Claim No: CFI 005/2012

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 FIRST INSTANCE

BEFORE JUSTICE SIR DAVID STEEL

Between

SHEIKH MESHAL JARAH AL-SABAH Claimant

-v-

UBS AG

Defendant

Hearing:	**23 June - 27 June 2013**
Counsel:	Mark Fraser (Taylor Wessing Middle East LLP) instructed by Lutfi & Co Advocates and Legal Consultants for the Claimant Lord Falconer QC & Esther Watt (Dunn & Crutcher LLP) instructed by Herbert Smith Freehills LLP for the Defendant
Judgment:	**27 August 2013**

JUDGMENT OF JUSTICE SIR DAVID STEEL

Introduction

1. The Claimant is seeking to recover from the Defendant ("the Bank") the sum of US$21,400,000 said to be owed to him under an oral agreement made in the Atlantis Hotel, Dubai, on 9 July 2009. One thing is common ground; namely that a meeting did take place on 9 July 2009 at the hotel at about 12.15pm between the Claimant and two representatives of the Bank. The first was Omar Al Salehi ("Omar"), Managing Director of the Investment Banking Department and Vice Chairman of UBS Investment Bank for the Middle East and North Africa region. The second was Othman Al Quraishi ("Othman") former Executive Director for the Middle East and North Africa Region. The meeting was brief and certainly lasted no more than an hour.

2. It was, or became, the Claimant's case that under the terms of the agreement, he undertook first to ensure that the current interest exhibited by Vivendi S.A. ("Vivendi") in purchasing the African subsidiary of a Kuwaiti telecommunications company called KSCC ("Zain") be "destroyed" and second that the Bank's engagement as lead investment adviser to Zain for the sale of the subsidiary ("Zain Africa") be secured. The remuneration said to have been agreed as payment to the Claimant for those services was between 0.1 per cent and 0.2 per cent of the total sale value of Zain Africa, which was anticipated by the Bank to be in the order of US$10 to 12 billion.

3. It was the Bank's case that no oral agreement of any kind was made and in any event, if an agreement on the terms contended for by the Claimant was in fact made, the Claimant did not fulfill any of his contractual obligations and thus was not entitled to any such remuneration.

The Chronology

4. With that introduction I turn to consider the chronology of events as emerges from the contemporary documents amplified by what is not controversial. From time to time I will try and identify the nature of the issues in regard to disputed events.

5. By early 2009 it was already rumoured on the market that Zain was contemplating "spinning off" its African assets and indeed by 12 January 2009, representatives of UBS had already had discussions with Bharti Airtel Ltd ("Bharti") who indicated an interest in making acquisitions in Asia or Africa.

6. In early April 2009, Vivendi made a direct approach to Zain expressing an interest in Zain Africa and on 3 April, representatives of the Bank (including Omar) were invited to meet with senior personnel from Zain to discuss the terms of a response. On 20 April, Vivendi wrote to Zain expressing enthusiasm for a joint venture involving Zain (or at least Zain Africa) and Maroc Telecom. No details were provided save the requirement that Vivendi should hold a 51% interest. Omar discussed this letter with Salah Al Fazan ("Salah"), former Chief Business Development Officer of Zain, on 23 April 2009 during which discussion concern was expressed about the lack of minority protection. Another meeting took place on 27 April 2009 during which Salah mentioned that he was meeting with Dr. Saad Hamad Al Barrak ("Saad"), former Chief Executive Officer of Zain in Dubai on 13 May and according to Omar's file note that "Dr. Saad wanted UBS to be available

before that meeting."

7. Omar duly met with Salah on 9 May to discuss the forthcoming meetings on the Vivendi bid. Omar agreed to meet Credit Agricole Corporate and Investment Bank ("Calyon") who were lead financial advisers to Vivendi. Omar also stated that at his meeting with Saad he would take the opportunity to "discuss alternatives to Violin [code for Vivendi]."

8. At a meeting on 15 May 2009, the Bank's European Business Review Group considered the proposed transaction which was minuted as a "Non-competitive sell side mandate for the disposal of the client's African assets (excluding Sudan)." The transaction value was reported to be in the range of USD 10-15 billion and the anticipated fee to be "above USD 20 million." In the wake of that meeting a Business Review Group Form was prepared and approved. The deal likelihood was put at only 25% but the Bank's chance of earning the relevant fees as 90%.

9. In late May 2009, Bank representatives attended at Vivendi's headquarters during the negotiations between Saad and the Chairman of Vivendi. The Bank was advising Saad not to grant exclusivity to Vivendi until both the terms were agreed and the source of the cash payment proportion of the selling price was revealed.

10. At a meeting between Saad and the Bank (represented by Omar amongst others) on 30 May 2009 it was agreed to progress the sale "on a twin track" with Vivendi as "frontrunner" (Vodaphone being regarded as a possible alternative). On 5 June 2009, Vivendi e-mailed Salah proposing continuing discussions with a view to signing a Memorandum of Understanding by 6 July 2009. Salah sought advice from the Bank as to how to respond being keen to channel everything through the Bank rather than by direct contact. The Bank was once again requested to make contact with Calyon. Having done so, the Bank representatives duly reported back to Zain on the outcome on 9 June 2009.

11. On 16 June 2009, Othman sent an e-mail to the Claimant attaching a UBS paper marked "Strictly Confidential" entitled "Zain Africa Background Materials." The cover sheet had a stamp or logo of the Libyan Investment Authority. It was the Bank's position that this document was sent to the Claimant without authority and in breach of confidence. Othman's evidence was that he had been asked by Omar to pass the document on with a view to obtaining the Claimant's assistance (through his security contacts) in obtaining Libyan interest in making a bid for Zain Africa.

12. On 17 June 2009, Vivendi made its first formal offer to acquire Zain Africa. On 23 June 2009, Othman e-mailed the Claimant quoting an India press report that Bharti was considering a purchase of Zain Africa for some US$12 billion. On 1 July 2009, the Kuwaiti Stock Exchange issued a statement to the effect that Zain was in co-operation with the Bank to review company strategy so as to maximise shareholder value.

13. A meeting was planned in Beirut on 5 July between representatives of Zain, the Bank, Vivendi and Calyon. This immediately followed another offer from Vivendi on 4 July 2009. In the meantime site visits in Africa were being undertaken by the Bank's representatives. These continued through 9 July 2009 and thereafter.

14. This period in early July 2009 saw a substantial exchange of internal e-mails within the Bank on which the Claimant placed considerable reliance in demonstrating, it was contended, grave concern as to the Bank's relationship with Zain and as to the prospect of BNP Paribas becoming the lead adviser to Zain.

15. For the moment I will simply quote from the chain of correspondence without comment save to note that they formed the basis of much of the cross-examination of Omar to the effect that the Bank had a powerful and pressing motive to seek the Claimant's help in both suppressing the Vivendi bid and ensuring a mandate for the Bank rather than BNPP:

From:	Lesueur, Christian-IBD+
To:	Lewisohn, Mark-IBD+; Al-Salehi, Omar-IBD+; Harding-Jones, Alison-IBD+; Hargrave, Nick-IBD+
Sent:	Tue Jul 07 18:40:09 2009
Subject:	Falcon: call w/Salah

I had a long call with a very frustrated Salah. Key points:

1. Saad taking calls from Albert who is complaining about Salah restricting access to Saad

2. Saad has now gone back to wanting to help Vivendi progress their bid, moving forward with the Nigeria visit etc. As a result, Salah cannot get Saad to sign off on the expenses that need to be incurred to progress the legal and accounting VDD reports (US$2.5m cost) that we feel we need to help other bidders catch up with Vivendi. Mark, Omar - Salah needs your help here with Saad.

3. Kassar continues to agitate with Al-Kharafi, calling him directly to say that Vivendi is prepared to buy the 10% treasury shares straight up, now with limited DD etc. Salah is not quite sure what is going on because he is hearing different stories from different shareholders. Omar - how did your meeting with Sheikh Mansour go?

4. Salah concerned about embarrassing himself, Zain and UBS by launching a process which then gets subverted by Saad and the shareholders. Told him we just need to take our chances, which he reluctantly accepts. Some shareholders are buying into Kassar, Calyon and Vivendi's arguments that there no other bidders other than Vivendi, including references to FT comments. Therefore, we need to get these NDA signed and demonstrate real traction in our process.

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6. We discussed BNPP to whom Saad has promised a "proper M&A role" so Salah doesn't feel he can fob them off with a "debt adviser" or "fairness opinion adviser" type role. The art will be in the scope of work though again he is worried that BNP will simply go above him to Saad if they don't like what they are offered by Salah. I suggested to him that he should get BNPP to produce a review of the business plan and to start analyzing Zain's debt options post the sale of ZA. I thought this is a lot of work but not particularly interesting right now. Btw, BNP have already told Vivendi that they are working as advisers to Vivendi (heard that from our Dominique Bazy who heard from Levy).

In general, a disappointing state of affair and it sounds to me like we are back to square one and that Saad is no longer listening to Salah or UBS. The BNP thing is very painful.

From:	Lewisohn, Mark-IBD+
To:	Lesueur, Christian-IBD+; Al-Salehi, Omar-IBD+; Harding-Jones, Alison-IBD+; Hargrave, Nick-IBD+
Sent:	Tue Jul 07 23:27:08 2009
Subject:	Re: Falcon: call w/ Salah

Can we have a quick call tomorrow to discuss.

Christian - how serious is Vodafone really? Can we get them to sign the NDA?

What about FT?

I would feel a lot better pushing hard for the VDD if we had 3 signed NDAs.

From:	Harding-Jones, Alison-IBD+
To:	Lewisohn, Mark-IBD+; Lesueur, Christian-IBD+; Al-Salehi, Omar-IBD+; Hargrave, Nick-IBD+
Subject	Re: Falcon: call w/ Salah
Date:	08 July 2009 11:12:54

This was my sense from Monday too - Salah feeling cornered and Saad not supporting.

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From:	Lesueur, Christian-IBD+
To:	Harding-Jones, Alison-IBD+; Lewisohn, Mark-IBD+; Al-Salehi, Omar-IBD+; Hargrave, Nick-IBD+
Subject:	Falcon: call w/Salah
Date:	08 July 2009 11:43:06

Vodafone is serious but will do this through Vodacom for optics reasons. We are waiting for them to revert on the NDA.

FT have the NDA as well.

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From:	Lesueur, Christian-IBD+
To:	Lewisohn, Mark-IBD+; Al-Salehi, Omar-IBD+; Harding-Jones, Alison-IBD+; Hargrave, Nick-IBD+

Sent: Wed Jul 08 19:39:35 2009
Subject: Falcon: call w/Salah

Just spoke to Salah. Key points:

1. It sounded like he had taken the day off and was more relaxed about life, which is good. He needed that.

2. Updated him on where we stand w/ FT and VOD, which he was encouraged by. He will be briefing Saad tomorrow and will use this to try to get sign off on VDD, opening up process and reclaiming control.

3. BNP pushing hard on advisory role and want to organise a meeting w/ Vivendi and Calyon to kick things off. Salah has told them no but not sure how long he can resist that. He is discussing their scope of work tomorrow and will share that w/ me. Omar - last chance saloon w/ Saad.

He was aware from BNP that Vivendi was working on another offer letter. It is very clear that BNP will do everything in their power to help Vivendi win this. Hope that Saad understands that.

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From: Lewisohn, Mark-IBD+
To: Lesueur, Christian-IBD+; Al-Salehi, Omar-IBD+; Harding-Jones, Alison-IBD+; Hargrave, Nick-IBD+
Sent: Wed Jul 08 22:57:23 2009
Subject: Re: Falcon: call w/ Salah

We need to impose some discipline here. We cannot have bnp - vivendi's main bank - having access to the process and feeding all that to Vivendi.

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From: Lewisohn, Mark-IBD+
To: Lesueur, Christian-IBD+; Al-Salehi, Omar-IBD+; Harding-Jones, Alison-IBD+; Hargrave, Nick IBD+
Subject: Falcon: call w/ Salah
Date: 09 July 2009 02:08:36

Ps salah must make it clear thay under no circumstances are bnpp to interact with any of the bidders without our express permission and no meetings can take place without us present

From: Lesueur, Christian-IBD+
To: Lewisohn, Mark-IBD+; Al-Salehi, Omar-IBD+; Harding-Jones, Alison-IBD+; Hargrave, Nick-IBD+
Subject: Re: Falcon: call w/ Salah
Date: 09 July 2009 12:59:53

We are hearing that BNP are making it clear to Vivendi that they plan to be very, very helpful to their cause. BNP also very, very close to FT. They have no relationship with Vodafone, or Reliance or China Mobile. It is quite clear what they will do if they participate fully on the advisory side.

From: Harding-Jones, Alison-IBD+
To: 'Salah.Alfouzan@zain.com'
Cc: Lesueur, Christian-IBD+; Al-Salehi, Omar-IBD+
Sent: Thu Jul 09 10:12:23 2009
Subject: BNP

Salah

Got a call from Herve at BNP who is keen to have a kick-off call with us today. I have told him am still awaiting clarification from you. Can we discuss please.

I did ask him about his relationship with Vivendi and he admitted it was very "tight" saying that Regis had told him that the outcome of the meeting with Saad on BNP's appointment before he knew it. Alison

From: Harding-Jones, Alison-IBD+
To: Lewisohn, Mark-IBD+; Lesueur, Christian-IBD+; Al-Salehi, Omar-IBD+
Sent: Thu Jul 09 10:16:35 2009
Subject: BNP

We have to be careful here - my sense from the fact that Regis knew of their appointment is that Saad had told Regis they were coming on board to facilitate the deal. I bet that Calyon are claiming we are being unhelpful just to try and facilitate a deal with Vodafone - much as we are saying that they just want to facilitate a deal with Vivendi. I don't think Saad is comfortable we are working to get the best deal for Z as in his mind that is Vivendi and we are pushing back on it - obviously we know we are working in Zain's best interests but I suspect Saad doesn't fully get that. We should discuss - we may be in a more difficult position than we think.

From: Lesueur, Christian-IBD+
To: Harding-Jones, Alison-IBD+; Lewisohn, Mark-IBD+; Al-Salehi, Omar-IBD+
Sent: Thu Jul 09 10:36:10 2009
Subject: BNP

I think this requires an urgent discussion w/ Saad.

We absolutely must limit BNP's role. In order of preference: debt adviser, fairness opinion adviser or junior adviser on specific matters. We cannot have them joint in the process - we will lose all remain control we have. It will be impossible to slow down Vivendi if we have BNP looking over our shoulder.

Int'l players will not be comfortable having a key Vivendi and FT bank in the process. BNP do not have a business outside France so will be deeply incentivise to ensure FT or Vivendi wins.

From: Lewisohn, Mark-IBD+
To: Lesueur, Christian-IBD+; Harding-Jones, Alison-IBD+; Al-Salehi, Omar-IBD+
Subject: Re: BNP
Date: 09 July 2009 13:53:53

Omar - when you speak to Salah can you say that we are uncomfortable meeting with bnp without him there and until there role is defined and we would like to propose to then - with Salah's agreement - a formal meeting in London when he is here next week. By then we will need to have sent out the process letters (in our name only) assuming the ndas are all signed.

From: Lesueur, Christian-IBD+
To: Lewisohn, Mark-IBD+; Al-Salehi, Omar-IBD+; Harding-Jones, Alison-IBD+
Subject: Falcon: catch up w/Salah
Date: 09 July 2009 18:09:14

Salah called me. Key points:

1. there is a key shareholder meeting tomorrow where the following will be discussed: a) should Zain sell ZA?, b) should Vivendi be given preferential treatment, and c) should the Treasury shares be included? Salah does not know how this meeting will turn out but is hopeful that this will be turned into a competitive process.

2. Dr. Saad is unhappy that we have opened up the process as he wants to make that decision. Salah explained that we have not just yet but are simply preparing ourselves with NDA, info pack etc. Let's be on message when we speak to others. Salah sounded reasonably confident that Saad would see the value in opening up the process. He wants us to get the NDAs done asap.

3. Vivendi, Kassar and Calyon are pushing hard the message that a) they are the only game in town, and b) they are the only ones who will take the 10% treasury shares. Al Kharafi is parroting these messages. Salah has been at pains to explain that they are not (cf. NDAs, approaches etc.) and that they are not really buying the treasury shares as they will putting those back to us in 2 years for the 35% of ZA.

4. Salah believes that Vivendi is working on an offer. My concern is that this offer will be tabled at this meeting tomorrow.

5. On BNP, Salah instructed me to push back on any meeting with them. He is not happy with how pushy they are being and has told them that not much is happening. They said they heard Vivendi is preparing a revised offer but would not say from whom they heard that (amazing.they are advising Zain and won't tell him where they hear things).

6. Salah does not want the Nigeria trip to go ahead. He has gotten Saad's approval to take the position that until there is an offer on the table that we like there will be no trip.

From: Salah Al Fouzan
To: Lesueur, Christian-IBD+; Harding-Jones, Alison-IBD+; Al-Salehi, Omar-IBD+
Subject: Advisor Role - Confidential
Date: 09 July 2009 17:28:43

All,

I am having a discussion with BNP later today to discuss their SoW. Happy to hear your views on their proposed role below. I understand now that Omar has cleared with Dr Saad that UBS will be the lead bank and BNP will be given a secondary supporting role.

It is not entirely clear that these e-mails are quoted throughout in the correct sequence but the overall theme is not affected namely that those at the Bank were anxious to ensure as wide a spread of interest as possible and were concerned that Vivendi and its advisers were seeking to obtain an inappropriate degree of exclusivity.

The meeting

16. The meeting at the Atlantis Hotel took place during the latter stages of these e-mail exchanges. The Claimant had arrived in Dubai on 8 July and Othman had gone to welcome him and to explain that he would like the Claimant to meet Omar. The meeting was arranged for noon the next day.

17. There is little common ground about the meeting save that it started about 15 minutes late and took place in a quiet area to the side of the lobby. It was Omar's evidence and the Bank's case that it was a "meet and greet" event the conversation covering, after introductions, general pleasantries and discussion of local and world events. The topic of the well publicised bid by Vivendi for Zain Africa may well have been one of the matters referred to.

18. The Claimant's evidence (which was not entirely consistent with his case as pleaded from time to time) was in brief summary as follows:
(a) Omar explained that the Bank was in a "bad" position because it would get no fees if the Vivendi deal went through
(b) The Claimant's help was needed to "destroy" the Vivendi transaction
(c) Omar told the Claimant that there was an unidentified alternative buyer at USD 10 to 12 billion
(d) The Claimant asked what he would get if he helped as asked. Omar said about 0.1 to 0.2 %: thus something, it was explained, in the region of USD 20 million
(e) The Claimant immediately telephoned Sheikh Ali Salem Al-Sabah a shareholder in the Securities Group (itself a shareholder of Zain)
(f) The Claimant told Sheikh Ali Salem that the Vivendi transaction was "going too quickly" and that it was in the interests of Zain to seek interest from other potential buyers. Othman gave Sheikh Ali Salem some further information and then repeated the opinion expressed by the Claimant
(g) The Claimant then asked for the fee agreement to be put in writing but was told that this was a complex process and he could rely on the Bank's oral agreement
(h) There was then discussion as to what further matters were needed for the Claimant to earn his fee. He was told he needed to persuade the shareholders to use a "beauty parade" to attract more buyers and ensure that UBS had a leading role in the disposal of Zain Africa

Witnesses

19. A number of witnesses were called to give oral evidence at the trial. The Claimant, in addition to himself, called Othman as his principal witness. Othman had been made redundant by the Bank in May 2011. Between them, they dealt with the 9 July meeting and various subsequent meetings referred to hereafter between the Claimant and Omar as well as other executives of the Bank through to October 2011.

20. The Claimant also called Adel Al-Kharafi, former member of the Parliament of Kuwait and former Managing Director of Kuwait Pipes Industries & Oil Services Company. He was involved in arranging a meeting for the Claimant with his cousin Nasser Al-Kharafi, the then Chairman of the Kharafi Group which was a substantial shareholder in Zain.

21. In addition to Omar, who dealt with his meetings with the Claimant, as well as discussions within the bank and with Zain, the Bank called the following witnesses:
(a) Carston Kengeter, former Co-Chairman and Co-Chief Executive Officer of UBS Investment Bank who had a meeting with the Claimantl in May 2010
(b) Salah, who dealt with the sale of Zain Africa and the relationship between Zain and the Bank
(c) Saad, who dealt with similar matters to Salah
(d) Anthony Iliya, former Chief Executive Officer of UBS Group for the Middle East and North Africa region, who covered proposals to engage the Claimant as a financial adviser
(e) Christopher Neihaus, former Head of Investment Banking Department for Middle East and North Africa region, who covered similar ground to Anthony Iliya.

22. The Bank also put in evidence under Rule 29 of the Rules of the DIFC Courts (RDC), namely a statement of Alexander Wilmot-Sitwell dealing with a meeting with Sheikh Meshal in May 2010 and subsequent events. He was formerly Co-Chairman and Co-Chief Executive Officer of UBS Investment Bank with Carston Kengeter. He is now employed as President of Europe and Emerging Markets by Bank of America Merrill Lynch.



23. The most important witnesses were of course the three who attended the July 9 meeting. Given the sharp disparity between their recollections of what was said, it is right that I should record my initial impressions of their credibility and reliability.

(a) Sheikh Meshal

He is a man of considerable importance in Kuwait. He had a reasonable command of English but allowances must be made for his limitations in this respect. Nonetheless he struck me as a witness on whose evidence it was difficult to have confidence. In the first place he had a tendency to avoid responding to a question by diverting to a different and often irrelevant topic. Secondly and more importantly his evidence in some respects did not just appear evasive but was demonstrably unreliable. A good example is contained in his evidence as to the role of his daughter (who was said to be his secretary) in maintaining his diary. He told the Court at the beginning of his evidence that his daughter kept both a documentary and an electronic diary for him. When pressed for disclosure it emerged that no such diaries were maintained. The request was prompted by his evidence that the detailed pleaded case as to dates when meetings took place between him and Omar was derived from the diaries. These dates were highly controversial. In fact, as explained below, the Claimant's case at a later stage was that they were obtained by Othman from an entirely different source namely from the Kuwaiti immigration authorities. Thirdly his evidence in many respects struck me as implausible. For example, moving to the end of the story, as will be noted below the Claimant wrote two letters to the Bank in the spring of 2011 making threats to publicise the allegedly improper employment of an intermediary for a transaction in 2004. It was his evidence that these had been drafted by his daughter. Both the timing and the terms of the letters (taken with her limited administrative role) rendered this evidence unconvincing.

(b) Othman

Othman had a better command of English than the Claimant Sheikh Meshal but was an excitable witness with an equally marked reluctance to respond to a question in a direct fashion. It was clear that he had long been a loyal friend and supporter of the Claimant who, as a member of the Royal Family and a former senior civil-servant in the Kuwait Security Service, commanded considerable respect and influence. Given his abrupt departure from the Bank (described below), his position as a resident in Kuwait and this long personal association with the Claimant, there was clearly a risk that his evidence would be partisan. That indeed was how it struck me. Once again the evidence he gave about the pleaded dates of meetings was revealing in this respect. In one other respect his evidence was particularly unconvincing. He claimed that various documents that were clearly confidential to the Bank had been passed on by him to the Claimant on the instructions of Omar. This even included, as recorded hereafter, a confidential report on the Claimant himself prepared by a consultant. This is all remarkable enough but even more astonishing is the fact that as already noted the process had started in mid-June before Omar had heard of the Claimant let alone met him.

(c) Omar

My impression of Omar was favourable although it must be remembered that he had the advantage of a full command of English. He gave his evidence succinctly and clearly. He faced up to apparent difficulties in a convincing manner. His reliability was established in particular in regard to the disputes already referred to about the dates and number of meetings pleaded by the Claimant as having taken place after July 9. It was and remarkably remains the Claimant's pleaded case (despite an amendment made in the wake of the hearing) that he and Omar met in his house in Kuwait on 21 occasions between September 2009 and April 2011. The details of the dates were set out in paragraph 11 of both the original and the Amended Statement of Claim. Omar's evidence was to the effect that only a few such meetings took place some of which were on different dates altogether. The Claimant himself was only able to speak about half a dozen dates and was forced to accept that the overall number of meetings were few and that indeed some of the meetings relied on, given airline schedules, hotel invoices and the other business of Omar, could not possibly have taken place. It was Othman's evidence that he was the source of the pleaded dates which coincided it was claimed with the dates on which he (Othman) crossed the border into Kuwait. When it was suggested to him that dates for Omar entering Kuwait might at first blush be more helpful given that both Sheikh Meshal and Othman lived in Kuwait he explained that he could not obtain such dates as the obtaining of details of Omar's passage through immigration would be contrary to Kuwaiti law. But Omar's evidence which I accept was that the dates did indeed match the record in his passport for crossing the border. Furthermore most of these dates had no connection with dates when he met with Sheikh Meshal. Not only was his evidence on this topic not challenged but also there was no explanation forthcoming as to how Othman had managed to obtain them despite his assertions as to the requirements of Kuwaiti law.



24. I accept the evidence of the remaining witnesses for the Bank. Indeed most of their evidence was unchallenged. In particular I accept the evidence of Salah and Saad that Zain had a close and longstanding relationship with the Bank and had sought its advice on the sale from the outset. But I should say something about the evidence of the remaining witness for the Claimant Adel Al-Kharafi. I hasten to say that I had no doubts as to his credibility although it is far from clear that he had any clear recollection of the meeting that he attended. What was disturbing was that his statement had been prepared in English without any interview and sent to him for signature. Although he talked to his Kuwaiti lawyer, he signed it as sent and it was put in as his evidence in chief. His cross-examination revealed clearly that he could not in fact begin to support its content.



25. It is however dangerous to rely on impressions of witnesses particularly if they are not using their first language. This consideration, taken with the fact that the primary issue relates to an unminuted meeting which took place some 4 years ago, make it a paradigm case for applying

the dictum of Lord Goff in *Grace Shipping v Sharp & Co* [1987] 1 Lloyds Rep. 207 at 215:

> "And it is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in Armagas Ltd v. Mundogas S.A. (The Ocean Frost), [1985] 1 Lloyd's Rep. 1, when he said at p.57:-
>
> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."
>
> That observation is, in their Lordship's opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence."

Events after the meeting

26. Before considering the issues relating to the content and outcome of the 7 July meeting with these observations in mind, it is desirable to complete the story of events after the meeting. In fact despite the Claimant asserting his success in sidelining their bid, Vivendi's interest continued. Indeed on 16 July 2009, Vivendi made two alternative "final offers" for Zain Africa requesting a response by 23 July 2009. They were immediately forwarded by Zain to the Bank. Omar's response to it was a four letter one. Alison Harding-Jones made the comment:

> "It's barely different to what they put on the table a couple of weeks ago - not sure what these guys are playing at! If anything it is worse."

27. The Bank prepared a draft answer to be sent by Zain. Zain duly dispatched a letter in the precise terms suggested on 17 July 2009. It rejected the offer but indicated optimism that a deal could be achieved following further discussions. Vivendi acknowledged the letter in an email dated 19 July 2009. The offers were then put back on the table by Vivendi with an indication that failing acceptance by 23 July 2009 the "offer would expire and we would be obliged to withdraw from the selling process." In fact, even before the expiry of the suggested period, Vivendi issued a press release on 20 July 2009 to announce that it was "interrupting talks" with Zain.

28. The following day a detailed update on the proposed sale was presented to the Zain board. This noted expressions of interest from Vodafone, Reliance (AT&T) and France Telecom apart from Vivendi. It was also mentioned that other potential counterparties included China Mobile and Bharti. The latter was however engaged in talks with MTN (a South African company) but it was considered that, if those talks failed, Bharti might come to the table.

29. Various complaints were expressed in the update as to Vivendi's aggressive stance. It was considered that Vivendi were still interested and were seeking to promote their attempts to buy *"by pressing the board of Zain"* and using leaks in France in an attempt *"to put pressure on Zain's share price."* The various offers by Vivendi were carefully compared, the latest being no better it was perceived than that dated 4 July 2009. Particular concern was expressed with regard to an earn-out/claw back mechanism contained within its terms. The advice to the board was to run a competitive process without granting exclusivity.

30. Given the alleged concern on the Bank's part as to the potential role of BNPP, it is notable that on 30 July 2009, Zain specifically invited the Bank's comments on the terms on which it (Zain) was prepared for BNPP to be engaged.

31. Matters then move to September 2009. On 4 September 2009 Omar was requested by the Bank to discuss fees with Zain. Shortly afterwards, on or about 6 September 2009, Omar and Othman met with the Claimant in Kuwait. The Bank contends that it was purely a social meeting. The Claimant and Othman contend that during the meeting Othman (at Omar's request) gave him a copy of a confidential Bank document entitled "Zain Discussion Materials" and asked him to provide it to Sheikh Ali Salem. The Claimant's case was that, having been shown the document, he insisted on being provided with a personalised copy for Sheikh Ali Salem. In contrast once again it was the Bank's case that this document was disclosed by Othman without any authority from Omar or anyone else. In any event, the Bank also maintained that it had no interest in providing a copy for Sheikh Ali Salem.

32. In the meantime on 30 September Bharti announced the collapse of its talks with MTN. This immediately led to discussions between the Bank and Zain as to the appropriate reaction if Bharti made a bid for Zain Africa. As regards BNPP's position Salah also informed the Bank as follows:

> "BNP mandate - he said he will propose at next week's Board that Project Falcon is terminated and terminate the BNP mandate on the back of this. There is only a 3 month tail on this agreement so should not cause a problem."

33. In early October 2009 a meeting may have taken place between Omar, Othman and the Claimant. The Bank's case was that if such a meeting had taken place then the discussions had centered on an apparent intention on the part of the Securities Group to build up its stake in Zain. The Claimant contended that at the meeting Othman had furnished two copies of the "Zain Discussion Materials" document, one marked up with Omar's manuscript notes by way of further explanation to the Claimant and both "personalised" as allegedly asked for the benefit of Sheikh Ali Salem by means of the notation in small type on alternate pages of "Shi Ali pres draft v.2 ppt."

34. It has to be said that there are a number of difficulties with accepting the Claimant's version of events in regard to this document. It is not easy to see any reason for Omar to be interested in providing a copy to Sheikh Ali Salem. If he wished to contact a shareholder there was no difficulty. In any event, the form of personalisation is itself very strangely phrased and certainly unimpressive. To the extent it could be contended that the document was handed over to assist the Claimant in performing his version of the agreement it is very odd that the copy kept by the Claimant had various manuscript notes which were claimed to reflect some details provided to the Claimant by Omar or Othman. Yet the Claimant in his oral evidence disclaimed any understanding of them.

35. This period also saw the emergence of an announcement by the Kharafi Group of discussions for the sale of its substantial stake in Zain to India's Vivasi Group and the Malaysian tycoon Syed Mokhtar Al Bukhary. But these talks fell through by 18 November 2009.

36. In addition to the September meeting, the Claimant contended that further meetings occurred between him and Omar in early October (as already noted), early November, early December 2009 and February 2010. The Defendant does not accept that such meetings took place and indeed not only was the evidence of Othman and the Claimant confused and inconsistent as already noted, details of flights, hotel bookings and so on made some of the dates wholly improbable if not impossible.

37. On 11 February 2010, Bharti made a "preliminary binding offer" for Zain Africa and on 14 February 2010 the Bank prepared a paper for Zain commenting on the Bharti offer and considering its implications. The same day the board of Zain accepted that exclusivity should be accorded to Bharti, the sale being subject only to final approval of the offer.

38. On 15 February 2010, a written mandate was accorded to UBS in respect of the planned sale. The main provisions were:

1. Role of UBS

UBS has been engaged.by you Zain Group.to act as your sole/lead financial adviser in relation to the Transaction.

2. Fees

We have agreed that you will pay to UBS the following fees:

(a) Zain Africa Sale Success Fee.US$ 12.5 million
(b) Zain Africa Discretionary Success Fee.US$ 10 million.

3. Effective Date

The Company and UBS hereby agree that, as between themselves, the effective date of this Engagement letter shall be 1 July 2009.

39. It is common ground that a meeting took place between Omar, Othman and the Claimant in early April 2010. It is the Bank's case that its purpose was to discuss the Claimant's interest in working for UBS as a senior adviser. It is the Claimant's case that any discussion along these lines was prompted by a wish on the Bank's part to put forward the prospect of employment as an alternative to payment of his fee.

40. On 18 April 2010, Omar sent a brief summary of the Claimant's background by email to Mr. Wilmot-Sitwell suggesting a meeting. Mr. Wilmot-Sitwell replied that he would like to meet the Claimant. A date was fixed for 18 May 2010. A more detailed CV for the Claimant was prepared by Othman and edited by Omar.

41. The meeting was in the event brought forward to 17 May 2010. Prior to it the Claimant had forwarded a set of golf clubs and a tennis racket to Mr. Wilmot-Sitwell. On 18 May 2010 Mr. Wilmot-Sitwell wrote to the Claimant as follows:

> "Dear Sheikh Meshal,
>
> It was a great pleasure to meet you yesterday and I appreciate you coming in to meet with me, especially given your sad news from home. My condolences again for your loss.
>
> I had not been in my office and was therefore not aware of your splendid gifts. This is very kind of you and I appreciate the lengths that you went to research my interests so thoroughly - I do indeed love to play both golf and tennis. However, I am afraid that our Internal Compliance regulations prohibit me from personally accepting these wonderful items, and I wondered whether it would be appropriate for us to donate them to one of our partner charities, such as the Bridge Academy.
>
> As we discussed yesterday, we are very interested in progressing our discussions around how we could mutually benefit from our business relationship. I have asked Omar to contact you in this regard. In the meantime, please do not hesitate to contact me directly.
>
> I look forward to seeing you again soon."

42. On 20 May 2010, the Claimant met with Mr. Kengeter and Mr. Niehaus in Dubai. On 2 June 2010 feedback on the Claimant's expectations were provided by Othman
without any mention of an outstanding fee viz:

> "Vice Chairman - Investment Bank $ 600K salary and other benefits 15% from transactions he contributes to running."

However, on 6 June 2009, Mr. Niehaus suggested that a background check be conducted on the Claimant. In due course Control Risks were engaged for this task. In the meantime the Claimant contends that he met with Othman and Omar on 20 June 2010 to discuss the terms of his engagement. This is denied by the Bank.

43. Control Risks produced a draft report on 8 July 2010. Notably Othman immediately forwarded a copy to the Claimant on, he again contends, Omar's instructions, an allegation that I am quite unable to accept. In the event the Bank decided not to proceed with the appointment following a meeting on 1 September 2010. It appears from a note of Mr. Iliya that the primary reason was the Claimant's lack of recent business (let alone banking) experience. Although it was intended that the Claimant be informed in writing Othman, consistent with his close relationship with the Claimant, offered to communicate the decision orally.

44. By February 2011, Othman's position at the Bank was in jeopardy. The Bank concluded that his role was not sufficiently broad to justify a full time position. On 16 February he was informed of the decision to terminate his contract but to offer him a position as an adviser.

45. On 29 March 2011, out of the blue the Claimant sent a letter to the Bank referring to a transaction in 2004 in respect of which the Bank had, it was suggested, failed to disclose the engagement of intermediaries. The letter concluded with the threat to bring the matter to the attention of the Prosecutor General of Kuwait. A further letter was sent by the Claimant on 13 April 2011, containing the threat to present the matter to the press and to other banks. These were the letters which the Claimant asserted had been drafted by his daughter. On 28 April 2011, the Bank confirmed by letter having reviewed the matter (including undertaking discussions with its client). Upon receipt of the letter, the Claimant merely observed that he accepted it as appropriate compliance with Kuwaiti law.

46. On 29 September 2011, Messrs. Lufti & Co, acting for Othman, wrote to the Bank's lawyers accepting an offer of an *ex gratia* severance payment. The proposed terms of settlement tendered by the Bank included a provision against disclosure of confidential information to any third party. In the event it would appear that an agreement was never executed by Othman. The Bank suggested that the explanation was the concern that the agreement would inhibit Othman from giving evidence for the Claimant.

47. On 18 October 2011, Messrs. Lufti & Co, now acting for the Claimant, sent a letter before action seeking compensation in regard to his "role as an intermediary special agent." This referred very briefly to a meeting in July 2009 with Omar. It was asserted that through the Claimant's co-operation the disposal of Zain Africa to Bharti had been completed on 8 June 2010. The letter continued:

> "Even though UBS had indeed previous banking relations with Zain Kuwait, this specific transaction was de facto lost in favour of a competing bid tendered by the French corporation Vivendi (advised by BNP Paribas).Through countless meetings with your executive staff, our Client not only provided you with unique advisory work.he had proven crucial for strategically neutralising the concurrent and even better offer by Vivendi.Our Client's role as adviser.was equally beneficial to you and your Indian corporate client to subsequently capture the deal while rebuffing

all other alternative bidders including UK based Vodafone and China Mobile."

Discussion

48. The Claimant's account of the meeting on 9 July 2009 in the Atlantis Hotel involves the initial difficulty that it lacks consistency. As has just been noted, the letter before action is based on the assertion that the Bank had not been acting for Zain but for Bharti. The inference to be derived from this was that Bharti had engaged the Claimant to "neutralise" a better offer for Zain Africa from an alternative bidder in the form of Vivendi. Given that this was the first indication from the Claimant as to the thrust of the July meeting, it substantially undermines the contention that at the July meeting Omar was emphasising the need for help in obtaining the Bank's engagement as adviser to Zain.

49. The original statement of claim did indeed put forward a very different account to the effect that the Bank needed assistance in being appointed by Zain as investment banking advisers. The Claimant it was then pleaded agreed to take on the tasks of:

(a) advising Zain's shareholders and management to hold a tender;
(b) enhancing the Bank's position for appointment as lead investment adviser to Zain;
(c) advising in relation to potential purchasers introduced by the Bank;
(d) assisting the Bank on all aspects of the transaction up to completion.

50. The Claimant's witness statement contained yet another account which was broadly repeated in his oral evidence. On this version his first task was to help "destroy" the Vivendi transaction. He was then to persuade the major shareholders of Zain to engage the Bank as lead investment bank. At the end of the trial I asked for amended Particulars of Claim to be prepared and served. This deleted the alleged obligations to advise in regard to potential purchasers introduced by the Bank and to advise in regard to the transactions generally. Leaving aside the surprising lack of any amendment to the pleaded dates of meeting, what remained notably absent in the amendment was any reference to the primary task of destroying (or even sidelining) the Vivendi bid which the Claimant was at pains to emphasise during his oral evidence as having been at the cornerstone of the discussion.

51. This lack of consistency further undermines confidence in the accuracy and reliability of the Claimant's oral evidence. This applies with equal force to the evidence of Othman. But not only are the various accounts inconsistent. They are wholly improbable in their own right. The Claimant's version of the July meeting requires Omar at short notice to go to the Atlantis Hotel to meet the Claimant during the course of the internal e-mail exchanges quoted above without instructions from (or notification to) his colleagues. Omar then has to enter into an oral contract after less than an hour's conversation with a Kuwaiti political figure who he had never met before (a) to sideline the offer from Vivendi (when the Bank's aim was to open the bid up) and (b) assist in obtaining a mandate from Zain (which was already perceived by the Bank to be a 90% probability). All this in order to sell Zain Africa to an unidentified alternative bidder in return for a fee payable to the Claimant equal to the entire potential earnings of the Bank if such a sale was concluded. This is almost absurdly improbable.

52. If it were necessary this account is rendered all the more implausible bearing in mind the following matters:

(a) The previous day the Bank had distributed a series of guidelines for the engagement of intermediaries. This had been copied to Omar. These made it plain that such agreements were not permitted without express permission.
(b) The principal concern of the Bank was to ensure an open sale process for their client. Vivendi had only just made a revised offer on 4 July 2009. Whilst it was not in a form that the Bank and Zain regarded as attractive, any move to open out the sale to other bidders would be undermined if steps were taken to "destroy" this or any further Vivendi bid.
(c) The Bank had already been involved in advising Zain in regard to the sale of Zain Africa since April. Whilst it is true that internal emails reveal that the Bank was troubled about the activities of BNPP in giving aid and information to Vivendi, the exchanges were still underway by the time of the meeting and there was suggestion that assistance might be obtained from Othman's contact in Kuwait.
(d) If and insofar as there was any doubt about BNPP's role in regard to Zain this had been put to bed the very same day by Saad and Saleh agreeing that BNPP would merely have a "secondary supporting role."
(e) There is not a single reference to any oral agreement reached on 9 July 2009 or even any suggestion that the Bank owed monies to the Claimant in any document until the letter before action in October 2011.
(f) If, as is claimed, the Claimant raised the issue of his outstanding fees amounting to US$ 20 million with Mr. Wilmot-Sitwell at their meeting in May 2010 it is inconceivable that he would not have immediately raised the matter with the Middle East office.

53. The fact remains that there was no motive for the Bank to seek help in its engagement as financial adviser to Zain let alone at substantial cost. The Bank had been a long-term adviser to Zain. In early 2004, the Bank advised Zain on a license bid in Kuwait. 2005 saw the Bank advise Zain on a bid for Celtel. Zain sought the Bank's help for a bid for Telsim later the same year but the Bank was already acting for Vodafone. In 2006 the Bank advised Zain when acquiring a stake in Umobile. Likewise in 2007, the Bank advised Zain on a bid for Paktel and in regard to a pooling of assets involving Zain Towers, Essar and MTN.

54. April 2009 saw the beginning of advice given to Zain by the Bank at Zain's request on the disposal of Zain Africa. This continued until completion of the Bharti bid. This reflected a longstanding, trusting and happy relationship. From an early stage the Bank was 90% confident

in receiving the appropriate fee on a successful sale. Why the Bank would be willing without negotiation to provide almost the entirety of that fee to the Claimant for achieving what had already become a near certainty defies common sense



55. I have already commented on my impressions of the credibility of the Claimant and Othman. I ought to add a word about some aspects of the Claimant's dealings with the Bank. I am not remotely concerned about the presentation of presents to Mr. Wilmot-Sitwell in the run up to the meeting in May 2010. It was a perfectly understandable and well-intended gesture although it again is difficult to reconcile with the assertion that it was coincident with the Claimant pressing for the delayed payment of his large fees.



56. But the letters sent in March and April 2011 threatening to report the Bank to the Kuwaiti authorities in regard to the engagement of an intermediary in 2004 have all the hallmarks of the employment of doubtful forms of pressure probably prompted by some level of concern about the notification to Othman of his proposed redundancy. The fact remains that the Claimant's case (underwritten by a strong financial motive) derives no support from the contemporary documentation or the probabilities and is dependent on the oral evidence of two people of limited credibility: one (the Claimant) a man with a confused idea as to the basis of his claim and the other a disgruntled former employee of the Bank with a very close relationship with the Claimant.



Conclusion

57. It may be that during the course of the conversation on the 9 July the participants exchanged gossip about the Zain Africa sale which led the Claimant to conclude that he could assist the Bank. But in my judgment the Claimant has fallen well short of establishing that any oral agreement was entered into on 9 July 2009, let alone one on the terms alleged. I should add that even if an agreement along the lines contended for had been reached it is difficult to identify from the sequence of events described above any connection between the activities of the Claimant (including any telephone call to Sheikh Ali Salem) and the announced withdrawal of Vivendi from the negotiations. As regards the requirement to ensure a mandate, this was a foregone conclusion. Accordingly the claim must fail.



Issued by:

Natasha Bakirci

Assistant Registrar

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