the respective costs orders. The Liquidators' submissions contended that additional information was required to substantiate the reasonableness of Ms van der Craats' hourly rates and her charges for travel time.
22. By submissions dated 25 November 2010, Ms van der Craats provided additional information. This should suffice to enable the Liquidators to make any necessary determination. If they still dispute Ms van der Craats' claims, the dispute will be resolved by the Registrar.

23. However, there is one point we should address. Since Ms van der Craats appeared for Mr Nazim Omara, as well as for the Applicant (although principally for the Applicant), during the hearings held between 4 and 8 June 2010, the costs order in the wrongful dismissal proceedings should be taken to cover only 75% of Ms van der Craats' fees and reasonable travel and accommodation expenses in relation to her participation in those hearings. The Court makes no order in favour of junior counsel with regard to the referred proceedings, which were dealt with by Mr de Lacy QC.

Priority

24. The Applicant submits that the costs orders in his favour should be given priority in the liquidation over the Bank's unsecured creditors. This claim seems to be put on three alternative bases:
- (a) any costs order made by a court has an independent priority on the liquidation of a company;
 - (b) the costs orders in each proceedings should be regarded as costs and expenses properly incurred by the Liquidators in the exercise of their functions; and
 - (c) it would be unfair for the Liquidators (who were unsuccessful) to receive their costs in priority to unsecured creditors, but for the Applicant (the successful party) to be relegated to a position of parity with the unsecured creditors.
25. Article 91(1) of the *Insolvency Regulations* states the general principle of equality in the distribution of the assets of a company in liquidation:

"Subject to the provisions of these Regulations as to preferential payments ..., the Company's property in a winding up shall on the winding up be applied in satisfaction of the Company's liabilities which rank pari passu and, subject to that application, shall (unless the articles otherwise provide) be distributed among the members

according to their rights and interests in the Company, save that a creditor may agree to rank in priority after any other debts.”

26. Article 91(2) qualifies the general principle as follows:

“In a winding up, the priority of payments shall be as follows:

- (A) secured creditors to the extent of their security;*
- (B) costs and expenses, including the Liquidator’s remuneration, properly incurred by the Liquidator in the exercise of his functions;*
- (C) preferential creditors as defined in Article 148; then*
- (D) unsecured creditors.”*

27. Article 148 provides as follows:

“A reference in these Regulations to the preferential debts of a Company is to the debts listed in this Article 148, and references to preferential creditors are to be read accordingly:

- (1) so much of any amount which is owed by the Company to a person who is or has been an employee of the Company by way of remuneration, which shall include any notice period not exceeding three months as does not exceed the sum of US\$50,000;*
- (2) so much of any amount which is owed by the Company to a person who is or has been an employee of the Company by way of reasonable accrued holiday remuneration and reasonable contributions to occupation pension schemes; and*
- (3) taxes, financial penalties and fees owed by the Company to the State, the QFC Authority, the regulatory Authority and the CRO.”*

28. The *Insolvency Regulations* do not contain a saving for powers of the court, as is the case in England. There the *Insolvency Rules 1986* (SI 1986/1925) provide (in r 4.220(1)) that in a winding up the priorities laid down by the Rules

are subject to the power of the court under s 156 of the *Insolvency Act 1986* (UK). Section 156 empowers the court, in the event that the assets of the company are insufficient to satisfy the liabilities, to make an order as to the payment out of the assets of the expenses incurred in the winding up in such order of priority as the court thinks fit: see *In re MT Realisations Ltd* [2004] 1 WLR 1678 (Laddie J). The Applicant, however, cannot rely in the present case on any similar statutory power in the court to vary the order of priority laid down in the *Insolvency Regulations*.

29. Nonetheless, it is well-established that where a liquidator, in the proper exercise of his or her powers, institutes unsuccessful proceedings in the name of the company, a costs order in favour of the successful party is payable in full out of the assets of the company. In the late nineteenth century, this principle was founded on the proposition that successful litigants in proceedings involving a company in liquidation should not have to compete with unsecured creditors to whom the company was indebted at the date of winding up: *In re London Metallurgical Company* [1895] 1 Ch 758, at 763, per Vaughan Williams J. In more recent times, costs orders made in these circumstances have been regarded as costs and expenses properly incurred in the winding up, which are usually accorded priority by the relevant legislation: see, for example, *Jeffcott Holdings Ltd (in liq) v Young* (1995) 16 ACSR 33 (Supreme Court of South Australia).
30. Under art 91(2)(B) of the *Insolvency Regulations* priority over unsecured creditors is given to “costs and expenses ... properly incurred by the Liquidator in the exercise of his functions”. There is no difficulty, in our judgment, in regarding the Applicant’s costs of the referred proceedings to be within the priority accorded by art 91(2)(B). The Liquidators, quite properly, referred questions for the Court’s determination, pursuant to art 95(1) of the *Insolvency Regulations*. The costs order in favour of the Applicant in the referred proceedings can be characterised as costs properly incurred by the Liquidators in the exercise of their functions. Accordingly, by virtue of the costs order in the referred proceedings, the Applicant is entitled to be paid his costs out of the Bank’s assets in priority to the Bank’s unsecured creditors.

31. The position is, however, different with respect to the Applicant's costs of the wrongful dismissal proceedings. These were instituted and heard before the Court made the order for the winding up of the Bank, even though judgment was not delivered until the day after the winding up order was made. The Liquidators did not defend the proceedings in their capacity as such and none (or virtually none) of the Applicant's costs of conducting the wrongful dismissal proceedings were incurred after the winding up order was made. Moreover, the Applicant's claim was not to recover moneys that were due to him at the date his employment was terminated (the moneys that otherwise would be entitled to priority under arts 91(2)(C) and 148(1), (2)). Rather his claim, in substance, was for damages for wrongful dismissal.

32. It is true that an application was made on behalf of the Bank, in anticipation of the Court making a winding up order, for an order under art 81 of the *Insolvency Regulations*. The effect of the order sought, and made by the Court, was that the Bank's expenses of defending the Applicant's claim were not to be regarded as a disposition by the Bank made after the commencement of the winding up (a winding up is deemed to commence at the time of the winding up application: art 87 of the *Insolvency Regulations*). Accordingly, legal fees and outgoings could be paid to the Bank's legal representatives without a risk that the payments would have to be returned following the winding up of the Bank. The making of the order under art 81 does not, however, alter the character of the legal expenses incurred by the Applicant in pursuing his claim for wrongful dismissal.

33. It follows that no basis has been put forward by the Applicant for asserting priority over the unsecured creditors under the scheme established by the *Insolvency Regulations*. In these circumstances, the Applicant's costs of the wrongful dismissal proceedings must rank with the claims of other unsecured creditors.

ORDERS

34. The orders we propose to make are the following:

1. The Bank pay the Applicant's costs of the wrongful dismissal proceedings determined by the Court on 7 June 2010.
2. The Applicant's costs of the referred proceedings determined by the Court on 16 August 2010 be paid out of the assets of the Bank in the winding up.
3. The Applicant's costs referred to in Order 2 be treated as costs and expenses properly incurred by the Liquidators for the purposes of art 91(2)(B) of the *Insolvency Regulations*.
4. The Applicant's own costs recoverable in the wrongful dismissal proceedings are limited to his photocopying expenses.
5. The Applicant's costs recoverable in the wrongful dismissal proceedings include the fees of Mr de Lacy QC in the sum of £28,000.
6. The Applicant's costs recoverable in the wrongful dismissal proceedings include 75% only of Ms van der Croats' reasonable fees and travel and accommodation expenses.
7. The Applicant's costs recoverable in the referred proceedings include the fees of Mr de Lacy QC assessed at £6,500.

Representation:

The Court dealt with the Application in Court and later on written submissions. The last written submission was from Ms. Prudence van der Craats dated 25 November 2010.

For the Applicant: Mr. Richard de Lacy QC (3 Stone Buildings, London, UK) and Ms. Prudence van der Craats (Kings Bench Chambers, Dorset, UK)

For the Liquidators: Mr. Michael Swainston QC and Mr. Edward Harrison (Brick Court Chambers, London, UK) and Mr. Irvine Marr and Mr. Mark Beswetherick (Clyde & Co, London, UK)
