



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

Neutral Citation: [2019] QIC (F) 9

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

2 October 2019

Case Nos: 6 and 7 of 2018

(1) MS ILEANA MERCEDES D'LACOSTE AGUDELO

(2) MS ENILUZ JHOANA GONZALEZ APONTE

Claimants

and

(1) HORIZON CRESCENT WEALTH LLC

(2) PATRICK BAERISWYL

(3) JEAN MARC MANTEGANI

Defendants

and

QATAR FINANCIAL CENTRE REGULATORY AUTHORITY

Interested Party

JUDGMENT

Members of the Court:
Justice Frances Kirkham
Justice William Blair
Justice Rashid Al Anezi

ORDER

1. The Claimants' applications for summary judgment are dismissed;
2. The Claimants' applications to strike out the Defendant's counterclaims are adjourned with permission to apply;
3. The books and records of the Criteria Investment Trust and the OA Investment Trust shall be preserved;
4. The First Defendant shall deliver up to the QFCRA the books and records of the Trusts within 28 days;
5. In the event that the books and records of the Trusts are no longer in the possession, custody or control of the Defendants, a Director of the First Defendant shall produce a witness statement setting out where the records are now held, or the full circumstances of their loss or destruction;
6. The Claimants and the Qatar Financial Centre Regulatory Authority may, at their own expense, make copies of the books and records of the Trusts; and
7. The Claimants' applications for further disclosure by the QFCRA are dismissed.

JUDGMENT

1. On 26 August 2018, the Claimants, Ms Ileana Mercedes D'Lacoste Agudelo and Ms Eniluz Jhoana Gonzalez Aponte, both residents of Costa Rica, issued separate proceedings, numbered 6 of 2018 and 7 of 2018 respectively. Save for differences between the sums claimed, the issues and underlying facts are identical in both cases. The parties and Court have found it convenient to deal with the two cases simultaneously and in practical terms as if they are one set of proceedings, though there has been no formal joinder of the two cases.
2. The Claimants bring their claims on the basis that they are each a beneficiary of a trust established in May and April 2017 respectively, operated by the First Defendant, Horizon Crescent Wealth LLC ("HCW") as trustee for each Claimant. Their claims against the Second and Third Defendants are brought on the basis that the Second and Third Defendants were, at material times, directors of HCW.
3. HCW is a company established in the Qatar Financial Centre. The Court has jurisdiction under Article 8(3)(C) of the QFC Law, and this is not in dispute. Clause 1 of each of the trust instruments provides that the trusts "...shall be subject to the exclusive jurisdiction of and construed and regulated only according to the laws of the QFC".
4. In each case, the Claimants contend that HCW was in breach of its duties as trustee by failing to transfer to each of them the assets of the relevant trust and to account to them for all other assets and documents of the trust when requested to do so. The Claimants contend that the Second and Third Defendants owed duties (a) to exercise their powers as directors with the degree of care and diligence that a reasonable person would exercise if they were a director of HCW in HCW's circumstances and occupied the office held by and had the same responsibilities within HCW as the director (b) to exercise their powers and discharge their duties in good faith and (c) not improperly to use their position to gain an advantage for themselves or someone else or cause detriment to HCW.

5. The Claimant in case 6, Ms D'Lacoste Agudelo, claims € 2,364,392.72. Ms Gonzalez Aponte, the Claimant in case 7, claims €5,614,392.72.
6. The Defendants' defences are identical (except for the corrections needed explained in paragraph 13 below). HCW accepts (a) that it received sums of money to be held on trust for each Claimant (b) that on 25 March 2018 each Claimant sent a notice removing HCW as trustee and appointing herself in HCW's place and (c) that it was instructed to transfer all funds it held to the bank account in Switzerland of the new trustee. HCW's case is that it was unable to transfer any money as its accounts had been frozen by the authorities.
7. The Second and Third Defendants in each case deny the Claimants' allegations of breach and say that they carried out their duties lawfully.
8. The Defendants allege that they suffered loss and damage resulting from the authorities' suspicions as to the origin of the Claimants' funds, the freezing of HCW's accounts and the QFCRA investigation. These, they say, caused financial loss and reputational damage and caused the Third Defendant be subject to a travel ban. The Defendants counterclaim as follows:
 - a. QAR 200,000,000 for HCW
 - b. QAR 50,000,000 for the Second Defendant as material and moral damages; and
 - c. QAR 30,000,000 for the Third Defendant as material and moral damages.
9. Each Claimant rejects the basis of the Defences and denies liability to the Defendants on their counterclaims.
10. The Qatar Financial Centre Regulatory Authority ("QFCRA") applied to be joined to both cases on the ground that its participation would assist the Court among other things by putting relevant information before the Court. On 6 December 2018 the Court ordered that QFCRA be joined as a party to the proceedings. The QFCRA does not seek any relief in either case 6 or case 7 or intend to play an active role.

11. The Claimants in each case have issued an application seeking the following relief, namely that:

- a. the Defendants' counterclaims be struck out;
- b. summary judgment be entered on their claims;
- c. there be consideration whether the Defendants complied with the requirements of a freezing order which the Court made on 9 May 2019; and
- d. the QFCRA provide information and disclosure to the Claimants.

12. We have been much assisted at the hearing of these applications by Mr Simon Hatton for the Claimants, Mr Abu Shaikha for the Defendants and Mr Ben Jaffey QC for the QFCRA.

Corrections

13. A correction is needed to the Statement of Case in Ms D'Lacoste Agudelo's claim (case no.6). The figure of 2,000,000.00 Euro in paragraph 6 should read 200,000 Euro.

14. Names and numbers were transposed in the defences. At the hearing of these applications Mr Abu Shaikha confirmed on behalf of the Defendants that the following corrections, simply to correct transpositions, should be made to the Defences and Counterclaims:

- a. case no. 6, where the Claimant is Ms D'Lacoste Agudelo, the figure of €5,614,392.72 in paragraph 15 of the Defence and Counterclaim should read €2,364,392.72;
- b. case no. 7, where the Claimant is Ms Gonzalez Aponte, the figures in paragraph 7.3 of the Defence and Counterclaim should read €5,614,392.72 not €2,364,392.72;
- c. case no. 6: the name "Ms Aponte" in paragraph 15.1 of the Defence and Counterclaim should read "Ms Agudelo"
- d. case no. 7: the name "Ms Agudelo" in paragraph 15.1 of the Defence and Counterclaim should read "Ms Aponte".

Background

15. As the Claimants' four applications are all interim applications, no evidence has been formally adduced or tested, though in the usual way the Court has had before it a number of witness statements to which it has had regard. Subject to that, the following events appear to be undisputed so far as these applications are concerned.
16. In April and May 2017 the Claimants established separate trusts with HCW as trustee. Ms D'Lacoste Agudelo established the OA Investment Trust. Ms Gonzalez Aponte established the Criteria Investment Trust. The Criteria Investment Trust identifies the Protector as Ms Gonzalez Aponte and the trustee as HCW. In a letter dated 13 April 2017 Ms Gonzalez Aponte authorised HCW to open a bank account in Qatar for the trust and to accept instructions from her by email. Similarly, the OA Investment Trust identified Ms D'Lacoste Agudelo as Protector and HCW as trustee. By letter dated 3 May 2017 Ms D'Lacoste Agudelo gave similar instructions to HCW as Ms Aponte had done.
17. It appears that between May and August 2017 Ms D'Lacoste Agudelo transferred a total of € 5,114,393 to be held subject to the OA Investment Trust, and Ms Gonzalez Aponte transferred a total of € 7,414,393 to be held subject to the Criteria Investment Trust.
18. Between about 17 January and 21 February 2018 HCW transferred a total of € 2,750,000 to Ms D'Lacoste Agudelo and € 1,800,000 to Ms Gonzalez Aponte. The Claimants contend that, by the end of February 2018, HCW held € 2,362,393 in the OA Investment Trust as trustee for Ms D'Lacoste Agudelo and € 5,614,393 in the Criteria Investment Trust as trustee for Ms Gonzalez Aponte.
19. According to the QFCRA, on 22 February 2018 it commenced an investigation into HCW's activities on the basis of suspected money laundering. On 22 February 2018, a freezing order was made by the Qatar Central Bank over all of HCW's bank accounts, which was subsequently extended by the Public Prosecutor. The accounts, including those holding the funds of the two trusts, remain frozen.

20. It appears that by deeds dated 15 March 2018 (Ms Gonzalez Aponte) and 16 March 2018 (Ms D'Lacoste Agudelo) each Claimant removed HCW as trustee and appointed herself in its place.
21. By letter dated 25 March 2018 Al Tamimi & Co wrote to HCW on behalf of both Claimants giving notice that HCW had been removed as trustee of both trusts. By that letter Al Tamimi & Co instructed HCW to transfer all funds held by them as trustees to accounts in Switzerland in the names of each of the Claimants, who had been appointed as trustees in HCW's place. HCW were also instructed to make all books of account available for collection.
22. HCW responded rejecting the notices removing them as trustees, on the basis that they were unable to operate their bank accounts as HCW's accounts had been frozen on 22 February 2018. The Defendants took no steps to transfer trust books to the Claimants or otherwise arrange for the trusts to be transferred to them as new trustees.
23. On 24 October 2018, the QFCRA applied to be joined to the proceedings. It stated that it was concerned that the funds transferred to HCW on behalf of the Claimants are part of a sophisticated attempt at money laundering and an attempt to evade tax. By order dated 6 December 2018 the QFCRA was joined to these proceedings. The Claimants have made various requests that the QFCRA provide further information. The QFCRA has provided some documents and has refused some requests. This has been one of the issues on the present applications.
24. On 11 March 2019 the QFCRA issued its Decision Notice in relation to its investigation against HCW. That identified breaches by HCW of the Anti-Money Laundering and Combatting Terrorist Financing Rules 2010 and included a requirement that HCW pay fines totalling QAR 30,000,000. Although the Decision Notice is directed at HCW and not the Claimants, pursuant to an order of the Court of 15 April 2019, the Decision Notice was disclosed to the Claimants.
25. It appears that the Claimants have not participated in or otherwise assisted the QFCRA in its investigation. They deny any suggestion that the funds settled in the trusts were in any way illegitimate. No formal allegations have been made against the Claimants and there has been no formal investigation in respect of the Claimants. The Defendants'

position has been that QFCRA conjecture that the Claimants may have failed to pay tax in Costa Rica, but say that there is no factual basis to accuse the Claimants of tax evasion or any other crime. HCW's position is that its own money laundering checks had excluded the possibility of any participation in any crime related to tax evasion. The QFCRA's position is that it continues to have concerns as to the true source of the funds in issue in these proceedings, and in particular the nature and circumstances of a settlement agreement that led to the funds ultimately arriving in Qatar.

26. Although HCW's accounts remain frozen, the Claimants have expressed concern that the fines imposed by the Decision Notice may be satisfied by payment out of these accounts, which, they claim, include the Claimants' money. By Order dated 8 May 2019, on application by the Claimants, the Court issued an injunctive order against HCW prohibiting it from removing from Qatar any of its assets in Qatar. The Order required HCW to inform the Claimants of all assets exceeding QAR 35,000 and of all deposits received by HCW from or on behalf of the Claimants and all transfers made by them of the Claimants' money including funds held in the Criteria Investment Trust and OA Investment Trust. HCW has not provided that information to the Claimants.
27. The QFCRA informed the Court that it is not aware of any evidence which suggests that funds subject to the Court's injunctive order dated 8 May 2019 have been dissipated.
28. On 10 May 2019 HCW lodged at the Regulatory Tribunal an appeal against the Decision Notice. The Court understands that this appeal is proceeding, but has not yet been determined.
29. It appears that HCW is no longer trading. This has some significance for the matters which the Court has to decide. It appears that HCW was holding itself out as carrying on asset management, QFCRA says without authorisation. Be that as it may, issues may arise as to whether the monies presently in frozen accounts in HCW's name are sufficient to meet all its obligations even aside from the fines.

Application for summary judgment

30. Each Claimant seeks an order for summary judgment against HCW in respect of the sums she claims is the balance of the trust fund held by HCW following the January/February 2018 transfers. Ms D'Lacoste Agudelo seeks judgment now for €2,364,392.72 and Ms Gonzalez Aponte for €5,614,392.72. At the hearing of these applications Mr Hatton confirmed that the Claimants were not seeking summary judgment against the Second or Third Defendant.
31. Mr Hatton acknowledged that any order for summary judgment should recognise the fact that HCW's accounts are currently frozen. He clarified the order he is seeking on behalf of Ms D'Lacoste Agudelo in case 6 in the following terms, namely that:

"1. HCW shall transfer to the Claimant, as new trustee of the OA Investment Trust, the balance of the trust fund, being the sum of € 2,364,392.72.

2. Execution of the transfer requirement set out in paragraph 1 above shall be stayed pending lifting of the Freezing Order imposed on 22 February 2018 and continued thereafter by the Qatar Authorities over the First Defendant's bank accounts or further order of this Court."

The terms of the order Mr Hatton is seeking in respect of Ms Gonzalez Aponte in case 7 is in the same terms save that the figure in paragraph 1 would be €5,614,392.72.

32. Mr Abu Shaikha stated that the Defendants are willing to pay trust monies to the Claimant, but are prevented from doing so because accounts had been and remain frozen.
33. The basis on which the Court gives summary judgment is set out in Practice Direction 2 /2019 (so far as relevant) as follows:

"In accordance with Article 22.6 of the Rules, the Court may, if it considers that justice so requires, give summary judgment on a claim ... if – (a) it considers that –

(i) the defendant to the claim ... has no prospect of successfully defending the claim."

Recent examples of summary judgment given by the Court include *Blom Bank Qatar LLC v Qatar Asphalt Company WLL*, Case No 9 of 2018 (10 April 2019), permission to appeal refused 14 July 2019, and *Leonardo S.p.A v Doha Bank Assurance Company LLC*, Case No 3 of 2019 (5 September 2019).

34. The Claimants submit that these principles plainly apply in the present case. The case, they submit, is a straightforward one in which a former trustee (HCW) has failed to transfer trust monies at new trustees' request. The former trustee does not dispute that the monies are trust monies and that it is bound to comply with the request – simply that it is unable to do so, the relevant accounts being frozen.
35. However, particularly in the light of the submissions of Mr Jaffey QC, the Court considers that it is faced with a more complex picture in this case. In the first place, on the material before it, the Court is unable to make any finding as to the source of the funds lodged with HCW. The funds may be trust money so as to give the Claimants a proprietary claim if the Claimants are legal or beneficial owners of the money. There has been no evidence forthcoming from the Claimants or otherwise to assist the Court with that. Mr Hatton relies on the fact that no formal investigation has been instituted as regards the Claimants. However, the source of the funds is an important issue as regards the investigation into HCW, and the Court has no explanation from the Claimants as to the source of the funds transferred to HCW.
36. Mr Hatton made clear that the Claimants are not seeking damages for breach of trust; their case is simply that HCW were holding funds as trustee, HCW had been replaced; and HCW thus had an obligation to pay over the funds they held as trustee.
37. It appears however that HCW has not maintained separate client bank accounts and that trust monies held for the Claimants may not have been kept separate from other monies held by HCW: in QFCRA's investigation, the Court was told that HCW employees admitted that HCW had commingled client funds with its own money. Thus, it appears that there is not a separate account for either Claimant's fund. The Defendants accept, in their pleadings, that the specific sums claimed by the Claimants were held on trust for the Claimants. There is no evidence however as to the current state of HCW's accounts. Mr Abu Shaikha said that the funds were probably not worth the same now

as had been the case in March 2018, but gave no information to assist with what their value might be. He submitted that, as accounts had been frozen, the Defendants could not know what the position was as regards the trust funds. The evidence before the Court as to how much money is held in HCW's accounts comes from paragraph 5.22 of the Decision Notice which gives what are said to be the then current balances of various HCW bank accounts totalling approximately QAR 26,430,000.

38. It appears that HCW was holding funds for other clients – the Court was told possibly 15 others though the Claimants were the largest clients – who may also have proprietary claims against HCW. Even assuming that the Claimants have a proprietary claim, on the state of the evidence the Court cannot be confident that there is in HCW's accounts sufficient money to pay the sums now sought by the Claimants, without trespassing on trust funds held on behalf of others. It is not possible for the Court to conduct an exercise of equitable tracing on a summary judgment application.
39. Applying the test set out above, the Court has concluded that it is not in the interests of justice to grant the Claimants' applications for summary judgment, which therefore fail. The Claimants are, of course, free to pursue their claims to a full hearing should they wish to do so. They should submit suggested directions to the Court following receipt of this decision. The Court will deal with directions on paper without the need for another hearing.
40. The Claimants also seek an order for immediate delivery of books and records relating to the trusts. Mr Jaffey was concerned to ensure that the QFCRA's position was safeguarded. However, he and Mr Hatton at the hearing agreed the following wording for an order, and which the Court approves:

"1 The books and records of the trusts shall be preserved;

2 The First Defendant shall deliver up to the QFCRA the books and records of the Trusts within 28 days; and

3 In the event that the books and records of the Trusts are no longer in the possession, custody or control of the Defendant, a Director of the First Defendant shall produce a witness statement setting out where the records are now held, or the full circumstances of their loss or destruction."

4 The Claimant and the Regulatory Authority may, at their own expense, make copies of the books and records of the Trusts.”

The Claimants’ applications to strike out counterclaims

41. The Claimants seek an order that each counterclaim be struck out on the ground that it is both legally and factually hopeless. Their case is that the Court should make such an order because that would enable the cases to be conducted expeditiously and effectively and would be in accordance with the Court’s overriding objective.
42. The relevant claims for loss and damage in each counterclaim are set out in paragraph 8 above.
43. The Claimants’ case is that these counterclaims should be struck out or subject to summary dismissal on the grounds that
 - a) they do not amount to legally recognisable claims;
 - b) no legally relevant duty owed to the Defendants by either Claimant is identified, and it is even more difficult to see how the Second or Third Defendants could have a cause of action against the Claimants;
 - c) there is no explanation how any such duty has been breached;
 - d) there is no explanation as to how the Defendants have suffered any loss as a result of any such breach of duty;
 - e) there is no explanation of the actual loss suffered or how the sums claimed have been arrived at;
 - f) there is no proper legal basis for the claim for “material and moral damages”; and
 - g) the Defendants have failed to comply with the requirement to provide information contained in the freezing order of 8 May 2019.
44. Further, even if the Defendants were owed a duty of some nature by the Claimants, the Claimants submit that the counterclaims fail to identify how breach of such duty has caused a loss giving rise to a right to damages in circumstances where HCW has been subject to investigation into its own procedures. In any event, the counterclaims are

inconsistent with the Defendants' own submissions in which they reject the suggestion that the funds they hold on trust came from anything other than legitimate sources.

45. The Claimants' case is that allowing the counterclaims to continue would be of no benefit to the Defendants and a waste of resources for all parties and the Court.
46. On behalf of the Defendants Mr Abu Shaikha stated that the Defendants had suffered badly from the QFCRA's actions. HCW's business had closed and had lost its opportunity to make profits; there had been loss of reputation. It would, he submitted, be wrong to strike the claims out.
47. The Court concludes that the Claimants' criticisms of the counterclaims, which in their present state are mere assertions, are fully justified. If they wish to pursue them, the Defendants must explain the legal and factual basis of their claims, including the nature of the duty which they say the Claimants owed to the Defendants and how that duty has been breached and the actual damages they claim to have suffered because of any breaches by the Claimants. The damages which the Defendants seek are extraordinarily high and must be explained.
48. The Claimants also submit that the counterclaims should be struck out by reason of the HCW's failure to comply with the information provision of the injunctive order dated 8 May 2019. The Court rejects that submission: striking out a counterclaim is not generally a remedy for a breach of an injunctive order. The Court notes that the Third Defendant had apparently ceased to be a director of HCW before 8 May 2019.
49. The Court notes further that the Claimants' claims are brought against the Second and Third Defendants, both individuals, as well as HCW. The Claimants indicated an intention to pursue those claims even if the counterclaims are struck out. In all the circumstances of these two cases the Court concludes that it would be fair to give the Defendants an opportunity to provide a proper explanation of their counterclaims, as set out in paragraph 43 above, and evidence to support the counterclaims. Accordingly, the Court adjourns generally the Claimants' applications to strike out the counterclaims, with permission to restore the applications if the counterclaims are left in their present wholly unsatisfactory state. The above applies equally to the Claimants' application for summary judgment on the counterclaims.

Failure to comply with the 8 May 2019 Freezing Order

50. The injunctive order dated 8 May 2018 included a requirement that HCW inform the Claimants' lawyers, by 19 May 2019, of all its assets exceeding QAR 35,000 in value and to provide a summary explanation of how it has dealt with the funds transferred to it by the Claimant. HCW did not do so. The Claimants' lawyers wrote on 23 May 2019 asking for immediate compliance. HCW has not responded.
51. Mr Hatton submits that it is important for the Claimant to know what has become of the money they transferred to HCW, particularly in circumstances where HCW's accounts appear to show less than what the Claimants believe should be the balances on the trust funds and where it appears there has been commingling of client funds with HCW monies.
52. The Court accepts these submissions, but no sanction is suggested by the Claimants except in relation to strike out, which for reasons set out above is not appropriate. The Claimants are entitled to take steps to enforce the injunction if it is practical to do so given that HCW seems to be defunct.

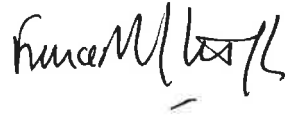
Disclosure applications against QFCRA

53. The Claimants seek an order requiring QFCRA to answer questions about the content of QFCRA's submissions to the Court made in January 2019 and to disclose various documents, being documents referred to in the Decision Notice and which formed the bases on which the QFCRA reached its conclusions. The QFCRA resisted the applications. However, Mr Hatton and Mr Jaffey were able to reach agreement as to some elements of the application and which agreement the Court approves (an order is not sought in this regard).
54. There remain in issue the Claimants' requests for the following material referred to in the Decision Notice, namely (a) the full transcripts of interviews conducted with various individuals relied on by QFCRA in reaching the conclusions set out in the Decision Notice and the documents referred to in them; (b) documents relating to the imposition

of the freezing order in February 2018 and (c) the Notice of Proposed Action issued to HCW on 16 July 2018.

55. Mr Hatton submitted that fairness requires disclosure. Though the QFCRA had disclosed redacted transcripts of interviews, he submitted that the Claimants needed to see the transcripts in full as this would enable them to understand the basis on which the QFCRA reached the conclusions and decisions set out in the Decision Notice (and which the Claimants say are wrong).
56. The Court accepts Mr Jaffey's submission that it should be slow to order disclosure of the full transcripts, because witnesses had been interviewed under compulsion, they were required to answer questions, and there is no protection against self-incrimination. Further, Article 19 of the Financial Services Regulations ("FSR") provides that the QFCRA has a duty of confidentiality in relation to confidential information it receives, and Article 77 of the FSR includes a power to withhold disclosure on a public interest ground.
57. The Claimants also submit that they need to see these documents to enable them to understand the source of the funds provided to HCW. The Court does not accept that proposition at all. As the Claimants' position appears to be that money was transferred to HCW on their behalf, they must know the source of the funds, but have chosen not to disclose it.
58. So far as documents relating to the imposition of the freezing order in February 2018 and the Notice of Proposed Action issued to HCW on 16 July 2018 are concerned, the Court accepts Mr Jaffey's submission that correspondence between regulators is not normally disclosed by the regulator and that the Court should be slow to order disclosure of information which might undermine a money laundering investigation, including a possible criminal investigation. It is open to the Claimants to make their applications to the domestic courts in Qatar.
59. The Claimants have not persuaded the Court that it would be right to make the order the Claimants seek. The Court rejects the Claimants' applications for disclosure by the QFCRA.

By the Court,



Justice Frances Kirkham



Representation:

The Claimants were represented by Mr Simon Hatton, Serle Court, London.

The Defendants were represented by Mr Sami Abu Shaikha, Sami Abdullah Abushaikha Law Office, Doha.

The Interested Party was represented by Mr Ben Jaffey QC, Blackstone Chambers, London.