DAS Real Estate owned and represented by Mussabeh Salem Mussabeh Humaid AlMuhairi v National Bank of Abu Dhabi Pjsc [2017] DIFC CA 007

Claim No: CA-007-2017

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

BEFORE JUSTICE ROGER GILES, JUSTICE TUN ZAKI AZMI, H.E JUSTICE OMAR AL MUHAIRI

BETWEEN

DAS REAL ESTATE OWNED AND REPRESENTED BY MUSSABEH SALEM MUSSABEH HUMAID ALMUHAIRI

Appellant

and

FIRST ABU DHABI BANK PJSC
(FORMERLY NATIONAL BANK OF ABU DHABI PJSC)

Respondent

Hearing: **11 February 2018**

Counsel: David Thomas QC assisted by Adam Bradshaw from DLA Piper Middle East LLP for the Appellant

Yacine Francis assisted by Simon Roderick from Allen & Overy LLP for the Respondent

Judgment: **12 April 2018**

JUDGMENT

Summary of Judgment

The Respondent, NBAD, financed a hotel development of the appellant, Das Real Estate. In 2015 NBAD terminated the financing, and then demanded repayment of a large sum of money. The parties agreed on preliminary issues directed to the validity of the termination, involving whether there had been an Event of Default under the Facility Agreement on which NBAD had been entitled to rely. The trial judge held that there had been Events of Default, and that NBAD was not precluded from relying on them to terminate the financing.

The Court of Appeal upheld the trial judge. The trial judge had not misdirected himself in law, or been appealably in error on the facts, in finding that in NBAD's opinion there had been a Material Adverse Effect as defined in the parties' agreement. Nor had he been in error in finding that certain conditions subsequent in the agreement had not been fulfilled. These were Events of Default, and the trial judge had also not been in error in holding that NBAD had not waived its right to rely on them to terminate the financing.

The appeal was dismissed, and Das Real Estate was ordered to pay NBAD's costs, subject to leave to apply for a different costs order within 14 days; minor errors in the orders as issued were corrected.

This summary is not part of the Judgment and should not be cited as such

ORDER

UPON the Appeal filed by the Appellant on 30 August 2017 against the Judgment of the Deputy Chief Justice Sir David Steel dated 10 August 2017

AND UPON hearing Counsel for the Appellant and Counsel for the Respondent at a Hearing on 1 February 2018

IT IS HEREBY ORDERED THAT:

1.The appeal be dismissed.

2. The Appellant pay the Respondent's costs of the appeal.

3. Liberty to apply for a different order within 14 days.

4. Order 3 of the CFI judgment in this case to be amended from referring to “any Conditions Subsequent” to “Conditions Subsequent 1,2 and 4 in Schedule 2 to the ARA.”
5. Order 4 of the CFI judgment in this case to be amended from referring to orders 3 and 4, to referring to orders 2 and 3, and from referring to Clause 23.12 to Clause 23.13.

Issued by:
Ayesha Bin Kalban
Assistant Registrar
Date of Issue: 12 April 2018
At: 3pm

JUDGMENT
JUSTICE ROGER GILES:
INTRODUCTION

1.Das Real Estate (“Das”) was engaged in a hotel development at Palm Jumeriah, Dubai. The project began in 2007, stalled in the global financial crisis, and was restarted with redesign in 2010. From 2008 finance was provided by National Bank of Abu Dhabi PJSC (now named First Abu Dhabi Bank PJSC) (“NBAD”). The financing (“the facility”) was amended in 2010 and 2013, and again in 2014 to a revised Facility Agreement attached to an Amendment and Restatement Agreement dated 28 September 2014 (“the ARA”).
2. The project underwent considerable vicissitudes, with time and cost overruns and disputes with the contractor. This brought many meetings between Mr Al Muhairi of Das and officers of NBAD, with the NBAD officers expressing its concerns as to the management of the project and its future. A detailed account is found in the judgment of the trial judge (‘the judge”). I will not repeat it, but will refer to relevant events as appropriate. These reasons assume familiarity with the judgment.
3. As at May 2015 construction work had ceased, Das no longer had a project manager, and there was a substantial shortfall in funding requirements. Das and the contractor, Intermass, were at loggerheads, and had been for some time. By a notice dated 21 May 2015, NBAD terminated the facility. On 31 December 2015 it demanded payment of AED 535,675,282.99, and on 7 January 2016 it gave notice of intention to enforce its mortgage security.
4. In proceedings commenced by Das, the parties agreed upon preliminary issues directed to the validity of NBAD’s termination of the facility. They were –

> “1. Was the Defendant’s notice dated 21 May 2015 a valid and lawful exercise of its rights under Clause 23.13 of the Facility Agreement?
>
> (a) Was there an Event of Default under Clause 23 of the Facility Agreement as a result of:
>
> (i) The Claimant’s failure to achieve Development Completion by 31 March 2015, pursuant to Clause 22.5 and 23.2 of the Facility Agreement?
>
> (ii) A material adverse change pursuant to Clause 23.11 of the Facility Agreement?
>
> (iii) The Claimant’s failure to comply with any Conditions Subsequent in Schedule 2 to the Amendment Agreement?
>
> (b)If the answer to any of the above questions in (a) above is “yes”, was the Defendant precluded from relying upon its rights under Clause 23.13 by reason of the matters pleaded by the Claimant in its Particulars of Claim at paragraphs 43.1, 43.4, 43.5, 43.6, 43.7, 44.2, 44.4, 44.5 and/or paragraphs 10, 13, 16, 17, 18, 19, 20, 21, 22 or 23 of the Amended Reply?”

5. The judge answered the questions –

- Issue 1(a)(i): No
- Issue 1(a)(ii): Yes
- Issue 1(a)(iii): Yes
- Issue 1(b): No

6. The orders consequent upon these answers were –

> "1. There was no Event of Default under Clause 23 of the Facility Agreement as a result of the Claimant's failure to achieve Development Completion by 31 March 2015, pursuant to Clause 22.5 and 23.2 of the Facility Agreement.
>
> 2. There was an Event of Default under Clause 23 of the Facility Agreement as a result of a material adverse change [sic] pursuant to Clause 23.11 of the Facility Agreement.
>
> 3. There was an Event of Default under Clause 23 of the Facility Agreement as a result of the Claimant's failure to comply with any Conditions Subsequent in Schedule 2 to the Amendment Agreement.
>
> 4. Further to paragraphs 3 and 4 [sic] above, the Defendant was not precluded from relying upon its rights under Clause 23.12 [sic] by reason of the matters pleaded by the Claimant at various points of its Particulars of Claim and/or the Amended Reply, as set out in the agreed preliminary issues."

7. Das appealed in relation to the answers to Issues 1(a)(ii), 1(a)(iii) and 1(b). NBAD has not appealed in relation to the answer to issue 1(a)(i).

The Facility Agreement

8. The revised facility was for AED 669,000,000, with capitalised interest and repayable at the end of 2015. Under the Facility Agreement, Das agreed "to procure that Development Completion occurs not later than 31 March 2015". It is clear, and the evidence was, that repayment was to come from timely completion of the development.

9. In the Facility Agreement, "Event of Default" was defined to mean "any event or circumstance specified as such in Clause 23 (Events of Default)". Clause 23 relevantly provided:

> "23. **Events of Default**
>
> Each of the events or circumstances set out in Clause 23 is an Event of Default.
>
> 23.1 ……
>
> 23.2 **Other obligations**
>
> The Borrower does not comply with any of its other obligations … under the Finance Documents and such non-compliance is capable of remedy and is not remedied within fifteen (15) Business Days of the Borrower receiving notice of such failure from the Lender requiring the same to be remedied.
>
> 23.3 …….
>
> 23.11 **Material Adverse Change**
>
> (A) The Borrower ceases to carry on or abandon the Development
>
> (B) In the reasonable opinion of the Lender there is a Material Adverse Effect.
>
> 23.12 ….
>
> 23.13 **Acceleration**
>
> On and at any time after the occurrence of an Event of Default the Lender may, and shall if so directed by the Lender [sic], by notice to the Borrower:
>
> (A) Cancel the Available Commitment whereupon it shall immediately be cancelled;
>
> (B) Declare that all Utilisations, together with accrued interest and all other amount accrued or outstanding under the Finance Documents, be immediately due and payable, whereupon they shall become immediately due and payable;
>
> (C) Declare all of the Utilisations be payable on demand, whereupon they shall immediately become payable on demand of the Lender, and/or

(D) Declare that cash cover in respect of each Letter of Credit is payable on demand at which time shall `-immediately become due and payable on demand by Lender."

10. The Finance Documents included the ARA and the Facility Agreement. "Material Adverse Effect" was defined to mean "a material adverse effect which will materially impair the ability of the Borrower to perform or observe any of its repayment or other material obligations under any of the Finance Documents".

11. The presently relevant "other obligations" (cl 23.2) came from cl 5.3 of the ARA, in the terms –

"5.3 **Conditions Subsequent**

(a) The Borrower shall deliver each of the documents and other evidence listed in Schedule 2 ("Conditions Subsequent") to the Lender (in form and substance satisfactory to the Lender) on or before the date set out next to each such document or other evidence.

(b) If any document or other evidence referred to in paragraph (a) above is not delivered by the time limit required under paragraph (a) above, that non-delivery will constitute an event of Default under the Amended Restated Agreement [sic] and no grace period shall apply."

12. This picked up from Schedule 2, so far as presently relevant –

13. Clauses 30 and (in part) 31 of the Facility Agreement provided –

"30. **Remedies and Waivers**

No failure to exercise nor any delay in exercising on the part of the Lender any right or remedy under the Finance Documents shall operate as a waiver nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

31. **Amendments and waivers**

31.1 **Required Consents**

No.	Condition Subsequent	Deadline for Delivery
1	A duly executed original of the Construction Contract Assignment	30th September 2014
2	A duly executed original of the Contractor's Insurances Assignment	30th September 2014
3	A copy of the Construction Contract (as amended) duly executed by all parties thereto, certificate [sic] as true, complete and accurate by a duly authorised officer of the Borrower	30th September 2014

14. The Facility Agreement was governed by and to be construed in accordance with the laws of Abu Dhabi and the applicable federal laws of the UAE. It contained an exclusive jurisdiction clause in favour of the DIFC Courts. Any terms of the Finance Documents may be amended or waived only with the consent of all Parties."

Issue 1(a)(ii): Material Adverse Effect

15. The judge referred to *Cukurova Finance Int Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 2 ("Cukurova") for the need for admissible evidence that NBAD had formed the opinion that there was a Material Adverse Effect, being an honest and rational opinion. Das contended that, in holding that there was an Event of Default, the judge had –

(a) misdirected himself in law in then departing from the Cukurova necessity; and

(b) erred in fact in inferring that NBAD had formed the requisite opinion.

16. In addressing these contentions, the judge's reasoning should first be recounted. The judge noted the need for admissible evidence of the formation of the relevant opinion. He asked himself whether, in the absence of direct evidence of the opinion, it could be inferred from the circumstances, and clearly enough considered that it could. He summarised "the factual circumstances in which the loan was accelerated", and said that they warranted not just an honest and rational view that there was a material adverse change [sic], but also one that would inevitably be formed by a competent bank. He then referred to the "expressions of justifiable and pressing concern" by NBAD and its advisers, and set out evidence of contemporaneous

expressions of concern and evidence of NBAD's witnesses speaking of their concerns at the time, and said that would be irrational to distinguish NBAD's analysis of the situation taken with those expressions from an opinion that there was a Material Adverse Effect. While recording that Material Adverse Effect was not a topic in any internal minutes or memoranda, and had not been asserted until the amended Defence in the proceedings, he was nonetheless satisfied that the requisite opinion had been formed.

(a) Misdirection in law

17. The contention was put in two ways. At the heart of the first way was the judge's introduction to the summary of the factual circumstances in which the loan was accelerated –

> "106. The question that arises is whether there is any (or any adequate) material from which it can be inferred that NBAD formed the requisite opinion bearing in mind that the event of default arises from the circumstances and not from forming the opinion. The starting point must be the factual circumstances in which the loan was accelerated. As pleaded by NBAD the reality was that there had been a substantial overrun of cost from AED 685 million to AED 806 million leaving a large shortfall of funds available for completion. (Indeed, EC Harris put the shortfall at AED 170 million leaving aside EOT). Das had no available funding for the shortfall or any part of it. There had also been a considerable degree of delay (of around 9 months) with work coming almost at a standstill. There was no project manager and no plans to appoint one. The underlying problem was the level of dispute between Das and Intermass. There was no agreement on EOT's. Das refused even to meet with Intermass. Remarkably the reason later advanced by Mr Almuhairi for not engaging with Intermass before termination of the contract (a process urgently requested after termination) was an allegation that the Chairman of NBAD was a partner in Intermass – a point never made at the time or advanced at the trial. The alternative advanced by Das of engagement of a new contractor would involve more expense and delay." (underlining added)

18. Das submitted that in the underlined words, the judge had applied an incorrect test, not that called for by cl 23.11(b) – in effect, an objective test rather than one addressing formation of an opinion by NBAD.

19. I am unable to agree. It is clear from the reasons, including the words preceding the underlined words, that the judge was addressing formation of an opinion by NBAD. In the absence of direct evidence of the opinion, as with any other fact, its existence could be inferred. Any inference arose from the circumstances, not from forming an opinion in the air, and I do not think the judge meant anything more. The underlined words do not have the vitiating significance called for by the submission.

20. The second way the contention was put was that it was impermissible to infer the formation of the opinion on the basis that no other opinion was reasonably available, and that the judge had erred in taking that approach in reliance on a passage in *Pan Foods Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group* [2000] HCA 20; [2000] 170 ALR 579 (High Court of Australia).

21. The short answer is that the judge did not take that approach (nor did the High Court of Australia). While in the course of his reasoning he held that formation by a competent bank of an honest and rational view that there was a material change was inevitable, he did not rest his finding on that. He went on to address NBAD's opinion as found through the evidence of what he described as contemporaneous justifiable and pressing concerns and the evidence of witnesses of the concerns at the time. The judge came to his inference from that evidence, see the next section of these reasons.

(b) Error of Fact

22. The judge found the formation of the opinion by inference. Das must show that the drawing of the inference was plainly wrong, see *Al Khorafi v. Bank Sarasin-Alpen* (ME) Ltd [2015] DIFC CA 003 at [168] – [169], citing from *Sohal v Suri* [2012] EWCA Civ 1064 at [30] – [31] –

> "30. It is common ground that, on an appeal against a judge's findings of fact, the appellant has in general to show that the judge was plainly wrong. It is well established that, where a finding turns on a

judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involved an evaluation of facts, an appellate court will not interfere with a finding made by the judge unless the judge's conclusion is "outside the bounds within which reasonable disagreement is possible". Where, however, the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court in general must make up its own mind as to the correctness of the judge's finding (see *Dates Electronic Holdings v United Parcels Service* [2007] 1 WLR 1325 at [46] per Lord Mance).

31. In this case, the appellant makes a number of challenges: he contends that the judge failed to draw certain inferences from the primary facts, that, in other respects, he drew the wrong inferences and that in drawing or not drawing inferences the judge attached the wrong weight to various matters. In my judgment, where the challenge is to an inference not drawn, or drawn, by the judge from other facts the principles are as set out above. The appellant has to show that the failure to draw the inference, or as the case may be the making of the inference, was plainly wrong. The respect which, as I have just explained, an appellate court accords to primary facts based on oral evidence, and to an evaluation of facts made by the judge, applies also to inferences drawn from such facts or evaluation. Putting the matter another way, in those circumstances, the appellant will in general have to show that the inference, which he contends should have been drawn, was one that should inevitably have been drawn, so as to entitle the appellate court to interfere. In addition, it follows from the fact that the appellate court must be satisfied that the judge is wrong that it is not enough merely to disagree with the weight which, when drawing or deciding not to draw inferences, the judge has given to some factors over others."

23. Das submitted that in coming to his finding the judge had failed to accord due weight to a number of matters, each of which (it said) negated inference of formation of the opinion. The principal matters were –

(i) that a Material Adverse Effect was not in the notice of 21 May 2015 or in the Defence prior to amendment, although legal advice must have preceded those steps and the notice stated other Events of Default;

(ii) that the topic was not in any internal minutes or memoranda;

(iii) that there was no evidence from the NBAD officers who decided to issue the notice of 21 May 2015;

(iv) that the evidence was not precise as to the particular Material Adverse Effect considered to be affecting ability to perform or obey repayment or other obligations;

(v) that even in the Amended Defence there was not a direct pleading of formation of the opinion;

(vi) that it was not correct that it was inevitable that any competent bank would have formed the opinion that there had been a Material Adverse Effect and there was no expert evidence to that effect; and

(vii) that the contemporaneous expressions of concern and the witnesses' evidence of concerns were only concerns, short of opinions and well short of opinions going to ability to perform or obey repayment or other obligations.

24. I do not doubt that the judge had all these matters in mind, and he expressly referred to many of them. In my view, he was not plainly wrong in inferring the formation of the opinion; indeed, it was a finding well open to him. There was sound evidence of concerns held within NBAD, including amongst relevant decision-makers, of a situation in which the project would not be completed on budget or at all; and this equated with inability to repay, and so a Material Adverse Effect, since repayment would be upon timely completion of the project.

25. I do not think it correct to describe the views of the NBAD officers as only concerns. The judge set out some of the evidence (at [109]). There was further evidence, for example that termination of the construction

contract with Intermass was “a major concern”; that Mr Al Muhairi’s refusal to meet with Intermass meant “that the interests of NBAD were being jeopardised” and meant that “there were likely to be negative implications for the completion date and costs of the project, and Mr Almuhairi’s ability to comply with his obligations under the loan”; that the termination was seen “to have very serious negative implications for the project and lead to defaults under the loan” and the refusal was seen as making it “impossible to achieve any solution or sensible plan for completion of the project”; and that by the end of April 2015 “there was no longer any realistic prospect of completing the project on time or on budget.”

26. In this regard, and relevant to (vii) above, the judge said –

> “108. I have not forgotten the absence of any reference to Material Adverse Effect in any document prior to the Defence and the absence of any reference to the topic in any internal minutes or memoranda. But accepting that mere expressions of concern are not enough it would nonetheless be irrational to distinguish the bank’s analysis of the situation taken with the expressions of justifiable and pressing concern by the bank and its advisers as to the liability of Das to complete the project and service the level of debt from a clear opinion that there was a Material Adverse Effect by the time of the demand by NBAD.”

27. When seen in context, the concerns were not mere expressions of concern, but were well able to be seen as carrying with them the requisite opinion.

28. I add that in oral submissions Das rather hesitantly submitted that, although finding or not finding the formation of the opinion was a question of fact, as a matter of law direct evidence of the formation of the opinion was required because it was “fair” that there should be direct evidence when the party was, as it was put, “judge in its own cause”. The fairness was also ascribed to good faith. The hesitancy was justified. While absence of direct evidence may be a factor in making or not making the finding of fact, there is no proper basis for the proposition of law.

Issue 1(a)(iii): Conditions Subsequent

29. The relevant conditions subsequent are conditions 1,2 and 4 set out earlier in these reasons. It is convenient to begin with condition 4.

(a) Condition 4

30. The original construction contract had been executed in 2010. Two amendments were proposed, amendment no. 1 to appoint a new project manager and amendment no. 2 to increase the contract price. The judge found that amendment no. 1 was never provided and amendment no. 2 was provided late, that is, after 30 September 2014.

31. The judge recorded that Das abandoned its pleaded case that the original construction contract had been provided in 2010 and there had not been an amended contract to be delivered, and instead submitted that delivery of the amended contract had been made, although late. The submission appears to have been preliminary to reliance on waiver, as late delivery could not of itself be compliance with the condition. Unsurprisingly, given the findings abovementioned, the judge found that condition 4 had not been complied with.

32. Das’ submissions on appeal appeared to revert to the abandoned case. It submitted that non-compliance on 30 September 2014 could not be found because there was no amended construction contract by that date. It said also that it delivered the only amended construction contract thereafter coming into existence in October/November 2014, but it became evident that this was indeed preliminary to reliance on waiver.

33. Clause 5.3(a) of the ARA and condition 4 required the delivery of “a copy of the Construction Contract as amended”, duly certified. “Construction Contract” was defined as “the construction contract entered into between the Borrower and the Contractor for the design and construction of the Development”. Nothing in the definition tied it to the original construction contract; it was capable of an ambulatory application.

34. I do not accept that the clause called for delivery of an amended construction contract only if it was in existence as at 30 September 2014. The purpose of the clause and the condition was that the amended construction contract should be in place, and NBAD should have a copy of it, for the purposes of the facility and its monitoring, at a time certain in relation to draw down under the revised facility. There was no point in NBAD stipulating for a condition with an end date which could be answered simply by saying that there was no such document as at that date; the point was that, if the document was not provided, there would be an Event of Default on which it could act. Inherent in the delivery required by the clause was that Das should bring the proposed amendments to a conclusion (whatever it may be) and bring about the execution of an amended construction contract so as to deliver it by 30 September 2014.

35. Although the judge did not make findings, because of the abandonment of the pleaded case, the evidence of the preparation of the ARA points clearly to this operation of the provision. Das had proposed the appointment of a new project manager in June 2014. The proposal was described at the time as amendment no. 1, although Intermass advised that it did not accept it and negotiations ensued. Also in June 2014, and thereafter, Das was negotiating with Intermass for a new contract to reflect the revised development costs and completion date. The latter proposal, at least, was known to NBAD, and over the period June-September 2014 Ms Shokka, Manager and then Director, Group Credit Risk in NBAD, made requests to Mr Blot, Finance Manager for Das, for the amended construction contract. On 29 June 2014 she asked to be updated on the status of the amended construction contract, noting that it "should have been finalised by then". She repeated the request a number of times thereafter. On 9 September 2014 she asked, "Kindly advise target date for finalisation of the Intermass contract", on 14 September 2014 she said that it was urgently required, and on 25 September she emailed, "What about Intermass contract? Can we now consider the signed one you have as final? If so please forward to us urgently ….".

36. In these circumstances, it is entirely explicable that NBAD should have stipulated for, and that Das should have agreed on, finality by having the proposed amendments formalised in an amended construction contract, with a copy delivered to NBAD, for their ongoing relationship under the ARA. This is all the more so when the increase in and restructuring of the facility had itself been agreed in May 2014, with negotiations in formalising it occupying the same months thereafter. That there were only days between the date of the ARA and 30 September 2014 was due to that extended process.

37. In my view, the judge was correct in his conclusion that condition 4 was not complied with.

(b) Condition 1

38. The judge held that condition 1 referred to assignment of an amended construction contract. He did not accept Das' submission that, because the word "amended" was used elsewhere but not in condition 1, it referred to an assignment of the original construction contract, which had been delivered long before.

39. Das repeated the submission on appeal. In my view the judge was correct. As earlier noted, the definition of "Construction Contract" was capable of an ambulatory application. It would not make sense to call for an assignment of the original construction contract when an assignment of that contract had been delivered long before, particularly when condition 4 contemplated (at the least: in my view called for) the existence of an amended construction contract.

40. As with condition 4, Das' case at trial as recorded by the judge was not that there was no amended construction contract to assign, hence there was no failure to comply with the condition. Rather, it was submitted that the ARA had been varied by agreement that NBAD's solicitors Clifford Chance were to produce the draft assignment, and absent a form of assignment provided by Clifford Chance there was no failure to comply.

41. The judge considered variation in connection with condition 2, for which a similar submission was made, and held that "Das has fallen a long way short of establishing an intention of the parties to amend the Facility

Agreement to substitute NBAD's legal advisers in place of Das as the party responsible for arranging compliance with the conditions subsequent" (at [74]). He otherwise did not accept the submission because the amended construction contract was not in existence and so, if it were relevant, Clifford Chance was not in a position to prepare an assignment.

42. On appeal Das contended first, that there was no failure to comply with the condition because there was no amended construction contract in existence as at 30 September 2014; and secondly, that in any event there had been agreed variation of the ARA as described above.

43. It follows from what I have said about condition 4 that the first submission cannot be accepted. The delivery in condition 1 equally included bringing about an assignment of the amended construction contract.

44. As to the second submission, even if by some arrangement (whether variation or not) Clifford Chance was to produce the draft assignment, the non-compliance with condition 1 was not because they failed to do so by 30 September 2014. The Facility Agreement included a form of assignment, and what was left was to adapt it to the amended construction contract. Clifford Chance were not in a position to do so, and the reason for the non-compliance was the failure on Das' part to bring about the timeous execution of an amended construction contract. Until that was done, it could not be assigned. In my view no error has been shown in the judge's conclusion.

(c) Condition 2

As recorded by the judge, Das accepted that no assignment of the insurances compliant with the condition been delivered. It made the same submission of variation whereby Clifford Chance was to produce the draft assignment. His Honour did not accept the submission as to variation, see above, and said –

"73. The contemporary record of the arrangements as set out on Clifford Chance's table dated 14 September 2014 was to the effect that Clifford Chance were to circulate a draft "once Contractor's insurances are available". This latter requirement involved the need for an endorsement of the relevant policy rendering NBAD the sole loss payee. Such was never accomplished. The fact remains that Condition No. 2 was never satisfied and if relevant Clifford Chance were not in a position to prepare the draft. Such was attributable to non-compliance by Das."

45. Das contended on appeal that the judge was in error in failing to find a variation whereby Clifford Chance were to prepare the draft assignment, and that it had not failed to comply with the condition because Clifford Chance had not done so. It said in that regard that the judge was in error in finding that endorsement rendering NBAD the sole lost payee had not been accomplished.

46. This cannot be accepted. It was said that "the insurances" were available to Clifford Chance, and that that was evidenced by failure of NBAD to raise any contemporaneous concern in respect of the contractor's insurances or to complain of non-compliance with condition 6 calling for delivery of the originals of the contractor's insurances with endorsement of NBAD as additional insured and sole loss payee. This is well short of persuasive challenge to the judge's finding that the endorsement was not accomplished. If Clifford Chance was to produce the draft assignment, again it was not possible to do so. The Facility Agreement also contained a form of assignment of insurances, needing only adaption to the insurances when in place, and the reason for the non-compliance was not Clifford Chance's failure to produce the draft assignment but Das' failure to bring about the insurances to be assigned.

Issue 1(b): Waiver

47. Waiver arose only in relation to compliance with the conditions subsequent. At trial Das relied on Articles 135 and 246 of the UAE Civil Code. On appeal it relied only on Article135, relevantly reading –

"A person who remains silent shall not be deemed to have made an utterance, but silence in the face of need is tantamount to a statement and shall be regarded as acceptance".

48. The judge found that Das was repeatedly told that "non-compliance with the conditions subsequent would lead to the halt of payments with all other rights reserved" (at [86]); that is, he found that NBAD had not been silent as to non-compliance. He continued –

> "87. In the event of silence the secondary question arises as to whether there was a "need" to speak. The terms of Article 135 are not easy to operate in the present context. Silence in the face of "need" amounts to "acceptance". Indeed Article 135(2) identifies the specific example of acceptance of an offer in the context of prior dealing between the parties. The commentary on the UAE Civil Code by James Whelan gives the example of a person who "has the right to prohibit the act by his words is regarded as consenting to it by his deliberately abstaining from saying anything". It strikes me as a long way from that scenario that any failure to say anything about the conditions subsequent constituted consent to their not being complied with. Indeed, given the terms of Article 30 of the ARA it is difficult to accept that any reservation of right or other oral or written warning was "needed".
>
> 88. The only reservation I have is in regard to Amendment No. 2 within Condition Subsequent 4. The signed amendment was provided but late. I am not sure these matters were developed in the evidence. But some response might have been expected to the effect that it was still being treated as non-compliance. In that sense, there may in my judgment have been a need to speak. However even then Amendment No. 1 [sic] was never furnished in signed form so the point is of little significance.
>
> 89. In my judgement, this is not a state of affairs falling within Article 135 of the UAE Civil Code. In this connection, I derive no assistance from the report of Dubai Court of Commercial Appeal Case No. 134/2004."

49. The short answer to need to speak, in my view, is cl 30 of the ARA. It is an express provision in the agreement governing the relationship between the parties that failure to exercise or delay in exercising a right or remedy shall not operate as a waiver. It excludes any need to say that rights and remedies in relation to non compliance with conditions subsequent remain notwithstanding late delivery of a required document. I respectfully do not join the judge in the possibility that there was a need to speak as to Amendment No. 2. It may be noted that there was no evidence from Mr Al Muhairi that he was lead to believe that NBAD had waived any right or remedy.

50. That would dispose of waiver in reliance on Article 135, but I add that I do not accept Das' submission that the judge erred in finding that NBAD was not silent.

51. The judge referred to a meeting in February 2015 at which NBAD told Mr Al Muhairi that "pending CSs [conditions subsequent] constitute a breach of the restructure agreement and stressed that loan drawdowns are at a halt until a clear strategy forward is in place"; to correspondence in March and April 2015 in which "NBAD made it plain … that any right or remedy that NBAD might have arising from any event of default were reserved"; and more generally to evidence of Ms Shokka –

> "Prior to that meeting [the February meeting] I had repeatedly said to Mr Blot that the conditions subsequent in the Restatement need to be satisfied and that Mr Almuhairi's continuing failure to satisfy them would lead to NBAD halting further payments under the loan. In particular I repeatedly told Mr Blot that Mr Al Muhairi needed to agree an amended contract with Intermass and provide NBAD with a copy as soon as possible."

52. Das submitted to the effect that there was no specific reference to conditions 1,2 or 4 until April 2015, and no reference to NBAD reserving its right to rely on any failure to comply with them to terminate the facility; rather, at least until April 2015 the threatened sanction was a halt on drawdowns, which in fact did not occur, and NBAD continued to deal with Das with a view to progressing the project.

53. This is too narrow a view. Reading the materials to which the judge referred, it was well conveyed to Das that NBAD required compliance with the conditions and reserved its rights by reason of non compliance,

notwithstanding that it was seeking to have Das comply, albeit late, and to work towards fulfilment of the project including by allowing drawdowns.

54. Das' submissions included that the judge had erred in failing to find "waiver by consent under Clause 31.1 of the Facility Agreement". It should be said that it does not appear that the judge was asked to find such a waiver. While cl 31.1 permits amendment or waiver of a term by consent, without a need for writing, it may require a meeting of minds directed to the term. The evidence did not support such a meeting of minds. In any event, it follows from the preceding paragraph of these reasons that NBAD did not consent to waiver of failure in timely compliance with the conditions.

The Result

55. I propose that the appeal be dismissed. There does not seem to be any reason why costs should not follow the event. I propose an order that Das pay NBAD's costs of the appeal, reserving liberty to apply within 14 days for a different order if Das should be so advised.

56. I note that order 3 is inappropriate in referring to failure to comply with "any Conditions Subsequent". It should be amended to refer to Conditions Subsequent 1,2 and 4 in Schedule 2 to the ARA. Order 4 incorrectly refers back to orders 3 and 4, when it should refer to orders 2 and 3, and incorrectly refers to Clause 23.12 when it should refer to Clause 23.13. This should be corrected.

JUSTICE TUN ZAKI AZMI:

1.I agree with the abovementioned judgment and have nothing further to add.

H.E. JUSTICE OMAR AL MUHAIRI:

1**.** I agree with the abovementioned judgment and have nothing further to add.

Issued by:
Ayesha Bin Kalban
Assistant Registrar
Date of Issue:12 April 2018
At: 3pm