



محكمة قطر الدولية
ومركز تسوية المنازعات
QATAR INTERNATIONAL COURT
AND DISPUTE RESOLUTION CENTRE

**In the name of His Highness Sheikh Tamim bin Hamad Al Thani,
Emir of the State of Qatar**

**IN THE CIVIL AND COMMERCIAL COURT
OF THE QATAR FINANCIAL CENTRE
FIRST INSTANCE CIRCUIT**

18 February 2019

CASE No: CTFIC1009/2018

QATAR FINANCIAL CENTRE REGULATORY AUTHORITY

Applicant

v

FIRST ABU DHABI BANK P.J.S.C

Respondent

REASONS FOR JUDGMENT OF 17 FEBRUARY 2019

**Before:
Justice Bruce Robertson
Justice Arthur Hamilton
Justice George Arestis**

ORDER

At the conclusion of the hearing on Sunday 17 February 2019, the Court made the following Order with written reasons to follow:

1. That the Application of the Respondent for a stay of execution of the requirement in the judgment of 18 November 2018 to **produce** documentation is **granted** until the final judgment of the Appellate Division of the Court in this matter is delivered;
2. That the Application of the Respondent for a stay of execution of the requirement in the judgment of 18 November 2018 to **preserve** documentation is **refused**;
3. That the Application of the Applicant for the Respondent to file and serve an **affidavit** on the procedures and processes that the Respondent has put in place worldwide to preserve the documents ordered to be produced under the judgment of 18 November 2018 is **granted**. The affidavit is to be filed and served by no later than **4 March 2019**; and
4. That the Applicant being the largely successful party, the Respondent is to pay the Applicant's reasonable costs of the hearing. Such costs are to be agreed between the parties, failing which they will be determined by the Registrar.

REASONS

1. Following an urgent oral hearing on 17 February 2019 the orders noted above were orally delivered. The Court indicated that reasons would follow. These are those reasons.
2. There is one preliminary matter which should be addressed before the issues between the Parties are considered and determined. It is this. In the Application for assistance on which this Court gave judgment on 18 November 2018 the Respondent is named as “FIRST ABU DHABI BANK PJSC” (that is the Bank established in Abu Dhabi). The same Respondent is named in the Application currently before this Court for dismissal of the application for a stay and for a requirement that ‘the Respondent’ evidence certain matters by affidavit. By contrast, in the Application for Permission to Appeal (incorporating the application for a stay) the ‘Appellant’ is named as “ FIRST ABU DHABI BANK PJSC ‘FAB-QFC BRANCH’ ”.
3. In the course of the hearing Mr Lal on more than one occasion stated that he appeared for ‘the Respondent’ but at other times insisted that he had instructions only from the Qatari Branch of the Bank. The question whether, for the purposes then before the Court, the Qatari Branch and the Bank were distinct entities was fully explored by this Court. It held in the judgment dated 18 November 2018 that they were not. As matters stand, that decision is unreversed. It was not suggested that this Court in the matters currently before it could or should proceed on any different basis.
4. Accordingly, on a strictly technical view the application for a stay (in so far as in this Court) and the opposition to making of a requirement for an affidavit are either presented by the Bank or they are not presented at all. While this difficulty has troubled the Court, it was not argued by the Regulator that the Court should reject the application for a stay or the resistance to the application for an affidavit on any technical or procedural ground. In these circumstances this Court has been prepared to consider all matters on their substantive merits.

5. On the 18 November 2018 the Court, following a hearing, issued, along with a reasoned judgment, the following Order:
 - (a) The Respondent is ordered to comply forthwith with the Notice dated 19 March 2018 referred to in paragraph 6 of this judgment, including in relation to materials held outside the QFC; and
 - (b) The Respondent is ordered to preserve its documents, books and records and not otherwise move or deal with them insofar as they are responsive to the Notice.
6. The 'Notice' referred to in (a) above was a written notice, served on the Bank by the Regulator pursuant to Article 52(2)(8) of the QFC Financial Services Regulations, to provide various documents under identified heads.
7. To date, the Order has not been responded to in anyway and appears to have been ignored, except with regard to the QFC Branch.
8. On 16 January 2019, the Bank filed, on the eCourt system, an Application seeking Permission to Appeal against the Order. We understand that the Appellate Division of the Court is due to consider the Application seeking Permission to Appeal at an oral hearing on 17 and 18 March 2019. The Court has ruled that if permission is granted the substantive appeal will be heard then.
9. In the meantime, there are two applications pending before this Court.
10. First, the Bank seeks a stay of execution of the two Orders of this Court, given on 18 November 2018, pending determination of its Application seeking Permission to Appeal.

Although an application for a stay of execution was incorporated in the application to the Appellate Division seeking permission to appeal, the Appellate Division directed that this Court hear and determine the issue. Subsequently, the Bank, in opposing the Regulator's request for an affidavit, sought a stay in this Court.

11. Secondly, the Regulator, in an Application filed on 22 January 2019, not only opposed the request for a stay but sought an Order from this Court requiring the Bank to evidence, by an affidavit, the procedures and processes that the Bank has put in place worldwide to preserve documents ordered to be produced by the Court's judgment of 18 November 2018.
12. The Regulator submitted that such an Order was necessary in order to ensure that the Bank has taken the necessary steps in order to preserve the relevant materials. Moreover, the Regulator alleged that the matter is urgent in light of the apparent non-compliance, to date, with the Order which may adversely impact the ongoing investigation by the Regulator of various acts and omissions of the Bank.
13. The Bank contended, in written submissions dated 31 January 2019, that the Court has no jurisdiction to order the filing of an affidavit in relation to what it calls 'Non-QFC Documents' by which it refers to documents not held by its QFC Branch. This, the Bank said, is the critical subject of the Application seeking Permission to Appeal. In respect of what it calls 'QFC Documents' the Bank states that the Regulator has already been informed of the measures that have been put in place to ensure that potentially relevant documents are preserved.
14. In a written Reply filed on 5 February 2019, the Regulator reaffirmed its position that the fact that there is a pending Application seeking Permission to Appeal is not a sufficient reason to justify a stay or for refusing its Application in relation to an affidavit.

The Position at the Hearing

15. Because of the extreme position taken by each party, the Court took the unusual step of holding an urgent hearing on 17 February to determine the outstanding applications in this Court.
16. The Bank was highly critical of the approach taken by the Regulator, asserting that its behaviour is both ‘unconventional and unexplained’. It is not entirely clear what is meant by this. What is, however, clear is that the Bank maintains that central to this case is the issue of jurisdiction. The Bank argues that the Court was wrong in its judgment of 18 November 2018 and that it (the Court) should do nothing in furtherance of that judgment until the Appellate Division has determined the Application seeking Permission to Appeal.
17. In any event, the Bank made five additional observations:
 - (i) no affidavit was sought by the Regulator in its original application- it should not be seeking one now;
 - (ii) the provision of an affidavit was not ordered by the Court in its judgment of 18 November 2018;
 - (iii) there is, contrary to the Regulator’s claim, no urgency in this case;
 - (iv) the Regulator has provided no evidence that the Bank has, would, or could destroy documents in the interim; and
 - (v) the Regulator has failed to explain its lack of progress in relation to the underlying investigation.
18. Against that backdrop, the Bank alleged that the Regulator’s actions are ‘politically motivated and influenced by the wider issues between the State of Qatar and the United Arab Emirates.’
19. The Bank argued that if the Court concluded that it has the power to order an affidavit in relation to ‘Non-QFC Documents’ then a number of issues arise. First, how could the Court

enforce or supervise such an Order? Secondly, such an Order would likely be appealed in any event. Thirdly, to what extent would such an Order assist the Regulator with its investigation? Finally, would such an Order lead to efficient case management and procedure or would it simply complicate matters and lead to increased cost?

20. Accordingly, the Bank invited the Court to

- (i) dismiss the Regulator's Application;
- (ii) order a stay of execution pending the judgment of the Appellate Division; and
- (iii) order that the Regulator pay the costs incurred by the Bank in respect of its Regulator.

21. The Regulator was equally critical of the Bank, accusing it of 'deliberate non-compliance' with the Court's Order of 18 November 2018 and 'intemperate' behaviour.

22. The Regulator submitted that if the Court granted a stay of its Order, the Bank would be able to dispose of relevant materials. This would frustrate the Regulator's on-going investigation and would render 'pointless' the litigation to date. It would also be contrary to the interests of justice. The fact that the Bank has sought to appeal the Order does not operate as a stay; on the contrary, the status quo should be maintained pending the Appellate Division's judgment.

23. An affidavit is required, says the Regulator, to allow the Court to be satisfied that its Order is being complied with and not, as suspected by the Regulator, simply ignored. The Regulator observed that, to date, the Bank has 'refused' to explain what it has done to preserve documents, including those held outside the QFC; its reliance on 'generic document retention and management policies' is said to be insufficient.

24. The Regulator noted that it has written, three times, to the UAE Central Bank asking for its assistance but that no reply has been received.

25. The Regulator submitted that the Bank's allegations of political bias are 'baseless'. The Regulator is simply seeking to obtain documents relevant to an ongoing investigation into very serious matters relevant to the Bank's market conduct and fitness and propriety to hold a banking authorisation.
26. The Regulator maintains that its Application is 'plainly urgent' to ensure that all relevant documents are preserved.
27. Throughout the hearing there continued an air of unreality as Mr Lal was insistent that he represented only the QFC Branch of the Bank and had no other instructions. Meantime he vigorously argued the position of the Bank generally and particularly the Central Headquarters of the Bank.
28. Although Mr Jaffey did not formally withdraw his application for production of documents, he realistically acknowledged and accepted that this aspect of the case could and should await the determinations of the Appellate Division.
29. Accordingly, we accepted that the stay in respect of that aspect should be granted. This was not because an appeal was in contemplation but because on a sensible balance of the competing positions such was needed.
30. The focus of this hearing was whether until the appellate processes have been determined the order for preservation of relevant matters should be stayed. The fact that the appeal is about a fundamental and core aspect of the November 2018 decision is of course relevant and important but not critical or conclusive. The purpose of that requirement was to hold inviolate evidential material about precisely what happened in the relevant days in 2017. The steadfast refusal of the respondent Bank to engage in the proceedings in any meaningful way except with regards to acts or omissions within the QFC Branch naturally has aroused concern.

31. The heart of the litigation, if the Regulator in its claims and this Court in its decision is correct, means acts and omissions in a much wider area are of fundamental importance. There is nothing unreasonable, onerous or unfair in requiring that relevant material is not destroyed, lost or otherwise altered. Mr Lal argued that there will be clear and unambiguous requirements of major international banks to preserve records. We have no effective evidence of this and there is a total void about any systems to maintain memos, notes, email interchanges, and the like which could be of critical evidential value. Placing the obligation on the Bank to ensure that these are kept safe and secure is a common sense way of ensuring that nothing is altered or disappeared while the litigation saga runs on. Some material about obligations and approaches to this issue in the QFC Branch tell us nothing about the wider environment and its circumstances.
32. The simple reality is that since 18 November judgment perfectly reasonable and simple requests have been made by the Regulator for assurance as to how the status quo is being maintained. The requests have been ignored and/or deflected. Even in this hearing the base information has not been forthcoming. The Bank simplistically argues that because in its view the Court is in error in its jurisdictional approach any step which holds the ring between the parties is not appropriate.
33. Balancing competing positions is at the heart of the exercise. If the relevant material is not preserved and the approach of this Court is upheld the future conduct of the litigation will potentially be seriously compromised. If the Appeal process rules that there is no power to enquire beyond what happened in Doha then no detriment or consequence will have occurred. Of course there will be some time and resource in the preservation but these are orders and requirements which have existed over many months. We have no difficulty in concluding that the balance in favour of maintaining the order of this Court and refusing a stay of the obligation to preserve was overwhelming.

34. The corollary or consequential step was the Regulator's request for an affidavit to be filed by the Bank about the steps which have been taken to comply to date.
35. Having reached the clear view that the order for preservation must remain in full force and effect notwithstanding the pending appeal, the final issue is whether there is a need or justification for an immediate report on the steps which have been taken by the Bank to fulfil its obligation. The fact that this was not initially requested is immaterial. The Regulator was entitled to assume that a responsible institution would professionally meet its duty. Nor do we see the passage of time as disentitling the Regulator to have such a response. Within 5 days of the Bank having filed its application for permission to appeal- which was on the last available day for it to do so- the Regulator sought assistance of this sort. Notwithstanding gentle and subsequently more vigorous requests for information as to how the Court's requirement for preservation was being responded to no sensible or meaningful reaction had been received. In the month until this hearing the position has not changed. Unless and until it is determined that this Court was in error on 18 November 2018 to require the Bank- not just the QFC Branch- to preserve all materials as identified in the appendix to the original notice of preservation and production dated 18 March 2018, that is the legal position.
36. There is no hard evidence about this and after the total passage of time it is a sensible and appropriate exercise of the Court's supervisory discretion to obtain such information.
37. The Regulator suggested this could be expected within 7 days but accepted that 14 days could be seen as a more reasonable timeframe. Mr Lal was at pains to argue that it would be a substantial task involving many people over a sustained period of weeks. We are not persuaded. The Bank has been on the clearest notice for months of this obligation and it should be in a position to respond within a fortnight.
38. As the relief sought was discretionary, Mr Lal argued and Mr Jaffey did not disagree, that the Court should consider viable available alternatives to either preservation and/or the

affidavit as to what has occurred. We agree but a measured and mature approach is required. The alternatives ventilated before us would have the potential for catastrophic consequences for the Bank and the Banking industry more generally. The simple explaining of what has been done, and what is being maintained, in furtherance of the perseverance requirement is an overwhelmingly more appropriate approach.

39. Although the Bank was successful in obtaining a stay in respect of the requirement for production that was before us not a contested matter. The substance of the hearing was preservation and reporting thereon, upon which the Regulator was successful. In the normal manner costs will follow the event. The Regulator is entitled in reasonable costs in respect of the matters before the Court on 17 February to be agreed between the Parties or as assessed by the Registrar.

By the Court,


Justice Bruce Robertson



Representation:

Mr Ben Jaffey QC (Blackstone Chambers) appeared on behalf of the Qatar Financial Centre Regulatory Authority

Mr Hamish Lal (Akin Gump Strauss Hauer & Feld LLP) appeared on behalf of First Abu Dhabi Bank P.J.S.C (a company formed and incorporated under the laws of the United Arab Emirates and registered in the Qatar Financial Centre as First Abu Dhabi Bank- QFC Branch)