



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

Neutral Citation: [2020] QIC (F) 11

IN THE CIVIL AND COMMERCIAL COURT

OF THE QATAR FINANCIAL CENTRE

FIRST INSTANCE CIRCUIT

14 September 2020

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

(Concerning disclosure)

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

ORDER

1. Upon the Claimants' undertaking, by 4pm on Monday 28 September 2020, the QFCRA is to disclose to the Claimants any and all bank statements as well as any material reasonably necessary to understand the bank statements held by them concerning the nine accounts frozen at Qatar National Bank and the seven accounts frozen at Mashreq Bank pursuant to the Freezing Order obtained by the QFCRA on or around 22 February 2018, such accounts being in the name of Horizon Crescent Wealth LLC or in the name of entities wholly-owned by it.
2. Further, the Court notes that it is proper for the QFCRA to redact any information which is not related to the Claimants, and also to anonymise where appropriate. The Court invites the parties to agree on the precise scope of the disclosure but considers that in general it should not go beyond the bank statements, and any material reasonably necessary to understand the bank statements. It should not be allowed to become a fishing expedition beyond the legitimate concerns of the Claimants in these proceedings.
3. Any reasonable costs associated with the disclosure exercise must be borne by the Claimants.
4. Permission to apply.

JUDGMENT

Introduction

1. The Claimants, Mrs D'Lacoste Agudelo (in Case No. 6 of 2018) and Mrs Gonzalez Aponte (in Case No. 7 of 2018) bring claims on the basis that they are each a beneficiary of a trust established in May 2017 and April 2017, operated by the First Defendant, Horizon Crescent Wealth LLC ("HCW") as trustee for each Claimant. They contend that, in relation to each of the two trusts, HCW was in breach of its duties as trustee by failing to transfer to 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
2. HCW does not dispute that it operated a trust fund for each of the Claimants.

3. The Court has issued judgments in respect of some other matters in issue in these proceedings: [2019] QIC (F) 9, dated 2 October 2019, and [2020] QIC (F) 2a, dated 17 March 2020. The facts are set out in the judgment of 2 October 2019.
4. The Claimants now apply for an order that the Qatar Financial Centre Regulatory Authority (QFCRA), Qatar National Bank (QNB) and Mashreq Bank disclose any and all bank statements and records whatsoever held by them concerning the nine accounts said to be frozen at QNB and the seven accounts said to be frozen at Mashreq Bank pursuant to a freezing order made in February 2018 in respect of HCW's accounts in Qatar.
5. The Claimants also seek to join Mashreq Bank and QNB as parties to these proceedings.

Background

6. It is claimed that, by January or February 2018, Ms D'Lacoste Agudelo's trust fund stood at about €2.36 m, and Ms Gonzalez Aponte's at about €5.6 m. In March 2018 both Claimants instructed HCW to transfer all sums held by it as trustees into separate accounts. However, on 22 February 2018 a freezing order was made by the Qatar Central Bank (QCB) subsequently extended by the Public Prosecutor in respect of bank accounts held in the names of HCW or of entities wholly owned by it. As its accounts were frozen, HCW was unable to transfer funds to the Claimants.
7. HCW has been the subject of an investigation by the QFCRA. That investigation culminated in the issue on 11 March 2019 of a Decision Notice against HCW under which the QFCRA imposed financial penalties on HCW totalling QAR 30 m. HCW's challenges to the Decision Notice have failed: see [2020] QIC (RT) 1 dated 9 March 2020, a decision of the Regulatory Tribunal, and the judgment on the refusal by the Appellate Division of the Court of HCW's application for permission to appeal against that decision: [2020] QIC (A) 2.
8. By order dated 24 October 2018 the QFCRA was joined to these proceedings as an Interested Party.
9. On 9 May 2019, the Court, upon application by the Claimants, issued a freezing injunction against HCW which, among other things and until further order of the Court, prohibited HCW from removing from Qatar or in any other way disposing of, dealing

with or diminishing the value of any of its assets which are in Qatar. At the same time, the Court required HCW to inform the Claimants' lawyers of all its assets exceeding QAR 35,000 in value whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. HCW was also required to inform the Claimants' lawyers of (1) all deposits received by HCW from, or on behalf of, the Claimants, and (2) all transfers made by HCW (or those acting on its behalf or under its control) of the Claimants' monies (including monies held on behalf of two identified trusts), giving the value, date, bank account details and ultimate destination for each deposit and transfer.

10. On 2 October 2019 the Court ordered, insofar as relevant to the current application, that:

the books and records of the trusts should be preserved;

HCW must deliver up to the QFCRA the books and records of the trusts, and

the Claimants and the QFCRA may, at their own expense, make copies of the books and records of the trusts.

11. The Claimants say that, until now, HCW have provided only two trust portfolio summaries, which contain very limited information; otherwise they have not complied with the terms of the 2 October 2019 order. It appears that the trust funds may now be of lower value than in early 2018, but the Claimants have been unable to obtain information. They wish to demonstrate a proprietary claim to the frozen funds but their attempts to conduct an exercise of tracing the trust funds in equity have been hampered by the failures by HCW to deliver up books and records as the Court had ordered.

12. The Claimants' application is supported by a witness statement filed by Ms Wilkinson of Fieldfisher LLP on behalf of the Claimants.

13. The QFCRA and the holding banks all object to the making of an order requiring them to disclose the documents which the Claimants request.

Discussion

14. QNB and Mashreq Bank:

Fieldfisher served the Claimants' application on Mashreq Bank and QNB on 27 May 2020.

By email dated 3 June 2020 QNB said:

“Reference to the subject and request conveyed in your letter dated 27 May 2020, which was received by us on 2d June 2020, kindly be advised of the followings:

As per article No. 145 of the Law No.13 of 2012 on Issuing the Law on Qatar Central Bank and the Regulation of Financial Institutions,

“All client accounts, deposits, trusts and safety deposits in banks and all transactions related to them, shall be confidential, and may not be accessed or disclosed and nor may any information or data about it be given to any person either directly or indirectly, except by written permission from the client, his heirs or legatees, or based on an enforceable court ruling in a current legal dispute”.

Given the above and taking into consideration that the freezing order was directly submitted to us by Qatar Central Bank, we respectfully suggest that your request is addressed to Qatar Central Bank based on an enforceable court order.”

Fieldfisher replied, clarifying that the court order they were seeking was one which would require QNB to make disclosure. QNB responded by email to Fieldfisher of 3 July 2020:

“As per the procedures we followed earlier in similar cases, the civil and commercial court of QFC addressed letter to Qatar Central Bank and the later (sic) asked banks to execute the order, but there was no direct order/instructions from the QFC's court to banks.”

On 7 June 2020 Mashreq Bank wrote to Fieldfisher, stating:

“Please note that Bank has deliberated on your request and we will release the documents post receipt of court order to that effect.”

15. The Claimants submit that the Court has jurisdiction to make an order against QNB and Mashreq Bank:

“as the court has the equitable jurisdiction to make such third party disclosure orders where the party is likely to have relevant documents and the order is in the interests of justice. It is well established as a matter of common law that a disclosure order can be made against a third party where such disclosure is likely to assist in tracing assets in connection with a proprietary claim, as is the case here.”

16. Fieldfisher cite no authorities to support the submission that this Court has equitable jurisdiction in an application of this nature or indeed that the Court should in this type of case have regard to the common law.

17. Neither QNB nor Mashreq Bank is a QFC company. Article 9 of the Court’s Regulations and Procedural Rules defines the jurisdiction of the Court. Neither Mashreq Bank nor QNB falls within that definition. Accordingly, the Court does not have jurisdiction to join either QNB or Mashreq Bank as parties to these proceedings or to make an order for disclosure against either of them. The Court does not acquire those powers by way of some form of “equitable” jurisdiction, as has been suggested. This Court does not apply common law as a matter of course, and in any event it is not clear how practices in common law countries might explain how this Court would be enabled to exercise jurisdiction over Mashreq Bank or QNB which is not found in the QFC law or the Court’s Regulations and Procedural Rules.

18. QFCRA

Fieldfisher corresponded with the QFCRA in the early months of 2020. In their letter of 15 January 2020, the QFCRA wrote:

“As you are aware we are restricted in our ability to disclose information received in the course of an investigation pursuant to Article 19 of the Financial Services Regulations. We do not consider that we can lawfully provide such materials to you without an order of the Court.”

They went on to suggest that Fieldfisher ask HCW to provide the documents, then wrote:

“In the event that HCW do not comply with a reasonable disclosure order, we consider you may need to apply to the Court for an order addressed to the Regulatory Authority for disclosure of the bank statements...”

19. In their response of 11 February 2020, Fieldfisher reminded the QFCRA that HCW were already in breach of their obligations to disclose the documents; it was unlikely that HCW would comply with a further court order requiring disclosure.

20. By their letter of 8 March 2020 the QFCRA said it was:

“restricted in its ability to disclose information received in the course of an investigation pursuant to Article 19 of the Financial Services Regulations. These restrictions, like those in section 348 of the Financial Services and Markets Act 2000 (UK) are, amongst other purposes, intended to encourage the free flow of information to the Regulatory Authority in the performance of its functions.”

21. The QFCRA filed detailed submissions on 15 June 2020, setting out their objection to the making of the order which the Claimants request. They acknowledge that the Claimants should have access to the documents they seek. They confirm that they have copies of the bank statements which they had obtained from the QCB. Their objection to this application is, first, that QCB have not given permission to the QFCRA to release the documents and, secondly, that information received from the QCB is subject to confidentiality and may be used by the QFCRA only for the purposes of the QFCRA’s investigation into the activities of HCW and related proceedings. They submit that the effectiveness of their powers of investigation relies on their ability to obtain information from other regulators and third parties and, when doing so, to ensure that such information is kept confidential and that restrictions on use of such information are complied with. If, as part of a regulatory investigation, confidential information is disclosed and repurposed for civil litigation, then that outcome would significantly compromise QFCRA’s capacity to perform proper and complete investigations.

22. The QFCRA suggest that, instead, the Claimants seek the bank statements from HCW or, if that failed, from QCB.

23. The QFCRA does not challenge the jurisdiction of the Court to order disclosure of the documents which the Claimants seek.
24. The QFCRA does not suggest that Article 19 of the Financial Services Regulations prohibits or in terms prevents disclosure. That Article provides as follows:

Article 19 - Confidentiality

(1) Subject to Article 20(5) (Information relating to requests from Overseas Regulators) the following Persons shall not disclose any Confidential Information received by them in the Exercise of their Functions otherwise than as permitted by Article 19(3) and (4):

(A) the Regulatory Authority, or any of its officers, employees, agents or contractors;

(B) any Nominated Person nominated or approved by the Regulatory Authority to undertake a report pursuant to Article 49;

(C) any external Investigator appointed by the Regulatory Authority pursuant to Article 50 (Appointment of Investigators) and 51 (Investigations of Companies);

(D) any Auditors and Actuaries referred in Part 15 (Appointment of Auditors and Actuaries)

(E) any Independent Person appointed to undertake a review under paragraph 23 of Schedule 1 (Review of Regulatory Authority) or deal with complaints against the Regulatory Authority in accordance with paragraph 25 of Schedule 1 (Complaints against the Regulatory Authority); nor

(F) Persons undertaking an Inquiry pursuant to paragraph 24 of Schedule 1 (Inquiry relating to the Financial System),

(2) The restriction on disclosure of Confidential Information referred to in Article 19(1) shall also apply to any Person (other than the Person to whom

the duty of confidentiality is owed) coming into possession of such Confidential Information.

(3) Confidential Information may be disclosed by the Regulatory Authority or the Persons referred to in Article 19(1) and (2) in the following circumstances:

(A) with the consent of the Person to whom the duty of confidentiality is owed;

(B) where such disclosure is permitted or required by or pursuant to the QFC Law, these Regulations or any other Regulation conferring powers, duties or functions on the Regulatory Authority;

(C) in response to a legally enforceable demand;

(D) where the disclosure is made in good faith for the purposes of the performance or exercise by the Regulatory Authority of any of its functions, duties and powers under the QFC Law, this Regulation or any Related Regulations;

(E) (in the case of Persons other than the Regulatory Authority) to the Regulatory Authority;

(F) (in the case of a review or inquiry referred to in Article 19(1)(E) and (F) above), to the Council of Ministers;

(G) to the Tribunal or Appeals Body in connection with any matter falling within their jurisdiction;

(H) to any body, agency or authority Exercising Functions relating to the detection or prevention of money laundering or terrorist financing, whether inside or outside Qatar; or

(I) to any other civil or criminal enforcement agency or authority, whether in the State or internationally; or

(J) to Overseas Regulators in accordance with Article 20 (International Relations and Co-operation).

(4) In exercising the duties, functions and powers assigned or delegated to the Regulatory Authority as referred to in Schedule 2, paragraph 1, the Regulatory Authority (or any of the Persons referred to in Article 19.1 acting on behalf of the Regulatory Authority) shall be permitted to disclose to the Person assigning or delegating such duties, functions and powers only such Confidential Information as is obtained in the performance of the delegated duties, functions and powers, but not any Confidential Information obtained otherwise than in such capacity unless such disclosure is permitted in accordance with Article 19(3).

Conclusions

25. Article 10.2 of the Court's Regulations and Procedural Rules provides:

"10.2 Without prejudice to the generality of Article 10.1 above, the Court may:

...

10.2.5 require a person to ... produce any item, record or document or material in electronic form in his possession..."

26. The QFCRA accepts that Article 19(3)(A) of the Financial Services Regulations "would permit disclosure pursuant to an order made by this Court to the Regulatory Authority".

27. HCW have not responded to the Claimants' requests that documents be provided. HCW have failed to comply with court orders ordering them to disclose the records which the Claimants now seek. It is unrealistic to expect that HCW, which seems no longer to be participating in the proceedings brought by these Claimants, will provide the documents.

28. Unless the Claimants are able to access the documents they seek, they will face real difficulty in establishing whether or not they have a proprietary claim to the trust funds or understanding how much money is and has been credited to the trust funds accounts, whether any monies have been paid out and, if so, where monies might have gone.

29. The QFCRA's main concern appears to be that the documents were provided by the QCB, which has not given consent to disclosure to the Claimants. They also rely on the proposition that the effectiveness of their investigatory power relies on its ability to obtain information on a confidential basis and to ensure that such information is kept confidential.
30. The Court accepts the general proposition that the effectiveness of the QFCRA's investigatory powers relies on its ability to obtain information on a confidential basis and to ensure that such information is kept confidential. The same applies to all financial regulators.
31. However, this is a very different situation. In this case, the QFCRA completed its investigation into HCW in March 2019, and the matter is now public following the decisions of the Regulatory Tribunal and the Appellate Court. The QFCRA do not suggest that disclosure now to the Claimants of HCW's bank statements would prejudice or jeopardise any ongoing investigation.
32. The Court must balance the real need of the Claimants to obtain information which the QFCRA has, against QFCRA's concerns that QCB has not consented and as to the consequences for its operations if it is susceptible to disclosure orders of information obtained in confidence. As has been noted, the Claimants are unlikely to be able to obtain the information by any other means than disclosure by the QFCRA. On the information available to the Court, it has concluded that the balance lies in favour of the Claimants.
33. Fieldfisher have offered the following undertaking, if the Court grants the application:

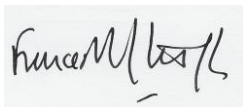
"The Claimants undertake that any bank statements and records disclosed pursuant to the order sought will be:

(a) Kept confidential and not disclosed to any third party for any reason; and

(b) Used only for the purposes of the present Trust Proceedings, namely in order to carry out a tracing exercise so that the Claimants may establish the movement of their funds once paid into the Frozen Accounts" ...

34. Further, the Court notes that it is proper for the QFCRA to redact any information which is not related to the Claimants, and also to anonymise where appropriate. The Court invites the parties to agree on the scope of the disclosure but considers that in general it should not go beyond the bank statements, and any material reasonably necessary to understand the bank statements. It should not be allowed to become a fishing expedition beyond the legitimate concerns of the Claimants in these proceedings. The cost of the disclosure exercise must be borne by the Claimants.

By the Court,



Justice Frances Kirkham

