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

In the name of His Highness Sheikh Tamim Bin Hamad Al Thani,

Emir of the State of Qatar

Neutral Citation: [2020] QIC (F) 17

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

14 December 2020

CASE No: CTFIC0011/2020

Between:

AYCAN RICHARDS

Claimant

v

NIGEL THOMAS HOWARD PERERA

First Defendant

INTERNATIONAL FINANCIAL SERVICES QATAR LLC

Second Defendant

JUDGMENT

Members of the Court

Justice Arthur Hamilton

Justice Fritz Brand

Justice Helen Mountfield QC

ORDER

1. The Defendants are ordered to pay to the Claimant:

    a. Jointly and severally, the capital sum of QAR 392,500.00.

    b. For the Second Defendant, interest on the capital sum calculated at the rate of 10% per annum from 16 March 2020 until 14 December 2020 in an amount of QAR 29,185.00; for the First Defendant, jointly and severally with the Second Defendant, interest on the capital sum calculated at the rate of 10% per annum from 19 March 2020 until 14 December 2020, in the amount of QAR 28,863.

    c. Jointly and severally, further interest on the capital sum in (a) calculated at the rate of 10% per annum from 15 December 2020 until date of payment.

    d. Jointly and severally, the reasonable costs of the proceedings, such costs if not agreed to be assessed by the Registrar.

JUDGMENT

[1] The Claimant is Ms Aycan Richards ("Ms Richards") a British citizen who resides in Qatar. The First Defendant is Mr Nigel Perera ("Mr Perera") an Australian citizen who is also a resident of Qatar. The Second Defendant is a corporate entity, International Financial Services Qatar LLC ("IFSQ") established in the Qatar Financial Centre ('QFC') and regulated by the QFC Regulatory Authority. At all times relevant hereto Mr Perera was the Chief Executive Officer of IFSQ. In July 2020 Ms Richards instituted action in this Court against Mr Perera and IFSQ, collectively referred to as the Defendants, for payment of QAR 392,500.00 together with interest and costs. The claim is based on a written agreement dated 26 December 2019 and signed by Ms Richards

and by Mr Perera on behalf of both Defendants, on 2 January 2020, to which we shall refer as the *"*consultancy agreement*"*.

[2] We shall presently revisit the terms of the consultancy agreement in more detail. However, broadly stated for introductory purposes, Ms Richards undertook to provide consultancy services to IFSQ for a period of 6 months in exchange for a retainer fee of QAR 78,500 per month, which would be payable by IFSQ on the 15th of each month. The agreement also provided that if any monthly retainer fee were to remain unpaid for 10 days after the due date, all retainer fees outstanding at that time would become due and payable with immediate effect. In his personal capacity Mr Perera guaranteed payment by IFSQ under the agreement and undertook that, if any amount owing by IFSQ should remain outstanding, he would be personally liable for payment of that amount within three business days.

[3] Many of the allegations relied upon by Ms Richards in support of her claim are not disputed, in that they were either admitted by the Defendants or at least not pertinently denied by them. In any event, most of them are borne out by documentary evidence, including email exchanges between the parties. Included amongst these uncontroverted allegations of fact are the following:

(a) Mr Perera was authorised to sign the consultancy agreement on behalf of IFSQ.

(b) He also signed 6 post-dated cheques on behalf of IFSQ for QAR 78,500 dated on the 15th of each consecutive month, which was intended to facilitate the payment of the retainer fees for 6 months under the agreement.

(c) The first of these cheques was presented for payment and in fact paid out by the bank on 15 January 2020.

(d) On 16 February 2020, Mr Perera sent an email to Ms Richards asking her to return the

unpaid cheques to him so that they could be counter-signed by a new company signatory.

(e) For medical reasons, Ms Richards was unable to take the cheques to IFSQ personally, so she asked her assistant to do so. The Operations Manager of IFSQ thereupon took the cheques from the assistant and simply shredded them.

[4] Arising from these facts, attorneys instructed by Ms Richards wrote a letter of demand to IFSQ on 9 March 2020, in terms whereof demand was made for payment of the full outstanding amount under the consultancy agreement. Failing compliance with the demand, the present proceedings were instituted against both Defendants for the same amount.

[5] In their statement of defence, dated 28 July 2020, the main defence raised by the Defendants was that, by virtue of clause 8.5 of the consultancy agreement, this Court has no jurisdiction to determine the dispute. The crux of clause 8.5 upon which the defence relies, is that the agreement shall be governed by the laws of "the State of Qatar" and that the "Qatari Courts will have exclusive jurisdiction with regard to all matters related to this agreement". In accordance with what they describe as their "secondary defence," the Defendants pleaded that the consultancy agreement was unenforceable (or as they put it 'null and void'), essentially because it was a simulated transaction which was not intended by the parties to be valid and binding in accordance with its terms. On 25 August 2020, Ms Richards filed a reply in which she responded to both defences raised and persisted in her claim.

[6] This Court thereupon decided to adjudicate upon the jurisdiction issue separately and without entering on the merits of the dispute. In the event we gave a judgment on 8 October 2020 in terms whereof the jurisdictional challenge was dismissed ([2020] QIC (F) 13). Accordingly it was directed that this Court had jurisdiction over the dispute and that the case should proceed to a

determination of the merits at a hearing to be held in due course.

[7] Shortly thereafter, however, this Court granted an ex parte order, at the behest of Ms Richards, on 13 October 2020, in terms whereof monies in the bank accounts of IFSQ within the State of Qatar were authorised to be frozen up to the value of the claim plus interest in an aggregate amount of QAR 431,750.00. In the event, funds somewhat short of that amount were successfully frozen. After the freezing order was served on IFSQ , it filed an application for the setting aside of that order on 5 November 2020. In support of this application IFSQ contended that the prejudice suffered by it and its employees in consequence of the order was disproportionate to the benefit it might hold for Ms Richards, in that the contination of the freezing order would result in about 15 members of its personnel not receiving their salaries. The further ground relied upon by IFSQ for the setting aside of the freezing order was that the consultancy agreement was a sham and that in consequence, Mr Richards' claim was destined to fail.

[8] After considering the application by IFSQ to set the freezing order aside, including noting that no alternative security was offered, we issued a further order on 9 November 2020. In terms of this order the application was dismissed. In view of the prejudice undoubtedly caused to IFSQ by the freezing of its bank account, we directed however that the hearing on the merits be expedited. In the result the trial was set down for hearing on a virtual platform, due to Covid 19, on 30 November 2020. We also directed that the parties file skeleton submissions by 25 November 2020.

[9] Thereafter IFSQ filed a "Response Memo" on 18 November 2020. Ms Richards had meantime filed her witness statement on 11 November 2020. But no witness statement compliant with the Court's Rules was filed by or on behalf of the Defendants. On 25 November 2020 Ms

Richards filed her skeleton submissions, in accordance with this Court's procedural directions, but the Defendants failed to do so. It was only on 29 November 2020, literally on the eve of the hearing, that skeleton submissions were filed on behalf of both Defendants. These skeletons did not mention the delay or offer any satisfactory explanation for this default.

[10] At the hearing Ms Richards appeared in person while the Defendants were represented by the Law Office of Gebran Majdalany in the person of Mr Abdullah Mohamed El Wakeel. At the start of the proceedings the following matters were raised with the parties and eventually ruled upon by this Court:

(a) Mr El Wakeel was asked to explain the Defendants' non-compliance with the directions of this Court. Although he gave no explanation worthy of mention, Ms Richards conceded that she was not prejudiced by the late filing of the Defendants' skeleton submissions. Although as a matter of principle, this Court cannot and will not condone the wanton non-compliance with its directions, we decided that, in all the circumstances of this case and particularly the absence of any prejudice to the other side, the Defendants should be allowed to rely on their skeleton submissions.

(b) We conveyed our prima facie view to the parties, with which they both agreed, that in the light of the nature of the defences raised, the Defendants should present their evidence and argument first.

(c) We raised the question with the parties as to what legal system should be applied. The question originated from clause 8.5 of the agreement which nominates "the Laws of the State of Qatar" as the applicable legal system. This raises the question whether we should apply the Qatar Civil Code ('the Code') or the QFC Contract Regulations ('the Regulations'), which could in our view both be regarded as part of "the Laws of the State of Qatar". Mr El Wakeel contended that we should apply the Code and that in fact the Defendants' whole case was predicated on the basis of the supposition that the detremination of the dispute is governed by the provisions of the Code.

Ms Richards, on the other hand, took the position that she has no real preference either way. In the circumstances we decided, without determining the question we raised, to accede to Mr El Wakeel's request to apply the Code in preference to the Regulations and we informed the parties accordingly.

[11] Although not entirely clear at the start, it eventually turned out that the defences on the merits which are relied upon by the Defendants are the following:

(a) The consultancy agreement relied upon by Ms Richards was null and void; it was a sham, never intended by the parties to be valid and enforceable in its terms, but constituted a fictitious or simulated transaction instead.

(b) The consultancy agreement was signed by Mr Perera, on behalf of IFSQ and in his personal capacity, under duress resulting from threats by Ms Richards to report one or both of them to the police.

(c) Enforcement of the agreement will militate against Article 63.3 of the Code in that *"the interests desired are disproportionate to the harm that will be suffered by others"*.

[12] Broadly stated, the allegations of fact relied upon for the first defence referred to in (a), namely, that the agreement relied upon was a sham, are :

(a) The amount of QAR 471, 000.00 which constitutes the aggregate of the six monthly payments contemplated in the consultancy agreement, was the equivalent of £100,000.00 in accordance with the exchange rate at the time.

(b) This amount of £100,000.00 was lent and advanced by Ms Richards to a previous owner of the shares in IFSQ, Mr Thomas Paul Fewtrell ('Mr Fewtrell') in terms of a personal loan agreement between them on 7 February 2019, which was intended to be repaid by him and not

by IFSQ.

[13] Although no witness statement compliant with the Rules was filed on behalf of either Defendant, Mr Perera was, with the consent of Ms Richards, called as a witness to testify on behalf of both Defendants. In the main he confined his evidence to the confirmation of a statement, dated 17 May 2020, which states in relevant terms : *"I* [NTH Perera]*... hereby confirm that the consultancy agreement dated 26 December 2019 concluded between Mrs Aycan Richards and IFSQ, a Qatari company established under QFCRA rules…. represented by myself in my capacity as authorised signatory in IFSQ, was a simulated agreement and both parties had no intention to execute this agreement and the real intention of this agreement was to repay the personal loan of amount GBP100 000 granted from Mrs Aycan Richards to Mr Thomas Paul Fewtrell …and since IFSQ was not a party nor a guarantor to this loan agreement, the consultancy agreement was concluded to establish a legal justification to bind IFSQ to repay the loan amount. And this was upon the request of Mrs Richards as the past shareholder in IFSQ."*

[14] This statement is to be read against the background of the following facts which are largely undisputed, in that they were asserted by the one side and admitted or at least not denied by the other and which are borne out for the most part by documentary evidence*:*

(a) During January 2019, Ms Richards had discussions with Mr Perera and Mr Fewtrell about her potential acquisition of the shares in IFSQ from the then shareholders.

(b) It turned out that IFSQ was struggling to maintain the minimum capital requirements imposed by the Regulatory Authorities. Hence it was agreed that Ms Richards would, pending her acquisition of the shares, lend an amount of £100,000.00 to Mr Fewtrell who would in turn transfer the loan amount to IFSQ.

(c) Ms Richards further agreed with Mr Fewtrell and Mr Perera that IFSQ would issue a cheque in favour of Ms Richards for the QAR equivalent of the £100,000.00 loan as "a

form of security" for the loan (referred to as *"the security cheque"*) and that if her acquisition of the shares succeeded, this amount would be deducted from the purchase price.

(d) In the event a written loan agreement for the agreed amount was executed and signed by Ms Richards and Mr Fewtrell on the 7 February 2019; the amount of £100,000.00 was paid to Mr Fewtrell and immediately transferred to the bank account of IFSQ; and a post-dated security cheque in the sum of QAR 491,000.00, signed on behalf of IFSQ by Mr Perera, was sent to Ms Richards by Mr Perera, with the following message: *"Hi Aycan here's the cheque ready to be given to you. I'm sure it will be ripped up when you take over, but this is a good insurance!"*

(e) On 14 March 2019, a Sale and Purchase agreement was entered into between Ms Richards and the shareholders of IFSQ in terms whereof she acquired their shares. However, for reasons irrelevant for present purposes, Ms Richards became dissatisfied with the transaction and in July 2019 she withdrew from the sale. Her capital contributions to the company were refunded and she returned the shares. But the £100,000.00 loan was not repaid.

(f) When, despite her demands, repayment of the loan remained outstanding, Ms Richards deposited the security cheque on 15 December 2019. She was however informed by the bank personnel that the cheque required two signatures whereas it contained only one. At the same time, she was told by the same bank officials that the bank's records still reflected her as an authorised signatory on IFSQ cheques. So, she co-signed the cheque and her bank account was credited by the amount thereof.

(g) After the cheque was credited to her account, Ms Richards informed Mr Fewtrell and Mr Perera of what she had done by an email in the following terms: *"I have cashed the cheque you had given me for the money I lent to Paul which was then transferred to IFSQ on the condition that if the sale falls through, then I can get my money £100 000."*

(h) Mr Perera thereupon informed the bank that the cheque was fraudulently signed by Ms Richards who no longer had signing powers on behalf of the company. In consequence the bank cancelled the credit of Ms Richards account and returned the cancelled cheque to her. Ms Richards responded to these allegations of fraud against her by threatening to report Mr Perera to the police for fraudulantly issuing her with a cheque that he knew to be invalid.

(i) Ms Richard persisted in her demands for repayment of the £100,000.00 loan. Mr Perera then informed her that IFSQ was unable to repay the amount immediately. At the same time, he told her that he did not want IFSQ's liability to be reflected as a loan because that would reduce the liquidity of the company to below the level required by the Regulatory Authorities. In these circumstances Mr Perera suggested that they couch her claim in the form of a consultancy agreement to which Ms Richards reluctantly agreed.

(j) The Consultancy Agreement is heavily weighted in favour of Ms Richards. In return for the monthly payment to her of QAR 78,500, she undertook to hold herself ready to render *"consultancy services"* of no more than six hours per calendar month and only when requested to do so by IFSQ. These consultancy services consisted of no more than *"the review and provision of feedback on the company's business plan and on the sales and marketing plans developed by the company."* In addition, clause 3.4 of the agreement pertinently provided that the retainer would not be affected by whether or not the company required any services at all.

In so far as there are any inconsistencies between the testimony of Ms Richards and that of Mr Perera in relation to the above, we prefer that of the former, which provides a clear and convincing narrative of events, consistent with the documentary evidence.

[15] As the legal basis for its first defence, the Defendants relied on the following Articles in the

Qatar Civil Code:

> Article 155.- *" 1. A contract shall be revoked where the obligation of a contracting party is without good cause or unlawful."*
>
> Article 157 – *"1. The cause of the contract shall be its true cause until evidence to the contrary is provided.*
>
> *2. Where the cause is fictitious any party alleging that the obligation has another lawful cause, shall provide evidence to support this allegation."*
>
> Article 173 – *"Where a nominal (simulated) contract is concluded, the concealed (true) contract and not the apparent contract shall bind the contracting parties and the general successor of each party."*

[16] As to the requirement of *"good cause"* in Article 155.1, it has been accepted in uncodified Civil Law systems, such as South Africa and Sri Lanka, that the requirement demands no more than *"a promise made seriously and deliberately and with the intention that a lawful obligation should be established (see e.g. Christie's Law of Contract in South Africa 6th Ed 10 and the cases there cited.)"* We have no reason to think - and none has been suggested to us - why the requirement should not bear the same meaning in Article 155.1. Thus understood, the requirement is closely aligned to a provision rendering a fictitious contract unenforceable.

[17] One thing that is borne out by all the evidence is that, whatever the cause of its obligations, IFSQ intended to make payment to Ms Richards in accordance with the tenor of the agreement. After all, it effectively secured future payment of the agreed amounts by issuing post-dated cheques which corresponded exactly to its undertaking as formulated in clause 5.2 and we know

that, as a fact, one of these payments was indeed effected. IFSQ's intent to give effect to its obligation to pay in accordance with the terms of the agreement is also borne out by Mr Perera's statement to the effect that *"since IFSQ was not a party nor a guarantor to this loan agreement, the consultancy agreement was concluded to establish a legal justification to bind IFSQ to repay the loan amount."* This means that the whole purpose of the agreement was to create a legal basis upon which the payments which IFSQ intended to make could be justified. Accordingly there can be no merit in any suggestion that IFSQ's undertaking to pay in accordance with the terms of the agreement was not seriously and deliberately given or that it may be regarded as a fictitious one. Nor can it be said that Ms Richards was not serious in holding herself out as available and willing to provide consultancy services to IFSQ if asked to do so – she explained in her oral evidence that she had the relevant expertise and would have done so, had she been asked, which she was not.

[18] In this light, the fact that the loan was initially made to Mr Fewtrell personally is of no real consequence. The uncontroverted position is that IFSQ was the ultimate beneficiary of the loan and, more importantly, that IFSQ deliberately undertook to repay the amount of the loan. As we understand the evidence, it was never intended that repayment should be made by Mr Fewtrell. The intention was that, if the sale was implemented, the amount of the loan would be deducted from the purchase price for the shares. Conversely, if the sale fell through, it would be repaid by IFSQ. Intitially the arrangement was that this repayment would be effected by means of the security cheque. But when the cheque was cancelled the parties effectively agreed that repayment would be brought about by implementation of the consultancy agreement.

[19] As to the defence of simulation, it often happens that parties who have reached agreement in principle choose to give effect to it in a contractual form which may not be the most obvious. If they do so, it does not follow that the contract is simulated. If the parties honestly intend to give

effect to their agreement in accordance with its tenor, it is immaterial why the agreement was formulated in that less obvious way. According to the evidence of Ms Richards this is what happened in this case. Although the real purpose of the consultancy agreement was to facilitate the repayment of the loan, so she stated, she ultimately intended to comply with its stated terms by rendering the agreed consultancy services as and when required by IFSQ. We have no reason to doubt the veracity of this version. Apart from the fact that there is no evidence to the contrary, the services required from Ms Richards in terms of the Agreement would presumably require little effort on her part. IFSQ, for its part, implemented its terms in so far as it made the first instalment payment under it.

[20] In any event, even if it were to be held that the consultancy agreement constituted a simulated transaction, that would not mean that the obligations of the parties to the agreement were not enforceable. On the contrary, Article 173 pertinently provides that where a simulated contract is concluded, the disguised or true contract will be binding on the parties. This is in accordance with the maxum of Roman Law *"plus valet quod agitur quam quod simulate concipitur"* (which may be rendered in English: 'effect will be given to the true intent of the parties and not to their simulated intent'). If the consultancy agreement was truly a contract for repayment of a loan, IFSQ as borrower was bound to implement it as such. In the premises we conclude that the first defence on behalf of ISFQ cannot succeed.

[21] The second defence of the duress rests on the legal basis of Article 137 of the Code which provides that "*a contract may be voidable as a result of duress if one of the parties has contracted under the stress of a justifiable fear unlawfully instilled in him.*" The problem we have with the defence in the circumstances of this case is that no factual basis whatsoever has been established that can serve as its foundation. The conduct by Ms Richards relied upon by the Defendants is a

threat to report Mr Perera (and perhaps also Mr Fewtrell) to the police for issuing an invalid cheque. The requirement of Article 137 is however not only to establish a threat. The Defendants also had to demonstrate that the threat was unlawful, which in our view they have failed to do. But, more significantly, Article 137 also requires the Defendants to prove that when Mr Perera signed the consultancy agreement, he did so by virtue of his fear resulting from the threat and that his fear was justifiable in the circumstances. As we see it the Defendants' case founders on this requirement. Despite the fact that Mr Perera testified at the hearing, he did not even suggest that he signed the agreement out of fear; nor does anything in the documentary evidence before the Court support any such allegation. This means that the second defence must also fail.

[22] The third defence, resting on Article 63 of the Code, is to the effect that the enforcement of the contractual rights relied upon by Ms Richards should not be allowed, since the harm it would cause to the Defendants would be disproportionate to the benefit that she would attain. But we find this argument untenable. First of all, we have serious doubts whether Article 63 finds any application at all. No Qatari judicial or other authority was cited to us to illustrate the practical scope of this Article, which appears to be concerned with the abusive exercise of rights. It is not obvious that it could apply where a party to a lawful commercial contract, freely entered into, seeks to enforce it by litigation. It may be that Article 63 only finds application when the right in question is sought to be exercised without the assistance of the Courts. However, assuming the applicability of the Article, there is again no factual basis laid for its application. On the Defendants' papers the basis of disproportionate prejudice is relied upon only as a ground for setting the freezing order aside. It is not raised as a defence against the enforcement of Ms Richard's rights under the agreement. And in evidence by Mr Perera, not a word was said about the Defendants' inordinate prejudice. Finally, it appears to us that if this defence has any merit, which we find difficult to conceive, it should be raised with the enforcement judge and not in this forum.

[23] As to Mr Perera's personal position, he relied in his statement of defence on Article 813 of the Code – that a guarantee shall not be valid unless the original obligation is valid; on Article 817 – that the guarantee shall be discharged upon discharge of the debtor; and on Article 818 of the Code – that a guarantor may raise all defences available to the debtor. In effect Mr Perera therefore raised no separate defence that could succeed if, as is the case, FISQ were to be held liable.

[24] In argument on his behalf it was however contended that his liability as a guarantor only arises after the principal debtor had been excussed, that is, after every practical step had been taken to recover from IFSQ. The basis advanced for this contention was found in Article 824 of the Code which provides in its relevant part: *"1. ... the creditor may not seek seizure of the assets of the guarantor until the assets of the debtor have been depleted, and only if the guarantor is jointly liable with the debtor. 2. In either event, the guarantor shall hold to his right thereto."*

[25] But as we see it, the section does not constitute a defence to a claim for judgment against the surety. At best it might provide an answer at the execution stage when the judgment creditor seeks to attach assets of the surety before the principal debtor had been excussed. Even at that stage, the surety against whom judgment had been obtained, cannot take a supine attitude and simply raise the answer *in vacuo.* That much appears from Article 825 which provides : *"1. Where the guarantor demands depletion of the debtor, the guarantor shall, at its own expense, direct the creditor to those assets of the debtor that may settle the debt in full. 2. No assets that the guarantor may indicate shall be effective if disputed or outside the State of Qatar."* In any event, in this case the guarantee took effect, by virtue of clause 5.3(b) of the consultancy agreement, in relation to the outstanding retainer fees by not later than March 2020. Upon its taking effect, Mr Perera became unconditionally liable for payment of those fees.

[26] For these reasons we hold that Ms Richards is entitled to judgment against both Defendants in the capital amount of QAR 392,500.00, that she claims. Her claim for interest is based on clause 5.2(c) of the Consultancy Agreement which provides that *"delayed payments beyond 5 business days may result in a 10% delayed payment penalty which may be imposed by* [Ms Richards] *at her own discretion."* As we see it, the whole of the capital balance outstanding only became due and payable, under the acceleration provisons of clause 5.2(d), on the expiry of five business days after 8 March 2020 when demand for payment was made by Ms Richards' attorneys on her behalf, namely on 16 March 2020. Mr Perera became unconditionally liable for payment of that balance on the expiry of three business days from non-payment by IFSQ, namely, on 19 March 2020. Both are liable to pay interest at the contractually agreed rate. Calculated from 16 March 2020 at the rate of 10% per annum to 14 December 2020 (which is the sum for which IFSQ is liable) capitalised interest amounts to QAR 29,185 .Calculated from 19 March 2020 to 14 December 2020 (which is the sumfor which Mr Perera is liable) capitalised interest amounts to QAR 28,863.

By the Court,

Justice Fritz Brand

Representation

The Claimant appeared in person.

The Defendants were represented by Mr Abdallah Mohamed El Wakeel (Law Offices of Gebran Majdalany, Doha, Qatar).