Judgment handed down in an appeal which raised issues of wider importance for the QFC and Qatari law- Simon Hale

Simon Hale appeared on behalf of the defendant bank in an appeal against a first instance decision in the Civil and Commercial Court of the Qatar Financial Centre (the "QFC"), which raised issues of wider importance for the QFC and Qatari law.

Background

1. In 2014-2015, the Government of Qatar introduced a policy to provide better accommodation for construction workers who were employed in Qatar, particularly for projects relating to the FIFA World Cup 2022 and other infrastructure. This was, in part, as a response to international concerns about the working conditions and standard of living offered to those people.
2. This dispute concerned a project which was set to provide 4,000 beds in good quality accommodation with enhanced facilities for workers and was ultimately backed by the Ministry of Municipality and Environment within the Qatari government.
3. The project did not proceed to completion and a dispute arose between the developer, Daruna for Real Estate Brokerage ("Daruna"), and Lesha Bank LLC (the "Bank") in relation to the terms on which the Bank had agreed to provide project finance and the subsequent termination of that finance.
4. On 14 August 2022, the first instance court found for the claimants, and gave judgment for damages in the sum of QAR 13,722,949 against the Bank for breach of a financing agreement between the Bank and Daruna.
5. After changing both its solicitors and counsel, the Bank appealed, contending that the first instance court was wrong to find that such an agreement existed. The claimants cross-appealed seeking further damages in the sum of over QAR 900,000,000.

Judgment

6. The appeal was dismissed (although the reasoning of the first instance court was found to have been wrong) and the cross-appeal was allowed but only to the extent of adding QAR 400k to the award. The key elements of the reasoning of the judgment were as follows:

    a. The Appeal Court accepted the Bank's argument that many relevant documents were not put before the first instance court, and that additional documents ought to be allowed into consideration within the appeal. This situation was mainly the fault of the bank's former advocates, which left the first instance court facing "*a formidable difficulty*" (see [3]-[5]).

    b. The Bank's contention that the applicable law was indeed QFC law, there being no "explicit agreement" by the parties to apply another law, was also accepted (see [49]-[51]). At [51], the court considered the question of whether a choice of law clause stating "*the laws of Qatar*" was incompatible with a choice of QFC law, the QFC being a free zone within Qatar. The Appeal Court noted that this point had been considered but not decided in a previous case, Aycan Richards v Perera and International Financial Services Qatar LLC [2020] QIC (F) 17, at first instance. The Appeal Court also did not need to decide the

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point, but gave a strong indication that, because QFC law is "*part of the applicable law of Qatar",* a choice of law clause providing that the "laws of Qatar" or the "laws of the State of Qatar" will govern an agreement or transaction was not inconsistent with applying QFC law.

c. The Appeal Court further upheld the Bank's arguments that the First Instance Court's reasoning about the structure of the project finance transaction had been wrong. The First Instance Court had found there was a binding contract between the Bank and Daruna in a letter dated 14 August 2016 from the Bank offering to provide equity finance . However, the Appeal Court determined that this letter was not an "*offer that was capable of acceptance"* that could bind the Bank, was subject to conditions precedent, and had not been accepted by either the signing of the shareholders' agreements or by conduct (see [52]-[55]).

d. The Bank's central argument was that the true agreement between the parties as to financing the project was solely that contained in the shareholders' agreement ("SHA") between Daruna and an SPV created by the Bank for the purposes of the transaction: a subsidiary named Kuthban, which was to take a controlling share in a further SPV called Um Slal Four Accommodation ("USFA") (see [21] and [56]). The Appeal Court accepted the Bank's submission that financing transactions routinely involve contractual structures with different corporate entities, and it is for the parties by their agreements to allocate legal liability between such entities. It was found at [59] that:

"*If the contractual structure provides that a particular corporate entity is liable for funding, the fact that funding may be expected in substance come from the Bank itself is irrelevant. The Court will not rewrite the parties' contractual arrangements*"

e. However, the Court found that the "*true picture*" was that Daruna only agreed to the agreement being structured though the SHA with Kuthban on the basis that the Bank would remain obliged to provide the finance as set out in clause 5 of the SHA, "*and would ensure that the obligations of Kuthban under that agreement were honoured by the Bank*" (see [61]-[62]). The reasons for that conclusion are set out in full at [62], but essentially the Appeal Court determined that it could look behind the various SPV structures and consider the Bank directly liable.

f. After finding that the Bank did owe an obligation to *"ensure that the obligations of Kuthban"* were met (as set out in paragraph 6e. above), the Appeal Court found the Bank had breached that obligation. This was a point that had been conceded by the Bank's former advocates at first instance (see [64] and [66]).

g. The Court did not allow the Bank to argue that the venture would always have failed in any event because Daruna could not provide the required Complimentary Shareholder Funding that it was obliged under the SHA to inject into the project. This was a new point which the Bank took for the first time on the appeal, and which the Appeal Court considered should have been raised by the Bank's former lawyers at first instance. In any event, that there was no evidence to support it (see paragraphs [65]-[66]).

7. the Appeal Court thus upheld the outcome of the case, but for quite different reasons to those given by the first instance court.

8. On Daruna's cross-appeal, the court found as follows:

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a. The Court rejected Sheikh Nasser's claim for QR 142m of lost profits on the Umm Slal project (see [85]-[86]), and any and all claims relating to another project, the Al Khor project, which Daruna said it had lost as a consequence of the failure of the original project (see [88]). There was found to be, in both cases, no evidence to establish the loss claimed. The Court further rejected any claim by Daruna's principal, Sheikh Nasser, for personal loss, on the basis that he was not a party to the agreement (see [89]).

b. However, the Court decided that a different head of loss should be awarded, with the aim of *"compensating Daruna for the lost investment opportunities that would have been available to Daruna by the use of those funds if deployed elsewhere"* (see [77]). The Court recorded the Bank's submission that this issue was not pleaded and had not been raised before the first instance court but determined that it had the jurisdiction to consider a claim in circumstances were the claimant had potentially not been properly compensated (see [78]).

c. The Appeal Court then made the following assessment of the head of loss at [81]:

"The assessment is a matter for the court which is familiar with the economic circumstances and the general investment opportunities that would have been available to a prudent businessperson in the market during the relevant part of the period, taking into account the material risks. It is not necessarily a matter for specific evidence. Taking into account all the material matters in this case, we assess that amount to be QAR 400,000."

Wider impact of the Judgment

9. The Appeal Court expressly said that written arrangements between distinct corporate parties must be respected. Qatari law and QFC law recognised the corporate veil and the concepts of distinct corporate identity. However, ultimately the court did in fact *"look through these SPVs"* to allow a claim directly against the Bank (see [62v]). That conclusion will be of interest to parties transacting finance in the QFC using intermediate entities and SHA structures like the ones the Bank used. The judgment underscores the need for the terms of agreements between intermediate or SPC vehicles to be watertight and unambiguous. This need is also highlighted by the court's finding that the Bank had agreed to ensure that the obligations of Kuthban would be performed even though there was no parent company guarantee or similar instrument, within which such an obligation would normally be recorded.
10. The treatment of the choice of law issue (discussed at paragraph 6b., above) also has wider ramifications. Whilst the point was not expressly determined, the Court gave a strong indication that a choice of law clause providing for the "*laws of Qatar*" is not inconsistent with the application of QFC law.
11. Finally on Daruna's cross appeal, the award of QAR 400,000 for general loss of investment opportunities appears to have been a proxy for a claim for interest, which Daruna had chosen not to claim for religious reasons. This is an interesting approach to consider in cases where parties in Islamic countries do not wish to pursue interest claims.

Conclusion

12. Ultimately although the defendant was not successful in the result, the Appeal Court accepted the defendant's case that the first instance court's reasoning was wrong. The decision was upheld on different grounds.

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