

**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

12 December 2010

CASE NO: 09/2010

IN THE MATTER OF THE
WINDING UP OF AL MAL BANK LLC

NAZIM OMARA

v

AL MAL BANK LLC (IN LIQUIDATION)

JUDGMENT ON APPLICATION
TO DISCHARGE FREEZING ORDER

Members of the Court:

Justice Dohmann

Justice Lord Cullen

Justice Sackville

ORDERS

1. The application to discharge the order made on 14 October 2010 ("*Freezing Order*") is dismissed.
2. Mr Omara is to comply with paras 8-12 of the Freezing Order within 14 days of this Judgment.
3. Mr Omara is to pay the Liquidators' costs of opposing the application to discharge the Freezing Order.

JUDGMENT

THE COURT:

THE APPLICATION

- 1 On 14 October 2010, on the application of the Liquidators of the Al Mal Bank LLC (“*Bank*”), this Court made what is described as a “*Precautionary Attachment Order*” in relation to the assets of Mr Nazim Omara (“*Mr Omara*”), the former Chief Executive Officer (“*CEO*”) of the Bank. The order was made at the close of a hearing which was held to determine, among other matters, a claim by Mr Omara for wrongful dismissal by the Bank. Mr Omara withdrew his claim on the same day as the order was made, although the Court had foreshadowed on 10 October 2010 that it was prepared to make an order preventing Mr Omara disposing of his assets.
- 2 The order of 14 October 2010 (which we refer to as the “*Freezing Order*”), was made by the Court in anticipation of the Liquidators instituting proceedings against Mr Omara claiming compensation for losses said to be caused to the Bank by Mr Omara’s alleged misconduct. The Liquidators instituted proceedings on 22 October 2010 against Mr Omara by way of a counter-claim in Proceedings 05/2010 and a parallel application under art 105 of the *QFC Insolvency Regulations* (No 5 of 2005) (“*Insolvency Regulations*”). (The terms of art 105 are referred to at [11] below).
- 3 By an application dated 27 October 2010, signed by Mr Omara personally, he applied to discharge or revoke the Freezing Order. He also sought orders dismissing or staying the proceedings against him instituted by the Bank. Mr Omara subsequently filed an unsigned witness statement, dated 3 November 2010, in support of the discharge application.

- 4 The Liquidators filed written submissions in response to Mr Omara's application on 4 November 2010. Mr Omara responded to the Liquidators' submissions on 13 November 2010. Mr Omara's response, like the discharge application, was signed by him personally but his contentions raise legal arguments.
- 5 In essence Mr Omara contends that the Court lacked jurisdiction to make the Freezing Order and that the Order amounts to an invalid attachment of his property. The terms of the Freezing Order are set out in an Appendix to this judgment.

STATUTORY FRAMEWORK

The QFC Law

- 6 Since Mr Omara challenges the Freezing Order on jurisdictional grounds, it is convenient at the outset to explain the scope of the Court's jurisdiction. The jurisdiction is defined in *The Qatar Financial Centre Law* (Law No 7 of 2005), as amended by *Law No 2 of 2009* ("QFC Law").
- 7 Article 8(3) of the *QFC Law* establishes a Court called the Civil and Commercial Court of the Qatar Financial Centre ("*Court*"). The "*First Instance Circuit*" of the Court has jurisdiction under art 8(3)(c) of the *QFC Law* to hear the following disputes:
 - "c/1- Civil and commercial disputes arising from transactions, contracts, arrangements or incidences taking place in or from the QFC between the entities established therein.
 - c/2- Civil and commercial disputes arising between The QFC authorities or institutions and the entities established therein.
 - c/3- Civil and commercial disputes arising between entities established in The QFC and contractors therewith and employees thereof, unless the parties agree otherwise.

c/4- Civil and commercial disputes arising from transactions, contracts or arrangements taking place between entities established within The QFC and residents of The State, or entities established in the State but outside The QFC, unless the parties agree otherwise.”

8 The Bank is an entity established in the Qatar Financial Centre (“QFC”) (The QFC itself is set up by art 2 of the *QFC Law*.) It follows that the jurisdiction of the Court includes hearing civil and commercial disputes:

- arising from transactions, contracts or arrangements taking place in or from the QFC between the Bank and other entities established in the QFC; and
- arising between the Bank and contractors with or employees of the Bank (unless the parties agree otherwise).

9 Mr Omara relies on cll 15 and 16 of Sched 6 to the *QFC Law*. These provide as follows:

15. Once the chairman and the members are appointed, The Civil and Commercial Court shall lay down its operational rulebook and proceedings in accordance with the provisions of this Law, the fundamental litigation principles and international best practices. Such rulebook and proceedings shall not be in effect until approved by The Council of Ministers.

16. The provisions of the Civil and Commercial Procedures Law as issued by law no (13) of the year 1990 and amendments thereof, shall apply to the claims submitted before The Civil and Commercial Court, where The QFC Law and the rulebook and proceedings put in force by the Court by virtue of the previous clause, are silent on the concerned matter.”

Insolvency Regulations

10 In determining the source of the Court’s power to make freezing orders of the kind made against Mr Omara, the *Insolvency Regulations* are relevant.

11 Article 105 of the *Insolvency Regulations* provides that the Court may, on application by a liquidator, in relation to any conduct referred to in arts 97 to 103, make any order the Court sees fit in relation to a person to whom art 105 applies. The orders which the Court may make include the following:

- “(1) an order to return or pay to the Company any money or other property of the Company which he has misapplied or retained, or become accountable for;
- (2) an order to compensate the Company in respect of any misfeasance or breach of any fiduciary or other duty in relation to the Company;
- (3) an order to make such contributions (if any) to the Company’s assets as the [Court] thinks proper; or
- (4) an order requiring the person to do, or not to do, any act or thing.”

12 Articles 97, 99 and 102 of the *Insolvency Regulations* provide as follows:

“Article 97 – Fraud in anticipation of winding up

When a Company is ordered to be wound up ... Article 105 shall apply in respect of any person, being a past or present officer of the Company, who, within the 12 months immediately preceding the commencement of the winding up, has:

- (1) concealed any part of the Company’s property to the value of US\$200.00 or more; or concealed any debt due to or from the Company;
- (2) fraudulently removed any part of the Company’s property to the value of US\$200.00 or more;
- (3) concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the Company’s property or affairs;
- (4) made any false entry in any book or paper affecting or relating to the Company’s property or affairs;

(5) fraudulently parted with, altered or made any omission in any document affecting or relating to the Company's property or affairs; or

(6) ...

In each case with the intention of defrauding the creditors of the Company or concealing the state of the Company from any person.

...

Article 99 – Falsification of Company's books

When a company is being wound up, Article 105 shall apply to an officer or shareholder or other person liable to contribute to the assets of the Company if he destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the Company with intent to defraud or deceive any person.

...

Article 102 – Fraudulent trading

If in the course of the winding up of a Company, it appears that any business of the Company has been carried on with intent to defraud creditors of the Company or creditors of any other person, or for any fraudulent purpose, Article 105 shall apply to any persons who were knowingly parties to the carrying on of the business in the manner mentioned above."

Civil and Commercial Procedure Law

- 13 Clause 16 of Sched 6 to the *QFC Law* (reproduced at [9] above) refers to the provision of the *Civil and Commercial Procedures Law* (No 13 of 1990) ("*CCP Law*"). Mr Omara's submissions rely particularly on arts 398 to 404 of the *CCP Law*, which deal with the circumstances in which a creditor may execute a "*precautionary attachment*" on the movable property of a debtor.

- 14 It is not necessary to set out arts 398 to 404 in full. We need refer only to the relevant portions of arts 398, 401 and 402:

“Article 398

Subject to the provisions of article (401), the creditor may execute a precautionary attachment on the movables of his debtor in the following circumstances:

1. If he is the holder of a bill of exchange or promissory note, and the debtor is a merchant who has endorsed the bill of exchange or promissory note that obliges him to fulfilment, according to the Commercial law.
2. If the debtor has no regular residence in Qatar, or if the creditor, for serious reasons, has fears that the debtor would escape, or smuggle or hide his money.
3. In every other case in which the creditor fears to lose the guarantee for his right.

...

Article 401

The precautionary attachment shall not be executed in the aforementioned circumstances unless in implementation for an incontestable right and which is due.

If the creditor has no executive deed or enforceable ruling, or if his debt is of no definite amount, no precautionary attachment shall be executed except by an order from the enforcement judge, authorizing the attachment and temporarily assessing the applicant's of the attachment order right.

This matter requires a reasoned petition that, in the case mentioned in the previous article, must include a thorough statement on the movables to be attached.

The judge, before giving his order, may make a brief investigation if he is not satisfied with the documents supporting the request.

If the claim is properly brought up before the competent court, attachment permission may be requested from its chairman.

Article 402

In precautionary attachment on the movables, the rules and procedures set forth in part IV, chapter I, of this book, except those relating to the identification of the sale day, shall be followed.

...

In cases where the attachment is executed by an order from the enforcement judge in accordance with the second paragraph of the preceding article, the applicant of the attachment order, during the two weeks referred to in the preceding paragraph, must bring before the qualitatively competent court a claim proving his right and the validity of the attachment order, otherwise the attachment shall be considered as non-existing.”

REASONING: APPLICATION TO DISCHARGE FREEZING ORDER

- 15 We shall deal first with Mr Omara’s application to discharge the Freezing Order. We do so by reference to the headings adopted by Mr Omara, which were also adopted by the Liquidators in their written submissions. However, we follow a different order.

Jurisdiction

- 16 The word “*jurisdiction*” is capable of many meanings. In the present context it means the authority of a court to hear and determine a claim or dispute.
- 17 Mr Omara submits that the Court lacks jurisdiction to make orders of the kind made against him. He contends that, as the Liquidators are named as the claimants in the proceedings against him and as they themselves are not QFC entities, art 8(3)(c)(c/3) of the *QFC Law* does not confer jurisdiction on the Court to make the Freezing Order.
- 18 Article 8(3)(c)(c/3) of the *QFC Law* confers jurisdiction on the Court to hear, among other matters, civil and commercial disputes arising between entities established in the QFC and employees of such entities. As we

have noted, the Bank is an entity established in the QFC. It is not in dispute that Mr Omara was an employee of the Bank until 17 November 2009.

- 19 Although the Bank is in liquidation, it continues to exist as a legal entity. A winding up order has never been thought to end the corporate status of the company concerned, until it is finally dissolved: *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592. The claims against Mr Omara are not brought by the Liquidators for their personal benefit. They are brought on behalf of the Bank. It follows that the claims made by the Liquidators, including the claim for the Freezing Order, have arisen between the Bank and Mr Omara as an employee of the Bank.

- 20 It is of course true that Mr Omara is no longer an employee of the Bank. However, art 8(3)(c)(c/3) of the *QFC Law* is plainly concerned with disputes that have arisen out of or in consequence of the relationship between a corporation, such as the Bank, and its employees. Of necessity, many of these disputes will be formalised in litigation after the employer-employee relationship has terminated. That does not take them outside the scope of art 8(3)(c)(c/3) of the *QFC Law*. Were this so, the Court would not have had jurisdiction to hear and determine Mr Omara's own claim against the Bank for wrongful dismissal.

- 21 There are other bases on which the court may well have jurisdiction to hear and determine the Liquidators' claim for the Freezing Order against Mr Omara. For example, once a party properly invokes the jurisdiction of the Court to pursue a claim against a corporation, a counter-claim filed by the respondent (or a liquidator acting on its behalf) against the claimant is very likely to be within the jurisdiction of the Court. Article 8(3)(c)(c/1) of the *QFC Law*, the terms of which are not entirely clear, may be another source of jurisdiction.

- 22 It is not, however, necessary to pursue these questions further. The Court had jurisdiction under art 8(3)(c)(c/3) of the *QFC Law* to deal with the

dispute between the Liquidators and Mr Omara, including the Liquidator's claim for the Freezing Order.

Applicable Laws and Procedures

- 23 That a court has jurisdiction to hear a dispute between parties does not necessarily mean that it has the power to make a particular order in those proceedings. The concepts of jurisdiction and power are not co-extensive.
- 24 Mr Omara contends that the Court lacked power to make the freezing order. He submits that until the Court's operational rules are approved, it is obliged by cl 16 of Sched 6 to the *QFC Law* to apply the *CCP Law*. Mr Omara argues that the Court is limited to the power of ordering a "*precautionary attachment*" conferred by the *CCP Law* (set out at [14] above). He further says that it is not open to the Court to rely on international best practice (as is contemplated in the Court's *Practice Guide* (No 1 of 2009), when the relevant principles are contained in the *CCP Law*.
- 25 Mr Omara submits that the Freezing Order was not made and could not have been made in compliance with the *CCP Law*. In particular, he argues that neither the Liquidators nor the Bank had an "*incontestable right*", for the purposes of art 401 of the *CCP Law*, at the date the Freezing Order was made. He also submits that the Freezing Order was not made by an enforcement judge in conformity with the requirements of art 401.
- 26 Mr Omara's submissions are based on a misconception, although to be fair to him (or his advisers) the misconception may have been induced by the somewhat misleading heading to the Freezing Order. The Freezing Order is not and (despite the heading) does not purport to be a "*precautionary attachment order*" of the kind contemplated by the *CCP Law*. The Freezing Order does not attach to Mr Omara's movables or indeed to any of his property. The Freezing Order operates on Mr Omara

personally by restraining him from removing from Qatar or otherwise disposing of or dealing with his assets, except as permitted by the terms of the Order itself. The Freezing Order is, in the language used by lawyers familiar with equitable principles, an order *in personam*, binding on the person subject to the order. It is not an order *in rem*, binding by its own force on particular property or assets of the person subject to the order.

- 27 The Court's power to make the Freezing Order does not derive from the *CCP Law*, which is concerned with quite different processes available to creditors in Qatar. Nor does the Court's power to make the Freezing Order derive from the *Practice Guide's* incorporation of international best practice, in default of approved operational rules.
- 28 The Court's power, in the exercise of the jurisdiction conferred by art 8(3)(c)(c/3) of the *QFC Law*, to make the Freezing Order is to be found in the *Insolvency Regulations*. Article 105 authorises the Court, on the application of the Liquidators, "*in relation to any conduct referred to in arts 97 to 103*", to make any order it sees fit in relation to a person to whom art 105 applies. The orders the Court can make include an order requiring a person "*to do, or not to do, any act or thing*" (art 105(4)). This power is clearly wide enough to support an order restraining a person from dealing with his or her assets, where there is a risk of dissipation of those assets, on the application of a party claiming to have a good cause of action against the first person.
- 29 The claims made against Mr Omara by the Liquidators, on behalf of the Bank, are in relation to conduct referred to in arts 97 to 103. Among other things, it is alleged that Mr Omara maintained and operated undisclosed accounts in the name of the Bank, improperly withdrew and paid out funds from those accounts and falsified records of the Bank (see arts 97(1), (2), (4), 99, 100).
- 30 Mr Omara himself is a person to whom art 105 applies. Article 97, for example, states that art 105 shall apply to a person, being a past officer of

the company in liquidation, who has, within the 12 months immediately preceding the commencement of the winding up, who has committed any of the acts identified in art 97. Mr Omara was the CEO of the Bank and it is alleged that he committed a number of improper acts referred to in art 97 within the relevant period.

- 31 It is clearly not necessary, in order for the power in art 105 of the *Insolvency Regulations* to apply, that the Court has previously authoritatively determined that the allegations against the relevant person are true. If that were the case, the Court would be rendered powerless to preserve assets of an alleged wrongdoer or, for that matter of the company itself, pending the final determination of a claim made by the Liquidators. It cannot have been intended that art 105 should be given such a narrow construction. The effect of such a narrow construction would often be to prevent the Court, on the application of a liquidator, from taking effective measures against wrongdoers whose actions have detrimentally affected the creditors of the company in liquidation.
- 32 In any event, in the present case, the Court made the Freezing Order after it had heard a great deal of evidence in the wrongful dismissal proceedings brought by Mr Omara against the Bank. To put the matter at its lowest, the evidence, including Mr Omara's own admissions, established a very strong *prima facie* case of wrongdoing against him, as can be seen from the findings recorded in the Court's judgment in *Taha Babiker v Al Mal Bank* [Case 04/2010, QFC Civil and Commercial Court of First Instance, 1 December 2010]. This is not a case where the claim by the Liquidators rests on untested allegations.
- 33 For these reasons, the challenge to the Court's power to make the Freezing Order fails.

THE APPLICATION TO STAY OR DISMISS

Indemnity

34 In support of his application to dismiss the proceedings against him, Mr Omara asserts that any such proceedings are futile, because he was an officer of the Bank and is therefore entitled to an indemnity in respect of claims against him in that capacity. He relies on:

- art 61(1) of the *QFC Companies Regulations* (No 2 of 2005) (“*Companies Regulations*”), which provides that a company may in its articles grant an indemnity in respect of “*any negligence, default, breach of duty or breach of trust of which the Officer may be guilty in relation to the LLC or any Subsidiary thereof*”; and
- the Bank’s Articles of Association, which, in art 28, contain an indemnity “*to the extent allowed by the Regulations*”, that is, by *Companies Regulations*.

35 We note that art 61(1) of the *Companies Regulations* does not cover alleged fraud.

36 In response to Mr Omara’s submissions, the Liquidators cite art 61(2) of the *Companies Regulations*, which provides as follows:

“Any provision whether contained in the articles of association of the LLC or in any contract or arrangement between the LLC and any Officer ... exempting such Officer or person from, or indemnifying him against any liability which by virtue of the rule of law would otherwise attach to him in respect of any fraud or dishonesty of which he may be guilty in relation to the LLC shall be void provided that, notwithstanding anything in this Article 61 an LLC may, in pursuance of any such provision as aforesaid, indemnify any such Officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal in which judgment is given in his favour or in which he is acquitted”.

37 We accept the Liquidators’ submission that, against the background of the trial of Mr Omara’s own claim and the defence to it, the allegations now levelled against him are serious allegations of fraudulent misconduct and dishonesty which fall squarely within art 61(2). As the Liquidators correctly

submit, the exclusion of an indemnity for fraud or dishonesty by art 61(2) is entirely conventional and is incorporated in the corporate codes of most countries with developed regulatory regimes.

38 Mr Omara's contention that the indemnity provided by the Bank's Articles of Association justifies a stay of the Liquidators' proceedings is without foundation. We reject it.

Stay

39 Mr Omara applies, in the alternative, for a stay of the proceedings against him. He relies on art 322 of the *Criminal Procedures Law* (No 23 of 2004), which provides as follows:

"If the civil action is filed prior to the criminal action or during its procedures, the decision thereof stays pending until a final judgment is rendered on the criminal action. The stay of the action shall not prohibit undertaking precautionary and urgent procedures".

40 The Liquidators correctly point out that by the terms of art 322 of the *Criminal Procedure Law*, any stay does not preclude precautionary or urgent procedures such as the Freezing Order.

41 The Liquidators submit that art 322 of the *Criminal Procedure Law* has no application in the present case, for the following reasons:

- Not every "*civil action*" should be stayed because of criminal proceedings; it should be shown that pursuit of the relevant civil action will prejudice the criminal proceedings in some way and Mr Omara has made no attempt to do that.
- On the contrary, Mr Omara chose not to seek a stay of his own claim, which raised substantially the same factual issues as the present proceedings initiated by the Liquidators. They submit that

having made that election in relation to his own action, it would be unjust if Mr Omara were permitted to resile from it in related proceedings in which he happens to be the party sued.

- While an action by the Bank under the direction of the Liquidators might be a “*civil action*” for the purposes of art 322 of the *Criminal Procedure Law*, the Liquidators’ application under art 105 of the *Insolvency Regulations* is less easily described as such. Rather, it is a procedure designed to permit the Liquidators to gain control of or recover assets in the interests of creditors. It would be very odd if the conduct of a liquidation had to be deferred until criminal proceedings against an officer or former officer of the company concerned were completed.

42 It is not necessary for the Court to address the arguments advanced by the Liquidators. We should not be taken, however, as accepting that an application under art 105 of the *Insolvency Regulations* is not a “*civil action*”, nor that Mr Omara’s so-called “*election*” is necessarily relevant to the question of a stay.

43 The difficulty confronting Mr Omara is that he has adduced no evidence to show that a prosecution has in fact been instituted against him (as distinct from a criminal investigation). If a prosecution has been instituted, there is no evidence as to the charges levelled against him and whether there is any overlap between any such charges and the issues arising in the proceedings instituted by the Liquidators. We have no basis for concluding that the conduct of the Liquidators’ proceedings against Mr Omara will prejudice him in his defence to any prosecution that may be on foot.

44 At this stage, it is not appropriate to make any order staying the Liquidators’ counter-claims or their applications under art 105 of the *Insolvency Regulations*. If Mr Omara renews his application and supports

it by appropriate evidence, the Court will be prepared to give consideration to it.

FURTHER RELIEF

- 45 An important part of the Freezing Order was the requirement that Mr Omara provide disclosure of his assets worldwide (see paras 8-12 of the Freezing Orders, reproduced in the Appendix). It is not in dispute that Mr Omara has not complied with this part of the Freezing Order. Accordingly, the Court orders that Mr Omara complies with paras 8-12 of the Freezing Order within 14 days from the date of this Judgment.

COSTS

- 46 Mr Omara's application to discharge the Freezing Order has not succeeded. No issue therefore arises as to whether the Liquidators should be personally liable for any costs incurred by Mr Omara in making the application.
- 47 Since Mr Omara has failed in his application, the appropriate order is that he pay the Liquidators' costs of opposing the application to discharge the Freezing Order.

Representation:

The Court dealt with the application on written submissions. The last written submission was from Mr. Nazim Omara dated 13 November 2010.

For the Applicant: Mr. Nazim Omara (in person)

For the Liquidator: Ms. Joanna Rolls and Ms. Jacquie de Bidaph (RMS Tenon, London, UK)