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

Neutral citation: [2019] QIC (A) 3

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

13 May 2019

CASE No: 2 of 2019

QATAR FINANCIAL CENTRE REGULATORY AUTHORITY
Respondent

v

FIRST ABU DHABI BANK P.J.S.C.
Applicant/Appellant

JUDGMENT

Before:
Lord Thomas of Cwmgiedd, President
Justice Chelva Rajah
Justice Sir William Blair

ORDER

The applications for permission to appeal are allowed, but the appeals are dismissed. The Appellant is given permission to apply to the First Instance Circuit in respect of paragraphs 8-21 of the Respondent's Notice dated 19 March 2018.

JUDGMENT

Factual background

1. On 18 March 2018 the Respondent, the Qatar Financial Centre Regulatory Authority (QFC Regulatory Authority), appointed investigators into the conduct of the Applicant/Appellant, First Abu Dhabi Bank PJSC (Bank), arising out of dealings by the Bank between June and December 2017 on the foreign exchange market for Qatari Riyals (QAR), the currency of the State of Qatar. The QFC Regulatory Authority did so on the basis that it had jurisdiction under the provisions of Qatari law and regulation, as the Bank had registered a branch at the Qatar Financial Centre (QFC). On 19 March 2018 the investigators issued a Notice requiring the Bank to produce and provide, at the QFC Regulatory Authority's address in the QFC, 21 categories of documents and certain information in the possession power or control of the Bank at any of its offices or branches or of any employees or contractors of the Bank. The branch of the Bank registered at the QFC handed over what it said were such documents as it had in the branch, but it, and the Bank, declined to hand over any other documents. It says that it did not provide any responsive documents held outside the QFC, because it is only required to provide such documents in the possession, custody and/or control of the branch at the QFC.

2. On 29 July 2018 the QFC Regulatory Authority commenced proceedings before the First Instance Circuit for an order that the Bank comply with the Notice of 19 March 2018 and provide the documents responsive to the Notice held by the Bank outside the QFC. A challenge was made by the Bank and the branch to the jurisdiction of the QFC Regulatory Authority to issue the Notice to the Bank and to the service of the Notice on the Bank and to the jurisdiction of the Court over the Bank.

3. On 18 November 2018 the First Instance Circuit held in a judgment reported at [2018] QIC (F) 12 that the QFC Regulatory Authority had jurisdiction to issue the Notice of 19 March 2018 to the Bank, that there had been valid service on the Bank and that the Court had jurisdiction over the Bank. It ordered that the Bank forthwith comply with the Notice and also to preserve the documents, books and records.

4. On 16 January 2019 an application for permission to appeal was made against that Order and judgment, principally on the ground that neither the QFC Regulatory Authority nor the First Instance Circuit and Appellate Division of this Court had jurisdiction over the Bank; we ordered that the application for permission and the appeal, if permission was granted, be heard at a rolled-up hearing on 17 March 2019.

5. On 17 February 2019 following an application made by the QFC Regulatory Authority and the Bank, the First Instance Circuit ordered a stay of the Order to produce the documents until this Court had decided the issue of jurisdiction, but refused to stay the Order for the preservation of the documents books and records. It also ordered the Bank by 4 March 2019 to serve and swear an affidavit on the procedures and processes that the Bank had put in place worldwide to preserve the documents which the Court had ordered be produced.

6. The Bank sought permission on 27 February 2019 to appeal against the judgment and Order of 17 February 2019, again on the ground that there was no jurisdiction over the Bank. On 6 March 2019 we ordered that that application be heard together with the application in respect of the judgment of 18 November 2018.

7. On 14 March 2019, three days before the hearing at which the jurisdictional challenge by the Bank was to be heard before us, the QFC Regulatory Authority issued the Bank with a supervisory Notice prohibiting the Bank from carrying on any business for new customers at the QFC branch. Its decision was based on its view that the Bank had failed to comply with the Order of the First Instance Circuit to produce the affidavit to which we have referred in paragraph 5 above.

The issues on the appeal

8. There were five issues on the appeal:

   (1) Did the QFC Regulatory Authority have jurisdiction to commence an investigation into matters that occurred outside the QFC and to issue the Notice of 19 March 2019 to produce documents and provide information?

   (2) If so, did the jurisdiction of the QFC Regulatory Authority extend only to the branch of the Bank or did it extend to the Bank itself, even if that entailed the Bank producing documents held outside Qatar?

   (3) If so, was there valid service of the Notice of 19 March 2018 for the production of the documents on the Bank?

   (4) If so, did the First Instance Circuit have jurisdiction to make the Order requiring compliance with the Notice of 19 March 2018?

   (5) If so, did it correctly exercise its discretion to order compliance with the Notice in its entirety?

9. The First Instance Circuit determined each of these issues in favour of the QFC Regulatory Authority.

10. Although during the hearing in the First Instance Circuit there was, it appears, some confusion as to appearance, Mr Hamish Lal, the advocate for the Appellant before this Court made it clear that he appeared on behalf of First Abu Dhabi Bank PJSC and only on the basis that the Bank is contesting the jurisdiction of this Court.

11. The Bank submits that this appeal is of wider importance than the facts of the present case. There are a number of banks that are non-QFC companies and have branches within the QFC. Those banks, it is submitted, will be interested to understand what this appeal decides. If this Court's decision is that the QFC Regulatory Authority obtains jurisdiction over, for example, a bank domiciled in Geneva by virtue of that bank having a branch within the QFC, that message needs to be made clear and is of wider public importance.

12. At the conclusion of the oral hearing, we asked the advocates for the parties for further assistance as to international law and practice on issues (2) and (5). We allowed them until 28 March 2019 to make supplemental submissions. We subsequently allowed reply supplemental submissions in April 2019. We are very grateful to the advocates for their arguments and their further written submissions.

(1) Did the QFC Regulatory Authority have jurisdiction to commence an investigation into matters that occurred outside the QFC and to issue the Notice of 19 March 2019 to produce documents and provide information?

The powers of the QFC Regulatory Authority

13. The QFC and the QFC Regulatory Authority were established under the QFC Law, Law No. 7 of 2005 (as amended). The establishment of the QFC Regulatory Authority is provided for in Article 8 of the QFC Law, Article 8.1 providing as follows:

> "Notwithstanding any provision to the contrary in this or any other Law or regulation, The Regulatory Authority is hereby established for the purpose of regulating, licensing and supervising banking, financial and insurance-related business carried on in or from The QFC....
>
> Subject to the provisions of this Law, including the provisions set out in Schedule 4, Regulations made with the consent of the Council of Ministers shall define the management, objectives, duties, functions powers and constitution of The Regulatory Authority (including, without limitation, the exact activities which shall fall to be regulated, licensed and supervised by The Regulatory Authority) and such Regulations may only be varied or revoked with the consent of the Council of Ministers."

14. Schedule 4 sets out the governance and functions of the QFC Regulatory Authority specifying the objectives as including:

> "17.1 the promotion and maintenance of efficiency, transparency and the integrity of the QFC;
> 17.2 the promotion and maintenance of confidence in the QFC of users and prospective users of the QFC;
> 17.3 the maintenance of the financial stability of the QFC, including the reduction of systemic risk relating to the QFC;
> 17.4 the prevention, detection and restraint of conduct, which causes or may cause damage to the reputation of the QFC, through appropriate means including the imposition of fines;
> ..."

15. It was contended by the Bank that Article 8.1 sets out the starting point, and that what Article 8.1 provides is that the focus, as far as the QFC Regulatory Authority's jurisdiction is concerned, is territorial, or is focused on the activities that are actually carried on in or from the QFC. The debate before the First Instance Circuit has been whether that jurisdiction has been extended by other Regulations or Rules. The Bank contended that Article 8 is the start and the end of this debate. Article 8 is the sole provision that governs the jurisdiction of the QFC Regulatory Authority, and no Regulations or other subordinate legislation can lawfully extend its jurisdiction. As Article 8 applies expressly only to business "carried on in or from The QFC", there was no jurisdiction to investigate or call for documents or information in respect of any business that was not carried on in or from the QFC. The Bank contended that the QFC Regulatory Authority's construction of the relevant provisions to the contrary which was accepted by the First Instance Circuit is erroneous, and depends on impermissibly extending the jurisdictional scope of the QFC Regulatory Authority's powers as set out in the primary legislation by reference to subordinate legislation. Recourse to the requirement of fitness and propriety in the General Rules 2005 (GENE) is misconceived, because although the QFC Regulatory Authority may want to take into account (for example) a public allegation of money-laundering against another branch in (say) Singapore or Lagos, that does not mean that the QFC Regulatory Authority would have jurisdiction to compel that other branch to produce documents.

The scope of Article 8

16. We will first consider the Bank's contention that the issue must be decided on the basis of Article 8 of the QFC Law alone and that the jurisdiction of the QFC Regulatory Authority cannot be extended by subordinate legislation. We do not need to decide whether the jurisdiction of the QFC Regulatory Authority can be extended by subordinate legislation, as the point does not arise in this case. That is because it is clear, in our view, that it is implicit in the first paragraph of Article 8 .1 of the QFC Law that the jurisdiction of the QFC Regulatory Authority extends to permit it to inquire into matters which occurred outside the QFC and call for documents held outside the QFC provided that these relate to regulated activities carried on by a QFC authorised firm in or from the QFC. As we explain at paragraphs 28 and following, we find this to be so in the present case. It is impossible to see how any regulator could otherwise properly regulate firms authorised to carry on business in the QFC. Many transactions cannot be understood or explained without examining matters occurring elsewhere or requiring the production of documents and provision of information held elsewhere. Thus, in our view, provided that there was evidence that the investigation conducted by the QFC Regulatory Authority into matters occurring outside the QFC and the documents and information held outside the QFC related to regulated activities carried on by the authorised firm in or from the QFC the QFC Regulatory Authority had the necessary jurisdiction.

The argument of the QFC Regulatory Authority

17. As is implicit in the first paragraph of Article 8.1, the second paragraph sets out the way in which the jurisdiction is to be delineated, containing the working out of the detail. It is necessary therefore to consider the other provisions relied on by the QFC Regulatory Authority. It was contended by the QFC Regulatory Authority that the second paragraph of Article 8.1 of the QFC Law permits regulations to be made defining the duties, functions and powers of the QFC Regulatory Authority. Indeed it is not uncommon for this form of drafting to be adopted in primary legislation by making express provision for jurisdiction to be delineated by subordinate legislation. The Bank did not dispute the general power to make such regulations; its case was that the power

as set out in the QFC Law could not be used to confer jurisdiction in respect of matters which occurred outside the QFC.

18. The Financial Services Regulations were made under the provisions of the second paragraph of Article 8.1. Part 8 of the Regulations (Articles 48-57) provides for supervision and investigation.

(1) Under Article 50 (1) investigators can be appointed:

> "If it appears to the Regulatory Authority that there may have been, may be or may about to be a Contravention of a Relevant Requirement or there is any other good reason for doing so, the Regulatory Authority may appoint an employee of the authority or another competent Person (an Investigator) to conduct an investigation and report to it."

(2) Under Article 52(2) the QFC Regulatory Authority or the investigator may require by written notice any Person (defined as in Article 110 of the Regulations as including "... a natural or legal person, body corporate, or body unincorporate, including a branch, company, partnership, unincorporated association or other undertaking, government or state") to:

> "(B) To produce at a specified time and place any specified document or documents of a specified description."

The reference to "specified documents" is broad enough to apply to specified information in our view.

(3) Article 54 (set out at paragraph 73 below) provides for the assistance of the Court in the enforcement of the powers of the QFC Regulatory Authority.

It is not disputed nor could it be that it was within the powers conferred by Article 8.1 of the QFC Law to make the provisions in Part 8 of the Regulations.

19. The Financial Services Regulations primarily deal with business carried on in or from the QFC. However, the QFC Regulatory Authority contends that Article 26 of those Regulations extends the power and the jurisdiction in respect of activities carried on outside the QFC in the following terms:

> " (1) A Person who would not otherwise be regarded as carrying on activities in or from the QFC shall be deemed to be carrying on activities in or from the QFC for the purposes of Article 11 (2) of the QFC law and these Regulations if:
>
> .....
>
> (C) the activities are conducted in circumstances that are deemed to amount to activities carried on in or from the QFC under Rules made by the Regulatory Authority in accordance with Article 26 (2).
>
> (2) The Regulatory Authority may from time to time issue Rules as to the circumstances in which activities capable of having an effect in the QFC are or are not to be regarded as conducted in or from the QFC."

20. Exercising its powers under the Financial Services Regulations, the QFC Regulatory Authority made the General Rules 2005 (GENE). These Rules apply by Rule 1.1.3 to any "authorised firm operating ... in or from the QFC". Rule 1.2.1 of Part 1.2 entitled "*Principles relating to the conduct operational and financial standing of authorised firms*" provide:

> "(1) The principles in this Part apply to an authorised firm in relation to its conduct of regulated activities in or from the QFC.
>
> (2) The principles also apply to the activities of such a firm carried on outside the QFC, if the activities relate to regulated activities carried on by the firm in or from the QFC and are capable of having an effect on:
>
> (a) confidence in the financial system operating in or from the QFC;
> (b) the firm's ability to comply with the Regulatory Authority's requirements as to financial resources; or
> (c) the firm's fitness and propriety."

21. It is the QFC Regulatory Authority's contention that there is power to extend jurisdiction through Article 26 of the Financial Services Regulations; that the Bank disputes, on the basis that it would impermissibly through subordinate legislation extend the jurisdiction conferred by Article 8.1 of the QFC Law. On our interpretation

of Article 8.1 of the QFC Law, however, it is implicit that the jurisdiction of the QFC Regulatory Authority permits it to inquire into matters which occur outside the QFC and call for documents held outside the QFC provided that these relate to regulated activities carried on by a QFC authorised firm in or from the QFC. On that basis, the Bank's objection does not arise as the Regulations do not extend the actual jurisdiction conferred by Article 8.1.

22. The principles set out in Part 1.2 of the General Rules (GENE) include the observance of high standards of integrity in the conduct of its business, proper standards of market conduct and the faithful discharge of the responsibility of trust towards a customer. As the First Instance Circuit said at paragraph 35 and 36:

> "The GENE application provisions make it clear that, for the purposes of the principles there referred to, these principles apply to activities carried out by an authorised firm in and from the QFC and also apply, in certain defined circumstances, to activities carried on by such a firm outside the QFC. The [QFC Regulatory Authority's] regulatory and supervisory functions accordingly explicitly embrace, for conduct and related purposes, consideration of activities of authorised firms carried on outside the QFC where the condition specified in para 1.2.1(2) is met. Where an issue arises as to whether an authorised firm has acted outside the QFC in a way which engages that condition, the [QFC Regulatory Authority] may, in order to form a concluded view, require to have access to documents held outside the QFC. In particular, it may require to have access to such documents in order to reach a confident and duly informed view as to whether any of the principles (which include market conduct and regard to customers' interests) have been breached.
>
> One of the circumstances in which extra-QFC activities of an authorised firm may impinge on the principles is where such activities are capable of having an effect on the firm's fitness and propriety. Schedule 1 to GENE provides guidance on fitness and propriety of authorised firms. Among the matters which the [QFC Regulatory Authority] may consider in assessing the fitness and propriety of such firms are their controllers, close links and other connections, including among other things, whether it or its group is subject to any adverse effect or considerations arising from its country of incorporation or the country (or countries) of incorporation of its controllers. Assessment of fitness and propriety, accordingly, can have an international dimension."

23. The Bank referred us to the decision of this Court in *Abdulla Jassim Al Tamimi v Qatar Financial Centre Authority* [2018] QIC (A) 3 where at paragraph 106 the Appellate Division held that the Employment Regulations made under the QFC Law could not abridge an express time limit specified in Article 6 of the QFC Law. In our view that case is not relevant, as there is nothing express in the QFC Law which circumscribes the provisions of the second paragraph of Article 8.1 of that law.

24. It is unnecessary for us to express a concluded view on the QFC Regulatory Authority's contentions that the effect of the second paragraph of Article 8 of the QFC Law and Article 26 of the Financial Services Regulations is to permit the QFC Regulatory Authority to make rules which in the defined circumstances deem authorised firms to be carrying on activities in or from the QFC, even if they are not otherwise carrying on activities in or from the QFC. We see the force of the argument that the rules so made are not all (as the Bank contended) confined to the purposes set out in Article 11 (2) of the QFC Law (which contains the licensing requirement) but, as Article 26 of the Financial Services Regulations makes clear, can be made for the purposes set out in the Regulations. As the Regulations have a very broad scope, the purposes include proper conduct of business in accordance with the principles set out in the General Rules 2005 (GENE).

25. The Bank also referred us to paragraph 5.1 to 5.2 of the Policy statement issued on 11 September 2005 by the QFC Regulatory Authority. These paragraphs give guidance to firms about the way they should conduct business in the QFC in a manner which does not inadvertently transgress the laws of Qatar that apply to all other transactions carried out in Qatar outside the QFC. It was contended that in effect the guidance was drawing the distinction between the business in the QFC and onshore business in Qatar. Although it is right to draw this distinction, the guidance sheds no light on the extent of the QFC Regulatory Authority's jurisdiction to conduct investigations in respect of activities carried on in or from the QFC which may entitle it to inquire into matters which occurred outside the QFC.

26. Thus, in our opinion, on the proper interpretation of Article 8.1 of the QFC Law the powers and jurisdiction of the QFC Regulatory Authority to carry out an investigation under Article 50 of the Financial Services Regulations (which we have set out at

paragraph 18(1) above), to give notice requiring the production of documents under Article 52 (which we have set out at paragraph 18(2)), and make other requirements in respect of that investigation extend to the activities of an authorised firm carried on outside the QFC if the activities relate to regulated activities carried on by an authorised firm in or from the QFC . There is in our opinion no impermissible extension of such jurisdiction by subordinate legislation, and the provisions relied on by the QFC Regulatory Authority contain the working out of the detail of such jurisdiction.

27. We therefore turn to consider whether there is an evidential basis to satisfy the condition implicit in the first paragraph of Article 8.1 of the QFC Law and so enable the QFC Regulatory Authority to exercise jurisdiction over activities carried on outside the QFC by instigating an investigation on 18 March 2018 and by issuing the Notice on 19 March 2018 requiring production of documents and provision of information in respect of activities carried on outside the QFC.

The evidence

28. The evidence before the First Instance Circuit was principally set out in the statements of Mr Andrew Lowe, Director, Enforcement, of the QFC Regulatory Authority, who had been appointed on 18 March 2018 as one of the investigators to conduct an investigation under Article 50 (1) of the Financial Services Regulation and who issued the Notice under Article 52 (2) on 19 March 2018.

29. As summarised in the judgment of the First Instance Circuit (at paragraph 16), the evidence of Mr Lowe as to the background to the investigation concerned suspected dealings on the part of the Bank in QAR between June and December 2017. The QAR had since July 2001 been pegged to the US dollar. From at least that date until Eid al-Fitr 2017 (in June 2017) the QAR had a low volatility and high stability and there was a strong correlation between onshore and offshore trading in that currency. Both Monday 26 and Tuesday 27 June 2017 were public holidays throughout Islamic countries in the Middle East and banking institutions were closed. However, on both these days there was, according to the evidence produced by the QFC Regulatory Authority, grounds for concluding that there had been unusual trading by the Bank in QAR, resulting in a sharp depreciation in the trading value of the QAR as against the

US dollar. The QFC Regulatory Authority suspects that, between then and December 2017, there were repeated attempts by the Bank to manipulate the QAR to the disadvantage of that currency. The Bank denied these assertions of unusual trading and of manipulation of the currency. It is important to emphasise, as the First Instance Circuit emphasised, that no firm conclusions have been drawn as to any impropriety by the Bank. It is the evidence of Mr Lowe that the purpose of the investigation and the Notice requiring the production of documents is to establish whether or not there has been any such impropriety.

30. The evidence showed that when the branch of the Bank at the QFC was asked by a customer to make a foreign exchange transaction in respect of QAR, the branch did not quote a rate itself, but referred the request to the Head Office of the Bank in Abu Dhabi which sent to the branch at the QFC a quote for a rate of exchange for the transaction in question. In addition to that evidence, there was annexed to the evidence of Mr Lowe an email from a customer in Qatar to one of the officers of the branch in the QFC in August 2017 complaining about the rate of exchange so offered. In our view therefore, the activities carried on outside the QFC, namely the foreign exchange operations of the Bank in Abu Dhabi in QAR, related to the activities of the branch of the Bank in the QFC, namely foreign exchange dealings in QAR.

31. The QFC Regulatory Authority accepts that it was necessary to satisfy the two conditions set out in Rule 1.2.1 of the General Rules 2005 (GENE), namely that the activities (1) relate to regulated activities carried on by an authorised firm in the QFC and (2) are capable of having an effect on confidence in the financial system operating in or from the QFC, the ability of the firm to comply with financial resource requirements or the firm's fitness and propriety. The evidence we have set out in the preceding paragraph satisfied the first condition. The evidence also showed that there was potentially a basis for contending that such activities would have an effect on confidence in the financial system operating in or from the QFC and the Bank's fitness and propriety. As the First Instance Circuit concluded at paragraphs 35 and 36 (which we have set out at paragraph 22 above), the activities, if they were of the nature alleged by the QFC Regulatory Authority, were capable of having an effect on confidence in the financial system operating in or from the QFC and the Bank's fitness and propriety.

32. We therefore conclude that the QFC Regulatory Authority had power and jurisdiction to establish on 18 March 2018 an investigation under Article 50 and to require by Notice dated 19 March 2018 the production of documents and provision of information in respect of activities carried on outside the QFC in the circumstances we have outlined, provided that on the proper interpretation of the QFC Law and Regulations, the jurisdiction could be exercised over the Bank itself and not merely the branch and exercised in respect of documents held outside the state of Qatar. We therefore turn to consider that issue, the second issue in the appeal.

(2) Did the jurisdiction of the QFC Regulatory Authority extend only to the branch of the Bank or did it extend to the Bank itself, even if that entailed the Bank producing documents held outside Qatar?

33. It was the contention of the Bank that for the purposes of the QFC Law and Regulations the firm over which the QFC Regulatory Authority had jurisdiction was the branch of the Bank at the QFC and not the Bank itself; any such jurisdiction over the Bank could not be exercised by requiring the Bank to produce documents or provide information held outside Qatar. In essence these contentions are both issues of the interpretation of the QFC Law and Regulations in the light of international practice and case law and should be considered together.

Registration at the QFC

34. It is first necessary to consider the registration of the Bank and/or its branch at the QFC. The Companies Regulations made under Article 9 of the QFC Law provided two means through which a Non-QFC company can be authorised to do business at the QFC – (1) migration of the company under Part 5 of the Companies Regulations (Articles 110-116) so that it becomes a company incorporated as a QFC company or (2) registration as a branch under Part 6 of the Companies Regulations (Articles 117-126). Article 117 (1) provides:

> "A Non-QFC company shall not engage in or carry or purport to carry on any trade or Business activity in or from the QFC unless it is registered as a Branch with the [Companies Registration Office] in

> accordance with Article 119 of these Regulations and shall comply with these Regulations in all other respects."

Article 117 (2) requires a branch to appoint a representative who is authorised to accept service and a branch to have a principal place of business in the QFC to which communications and notices may be addressed. Articles 118 and 119 set out the process to be followed for registration.

35. On 24 November 2008 the predecessor company of the Bank, First Gulf Bank, a Non-QFC company incorporated in the UAE, decided to follow the method of registering a branch under Part 6 (Articles 117-126). Accordingly there was registered at the QFC as number 00098 "First Gulf Bank – QFC branch" as a branch under the provisions to which we have referred. First Gulf Bank merged with National Bank of Abu Dhabi, another Non-QFC company, incorporated in April 2017. In May 2017 that company changed its name to the Bank. On 21 May 2017 the QFC recorded in a certificate that change of name stating that the Registration Office certified:

> National Bank of Abu Dhabi – QFC Branch, QFC No 00098, incorporated as a Branch under Companies Regulations on 24 November 2008 changed its name to First Abu Dhabi Bank- QFC Branch QFC No 00098"

Article 119(2) of the Companies Regulations provides that the certificate is conclusive proof that the Non-QFC company is registered with the name and number specified.

36. In correspondence with the QFC Regulatory Authority, although the Bank described itself as the "Qatar Financial Centre Branch" its letterhead made clear that the Bank was "First Abu Dhabi Bank PJSC Qatar Financial Centre Branch (incorporated in the United Arab Emirates and authorised by Qatar Financial Centre Regulatory Authority". PJSC stands for Public Joint Stock Company.

The contention of the Bank that the branch was to be treated as separate and distinct from the Bank and that in any event any jurisdiction over the Bank could not be exercised in respect of documents held outside Qatar

37. Although it was accepted on behalf of the Bank that the branch is not a separately incorporated entity or body, it was contended on its behalf that a branch is treated separately for regulatory purposes so that a request for the production of documents cannot extend beyond the branch. The fact that a branch is treated separately is reflected in the insolvency regime and in the applicable taxation. Furthermore, the Bank contended, as it is a well-established principle of international law that jurisdiction is territorial and the regulation of banks and other financial services is carried on internationally through cooperation between regulators, the QFC Law and Regulations ought not to be interpreted so as to require the production of documents or provision of information held outside Qatar.

Our approach

38. The issues relating to the position of the Bank under the QFC Law and Regulations and their scope in respect of documents held outside Qatar are best approached by considering three questions:

    i. whether on the proper interpretation of the QFC Law and the Regulations the QFC Regulatory Authority had jurisdiction over the Bank which could require it to produce documents held outside Qatar;

    ii. whether the case law on the distinction between a branch of a bank and the bank is relevant; and

    iii. What is the rationale for the circumstances in which a branch has been treated as distinct for regulatory purposes?

(i) The interpretation of QFC Law and Regulations

39. The QFC Regulatory Authority contends that the provisions of the QFC Law and the Regulations which we have set out provide the jurisdictional basis for the requirement set out in the Notice of 19 March 2018 issued by the QFC Regulatory Authority and for the Order made by the First Instance Circuit and that it could require the production of documents held by the Bank outside Qatar.

40. The First Instance Circuit held (at paragraph 23 of its judgment) that the effect of the Companies Regulations was to treat the branch as the entity through which the Bank carried on its business; the branch was not in any way separate from the Bank.

41. We agree with the First Instance Circuit that the Companies Regulations, looked on as a whole, do not envisage a branch being treated as an entity distinct from the Non-QFC company which registered the branch at the QFC. The scheme of the Regulations plainly envisages that it is the Non-QFC company itself that is carrying on business at the QFC through the branch as an integral part of the Non-QFC company.

42. However, the Bank contended before us that even if we reached that view, it was insufficient; the jurisdiction sought to be exercised over the Bank in the present case necessarily required the Bank to produce documents and provide information it held outside Qatar; that is not something permitted under the QFC Law and Regulations. The Bank relied on the well-known principle set out in the decision of the Permanent Court of Justice in the *Lotus (1927)* PCIJ Ser A No 10 that:

> "[T]he first and foremost restriction imposed by international law upon a state is that-failing the exercise of a permissive rule to the contrary it may not exercise its power in any form on the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or a convention."

43. It was submitted by the Bank that, to meet this principle in a world where transnational business is the norm, regulation internationally had been organised so that it is conducted through cooperation between regulators either through bilateral treaties or under the terms of instruments such as the Multilateral Memorandum of Understanding

Concerning Consultation and Cooperation and the Exchange of Information (MMoU) established by IOSCO (the International Organisation of Securities Commissions) to which over 100 regulators, including the Securities and Commodities Authority of the UAE, were parties. If a regulator in one state wants documents or information held in another state, it therefore should rely on the assistance of the regulator in that other state. This principle of international cooperation is recognised in Article 20 of the Financial Services Regulations which gives the QFC Regulatory Authority power to enter into memoranda of understanding with overseas regulators and to cooperate with them. Pursuant to that power the QFC Regulatory Authority had become party to the IOSCO MMoU. It is also reflected in Article 48(2) which we discuss at paragraph 76 below.

44. The Bank gave examples of other states where it contended that such principles are recognised, including the UK, Switzerland and Germany. It referred to an annotation to the Hong Kong Securities and Futures Ordinance at page 56 by way of comment to the provisions dealing with supervision and investigations which suggested that such arrangements restricted the jurisdiction of regulators to the territory of the regulator:

> "Securities and futures crime and misconduct is global, yet regulators' jurisdictional reach is geographically limited. The SFC's jurisdiction ends at the borders of the Hong Kong SAR, just as the remit of other regulators end at the borders of their own jurisdictions. To effectively deal with crime and misconduct, regulators need to cooperate with one another on investigations and enforcement actions. Under the auspices of [IOSCO], securities regulators have created a global network of cooperative arrangements to help one another with investigations and enforcement actions. These relations are usually structured through memorandums of understanding, which have lesser standing than formal treaties. In May 2002, IOSCO adopted the [MMoU] to enhance full investigatory co-operation among its signatories."

The Bank in this connection drew attention to an observation in the decision of Ng J sitting at First Instance in Hong Kong in *Securities and Futures Commission v Ernst & Young (A Firm)* [2014] 3 HKC 406 (a case dealing with the question of whether the Hong Kong Securities and Futures Commission could seek documents held in China by an associated joint venture firm which had acted as the agent of Ernst & Young in a transaction), where the judge had said at paragraphs 47-49:

> "The [Securities and Futures Commission] takes the stance, in the view of this Court advisedly, that s.183(1) of the [Securities and Futures Ordinance] does not have or purport to have any extraterritorial effect in the same way that, for instance, s.106 of the US Sarbanes-Oxley Act of 2002 does..... . It must therefore be emphasized that the decision of this Court is concerned with and only with the obligation of [Ernst & Young] as a firm in Hong Kong to comply with the Notices issued under the [Securities and Futures Ordinance] as part of the laws of Hong Kong."

45. We cannot accept these arguments. As a matter of detail, though the examples given by the Bank illustrate its contention and are useful to this extent, this case does not involve securities regulation – the QFC Regulatory Authority is acting in this case as banking regulator, and the relevant regulator of the Bank is the UAE Central Bank, not the UAE Securities and Commodities Authority. More generally, in our judgment there is no presumption either in international law or otherwise against the QFC Law and Regulations having effect as regards the jurisdiction to establish an investigation in the QFC into matters that may have occurred outside Qatar relating to regulated activities of an authorised firm in the QFC and call for documents outside Qatar for the authorised firm. The interpretation of the QFC Law and the Regulations is to be ascertained by the language used and by considering its legislative purpose. We agree with the approach in *R (Jimenez) v The First Tier Tax Tribunal* [2019] EWCA Civ 51 where the Court of Appeal of England and Wales reviewed the case law in relation to the effect of legislation requiring a party to produce documents held outside the UK. As Patten LJ observed at paragraph 24:

> "... the question whether either the statute itself or some power which it confers is intended to have some extra-territorial effect is likely to depend upon close examination of the interaction between any relevant principle of international law which would operate against giving the domestic legislation process some extra-territorial effect and the public interest considerations which favour a construction that involves the power being exercised in relation to persons outside the jurisdiction."

46. That approach was also considered in a decision of the Divisional Court of the Queen's Bench Division of England and Wales in *R (KBR) Inc v Director of the Serious Fraud Office* [2018] EWHC 2368 (admin) where what was in issue were the powers of the Serious Fraud Office to require (in the course of an investigation into the conduct of a UK subsidiary of the KBR group) the production of documents held by the group outside the jurisdiction of the UK. The discussion in the judgment of Gross LJ in that case and the reasoning of Patten LJ in *Jimenez* at paragraphs 33-41 set out the broad

factors the courts in England and Wales take into account in determining the interpretation of UK legislation.

47. In our view, in interpreting the QFC Law and Regulations we should have regard to the factors set out in these decisions as we consider they express principles of general application which can properly be applied to the QFC Law and Regulations. We therefore have had considerable regard to legislative intention to establish the QFC as an international financial centre. We therefore must attach weight to the fact that the proper regulation of the QFC as an international financial centre will in some cases require the ability to exercise powers in the QFC in respect of matters occurring or documents and information held outside Qatar. There are also significant public interest reasons in the proper regulation of the operation of a bank through a branch at the QFC, its fitness and propriety and the ability to examine transactions in a foreign exchange market that strongly militate in favour of the provisions at issue requiring the production of documents or provision of information held outside Qatar. We agree with the observations of Gross LJ in *KBR* at paragraph 68:

> "By their nature, most such investigations will have an international dimension, very often involving multinational groups conducting their business in multiple jurisdictions, whether through a branch or subsidiary structure (it should matter not). It follows that the documents relevant to the investigation of a UK subsidiary of such a group may well be spread between the UK and one or more overseas jurisdictions."

In our judgment the jurisdiction conferred by Article 8.1 and the powers under Articles 50 and 52 the Financial Services Regulations should be construed as enabling the QFC Regulatory Authority to require the production in the QFC by regulated persons of documents held outside Qatar.

48. We are not assisted by the annotations to the Hong Kong Securities and Futures Ordinance nor by the observations in the judgment in the *Ernst & Young* case. At issue in that case was the question of whether documents held in China by the associated firm of Ernst & Young were in the possession custody or control of Ernst & Young as its

agents. Nor was the judgment concerned with the jurisdiction under the Ordinance as neither party was making an argument as to its effect.

49. Nor would our interpretation infringe the well-known principle in the *Lotus*. The principle addresses cases where a state authority in one state is seeking to enforce its laws in another state without that state's consent. It is therefore a matter of analysis whether the QFC Regulatory Authority was seeking to enforce the Notice in Abu Dhabi. In the case of the notice in *Jiminez* Leggatt LJ explained at paragraphs 52 to 53 of his judgment why that notice did not infringe the principle set out in the *Lotus.* We agree with that analysis and do not consider that the service of the Notice on the Bank at the QFC requiring the Bank for entirely proper and reasonable purposes to provide documents to assist in an investigation in the QFC violates in any way the principle in the *Lotus*. The action did not in any way involve the performance by an officer of the QFC Regulatory Authority of any act within the territory of the UAE; nor would the communication of the Notice directly to the Bank at its head office (if it had taken place), have infringed the sovereignty of the UAE. Reference to the well-known case in American jurisprudence, *In re Grand Jury Proceedings (Bank of Nova Scotia)* 691 F.2d 1384 (11th Cir. 1982) and subsequent authority is also helpful.

50. Thus on the proper interpretation of the QFC Law and Regulations, the Bank is subject to the jurisdiction of the QFC. The QFC Regulatory Authority had jurisdiction to issue the Notice of 19 March 2018 with its requirements that the documents to be produced and information be provided included those not held by the branch in the QFC but by the Bank outside QFC/Qatar. The First Instance Circuit of this Court consequently had jurisdiction in respect of the Notice. The question as to how the Court should exercise the discretion that the Court has in respect of the jurisdiction, particularly to investigate into matters occurring outside Qatar and call for the production of documents and provision of information held outside Qatar in the light of international regulatory cooperation, is an issue which we address as issue (5) at paragraphs 80 and following.

(ii) The case law on the distinction between a branch and the bank itself

51. We next turn to consider the cases to which the First Instance Circuit was referred - *Corinth Pipeworks SA v Barclays Bank* [2011] DIFC CA 002, and *Investment Group Private Limited v Standard Chartered Bank* [2015] DIFC CA 004 (which treated the branch of a bank as having no legal personality separate from the bank itself) and which it considered at paragraphs 25 and following of its judgment.

52. It was contended by the Bank that these cases were not relevant when considering the scope of the regulatory powers and jurisdiction of the QFC Regulatory Authority and the Court. We do not agree. In our view the general principles set out in *Corinth Pipeworks SA v Barclays Bank* and *Investment Group Private Limited v Standard Chartered Bank* are entirely consistent with the view we have reached on the interpretation of the QFC Law and Regulations. In *Corinth Pipeworks* the Court of Appeal of the DIFC Court had to consider whether a claim could be bought in the DIFC for a tort allegedly committed outside the DIFC where the defendant had a branch. The Court found that where a business operated within the DIFC and was not separately incorporated in the DIFC, the branch was no more than a part of the larger company similar to a division of the company. In giving the judgment, Justice Michael Hwang CJ said at paragraph 57:

> "Where a bank is licensed to carry on business in a place outside its country of incorporation, it is necessary for that bank to carry on business either through an unincorporated branch of the bank or through a separate legal entity which is a subsidiary of the bank. Bank regulators frequently, if not typically, require foreign banks to carry on mainstream banking business through a branch rather than a local subsidiary. However, it would be uncommon for an unincorporated branch of a foreign bank to be treated under local law as a legal entity separate and distinct from its head office unless it has been separately incorporated as a subsidiary.... A branch is no different in law from a division, and a division of a corporation is part of that corporation, and has no legal entity of its own (although it may be treated as an accounting entity for certain purposes."

At paragraph 63 he added:

> "It is a fundamental principle of company law that the only way for a company to create another entity under its control (and yet legally separate from it) is to incorporate a subsidiary".

53. Justice Sir John Chadwick, agreeing, said at paragraph 85:

> "For the reasons explained by the Chief Justice, Barclays Bank PLC, the corporate body incorporated in England and Wales, is the entity licensed or authorised by the DFSA to provide financial services. There is no other entity-relevant to the circumstances in the present case-which has been licensed or authorised by the DFSA to provide financial services or conduct any other activities. In particular, it seems to me impossible to reach the conclusion that the entity or enterprise licensed or authorized by the DFSA is the unincorporated branch through which Barclays Bank PLC provides services or conducts activities within the DIFC."

The decision in *Corinth Pipeworks* was followed in the *Investment Group Private* case.

54. The cases were, as the Bank correctly observed, cases decided in a non-regulatory context. We also have reservations about the breadth of some of the statements made in these cases as a branch may for certain regulatory purposes be treated as a separate entity. We nonetheless consider that the First Instance Circuit was correct to apply these cases in the regulatory context at issue in the present case – the power to issue the Notice for the production of documents. First, as the *Corinth Pipeworks* decision makes clear, part of the reasoning of the judgments was the way in which a branch is treated in a regulatory context. Second, a branch has no separate legal identity – a branch is part of a bank no different to a division. Third, the approach is consistent with the decision of the Privy Council in *Appeal Commissioners v The Bank of Nova Scotia* [2013] UK PC 19 and a decision of Hamblen J in *Teekay Tankers Ltd v STX Offshore & Shipping Company* [2014] EWHC 3612 (Comm).

55. We therefore conclude that the First Instance Circuit was correct in the view it took that, as a matter of general principle, the branch had no separate legal identity. The Bank is the regulated entity for regulated activities carried out by the Bank through its branch in the QFC.

(iii) An analysis of the circumstances in which a branch has been treated as distinct for regulatory purposes

56. We therefore turn to consider the third of the questions – the rationale for the circumstances where the branch has been treated as an entity distinct from the bank. There are four principal circumstances to which we will refer, but in each the reasons for the separate treatment of the branch as an entity distinct form the bank are grounded in firm reasons of policy. They are not applicable to circumstances relating to regulatory provisions for investigations and the production of documents.

57. The first of those circumstances are the decisions applying the principle that a deposit at a branch of a bank is generally only recoverable from the branch of the bank. This was a principle originally developed when a customer's balance was recorded by hand in the books of the branch and the decisions are sometimes referred to as the "separate entity cases". The principle has been considered in a number of US decisions that decided whether the head office of a bank could be made liable for the deposits made in a branch in another nation state when the branch had not honoured commitments because of revolution, war or economic events in that other nation state. In *Sokoloff v National City Bank of New York* 130 Misc 66, 224 NYS 102 (1927) (affirmed 250 NY 69 (1928)), a case arising out of the Russian revolution where the court found a means of holding the head office liable, the court set out the general position in a classic passage:

> "Where a bank maintains branches, each branch becomes a separate business entity, with separate books of account. A depositor in one branch cannot issue checks or drafts upon another branch or demand payment from such other branch, and in many other respects the branches are considered separate corporate entities and as distinct from one another as any other bank. Nevertheless when considered in relation to the parent bank they are not independent agencies; they are, what their name imports, namely branches, and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the parent bank and their property and assets belong to the parent bank, although nominally held in the name of the particular

branches. Ultimate liability for a debt of a branch would rest upon the parent bank."

58. The principle that generally a deposit made at a branch is only due at that branch was the basis of the decision in the principal English case, *Arab Bank Limited v Barclays Bank (DC0)* [1954] AC 495. In that case the claimant bank had deposited in a current account a sum in the Jerusalem Branch of Barclays Bank; the claimant bank made no demand for repayment at the branch in Jerusalem before it was closed shortly before Israel declared itself a State and war broke out with Jordan where the claimant bank was situated; Israel thereafter made it illegal to repay the deposit to the claimant bank and required the branch which had re-opened to pay the deposit to a custodian of enemy property. The House of Lords in deciding the case on the basis that there was no difference between the principles of law applicable in England, Israel and Jordan held that the outbreak of war between Israel and Jordan had not abrogated the obligations that had existed at the outbreak of the war. Under basic principles of banking law a deposit was only repayable at the branch at which the deposit was made and only upon a demand made at that branch; as the situs of the debt was in Israel when the demand was made and the obligation governed by Israeli law at the time the obligation to repay arose, the obligation was governed by Israeli law and Barclays was discharged by payment to the custodian under Israeli law.

59. However this line of decisions, as the statement in *Sokoloff* makes clear, is an exception to the general principle that a branch is not a distinct entity from the head office or other offices of a bank; the reasoning for the rule in respect of deposits originated in the way banks held deposits and kept their account; it can have no general applications beyond that.

60. The second circumstances are the way in which branches may be treated as distinct from the head office or other parts of a bank for tax purposes; there are sound fiscal reasons for this treatment as a state will wish to levy tax on that part of the bank which is carrying on business within its territory.

61. The third circumstances are where branches may be treated as distinct for insolvency purposes. Again this distinction is made on the pragmatic ground that the state in which

the branch is situated wants to protect the interests of its own depositors and other creditors, particularly when a state operates deposit insurance.

62. The fourth circumstances are cases where the courts have treated a branch separately for the purposes of compliance with a court order which it can carry out within the jurisdiction of the court, notwithstanding any restriction which may be placed on compliance by the head office. One such case is *Power Curber International Ltd. v National Bank of Kuwait S.A.K.* [1981] 1 WLR 1233 where an English court was asked to order a Kuwait bank to make a payment due under a letter of credit which the Kuwait Courts had prevented it from making. The court had jurisdiction as the bank had an office in London registered as a place of business under the English Companies Act. The court ordered payment, holding that the order of the Kuwait Courts was of no effect as the proper law of the letter of credit and of the situs of debt due was not the law of Kuwait (a decision subsequently overruled in *Taurus Petroleum* [2017] UKSC 64). Lord Denning added another reason at page 1241:

> "Yet another consideration occurs to me. Many banks now have branches in many foreign countries. Each branch has to be licensed by the country in which it operates. Each branch is treated in that country as independent of its parent body. The branch is subject to the orders of the courts of the country in which it operates; but not to the orders of the courts where its head office is situated. We so decided in the recent case about bankers books in the Isle of Man: *R v Grossman*. In this case I think that the order for provisional attachment operates against the head office in Kuwait but not against the branch office in London. That branch is subject to the orders of the English courts..."

In *National Infrastructure v Banco Santander* [2017] EWCA Civ 27, another letter of credit case, this passage was cited at paragraph 45 in support of the view of the Court of Appeal of England and Wales which stated at paragraph 44:

> "If the bank chooses to do business in any particular jurisdiction it has to submit to any order of courts, in such jurisdictions."

This succinctly expresses the applicable principle and explains the rationale for a court treating a branch as distinct from the head office for the purposes of enforcing its orders.

63. There is no reason, in our view, to treat a branch separately for regulatory purposes where the issue is as to production by the head office of documents which relate to regulated activities carried in an investigation into the propriety of such activities or into the issue of the fitness and propriety of the bank. On the contrary, there are aspects of regulation where it is essential to be able to exercise certain regulatory powers in respect of the bank as a whole, and one of those powers is the power to require the production of documents which are needed for the exercise of regulatory supervision of the business being conducted at the branch. Thus the view we have reached on the interpretation of the QFC Law and Articles 50 and 52 of the Regulations are entirely consistent with banking practice and the cases to which we have referred.

Overall conclusion on the issue

64. We were assisted by the material provided by the parties as to international practice, and though (as the Bank rightly submitted) the emphasis is on cooperation between regulators, there is also a clear recognition that for some supervisory purposes, it will be necessary to require production of information beyond that held by an individual branch. We appreciate that this has proved a controversial subject in some circumstances and in some jurisdictions, and doubtless (as explained below) a regulator must exercise that power with due caution, but in our view the requirement to provide the information does not in itself infringe any principle of international law. We therefore conclude that the proper interpretation of the QFC Law and Regulations conferred jurisdiction on the QFC Regulatory Authority to issue the Notice requiring the Bank to produce information from the Head Office and other branches, and that this is in line with case law and banking practice. Indeed, it is hard to see how there could be a meaningful investigation if it were not so.

(3) Was there proper service of the Notice of 19 March 2018?

65. The Notice of 19 March 2018 was addressed to "First Abu Dhabi Bank, Office 505 5/F, QFC Tower 2, West Bay Doha" and served at that address. That was the address at which the registered branch did its business and was recorded as such in the Companies Registration Office.

66. It is surprising that such an important Notice should have been addressed without including either reference to "QFC Branch" or "PJSC". That has understandably given rise to a challenge by the Bank.

67. However, we cannot accept the contention of the Bank that the Notice was addressed to the branch and was served only on the branch. For the reasons we have explained in the preceding paragraphs the address set out in the Notice was the address for service on the Bank, as the branch was the part of the Bank through which the Bank was authorised to carry on business at the QFC. The Notice was therefore properly served on the Bank at that address.

68. In any event, even if there had been an error in the way in which the Bank was described in the Notice, the provisions of Article 69 of the Financial Services Regulations would have entitled the Court to consider whether this amounted to a defect, irregularity or deficiency in the Notice rendering the procedure invalid. Article 69 provides that in such a case the procedure is not invalidated unless the Court declares the procedure to be invalid. It is not necessary for us to consider this provision as there was no such defect or deficiency in the Notice. It was clearly addressed to the Bank and properly served.

(4) Did the Court have jurisdiction to make the Order requiring compliance with the Notice of 19 March 2018?

69. Under Article 8.2, 8.3 and 8.4 of the QFC Law the First Instance Circuit and the Appellate Division of this Court have jurisdiction to determine disputes between the QFC Regulatory Authority and institutions authorised to carry on business in the QFC.

70. On 29 July 2018 the application to enforce the notice of 19 March 2018 was issued in the First Instance Circuit of this Court by the QFC Regulatory Authority against First Abu Dhabi Bank PJSC as the respondent. Rule 18.3 of the Regulations and Procedural Rules of the Court required service. The application with the supporting statements was personally served at the registered office of the Bank at the QFC.

71. Akin Gump Strauss Hauer & Feld LLP (Akin Gump), acting for the Bank, raised in a letter dated 1 August 2018 the objection to service and to the Court's jurisdiction, pointing out that the Notice of 19 March 2108 had been served on the branch within the jurisdiction of the QFC and that the Court had no jurisdiction over the Bank. On 27 August 2018, Akin Gump served a response which named as the respondent "First Abu Dhabi Bank PJSC (a company formed an incorporated under the laws of the United Arab Emirates and registered in the Qatar Financial Centre as First Abu Dhabi Bank - QFC Branch) – FAB-QFC Branch". The response stated it was filed on behalf of "First Abu Dhabi Bank -QFC Branch" and contended that the jurisdiction of the QFC Regulatory Authority and the Court was limited to the branch (which it averred had complied with the Notice); there was no jurisdiction over persons outside the QFC. In subsequent hearings, Mr Lal of Akin Gump stated he acted on behalf of "First Abu Dhabi Bank- QFC Branch" as set out in paragraphs 8-15 of the judgment of the First Instance Circuit, though as we have set out at paragraph 10, he made clear in his submissions to us that his submissions were limited to contesting the jurisdiction of the court.

72. However, it is clear in our view, as the First Instance Circuit concluded at paragraph 30 of its judgment, that for the reasons we have already given service of the application at the registered office at the QFC was service on the Bank.

(5) The exercise of the Court's discretion in respect of ordering compliance with the Notice

73. As we have set out, the Notice served by the QFC Regulatory Authority on 19 March 2018 was made under Article 52 of the Financial Services Regulations. The assistance of the First Instance Circuit was sought under Article 54 entitled "*The role of the [Court] in investigations*". It provides:

> "(1) The Regulatory Authority may apply to the [Court] to assist in the enforcement of the Regulatory Authority's powers in this Part 8.
>
> (2) The [Court] shall provide such assistance as it considers appropriate in the circumstances and in accordance with its powers, including the imposition of financial penalties for contraventions in accordance with these Regulations and the issue of search orders and orders for the seizure of documents and/or information."

It is clear from the terms of the Article that the Court has a wide discretion.

Article 48 of the Financial Services Regulations

74. Before considering how that discretion should be exercised, it is necessary to consider the Bank's contention that the QFC Regulatory Authority ought to have made its application under Article 48 (2) or, if that was not correct, the approach to the exercise of the discretion under Article 52 ought to be informed by Article 48 of the Financial Services Regulations.

75. Article 48 provides that:

> "(1) The Regulatory Authority may require the production by a Person in the QFC or (subject to article 48(2)) elsewhere of:
>
> (A)specified information or information of a specified description; and/or
>
> (B)specified documents or documents of a specified description,
>
> within such timetable and in such form and manner as the [Regulatory] Authority may reasonably require

(2) The [Court] may on application by the Regulatory Authority order that the Regulatory Authority may make a requirement under Article 48 (1) in respect of a Person outside the QFC (whether in the State or otherwise). The Regulatory Authority may request the appropriate Overseas Regulator to assist in exercising the power under Article 48 (1) in respect of any such Person."

The QFC Regulatory Authority relied on Article 48 as an alternative remedy in the event that the First Instance Circuit or the Appellate Division of this Court rejected the application for enforcement of the Notice of 19 March 2018 made under Article 52.

76. There is, in our view, a clear distinction between Article 48 and Article 52. Article 48(1) which contains a broad power to require the production of documents, but makes that power subject to an application to the Court under Article 48(2) in circumstances where the documents are required from persons who are outside the QFC, that is to say from third parties or those who do not carry on business in or from the QFC. The QFC Regulatory Authority is also empowered to make a request to an Overseas Regulator for assistance. The power under Article 48(2) is therefore not applicable to obtaining documents from the Bank which, as we have concluded, was carrying on business in or from the QFC; it was not therefore engaged in this case. The power the Court is being asked to exercise is primarily the power under Article 54; Article 48 is put forward, as we have mentioned, in the alternative in the event the First Instance Circuit or the Appellate Division of this Court had reached different conclusions on issues (1)- (4) set out above. Nonetheless we accept, as we have indicated and consider further below, the contention of the Bank that the power to ask regulators in other states for assistance is relevant to the exercise of the discretion.

The decision of the First Instance Circuit in respect of the exercise of the discretion under Article 54 of the Financial Services Regulations

77. In the light of our conclusion, in agreement with the First Instance Circuit, that there was jurisdiction over the Bank as a person carrying on business on in or from the QFC and as the evidence establishes that the investigation of matters occurring outside Qatar and documents and information held outside Qatar may relate to regulated activities carried on by the Bank in or from the QFC, it is therefore next necessary to consider

how the discretion in enforcing the Notice of 19 March 2018 was to be exercised under Article 54 of the Financial Services Regulations.

78. The First Instance Circuit considered the exercise of the discretion at paragraph 42 of its judgment:

> "The Court, under Article 54(2) of the FSR, has a duty to provide only such assistance "as it considers appropriate". Accordingly, there is a discretion vested in it which must be exercised with due care. At paragraph 4.5 of the second response [of the Bank] it is stated that the Court needs to "remain mindful of the wider political issues". The Court is mindful that this Application has been made while there continues to be an unfortunate political dispute between the State of Qatar and certain other states, including the United Arab Emirates. This Court is, however, wholly independent, in the exercise of its powers, of the government of Qatar and exercises those powers, including discretions vested in it, strictly in accordance with law. The Court is also mindful that, even where it has jurisdiction and power to do so, it may be inappropriate to exercise that power when to do so would involve a conflict of jurisdiction with a foreign court or would in some other way impinge on the sovereignty of a foreign state. In this case the documents now sought to be recovered are not only physically within a foreign state but, if they exist, may have been generated in that state. So far as drawn to our attention, there is no authority which gives this Court authoritative guidance as to how it should exercise its discretion in a case such as this"

Although the First Instance Circuit took into account the fact that the Bank was required by the Notice to produce documents and provide information held outside Qatar, its attention was not drawn to the authorities which we have considered in relation to this issue at paragraphs 42 to 49 above nor those which we set out at paragraphs 80 and following below.

79. In the absence of such assistance the First Instance Circuit first took into account in the exercise of its discretion whether the QFC Regulatory Authority should have exercised its powers under Article 48(2) or otherwise to make a request of the Regulator in the UAE as the regulator of the Bank in its state of incorporation. The First Instance Circuit observed that the assistance of the regulator in the UAE had been sought, but it had not responded (as we summarise at paragraph 86 below). The First Instance Circuit

concluded that prospect of such assistance seemed remote. The First Instance Circuit went on to conclude that there was a proper basis for apprehension by the QFC Regulatory Authority that there may have been a contravention of the Financial Services Regulations by the Bank. The First Instance Circuit also referred to the evidence of an adverse effect on a customer to which we have referred at paragraph 30 above and to the statement to the First Instance Circuit by Mr Jaffey QC, the advocate for the QFC Regulatory Authority before the First Instance Circuit, that there were other affected transactions amounting in values to an estimated QAR 45m (about US$12.36m). The First Instance Circuit considered the documents and information reasonably required for the investigation; it noted that no submission had been made that any third party could be prejudiced by disclosure. Nor would the disclosure impose an unreasonable burden on the Bank. Accordingly exercising due caution the First Instance Circuit ordered compliance forthwith with the Notice of 19 March 2019, including materials held outside Qatar.

The principles applicable to the exercise of the discretion

80. As we have explained at paragraph 50, we consider the Court should take into account in the exercise of its discretion the principles of international regulatory cooperation together with the more general principle that a court should proceed with caution and proper deliberation when making orders which require the performance of actions outside the jurisdiction.

81. Illustrations of the need for caution are provided by two cases decided in England and Wales. The first, *R v Grossman* (1981) 1973 Cr App R 302, is a decision of the Civil Division of the Court of Appeal of England and Wales. The UK tax authorities had applied under the UK Bankers Books Evidence Act 1879 against Barclays Bank (which is incorporated in the UK) for the production of documents in a branch of that bank in the Isle of Man (a separate jurisdiction) for use in a prosecution of Mr Grossman for tax evasion. At p. 308 Lord Denning MR held, accepting there was jurisdiction to make an order:

> "It seems to me that the court here ought not in its discretion to make an order against the head office here in respect of the books of the branch in the Isle of Man in regard to the customers of that branch. It would not be right to compel the branch—or its customers—to open their books or to reveal their confidences in support of legal proceedings in Wales....."

At p. 310, Oliver LJ added:

> "I do not say that an order in such unusual circumstances can never be made, but it would I think be one which ought to be made only on a case very much stronger than that which the Inland Revenue have been able to deploy in the instant case."

82. The second is the decision of Hoffmann J in the Chancery Division of the High Court of England and Wales in *MacKinnon v Donaldson, Lufkin and Jenerette Securities Corporation* [1986] Ch 482 where the plaintiff sought an order under the same UK legislation against the London branch of Citibank (a New York bank which was not a party to the action), seeking the production of documents held by Citibank in New York. After a review of the authorities, including *Grossman*, and the general principles relating to restraint by a state in demanding obedience to its authority by foreigners in respect of conduct outside the jurisdiction, the judge concluded that an order under that Act should not be made:

> "Save in exceptional circumstances, the court should not require a foreigner who was not a party to an action, and in particular a foreign bank which would owe a duty of confidence to its customers regulated by the law of the country where the customer's account was kept, to produce documents outside the jurisdiction concerning business transacted outside the jurisdiction."

83. It was contended by the QFC Regulatory Authority that such cases ought to be distinguished from the present case because they were decisions in private litigation where documents were sought from a non-party; they are inapplicable in litigation where documents are sought from a party. It placed reliance on the discussion of these two cases in *Re Mid-East Trading Ltd* [1998] BCC 726, *Jimenez* and *KBR* to which we have referred at paragraphs 45 and following above. *Re Mid-East Trading* concerned an application in the course of the winding up of a company for the production of

documents held outside the UK; the Court of Appeal of England and Wales after holding that there was jurisdiction to make the order and that "exceptional circumstances" as set out in *MacKinnon* were not required, nonetheless made clear that a court had to look at all the circumstances in deciding whether it was appropriate for an order to be made in respect of documents held abroad. Furthermore, although we accept that distinctions can also properly be made between the circumstances in *Mackinnon* and those in *Jimenez* and *KBR* for some of the four reasons set out by Gross LJ at paragraph 34 of his judgment, it is significant that the proceedings in this case are proceedings solely for the production of documents.

84. It is clear, in our view, that although the QFC Regulatory Authority had jurisdiction to give the Notice and the First Instance Circuit had power to make the Order made in this case for the reasons we have given, there are broad principles applicable to the exercise of the court's discretion in the circumstances of a case such as this. Here the QFC Regulatory Authority is seeking the First Instance Circuit's assistance in enforcing a request which requires the Bank to produce documents and provide information held outside Qatar, even though the Bank is only conducting its business through a branch within the QFC. In our view, the First Instance Circuit should have regard to the principles of mutual assistance that are ordinarily available to a regulator (as for example through the MMoU to which we referred at paragraph 43 above) and should respect the principles of state sovereignty by the exercise of caution. These broad principles plainly underlie the case law to which we have referred and are of more general application; they are not dependent on some of the distinctions made in the cases in England and Wales or sought to be made by the QFC Regulatory Authority.

85. In the present case, those principles need to be applied by taking into account three particular considerations, first the reasons why the documents were sought, second whether mutual assistance was an available means of obtaining the documents and third the scope of what was sought in the Notice of 19 March 2018.

The unavailability of mutual assistance

86. We agree with the First Instance Circuit for the reasons that it gave that it was entitled when considering the exercise of its discretion to pay close regard to the fact that the

documents and information were needed for the investigation of transactions by the Bank in QAR foreign exchange markets and that there were reasonable and proper grounds for making that investigation.

87. Second, and in the circumstances of this case of considerable significance, we agree that the First Instance Circuit had to give great weight to the unchallenged evidence that the QFC Regulatory Authority had sought the assistance of the Central Bank of the UAE (which is the state institution responsible for banking regulation in the UAE), but the Central Bank had not responded to the requests and was unlikely to do so. The evidence before the First Instance Circuit and before us in relation to the Central Bank of the UAE can be summarised as follows:

(1) On 2 April 2018 the Bank in its letter to the QFC Regulatory Authority stated it had notified its regulator, the Central Bank of the UAE, of the Notices issued on 18 and 19 March 2018 and was waiting for their instructions.

(2) On 14 May 2018 the QFC Regulatory Authority wrote to Mr Ahmed Al Qamzi, the Head of Banking Supervision at the Central Bank of the UAE asking it to use their powers to direct the Bank to preserve all its documents relating to trading and offers to trade in QAR and Qatari government securities. We are satisfied on the evidence produced to us that the letter was sent by courier and delivered to the Central Bank of the UAE.

(3) In its letter of 20 May 2018 the Bank stated it would not provide documents not held by the branch at the QFC; it reiterated that it had made the Central Bank of the UAE aware of the matter and gave Mr Ahmed Al Qamzi as the relevant person to contact.

(4) On 3 December 2018 the QFC Regulatory Authority wrote to Mr Ahmed Al Qamzi at the Central Bank of the UAE asking for assistance in obtaining the information set out in the Order and Judgment of the First Instance Circuit, a copy of which was enclosed. We are satisfied on the evidence produced to us that the letter was sent by courier and delivered to the Central Bank of the UAE.

(5) On 17 December 2018 the QFC Regulatory Authority wrote to Mr Ahmed Al Qamzi at the Central Bank of the UAE asking again for assistance in obtaining the information. We are again satisfied on the evidence produced to us that the letter was sent by courier and delivered to the Central Bank of the UAE.

(6) No response has been made to any of these requests nor has there been any communication by the Central Bank of the UAE to the QFC Regulatory Authority.

88. In such circumstances, it was not practicable to rely on the usual principle underpinning the regulation of international markets that assistance will be provided by regulatory authorities in other states to the regulatory authorities in a state which are seeking documents relevant to an inquiry being conducted in that state. In the light of the evidence before us, it is clear that there were reasonable and proper grounds for the investigation and that the documents were reasonably needed in that investigation. There was evidence adduced by the QFC Regulatory Authority to the effect that between 2006 and 2011 it had sought to establish an MOU with the Central Bank of the UAE, but had concluded that the Central Bank had decided to give more limited and informal cooperation. In the present investigation, however, no cooperation at all had been given. In these circumstances this was a factor of considerable weight when the First Instance Circuit came to exercise its discretion to assist in the enforcement of the Notice; indeed, the Bank's reliance on the principles of mutual regulatory cooperation was significantly undermined by the circumstances we have set out and as was clear from the evidence before us.

The scope of the Notice of 19 March 2018

89. The third consideration relevant to the exercise of the discretion was the scope of the documents sought under the Notice of 19 March 2018 and in particular the extensive requirements the Notice placed on the Bank to carry out action which requires it to produce documents and provide information held outside Qatar.

90. The Notice of the 19 March 2018 provided for the production of:

"All information concerning the activities of [the Bank] at any of its offices or branches or any of its employees or contractors during the period from 1 March 2017 to date [19 March 2018] in the possession, custody or control of [the Bank] at any of its offices or branches or of any employee or contractors of [the Bank], such information to include without limitation, all hard copy information, any information kept in electronic form (including emails and electronic attachments, DVDs, text messages, instant messages, chats, voicemails, call logs and any associated metadata) and any voice recording relating in any way to:

1 The market for, and trading of, the Qatari Riyal;
2 The markets for any Qatari government-backed bonds or other financial instruments;
3 The markets for credit default swaps or other derivatives relating to any of the foregoing;
4 The market for any other financial instrument that might be influenced or affected by the foreign exchange rate for the Qatari Riyal;
5 All orders relating to the financial instruments referred to in paragraphs (1) to (4) above placed or withdrawn and any transactions relating to such orders;
6 [typographical error in the order; wording moved to paragraph 5]
7 All instructions given to the persons responsible for placing, executing or withdrawing any such orders;
8 The development, consideration and adoption of the strategy behind the placing, execution or withdrawal of any such orders;
9 The individuals involved in approving or authorising the implementation of the strategy for the placing, execution or withdrawal of any such orders;
10 Confirmation whether the approval or authorisation of this trading strategy was provided by the Board of [the Bank] or any committee of the Board;
11 Any communications with Banque Havilland during 2017;
12 The dates of any meetings, video or teleconferences with Banque Havilland in which any officer, employee, contractor, consultant or advisor of [the Bank] participated in 2017 and the names of all such persons;
13 The names of each officer or employee, contractor, consultant or advisor of [the Bank] who was provided with a copy of or had access to the PowerPoint presentation created by Banque Havilland describing the strategy for trading in the financial instruments referred to in paragraphs (1) to (4) above;
14 The underlying economic purpose and the objectives [the Bank] hoped to achieve as a result of the placing of these orders and the execution of the intended transactions;
15 The underlying rationale for the particular strategy employed by [the Bank] with regard to the placing of orders in the securities and derivatives in question

16 Whether this strategy was consistent with the trading strategies adopted by [the Bank] in relation to other securities and derivatives of a similar nature at the times in question;

17 If this strategy was not consistent, the reasons for the adoption of this strategy at this time in relation to the markets in the securities and derivatives referred to in (1) to 4) above and the persons responsible for the adoption and authorisation of this strategy;

18 All communications of whatever type with any third party that expressed an interest in dealing with [the Bank] on the basis of an order placed by [the Bank] in any of the securities and derivatives referred to in (1) to (4);

19 The economic analysis that supported the decision to place orders in the securities and derivatives referred to in (1) to (4) at the prices at which [the Bank] expressed a willingness to trade;

20 Any other transactions in the securities and derivatives referred to in (1) to (4) or any instruments related thereto that were being entered into by [the Bank] on an over the counter basis during the period in question and any communications of any sort relating to any such transaction or proposed transaction; and

21 Relating to the variations in the pattern of your market activity in the securities and derivatives referred to in (1) to (4) during the period from 1 March 2017 to date and the persons responsible for approving such variations in the strategy adopted by [the Bank] in relation to these instruments from time to time."

91. There can be no doubt that the Notice was very wide in its scope. The Bank did not at any time make any submissions as to the wide terms of the Notice, no doubt because the Bank was challenging the jurisdiction of the First Instance Circuit of this Court and might therefore have been reluctant to take any step that might thereafter be considered a step in the proceedings which might be held to be a submission to the jurisdiction. The position of the QFC Regulatory Authority was, in effect, that this was not a matter into which the First Instance Circuit of this Court could inquire further. However, as explained above, requests from the regulator of a branch in one state for the production of documents held in the head office (or other branches) of the bank in another state or states, are not always straightforward, and can cause friction. All states have an interest in seeing that the procedures function smoothly in the interests of financial stability. By applying to the court for assistance, the regulator is seeking to place the authority of the court behind the request, with the implications that this has in the case of non-compliance and otherwise. In our judgment, a court should (for these reasons) generally of its own motion in such circumstances give consideration, when exercising its discretion, to the width of the scope of the requirements in any order it might make which involve action being taken outside that state.

92. We can see no basis for contending that the documents sought in paragraphs 1-7 of the Notice are not documents which the QFC Regulatory Authority reasonably requires for the purposes of the investigation; they are the basic documents that the QFC Regulatory Authority would need for the investigation. However, there may be an argument that the requests in paragraphs 8-21 may be too wide in scope given the extensive requirements placed on the Bank to take action through all of its offices and branches. We do not say that such an argument has merit, but on the evidence before us, this was an issue into which an inquiry might have been made before the First Instance Circuit of this Court. Indeed the QFC Regulatory Authority accepted before us that it would be prepared to discuss with the Bank the terms of the Order once the Bank had accepted the jurisdiction of this Court.

93. The appeal before us was conducted solely on the basis of the issue of jurisdiction to make an Order against the Bank. We did not therefore have the occasion in those circumstances to consider the scope of the Notice. Although we have held that there was plainly jurisdiction and circumstances that amply justified the exercise of the discretion to make an Order, in the light of the authorities that were before us and the principles we have endeavoured to state, we consider that the Bank should have permission to apply to the First Instance Circuit in respect of paragraphs 8-21 of the Notice of 19 March 2018.

Overall conclusion

94. As is apparent from what we have set out in this judgment we consider that the weighty arguments advanced by the Bank and the issues at stake are such that permission to appeal should be granted. However, for the reasons we have given we uphold the decision of the First Instance Circuit in its judgment of 18 November 2018 and dismiss that appeal. it was common ground between the parties that the issue on the appeal in respect of its second judgment of 17 February 2018 was also the issue of jurisdiction; we also uphold that decision and dismiss that appeal. We give permission to the Bank to apply to the First Instance Circuit in respect of paragraphs 8-21 of the Notice of 19 March 2018.

By the Court,

Lord Thomas of Cwmgiedd

President

Representation:

For the Respondent: Mr Javern Herberg QC, Blackstone Chambers, London

For the Applicant: Mr Hamish Lal, Akin Gump Strauss Hauer & Feld LLP