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
APPELLATE DIVISION

3 May 2015

CASE NO: 02/2015

CHEDID & ASSOCIATES QATAR LLC

Applicant

v

SAID BOU AYASH

Respondent

JUDGMENT

Members of the Court:

President Phillips
Justice Dohmann
Justice Scott

ORDER

Having accepted jurisdiction in this matter the **Court determines**:

1. The Claimant is granted permission to appeal against the judgment on the claim.

2. The Claimant is refused permission to appeal against the judgment on the counterclaim.

3. The appeal against the judgment on the claim is dismissed.

4. The decision on apportionment in the costs judgment is to be reviewed in the light of our judgement on this appeal.

5. Permission to appeal is granted in respect of the award of interest on the costs awarded, and that award is set aside.

6. Save as set out in 5 and 6 above, permission to appeal against the costs judgment is refused.

JUDGMENT

Introduction

1. On 14 and 15 April this Court heard an application for permission to appeal against the judgment of the First Instance Circuit, Justice Cullen, Justice Robertson and Justice Al Sayed, delivered on 25 September 2014. The hearing was on the basis that if, and to the extent that, permission to appeal was granted the hearing would be treated as the hearing of the appeal.

2. At the same time the Court heard, on the same basis, an application for permission to appeal against the Order in respect of the costs in this matter made by the same Justices on 20 January 2015.

3. The Appellant is the Claimant in the proceedings, and we shall refer to it as such. It is one of a group of companies. It operates in Doha under licence from the Qatar Financial Centre Regulatory Authority as an insurance and reinsurance broker. The Respondent is the Defendant in the proceedings, and we shall refer to him as such. On 1 April 2010 the Defendant commenced employment by the Claimant as a "Sales Unit Manager" on the terms of what we shall describe as a "Letter of Engagement". Some time in April 2010 this was replaced by an "Employment Contract", dated 1 April 2010 ("the First Contract of Employment"). At the end of February 2012 this was replaced by a revised "Employment Contract", in similar form ("the Second Contract of Employment"). On 2 April 2013 the Defendant gave one month's notice of

termination of his employment with the Claimant, in accordance with the terms of the Second Contract of Employment. The Claimant immediately dispensed with his services, but, after some delay, paid him the final month's salary to which he was entitled. The Defendant then took up employment with a rival firm of insurance brokers in Doha, Aman Insurance Brokers ("Aman").

4. Section 5 of the Second Contract of Employment was headed "Non-Competition". It purported to place restraints upon the activities that the Defendant was permitted to undertake in the year after his employment with the Claimant terminated ("the restraint provisions"). The Claimant alleged that the Defendant committed breaches of Section 5, and commenced these proceedings claiming, inter alia, damages pursuant to a liquidated damages clause that formed part of section 5. The Claimant has at all times been represented by Badri and Salim El Meouchi, a long established Lebanese law firm with an office in Doha.

5. The Defendant initially advanced by way of defence a number of points that were not pursued. He then engaged the services of Brown Rudnick LLP, a limited liability partnership under the laws of England and Wales, which is affiliated to a similar partnership in the United States. With the assistance of Brown Rudnick a number of further issues were raised by way of defence, some of which were dealt with before the final trial. The points relied upon at the trial were, for the most part, set out in written Opening Submissions dated 11 September 2014. These included (i) the Defendant was entitled to avoid both the First Contract of Employment and the Second Contract of

Employment pursuant to Article 36 of the QFC Contract Regulations, on the ground that they had been procured by threats; (ii) the Defendant was constructively dismissed, so the Claimant was not entitled to rely on the restraint provisions; (iii) the restraint provisions were unenforceable by virtue of the provisions of Article 20 of the QFC Employment Regulations because they were in unreasonable restraint of trade; (iv) the liquidated damages clause under which the Claimant sought to recover damages was penal and unenforceable; (v) no damage had been caused by the Defendant's conduct. The Defendant advanced a counterclaim alleging (i) that he had wrongfully been denied a bonus and (ii) that the Claimant's wrongful delay in paying him his last month's salary, together with other sums due on the termination of his employment, had caused him loss in the form of bank charges by way of a returned cheque fee, in the sum of QAR 200.

6. The Court below did not deal with the Defendant's case on constructive dismissal. This was raised for the first time in the Defendant's Opening Submissions and the Court reserved this matter pending the outcome of the trial; in the light of the Court's judgment it was no longer necessary to address it. The Court considered first the validity of the restraint provisions. It found them invalid, so that the Claimant's claim failed on this ground alone. The Court further held, that had it not so decided, it would have upheld the Defendant's right to avoid the Second Employment Contract, on the ground that it was procured by an unjustified threat. In these circumstances, the question of whether the liquidated damages clause was unenforceable became academic. The Court dealt with the issue none the less. It did not find the

clause unenforceable, but ruled that, on the facts of the case, it would not have given rise to any right to damages.

7. The Court dismissed the Defendant's counterclaim for failure to pay him a bonus, but allowed the claim for the bank charges of QAR 200.

8. The Court made an award of costs in favour of the Defendant in the sum of US$ 108,125.25.

The basic facts

9. The basic facts can be shortly stated, as they are not in issue. The Defendant is Lebanese. He came to live in Doha in 2005 and by the time of the trial was supporting his wife and two young children, who were living in Doha with him. He took up employment as an insurance broker with a company called Metlife Alico, and worked for that company for five years. On 17 March 2010 Mr Bilal Adhami, who was then the Managing Director of the Claimant, sent to the Defendant the Letter of Engagement, which described itself as a "contract of employment". This offered the Defendant employment as "Sales Unit Manager" from 1 April 2010. It set out a number of terms and conditions, which included the following: The Claimant would be engaged for a "Probation Period" of 3 months, during which his contract could be terminated "at any time with one day notice without assigning any reason for such termination". After the probation period, the employment could be terminated by either party giving one month's notice in writing. The Claimant reserved

the right to change any of the terms and conditions "as and when appropriate". The Defendant would not, during his employment or thereafter, divulge any confidential information governing the business affairs of the Claimant. No restraint was placed upon the Defendant competing with the Claimant after the termination of his employment. The Defendant endorsed the Letter of Engagement with his acceptance of its terms on 18 March 2010.

10. Shortly after the Defendant started working for the Claimant the parties signed the First Contract of Employment. This stated in a Preamble that the Claimant wished to hire qualified personnel to perform the Claimant's "insurance and reinsurance activities and services", and that the Defendant was "already familiar with this kind of job/activities". The Defendant was to be employed as "Sales Unit Manager" and agreed "to perform services and duties (hereinafter referred to as the "Job").

11. The First Contract of Employment stated that the Defendant's job description was provided in Appendix A, but no job description was appended. The contract went on to provide, however, that the Defendant agreed to perform "any task or mission as may be assigned to him" consistent with his qualifications.

12. After an initial probation period, the term of the contract was unlimited, it being automatically renewed at the expiry of periods of 12 months, "unless terminated by either party giving to the other not less than sixty (30) *[sic]* days prior written notice" to expire at the end of the 12 month term.

13. Section 5 of the First Contract of Employment was headed "NON COMPETITION". It prohibited the Defendant for a period of two years after the termination of his employment from soliciting business from clients of the Claimant (5.1) or rendering services to such clients in competition with the Claimant (5.4).

14. On 28 February 2012 (wrongly stated in the judgment below to have been in April 2012) the parties signed the Second Contract of Employment. It was intended to replace the First Contract of Employment and thus it also was dated 1 April 2010. It differed from the First Contract of Employment in a number of respects:

i) It did not state in what capacity the Defendant was employed other than that he was to perform "the Job" as identified and described in Exhibit 1 – see 'Definitions', the Preamble and Section 2.1. Exhibit 1, however, was a blank sheet headed "To Be provided".

ii) Section 3 set out the Term and Termination provisions. The contract was to remain in force until terminated by either party on notice, the notice period being one month until the Defendant had been employed for 5 years and thereafter three months.

iii) So far as the present proceedings are concerned, the most significant difference between the two Contracts of Employment was the incorporation in Section 5.2 of the Second Contract of Employment of

new restraint provisions. These were lengthy standard form provisions designed to be incorporated into the contracts of all who were employed by the Claimant. For this reason many of them were not appropriate to the Defendant. Those that were material provided as follows:

"***Non Competition***

The EMPLOYEE acknowledges that by entering this contract with EMPLOYER, the EMPLOYEE will be in a position to establish and maintain personal goodwill with existing clients of EMPLOYER and to develop personal goodwill with future Clients of EMPLOYER.

In consideration of and as a fundamental inducement to EMPLOYER entering into this Contract and in accordance with Article 20 of the QFC Employment Regulations, the EMPLOYEE hereby agrees and solemnly undertakes that, she/he will not for a period of (1) year following the effective termination of her/his employment for any reason whatsoever, undertake or hold an interest, directly or indirectly, whether against a compensation or gratuitously, whether for her/his own account or for that of another, in any work the nature of which competes with

the nature of the Job. By way of example and not limitation, this non-compete clause includes:

1. *contracting with companies in competition with the EMPLOYER or with companies having activities linked directly or indirectly with the Employer's activities.*

2. *contracting with any Client or Supplier serviced by the EMPLOYER during one (1) year period immediately preceding the date on which she/he ceases for whatever reasons to be employed by the EMPLOYER; or furnishing or rendering any service of the same nature as or competitive with those furnished or rendered by EMPLOYER in Qatar at the time of termination of his employment to any Client of EMPLOYER whether any such Client is or was under contract with EMPLOYER in Qatar or is or was using any of the services of the EMPLOYER in Qatar.*

.....

7. *Approaching, persuading or attempting to persuade any Client to cease doing business with EMPLOYER or to reduce the amount of business such a Client*

would otherwise have placed through EMPLOYER whether or not the relationship between EMPLOYER and such Client(s) was originally established in whole or in part through the EMPLOYEE's efforts."

iv. Section 5 included the following liquidated damages clause:

"5.5 Compensation for Breach

In the event of a breach of the non-competition and Confidentiality clauses provided for in this Contract, and notwithstanding any other remedy and rights that the EMPLOYER is entitled to by law, the EMPLOYER shall be entitled to a final, pre-agreed upon compensation that cannot be subject to any lower adjustment by any authority or Court whatsoever, equivalent to six (6) times the EMPLOYEE's last monthly basic salary.

The payment of such compensation does not replace, supersede, cancel or waive the EMPLOYER's right to sue the EMPLOYEE for reparation of all material and moral damages caused to the EMPLOYER."

15. As time went by the Defendant became unhappy with the duties that the Claimant required him to perform. In his witness statement he complained that

within a year of his joining the company about 20 employees left, most to work for other insurance companies. This left the Claimant short -handed and the Defendant complained that

> *"in addition to my work as an insurance broker, I was also required to deal with collections from clients who had outstanding invoices, among others. I had been hired to act as an insurance broker and yet was being forced to undertake these extra duties for no extra pay".*

Then, in 2013, he said that he was told to stop working in sales and to focus exclusively on collections. A new General Manager, Mr Kirk Austin, had been appointed, and he and the Defendant did not get on well together. The Defendant's dissatisfaction with his position led him to give notice by email on 2 April 2013. A few weeks later he took up employment with Aman, a company in the Investors Group. The Claimant duly provided a 'non-objection letter' to his taking up employment with the Group.

Criteria for granting permission to appeal

16. Article 35 of the Civil and Commercial Court Regulations provides:

> *"...if there are substantial grounds for considering that a judgment or decision is erroneous and there is a significant risk that it will result in serious injustice, then a Court...can give permission for an appeal to the Appellate Division of the Court."*

17. As we indicated early in the hearing, the award of QAR 200 on the Defendant's counterclaim could not possibly satisfy these criteria and, accordingly, we refuse permission to appeal against that order. The remainder of the judgment on the merits raises arguable issues of general importance in relation to QFC employment and contract law, and accordingly we grant the Claimant permission to appeal against that judgment and will deal with that appeal first, before turning to the question of costs.

QFC law

18. In paragraph 51 of the written Opening Submissions submitted on behalf of the Defendant it was submitted that in order to resolve the issue of whether the restraint provisions were in unlawful restraint of trade the Court should be guided by English case law. This is not the correct approach. QFC Regulations set out detailed codes of employment law and general contract law. Some of the provisions reflect principles of common law, but in many respects conditions in Qatar differ markedly from conditions in England and other common law countries. Where an issue is governed by a QFC Regulation, the correct approach is to apply that Regulation according to its natural meaning and having particular regard to conditions in Qatar. Foreign jurisprudence can sometimes be of assistance, but it should be used sparingly as a last and not a first resort.

Unjustified Threat

19. The Claimant has put at the forefront of its appeal an attack on the finding by the Court below that the Defendant was entitled to avoid the Second Contract of Employment on the ground that it was procured by an "unjustified threat". This finding, if correct, has far reaching implications in the field of Qatar employment law. We also will deal with this issue first.

20. Article 36 of the QFC Contract Regulations ("Article 36") provides:

> *"A party may avoid the contract when it has been led to conclude the contract by the other party's unjustified threat which, having regard to the circumstances is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or is wrong to use it as a means to obtain the conclusion of the contract."*

21. The Defendant's written Opening Submissions started with the contention that the Defendant had been led to sign both the First Contract of Employment and the Second Contract by a threat that fell within the provisions of Article 36. The threat was that, if the Defendant did not sign the contract in question, he would be dismissed. Because he had a wife and young family to support, he had no reasonable alternative but to sign the contract. For these reasons the Defendant claimed to be entitled to avoid both the First and the Second

Contracts of Employment and, thereby, to escape the application of the restraint provisions.

22. The Court below focused first on the Second Contract of Employment. It accepted the Defendant's evidence that all the Claimant's employees, including himself, were told that the Claimant had decided to alter their terms of employment by substituting those of the Second Contract of Employment for those of the First Contract of Employment, and that any employee who was not prepared to agree to this would be dismissed. The Court held at para 25:

> *"...we accept that the Defendant genuinely felt that he had no choice but to accept the Second Contract of Employment and sign it. In these circumstances we consider that if the Defendant had to rely on Article 36 in order to displace the restrictive covenant, he would have satisfied the requirements of Article 36, and avoided the Second Contract of Employment."*

23. We have difficulty with this conclusion, for a number of reasons. (i) If the Defendant had enjoyed a right to avoid the Second Contract of Employment, he did not exercise it. Instead he exercised his right under the contract to give one month's notice of termination, receiving salary for that one month. Thus he affirmed rather than avoided the contract. (ii) The revisions that the Claimant wished to make to its standard contract of employment were in no way unconscionable. They brought the termination provisions into accord with

the requirements of Article 23 of the Employment Regulations. They altered the restraint provisions, but not in a way that made them significantly more arduous. Indeed it might be argued that because they reduced the period of their application from two years to one year they were made more favourable to the employees. Furthermore, both under the First Contract of Employment and under the Second Contract of Employment, the employees enjoyed the protection of Article 20 of the QFC Employment Regulations, which we shall be considering in due course. The Claimant was contractually entitled to terminate the existing contracts of any employees who were not prepared to agree to the revised terms. We cannot see that the statement that they would do so was an "unjustified threat" within Article 36. (iii) The reality is that the Defendant signed the Second Contract of Employment because he wished to remain in the Claimant's employment, notwithstanding the alteration of the terms of his employment. There was no question of his having been forced to accept employment with the Claimant against his will. (iv) The Court below considered the question of whether, if the Defendant had avoided the Second Contract of Employment, the First Contract of Employment would have revived, but described this question as academic. It was, however, no more academic than the question of whether the Defendant could have avoided the Second Contract of Employment, and was closely interrelated to that question. It had been an integral part of the Defendant's case that he could also have avoided the First Contract of Employment under Article 36. That contention faced even greater difficulties, for when the Defendant signed the First Contract of Employment, he had just been engaged under the Letter of Engagement and was serving a probationary period during which the Claimant

had a right to terminate his services on two weeks' notice. It is even more difficult for the Defendant to identify as an "unjustified threat" the requirement to agree to the First Contract of Employment as a condition of continuing in the Claimant's employment.

24. In short, we consider that the Defendant's reliance on Article 36 was wholly misconceived and the Court below fell into error in acceding to it.

The validity of the restraint provisions in the Second Contract of Employment

25. We now come to the basis upon which the Court below found in favour of the Defendant – that Section 5.2 of the Second Contract of Employment, and in particular paragraphs 1 and 2 of that Section, were invalid.

26. Article 20 of the QFC Employment Regulations provides as follows:

> *"Restrictive Covenants*
>
> *Any provision in an Employee's employment contract provides that the Employee may not work on any similar projects or for a company which is in competition with the Employer must be reasonable, must not constitute an unreasonable restraint on trade, and must be appropriate to the circumstances of the Employee's employment with the Employer."*

27. The Court below identified the following arguments advanced by Mr Kennell on behalf of the Defendant for finding that paragraphs 1 and 2 were invalid by reason of Article 20 as constituting unreasonable restraints on trade: (i) There was no definition of "the Job" in the Second Contract of Employment so that the Defendant did not know what activities were covered by the restraint provisions. (ii) Section 5.4 extended the ambit of operation of the restraint provisions to countries in which companies "related to" the Claimant were situated. The effect of this was that the geographical scope of the restraint provisions was unreasonably wide. (iii) There was no justification for a clause that prevented the Defendant working for a competitor. In particular, there was no suggestion that he would make use of trade secrets that he had acquired while working for the Claimant. (iv) The Claimant could not reasonably seek to protect its business connection with clients whom the Defendant had brought with him when he took up employment with the Claimant.

28. The Court below dealt with these submissions comprehensively in paragraph 20 of its judgment as follows:

> *"We consider that the arguments presented by Mr Kennell were well founded and we accept them. The Claimant used a standard form of contract which took no account of the circumstances of the Defendant's employment. In his case the absence of a contractual description of "the Job" created uncertainty. This is of critical importance. Section 5.2, and in particular the paragraphs founded on by the Clamant, do not measure up to what is required by Article 20.*

Accordingly, the Defendant has committed no actionable breach of them."

29. We shall deal in turn with each of the points that the Court below accepted as valid. First we consider the importance attached by the Court below to the lack of a description of "the Job" in the Second Contract of Employment. There was no formal requirement for the Defendant's duties to be set out in writing. Article 8 of the QFC Contract Regulations provides that nothing in those Regulations requires that a contract be made or evidenced in writing or by a particular form. Article 45 provides that a contract shall be interpreted according to the common intention of the parties. The issue is whether, as the Court below found, the absence of a written job description made the meaning of Section 5.2 so uncertain that it was unenforceable. In our view it plainly did not. The absence of a job description was not something of which the Defendant ever complained. He did not suggest that he was uncertain as to his duties. On the contrary, he was in no doubt that he was employed as an insurance broker. The same was true of the Claimant. The only difference between the Defendant and the Claimant was as to the extent of time that the Defendant was required to spend in ensuring that insurance premiums were collected, but this had no bearing on the meaning of Section 5.2. Section 5.2 made it quite clear what it was that the Defendant was prohibited from doing in the year that followed the termination of his employment with the Claimant. The Court below erred in finding to the contrary.

30. Next we consider the point that the geographical area to which the restraints applied, as extended by Section 5.4, was unreasonably wide. We agree that it was. The appropriate response to this should have been, however, to sever Section 5.4 from the contract. Section 8 of the contract made express provision for severance of any provision that was "invalid, illegal or unenforceable". Contrary to Mr Kennel's submission we can see no difficulty in putting a blue pencil through Section 5.4.

31. Next we consider Mr Kennel's submission, accepted by the Court below and repeated before us, that there was no justification for Paragraph 1 of Section 5.2, which prohibited the Defendant from entering into a contract of employment with a competitor of the Claimant. Mr Kennell accepted that it was reasonable for the Claimant to impose a restraint on the Defendant soliciting business from clients of the Claimant, which was the restraint imposed by Section 5.2.7. He submitted, however, that the Claimant had no legitimate interest in prohibiting the Defendant from working for a competitor of the Claimant. So to do was an unreasonable restraint on trade.

32. In our view, this issue lies at the heart of the dispute between the parties. In resolving it, it is necessary to weigh the interest of the general public, and of the Defendant himself, against the interest of the Claimant. Qatar is a small country, with almost all business activity concentrated in Doha. Qatar has always welcomed foreign nationals willing to provide services that might otherwise be unavailable or in short supply. It is in the public interest that a foreigner, who has taken up employment with one employer, should be free to

continue to provide his services by taking up employment with an alternative employer should his initial employment come to an end. It is, of course, even more in the interest of the employee himself that he should be free to do so. Take the case of the Defendant. He came to Doha to carry on the business of insurance broking, in which he now has many years of experience. He and his wife have had two children since they came to live here. They have made Qatar their home. To prevent him for twelve months from carrying on the trade in which he specialises would be likely to result in him and his family having to leave the country. The Claimant had the right to terminate the Defendant's employment on one month's notice. Could the Claimant reasonably couple this right with the right to preclude the Defendant from looking for employment with a competitor? We think that the answer is plainly 'no'. As against the interests of the general public and the Defendant himself, we do not consider that the Claimant had a legitimate interest in preventing the Defendant from working for a competitor. So to do in these circumstances would have constituted an unreasonable restraint on trade.

33. We note that Ms Myrna Ghaziri, at paragraphs 59 and 60 of her witness statement for the Claimant, essentially conceded this. She said:

> *"...when [the Claimant] learned that [the Defendant] took a position at Aman, a competing company of [the Claimant], in contravention of the non-compete clause of the Second Employment Contract, [the Claimant], in good faith, did not launch legal proceedings against [the Defendant], although not waiving in any way whatsoever its right to*

do so. However [the Claimant] had no other choice but to do so when it learned that [the Defendant] was not only working in a competing firm, but was also soliciting and contracting with [the Claimant's] clients, in clear contravention of his contractual obligations."

This made it clear that the Claimant's concern was not that the Defendant was working for a competitor, but that the Defendant was soliciting the Claimant's customers, or "poaching" them as Ms El Meouchi for the Claimant more graphically described it.

34. For these reasons, in agreement with the Court below, we accept Mr Kennell's submission that the restraint imposed by Paragraph 1 of Section 5.2. on the Defendant taking up employment with a competitor was void because it constituted an unreasonable restraint on trade and thus infringed Article 20 of the QFC Employment Regulations.

35. We believe that Ms El Meouchi, to whose fluent and cogent advocacy we wish to pay tribute, was aware of this weakness in the Claimant's case. For this reason she sought to advance the argument that an embargo upon the Defendant taking up employment with a competitor was justified as the only reasonable means of ensuring that he did not disclose confidential information in the nature of trade secrets that he had acquired when working for the Claimant. The information in question consisted of the identity of the

Claimant's clients, the business written for them by the Claimant and the dates when that business would fall to be renewed.

36. We did not believe that this argument was advanced in the Court below, for the Court recorded at paragraph 15 of its judgment:

> *"For the Defendant, Mr Kennel pointed out that in the present case there was no suggestion that Section 5.2 was founded on the risk that the employee might use to his advantage trade secrets to which he had gained access in the course of his employment".*

37. When we raised this point with Ms El Meouchi she drew our attention to the following sentence from paragraph 69 of the Claimant's written closing submissions:

> *"...a company may, in the aim of protecting its business, restrict an employee from taking advantage of its trade connections or from utilizing information confidentially obtained through the claimant".*

38. We do not believe that those few words adequately advanced before the Court below the argument made to us by Ms El Meouchi, but we will address that argument. We accept that the identities of the Claimant's clients, and particulars of the business written for them by the Claimant, constituted confidential information in the nature of trade secrets. But disclosure of that information would only damage the Claimant if used to solicit business from

the Claimant's customers. We consider that the Claimant was adequately protected against this risk by Section 5.2.7, which prohibited such solicitation. There was no justification for restraining the Defendant from taking up employment with a competitor of the Claimant. It follows that the Defendant committed no breach of contract by taking up employment with Aman.

39. We turn to Paragraph 2 of Section 5.2, for the Claimant also relied on this Paragraph, although the Court below did not address it specifically. Paragraph 2 restrained the Defendant from "contracting with any Client...serviced by" the Claimant or rendering any service to such a Client of the same nature as that rendered by the Claimant. The parties were at issue as to the effect of this clause. It was common ground that at least four clients of the Claimant had, through the Defendant's agency, concluded contracts with Aman. The Claimant contended that this was a clear violation of Paragraph 2. The Defendant submitted that it was not. Paragraph 85 of his Opening Submissions contended that these clients did not contract with the Defendant, but with his employer, Aman.

40. This submission echoed one made by the Claimant in paragraph 51 of its Application for Permission to Appeal, when addressing the argument that the restraint provisions did not apply to personal clients of the Defendant that he had brought with him when he had gone to work for the Claimant:

> *"...the Defendant did not provide insurance services to any clients in his name, nor did he execute any agreements with the clients: rather it*

was the Claimant who owned this relationship and with whom brokerage/insurance contracts were signed..."

41. We consider the Defendant's contention that Paragraph 2 applied to contracts concluded personally by the Defendant to be correct. Paragraph 1 purported to prohibit him from entering into a contract of employment with a competitor of the Claimant. Paragraph 2 purported to prohibit him from personally contracting with or providing insurance services to Clients of the Claimant. There was no suggestion that the Defendant did this, and we do not, in the absence of argument on the point, propose to determine the nicely balanced question of whether the restraint on competition imposed by Paragraph 2 was reasonable.

42. We can summarise the position as follows. The Claimant had a legitimate interest in restraining the Defendant from soliciting its clients after leaving the Claimant's employment. Had the restraint provisions been limited to achieving this objective, they would have been reasonable. The same is true of Paragraph 7 of Section 5.2 and there could have been no objection to that Paragraph had it stood alone. The restraint on trade imposed by Paragraph 1 was, however, unreasonable and invalid.

43. It is right that we should address the question of whether the Claimant could legitimately restrain the Defendant from soliciting clients that he had brought with him when he moved to the Claimant. The Court below appears to have accepted Mr Kennel's argument that it could not. This argument was based on

a passage in a judgment of Denning LJ in *M & S Drapers v Reynolds* [1957] 1 WLR 9. We do not consider that that passage can properly be applied to the facts of the present case. We accept the point made by the Claimant that we have set out in paragraph 40 above. Clients whom the Defendant had brought with him became clients of the Claimant and the Claimant had a legitimate interest in restraining the Defendant from soliciting those clients to take their business elsewhere.

44. The Defendant recognised this. He did not seek to persuade any client of the Claimant to move to his new employer, Aman. The Claimant suspected that the Defendant had been "poaching" its clients and identified twelve clients who they believed had been enticed away by the Defendant. The Defendant dealt with these in detail in his First Witness Statement. He accepted that in four cases personal clients had followed him to Aman. This was not, however, because he had encouraged them to do so but because they had decided no longer to use the Claimant in any event. The Court below accepted this evidence. It was the Defendant's evidence that he had taken to the Claimant 120 to 150 personal clients. Had he set about attempting to entice these or other clients of the Claimant to his new employer this would, we feel, have become quite apparent to the Claimant. As it was, the suspicion that the Claimant formed that the Defendant was "poaching" its clients proved to be unfounded. In the event the Defendant committed no breach of the Second Contract of Employment.

The liquidated damages clause

45. We have set out the liquidated damages clause at paragraph 14 above. The Court below considered the application of this although, in the light of its findings on liability, the matter was academic. We also propose to comment on this.

46. Article 107 of the QFC Contract Regulations provides:

> *"(1) Where the Contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.*
>
> *(2) However, notwithstanding any agreement to the contrary, the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances."*

The manner in which the Court applied this provision appears from the following paragraphs of its judgment:

"In the present case there was no evidence of any harm resulting from the alleged breach of the non-contracting provisions. The only reference to the issue is in the sworn statement of the Defendant which makes clear that any

business which he had involvement with which could fall into the category, was business which the Client had already determined was not going to be placed with the Claimant again.

Where there is no harm proved to have resulted from the non-performance, any payment under this head would in our view be grossly excessive. Particularly, when on facts, there is no causal connection between even the alleged loss of premiums by the Claimant which were pointed to and the alleged acts in contravention by the Defendant. "

Accordingly, had the Defendant been held in breach of contract, the Court below would have reduced the damages payable under the liquidated damages clause to nil.

47. We are concerned that this passage from the judgment might suggest that a claimant has the burden of proving that the defendant's breach of contract has caused harm in order to recover damages under a liquidated damages clause. That is not the case. Article 107(1) provides that the aggrieved party is entitled to the specified sum *"irrespective of its actual harm"*. If a defendant seeks to reduce the damages payable pursuant to the provisions of Article 107(2) the onus lies on the defendant to satisfy the court that the specified sum is *"grossly excessive"* in relation to the harm resulting from the non-performance *"and to the other circumstances"*. Those words indicate that the Court must have regard to all the material circumstances, not merely the harm caused. Even then, the Article provides for reduction of the specified sum to

"a reasonable amount". We consider that only in exceptional circumstances will that sum be nil.

THE AWARD OF COSTS

48. By a judgment dated 20 January 2015 ("the Costs Judgment") the Court awarded the Defendant US$ 104,825.25 in respect of legal fees and US$ 3,300 in respect of disbursements and ordered that interest should be payable on this sum at 5% from the date of the award until payment. The Claimant seeks permission to appeal against the Costs Judgment.

The application for costs

49. The QFC Civil and Commercial Court Regulations and Procedural Rules provide:

> *"33.1 The Court shall make such order as it thinks fit in relation to the parties' costs of the proceedings.*
>
> *33.2 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 the circumstances are appropriate."*

50. The fact that these Rules grant such a wide discretion to the Court makes it difficult for a party to demonstrate that a costs order falls within the criteria for the grant of permission to appeal. This is particularly so in this case, for the

Court recorded at paragraph 25 of the Costs Judgment that both parties had invited it to take "*a broad approach* to *the matter of costs*". It goes without saying that when dealing with costs the trial court is much better placed to evaluate what is fair and reasonable than the appellate court.

51. The Defendant's application for costs was advanced by Mr Kennell of Brown Rudnick LLP. It alleged that the Defendant had engaged Brown Rudnick under a Letter of Engagement and a Conditional Fee Agreement. ("CFA"). Under these Brown Rudnick agreed to represent the Defendant on a "no win no fee" basis. A win was defined as the final dismissal of the claim against the Defendant or the award of damages to the Defendant. In the event of a win the Defendant would be liable to pay Brown Rudnick's fees at their standard rates and a success fee of 50% of those fees. Furthermore the Defendant agreed to pay, in any event, disbursements, which in the event amounted to US$ 5495.06.

52. Brown Rudnick claimed fees amounting to US$ 349,417.50. To this fell to be added a 50% success fee as, according to the terms of the Letter of Engagement and the CFA, the Defendant had "won" the litigation. In the Costs Application that they made on behalf of the Defendant they claimed:

> "*...the Defendant submits that he is entitled to recover this firm's conditional fees, the success fee and the disbursements from the Claimant, to the extent that the Court considers reasonable. The*

Defendant leaves it to the Court to determine what a reasonable recovery would be in this case."

53. The Claimant raised a number of objections to the Defendant's Application for Costs. These included: (i) The Defendant had not incurred any legal fees, because the Letter of Engagement and the CFA provided that the Defendant would not in any circumstances be liable for these. (ii) Having regard to the extent that each party had succeeded in the litigation the appropriate order was that each party should bear its own costs. (iii) The costs claimed by the Defendant were unreasonable and disproportionate.

54. The Court below rejected the first point made by the Claimant. It ruled that, on the true construction of the Letter of Engagement and the CFA the Defendant was liable to pay Brown Rudnick's legal fees. As to the second point, the Court held that, having regard to costs incurred in respect of issues on which the Defendant failed it was appropriate to reduce the costs recoverable by the Defendant by 40%. As to the third point the Court held that the legal fees claimed by the Defendant were disproportionate and that they should be reduced by half. The Court made no express reference to Brown Rudnick's claim for a 50% success fee, but implicitly held that no recovery could be made by the Defendant in relation to this. In the result the Court ordered the Claimant to pay the Respondent US$ 104,825.25 in respect of legal fees and US$ 3,300 in respect of disbursements. Interest at 5% was awarded from the date of the judgment.

55. By its Application for Permission to Appeal against the Costs Judgment the Claimant seeks to challenge each of the Court's findings and its order for the payment of interest. The Claimant submits that on the true interpretation of the Letter of Engagement and the CFA the Defendant was not liable to pay Brown Rudnick's legal fees, even in the event of success. The Claimant further submits that the degree of success achieved by each of the parties in the litigation should have resulted in an order that each side pay its own costs. The Claimant further submits that the reduced award of costs made by the Court was still disproportionate. Finally the Claimant challenges the award of interest made by the Court.

The terms of the CFA

56. We have considered the Letter of Engagement and the CFA, which, according to its terms, takes precedence over the former in case of conflict. These documents are not happily drafted. In particular the effect of the provision "*While we will not invoice you our fees in the event that we win the Claim…*" in the former is opaque. However, both agreements are governed by the law of England and Wales. Under that law it is critical to the effectiveness of a conditional fee agreement that the client should be liable to the provider of legal services in the event of success.

57. The Court below considered carefully the various provisions in the letter of agreement and the CFA that dealt with the payment of fees in both a 'win' and a 'no-win' situation. It concluded at paragraph 13

"The question then is whether, under the arrangement between the Defendant and Brown Rudnick, the Defendant was entitled to claim their legal fees against the Claimant. In our opinion the only basis on which a successful Client could seek Brown Ruddick's legal fees from the Opponent in accordance with Clause 5.1 of the Conditional Fee Agreement was that the Client had become liable to pay those legal fees."

58. We do not consider that there are "*substantial grounds for considering that [this] decision is erroneous*". On the contrary we have concluded that it was correct. The Letter of Engagement and the CFA made it plain that, in the first instance, Brown Rudnick would not invoice the Defendant for its fees, but would seek to recover them from the Claimant. The Defendant nonetheless remained liable for those fees in the event that it proved impossible to recover these. Mr Kennell told us that in those circumstances it was a matter for Brown Rudnick's discretion whether they exercised their right to claim fees from a client. We suspect that there may be an expectation that they will not do so. Certainly, having regard to the fact that the fees that they generated in the present case were disproportionate (see below) we are not surprised that they have not sought to do so in the present case. Nonetheless, the Court below rightly concluded that it was in a position to award costs against the Claimant on the ground that the Defendant was liable to pay these. The Claimant has not demonstrated that this aspect of the Court's decision provides a valid basis for the grant of permission to appeal.

Apportionment of costs

59. The Court at paragraphs 21 to 25 of its judgment gave consideration to the issues on which the Defendant had not succeeded and reduced his entitlement to costs by 40% in order to have regard to these. The Claimant contends that this reduction did not fairly reflect the costs attributable to issues on which the Defendant did not succeed. This aspect of the Costs judgment must in any event be reviewed in the light of our judgment on the substantive appeal. We have reversed the finding of the Court below in respect of the Defendant's contention that he was entitled to avoid the Second Contract of Employment because he had been induced to agree to it by an unjustified threat. We have also reversed the decision of the Court below that the restraint provisions were invalid because of uncertainty consequent on the lack of a job description in the Second Contract of Employment. We doubt whether the latter issue, which was raised late in the day, had a significant impact on costs. The same may not be true of the former issue, which the Defendant described as "duress". The Defendant had placed this at the forefront of his case. In addition, we have differed from the Court below on its interpretation of Article 107. Accordingly we propose to review the apportionment of costs and invite the parties to make written submissions on how costs should be apportioned in the light of our judgment. A timetable for this should be determined by the Registrar.

Proportionality

60. The Court below found that Brown Rudnick's fees were disproportionate and reflected that finding by reducing the fees recoverable by 50%. The Claimant contends that this reduction was inadequate.

61. Before the Court below the Claimant had criticised the Defendant for engaging the assistance of expensive English lawyers, rather than using a local firm. The Court rejected that criticism and, rightly, it was not pursued before us. This Court welcomes the assistance provided by lawyers engaged by the parties, whether they are based in this jurisdiction or abroad. The question of the proportionality of costs does not turn on the place of business of the lawyers. If the fees charged by foreign lawyers are disproportionate to what is at stake then they are likely to be disallowed. In fact we were informed that the Defendant had attempted to persuade law firms practising in the QFC to act for him in this case, but was unable to persuade any of them to represent him. If that is the position we find it regrettable.

62. Adversarial litigation in which the parties are represented is inevitably expensive. It is an unfortunate fact that if the amount at stake is small and if the lawyers involved are paid their normal fees, the costs are likely to be large compared to the amount at stake, even where no more work is done than is necessary to address the issues raised. In this case the Claim was for a total of a little less than QAR 118,000. The Counterclaim was for QAR 52,200. The Court was told that, had they been paid their full fees for the work done in

connection with this case, the fees of the Claimant's lawyers would have been QAR 569,165.83. The amount actually claimed was reduced to QAR 210,240.40. Because of the relatively modest sums in issue. We consider that the former figure gives some indication of reasonable charges for the work that had to be done in relation to the various issues raised in this case. It will normally be reasonable to claim as costs the fees reasonably incurred in order to address the issues raised by a case.

63. Applying this test the Court was unquestionably correct to find the fees claimed by Brown Rudnick to be disproportionate. The amount of hours worked by a substantial team are out of all proportion to what this comparatively simple case required. To the extent that work was devoted to issues on which the Defendant failed the apportionment exercise should preclude their recovery. It would have been possible to have conducted a detailed analysis to determine how many hours were reasonably devoted to the issues on which the Defendant succeeded, but the parties sensibly agreed that the Court should adopt a broad approach. We do not consider that the Court's decision to base the award of costs on only half the fees billed by Brown Rudnick, as opposed to a smaller percentage, satisfies the criteria for the grant of permission to appeal.

Interest

64. The Court ordered that interest should be paid on its award of costs from the date of the award. It was also ordered that the award of costs should not be

enforced pending the appeal. The Claimant contends that, in these circumstances, interest should not have been ordered from the date of the award because payment of costs was not then due. We believe that there is merit in this submission. Under the Letter of Engagement and the CFA the Defendant's liability to pay Brown Rudnick's fees was conditional upon success. Success was defined to occur on the successful termination of any appeal. No point was taken below in respect of this, but we consider that its effect is that interest should run on any costs awarded from the date of our final judgment. This will be when we have reviewed the effect of proportionality and apportionment on the costs award. Accordingly we grant permission to appeal against the award of interest on the costs judgment and set aside that award.

By the Court,

Lord Phillips of Worth Matravers
President of the Court

Representation:

For the Applicant / Claimant:	Ms Chadia El Meouchi, Mr Michel El Meouchi, Ms Carine Farran and Mr Walid Honein (Badri and Salim Elmeouchi Law Firm)
For the Respondent / Defendant:	Mr Roger Kennel and Mr Ravinder Thukral (Brown Rudnick LLP)