qatar
FINANCIAL CENTRE
CIVIL AND COMMERCIAL COURT

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

**IN THE CIVIL AND COMMERCIAL COURT**

**OF THE QATAR FINANCIAL CENTRE**

**12 AUGUST 2010**

**CASE NO: 06/2010**
**JUDGMENT NO: 1**

**IN THE MATTER OF THE**
**WINDING UP OF AL MAL BANK LLC**
**APPLICATIONS BY THE LIQUIDATORS IN -**

**TAHA BABIKER**

**V.**

**AL MAL BANK LLC**

**AND**

**NAZIM OMARA**

**V.**

**AL MAL BANK LLC**

**Members of the Court:**

**Justice Dohmann**
**Justice Lord Cullen**
**Justice Sackville**

## JUDGMENT

**THE COURT:**

1. On 8 August 2010, the Court commenced a scheduled five day hearing of applications by the liquidators of the Al Mal Bank ("Bank"). In those applications, the liquidators sought the assistance of the Court, pursuant to Art 95 (1) of the *QFC Insolvency Regulations*, to hear and determine certain matters arising in the liquidation of the Bank. In substance, these matters related to claims made by Nazim Omara and Taha Babiker ("the applicants") under what are alleged to be their contracts of employment. Mr. Omara was the Chief Executive Officer ("CEO") of the Bank, Mr. Babiker was the Head of Human Resources and Administration.

2. On 2 August 2010, prior to the hearing, the liquidators applied in writing to adjourn the proceedings. They said that they had been very active since their appointment on 6 June 2010, assembling documents from the records of the Bank and attempting to form a complete picture of the events and conduct leading to the liquidation of the Bank. The liquidators pointed out that they were relatively new to their role and that they had been diligently undertaking investigations into the complex affairs of the Bank.

3. The liquidators said that on 26 July 2010 they had become aware for the first time of criminal investigations by the Qatari authorities into alleged misconduct of the applicants, including allegations that Mr. Omara, the former Chief Executive Officer of the Bank, had fabricated documents. The liquidators also said that there had been some delay in gaining access to reports prepared by or for the Qatar Financial Centre Regulatory Authority ("QFCRA") that had led to the suspension of the Bank's licence.

4. According to the liquidators, the issues identified in the QFCRA reports and in the criminal investigations had to be examined further in order for them to have an opportunity to challenge the credibility of the applicants and to establish that the Bank had grounds to terminate their employment. The credibility of the applicants was critical to their claims to be entitled to rely on contracts of employment that may have been fabricated or, in Mr. Babiker's case, entered into without proper authority. The liquidators pointed to the danger that a premature hearing might lead to findings on credibility which could later be shown to be mistaken by reason of the uncovering of serious misconduct.

5. The applicants filed written submissions opposing the adjournment application. The Court directed that the application should be dealt with at the outset of the hearing.

6. The adjournment application was the subject of detailed oral submissions on the first morning of the hearing. The application was opposed by each of the applicants. At the conclusion of oral argument, the Court announced that it did not propose to adjourn the proceedings, but that it would hear and determine a more limited set of issues than had been contemplated in the pre-trial directions made by the Court. The Court also stated that it would publish its reasons later. These are the reasons of the Court for its decision on the adjournment application.

## COURSE OF EVENTS

7. On 4 July 2010, the solicitors for the liquidators of the Bank sought the assistance of the Court under Art 95 (1) of the *Insolvency Regulations* to determine certain questions relating to the claims of Mr. Omara against the Bank. Those questions were as follows:

> "a) Was [Mr. Omara] unlawfully dismissed?
>
> b) Under what contract was [Mr. Omara] employed?
>
> c) In the event [Mr. Omara] was unlawfully dismissed, is he entitled to:
>
> i. general damages for wrongful termination of his employment and, if so, in what sum;
>
> ii. exemplary and compensatory damages for the loss of opportunity in income and, if so, in what sum?"

8. The solicitors for the liquidators, in separate submissions dated 1 July 2010, had previously sought the Court's assistance under Art 95 (1) of the *Insolvency Regulations* to determine whether Mr. Babiker had been unlawfully dismissed.

9. At a directions hearing held on 14 July 2010, the Court directed that a hearing would be held, commencing on 8 August 2010, to deal with the liquidators' Art 95 (1) applications. The Court directed that at that hearing it would:

> "determine what was in each case the applicable contract, whether in each case termination of employment was lawful, whether in the case of [Mr. Babiker], there was dismissal for gross misconduct, and in each case, if dismissal was not lawful, so far as practicable the heads of damage i.e. the nature of any compensation (as opposed to detailed quantification) recoverable by each of the Applicants".

10. It will be seen that the directions made by the Court did not contemplate that it would hear and determine whether Mr. Omara's contract of employment had been validly terminated by reason of serious breaches on his part. At the directions hearing, the liquidators did not foreshadow such a claim. The liquidators' stance at the directions hearing was that they wished to consider whether in due course damages claims could be made against Mr. Omara by reason of conduct adverse to the interests of the Bank. However, the liquidators accepted at that time that they were unable to provide any further evidence than was already available to them on the question of whether Mr. Omara had been lawfully dismissed.

11. At the time the Art 95 (1) application was set down for hearing, therefore, the liquidators did not seek to argue that the termination of Mr. Omara's employment, although not done expressly on the ground of breaches of his contract of employment, could be justified on that ground. However, in later written submissions, the liquidators sought to argue that, by reason of objective evidence of serious misconduct during his term as CEO, the Bank had been justified in terminating Mr. Omara's employment, even though it had not done so expressly.

12. As has been noted, on 2 August 2010 liquidators applied to adjourn the proceedings. On 4 August 2010, in response to a further direction made by the Court, the liquidators provided draft particulars "in relation to the Claims of Each of [Mr. Omara] and [Mr. Babiker]". By this stage, the liquidators had commenced their own investigations into what they described as "irregular conduct of the Bank's business" prompted by "forensic investigations" carried out at the instigation of the QFCRA and the prosecuting authorities.

13. The particulars provided by the liquidators identified a number of "concerns" held by them as to the claims advanced by Mr. Omara and Mr. Babiker. Their concerns included the following:

> "(1) The Liquidators cannot accept the long-form contracts on which [Mr. Omara] and [Mr. Babiker] claim and put them to strict proof that these contracts were concluded at all (in the case of [Mr. Omara]) or with authority (in the case of [Mr. Babiker]).
>
> (2) In light of the matters developed below, the Liquidators are also concerned that there does not appear to be cogent evidence to support actual or ostensible authority [of Mr. Omara] to conclude a contract with [Mr. Babiker] in the terms alleged by Mr. Babiker if [Mr. Omara] purported to do so in September or October 2009. The reason is that by then both [Mr. Omara] and [Mr. Babiker] were apparently involved in misconduct such that [Mr. Babiker]

must have known that he could not rely on any actual or ostensible authority of [Mr. Omara] to sustain such a contract. Such a contract was not in the Bank's interest. The Liquidators note that the Undisclosed Accounts referred to below included an account set up on 16 September 2009 and the payments to [Mr. Babiker] from an Undisclosed Account made from 30 September 2009.

(3) The Liquidators further point out that the evidence suggesting apparent misconduct by [Mr. Omara] and [Mr. Babiker] would prima facie have justified their dismissal.

(4) Further or alternatively if the evidence pointing to the prima facie misconduct of [Mr. Omara] and [Mr. Babiker] is accepted, their dismissal could have been justified by reason of such misconduct at any time after it occurred, such that [Mr. Omara] and [Mr. Babiker] would not have been entitled to any substantial damages whether or not their dismissal was lawful in any respect. The Liquidators reserve the right to challenge quantum on that basis.

(5) Further or in the further alternative, the Liquidators reserve the right to claim against each of [Mr. Omara] and [Mr. Babiker] in respect of losses sustained by the Bank by reason of their apparent misconduct and/to make other claims against them in the course of the Liquidation as may be appropriate in light of the Liquidators continuing investigation.

(6) The Liquidators also reserve the right to assert a defence of set-off far as necessary against any entitlement [Mr. Omara] and [Mr. Babiker] may otherwise have."

14. The liquidators filed written submissions on 7 August 2010 in support of their adjournment application. As has been noted, the Court heard extensive oral argument on 8 August 2010 from Mr. Swainston QC, who appeared with Mr. Harrison for the liquidators, and from Mr. de Lacy, who appeared with Ms. van der Craats for Mr. Omara. Mr. Wofford, who was given leave to make submissions on behalf of Mr. Babiker, supported Mr. Omara's opposition to the adjournment application.

15. At the conclusion of the argument, the presiding Judge, Justice Dohmann, made the following statement:

"Now, the court has before it an application by the liquidators to adjourn the hearing of both questions referred by them for the court's determination: namely, one, the

question which is the valid contract of employment of (a) Nazim Omara and (b) Taha Babiker. Two, the question whether (a) Nazim Omara and (b) Taha Babiker were unlawfully dismissed. The court has assessed all written and oral submissions addressed to it on behalf of those three parties and the court rules as follows: The court will not adjourn question 1 set out above.

The court will adjourn question 2. With regard to the latter, directions will be dealt with in due course. With regard to 1 above, in relation to Mr Taha Babiker, the court will deal with the date of execution of the longform contract upon which he relies and with the issue of Nazim Omara's authority to sign Mr Taha Babiker's contract by reference to the liquidators' pleading set out at paragraph 4(2) of the particulars filed on 4th August 2010: namely, that Taha Babiker must have known that such contract was not in the interest of the bank and that Taha Babiker participated in Nazim Omara's misconduct by receiving payments from an undisclosed account from 30th September 2009 onwards."

**REASONING**

16. In assessing the liquidators' application for adjournment, it is important to appreciate that it was the liquidators themselves who applied to the court for determination of the Art 95 (1) application. They did so in early July 2010 on the basis that they were unable to produce any further evidence on the question of the lawfulness of the termination of the applicants' contracts of employment with the Bank. Yet very shortly before the scheduled hearing was to take place in Doha, for which each of the parties and the Court had undertaken very extensive preparations, the liquidators changed course. At that point, they expressed a strong desire to be able to investigate thoroughly the matters that had come to their attention through the forensic investigations.

17. Mr. Swainston sought to explain the liquidators' change of position on the ground that they had only recently obtained access to the details of the criminal investigations into the conduct of Mr. Omara and that they had not gained access to the QFCRA reports as soon as they had wished. This explanation for the lateness of the adjournment application doubtless reflected Mr. Swainston's instructions. However, the liquidators, despite filing a large number of statements of evidence, did not seek to adduce evidence outlining the measures they took to obtain information from QFCRA and the prosecuting authorities at an earlier stage in the liquidation of the Bank. Nor did the liquidators adduce evidence to explain why measures they did take to obtain the relevant material had not enabled them to prepare adequately for the hearing.

18. It is true, as Mr. Swainston pointed out, that the liquidators were appointed by the Court on 6 June 2010, only two months before the scheduled hearing of the Art 95 (1) application. The liquidators were, however, aware at the time they were appointed that the QFCRA had suspended the Bank's licence and had taken other regulatory action on the basis of reports into the Bank's affairs. They were also aware that Mr. Omara had been held in custody from 17 November 2009, the date of his dismissal from the Bank, until 18 December 2009, as a result of the allegations of criminal conduct against him. Even taking into account the heavy workload imposed on the liquidators, it might have been expected that they would have taken steps sooner to ascertain whether the criminal investigation had produced material relevant to the current hearing upon which they relied to seek the adjournment.

19. Mr. Swainston submitted that an adjournment of the hearing, even at such short notice, would not cause substantial prejudice to either applicant, but would cause the liquidators to suffer prejudice because they would be unable to investigate potentially serious claims of misconduct, especially against Mr. Omara. In our view, while this submission has some force, it underestimates the prejudice that would potentially be caused to the applicants. They have clearly devoted very considerable time and effort to prepare for the scheduled hearing. In addition, they have incurred very substantial legal expenses, particularly in the case of Mr. Omara. The liquidators have not offered to compensate the applicants for any financial hardship that might be occasioned by an adjournment of the Art 95 (1) application. In any event, a costs order would be made against the liquidators in their official capacity and so would diminish the pool of assets available for distribution to all creditors including the applicants themselves, should they ultimately be successful.

20. Perhaps more importantly, each of the applicants has an interest in having his case determined, or at least in having as many issues as practicable determined at the earliest opportunity. Each clearly has a reputational interest to protect. The evidence before the Court indicates that, if they are successful in these proceedings, their employment prospects are likely to be enhanced as are their prospects of being permitted to remain in Qatar. These matters of prejudice are not easily quantified, but they are significant nonetheless.

21. It is necessary to ensure that, so far as is consistent with the interests of justice, prejudice to each of the parties is minimised. The liquidators have an obvious interest in further investigating allegations of misconduct, especially against Mr. Omara, the former CEO. Those investigations may yield material that provides a defence to his action for wrongful dismissal and supports a potential claim against him. On the other hand, the applicants have an interest in the hearing addressing as many issues as practicable.

22. The time set aside for the hearing can be utilised constructively if the court hears and decides in each case the question of the applicable contract. This issue is the subject of conflicting

evidence but should be capable of resolution at the hearing. It should also be practicable to deal with the lawfulness of Mr. Babiker's termination of employment, since the particulars provided by the liquidators are within a relatively narrow factual compass. Should unforeseen difficulties arise, the matter can be kept under review.

23. Whatever the outcome of the hearing on these issues, the liquidators will have time to consider the evidence available to them for the purposes of any claim against the applicants. They will also have the opportunity to determine whether there is evidence to justify the foreshadowed defence to Mr. Omara's wrongful dismissal claim, namely that his misconduct, even if not known or relied on at the time, justified his dismissal.

24. Mr. Swainston argued that the case for an adjournment of the hearing was strengthened by the partial withdrawal of the solicitors for the liquidators on the first day of the hearing. The solicitors applied two days before the hearing for leave to withdraw from the representation of the liquidators in relation to Mr. Omara's claim by reason of a conflict of interest that the solicitors had belatedly recognised. The Court granted leave to the solicitors to go off the record in relation to Mr. Omara's case.

25. The withdrawal of the solicitors has not been shown to have impeded the liquidators' preparation of their case for trial, at least in relation to the limited range of issues that have been identified. Mr. Swainston and Mr. Harrison have been briefed for some time to appear at the hearing on behalf of the liquidators. They have had the opportunity to prepare for the trial with assistance from the liquidators' solicitors. Further, the withdrawal of the solicitors in Mr. Omara's case has not affected their representation of the liquidators in Mr. Babiker's case.

26. Mr. Swainston maintained that the absence of an instructing solicitor during the trial who had experience with and knowledge of the case would create difficulties for the conduct of the proceedings in relation to Mr. Omara. The Court is not persuaded, however, that the absence of an instructing solicitor will prove to be a significant difficulty in relation to the limited issues that have been identified. There is no inhibition in this jurisdiction on counsel appearing in proceedings without an instructing solicitor. In the present case, counsel appearing for the liquidators has had the advantage of access to a substantial body of materials that can reasonably be regarded as necessary for the cross examinations of both Mr. Omara and Mr. Babiker to the extent required at this hearing.

27. In Mr. Babiker's case, the particularised allegations are based on documentation that has been available to counsel for a sufficient period to enable cross examination to be adequately prepared. In Mr. Omara's case, once the hearing is confirmed to the question of determining the applicable contract of employment, the materials already compiled by the liquidators

should ensure that their counsel have a fair opportunity to explore the factual questions in dispute.

28. At this stage of the proceedings, there is no reason to doubt that any issue of credit that arises from the matters identified by the Court for hearing and determination can be fairly assessed. If it turns out during the hearing that there is a serious difficulty facing the liquidators, the question of an adjournment can be revisited.

29. Mr. Swainston complained that the applicants, especially Mr. Omara, had not complied with all the Court's direction for the disclosure of material. The principal complaint against Mr. Omara concerned the hard drive on his personal computer. However, the liquidators' request for the hard drive was not made until approximately one week before the hearing was scheduled to commence. While the hard drive was not produced immediately, it was supplied to the liquidators within a few days of the initial request.

30. Court directions must be complied with by all parties to proceedings. If the applicants fail to comply with directions in the present case, consequences may yet follow. Nonetheless, any default in producing documents thus far has not been such as to deny the liquidators a fair opportunity to present the case they wish to put to the Court in relation to the limited issues that have been identified.

## CONCLUSION

31. It is for these reasons that the Court has decided that it is in the interest of the justice for the hearing not to be adjourned, but to proceed on the issues that the Court has identified for hearing and determination.



DIGITALLY SIGNED AND VERIFIED
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