IN THE COURTS OF 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 H.E. CHIEF JUSTICE WAYNE MARTIN, H.E. JUSTICE SIR PETER GROSS, H.E. JUSTICE ROGER STEWART, H.E. JUSTICE PATRICK ANTHONY KEANE, H.E. JUSTICE LIM THIAM SUAN

BETWEEN

KRYSTAL FINANCIAL CONSULTANTS LLC

Claimant/Appellant

and

NEXTGEN ROBOPARK INVESTMENT LLC

Defendant/Respondent

Hearing : **20 May 2026**

Counsel : Mr Rajdeep Choudhury instructed by Ammar AlMulla Advocates and Legal Consultants for the Appellant
Mr George Hilton instructed by Al Tamimi and Company for the Respondent

Judgment : **16 June 2026**

AMENDED JUDGMENT OF THE COURT OF APPEAL

UPON the Order with Reasons of H.E. Justice Rene Le Miere dated 24 June 2025 in Claim No. CFI-027-2025 (the "Order")

AND UPON the Claimant's Appeal Notice dated 15 July 2025 seeking permission to appeal the Order (the "Appeal Notice")

AND UPON the Order with Reasons of H.E. Justice Rene Le Miere dated 10 November 2025 granting permission to appeal on Ground 1 (the "Order dated 10 November 2025")

AND UPON hearing Counsel for the Appellant and Counsel for the Respondent at an Appeal hearing on 20 May 2026 before H.E. Chief Justice Wayne Martin, H.E. Justice Sir Peter Gross, H.E. Justice Roger Stewart, H.E. Justice Lim Thiam Suan, and H.E. Justice Patrick Anthony Keane (the "Appeal Hearing")

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.

2. The Appellant shall pay the Respondent's costs of the appeal fixed in the amount of AED 180, 701.35.

3. If the Appellant's costs are not paid in full within twenty-one (21) days of the date of this Judgment the outstanding balance shall accrue interest at the rate of 9% per annum from the date of this Judgment until paid in full.

Issued by:
Delvin Sumo
Assistant Registrar
Date of Issue: 16 June 2026
Date of Re-Issue: 24 June 2026
At: 11am

SCHEDULE OF REASONS

Summary

1. The Claimant, Krystal Financial Consultants LLC ("Krystal") appeals from the decision of the Judge at first instance (the "Judge") in which he granted the application of the Defendant, Nextgen Robopark Investments LLC ("Nextgen ") for immediate judgment and dismissed Krystal's claim with costs. Permission to appeal was granted by the Judge on the ground that the appeal raised an issue of general importance relating to the criteria governing appellate review of a decision in circumstances in which the Judge at first instance enjoyed little or no advantage over the appellate court in deciding the question. In particular, the Judge considered that the appeal raised a question as to whether previous authorities in this Court required a party appealing from any evaluative decision to establish that the decision was "plainly wrong", in the sense described in the authorities, before the Appeal Court could overturn the decision, even in cases in which the Court of Appeal was as well paced as the judge at first

instance to undertake the evaluation.

2. Against the contingency that previous decisions of this Court might need to be reconsidered, the Court utilised the power conferred by the Courts Law 2025[1] and a Court comprising five Judges was constituted to hear the appeal.

3. In the result, and for the reasons which follow, the Court does not consider that previous decisions of this Court establish that the Court of Appeal can only overturn an evaluative decision if satisfied that the decision was plainly wrong. As will be seen, the position is rather more nuanced.

4. In the particular circumstances of this case, the decision of the Judge on the issue raised by the only ground of appeal was plainly correct and the appeal must be dismissed with costs.

The dispute

5. The dispute between the parties was conveniently summarised by the Judge in the following terms:

> (a) The case is brought by Krystal Financial Consultants LLC ("Krystal") as the Claimant and Nextgen Robopark Investment LLC ("Nextgen") as the Defendant.
>
> (b) Krystal is a company registered in Dubai, UAE, specialising in arranging financial instruments, while Nextgen is engaged in investment and management of commercial enterprises.
>
> (c) On 25 July 2024, Nextgen signed a "Debt Raising Mandate" with Krystal to explore refinancing options for a term loan with Dubai Islamic Bank (DIB).
>
> (d) The Mandate specified that Krystal would earn a success fee of 0.50% upon the execution of a funding facilities agreement with a lender introduced by Krystal.
>
> (e) The Mandate was non-exclusive, allowing Nextgen to negotiate with other parties.
>
> (f) DIB provided indicative terms to Nextgen on 10 May 2024, and Nextgen responded with its requirements on 31 May 2024.
>
> (g) On 11 September 2024, Krystal sent Nextgen a final offer letter from DIB, which had less favourable terms than initially indicated.
>
> (h) Nextgen responded to the DIB offer on 16 September 2024, citing a more favourable offer from another bank.
>
> (i) Krystal claims entitlement to a fee of AED 813,750 under the Mandate, arguing that Nextgen's failure to object within the stipulated time resulted in deemed acceptance of the offer.
>
> (j) Nextgen denies Krystal's entitlement, arguing that no agreement was executed with DIB, Nextgen communicated its objections to the DIB offer on 16 September 2024, and that the offer did not align with customer-defined terms.[2]

The decision at first instance

6. Nextgen applied for immediate judgment on the ground that Krystal's claim had no real prospect of success. As already noted, the Judge granted that application and dismissed Krystal's claim with costs. The Judge found that Krystal had no real prospect of establishing that any of three conditions which might have entitled it to its success fee had been satisfied. However, permission to appeal was only granted in respect of Krystal's challenge to one of those findings, namely his finding that Nextgen had communicated its objections to the offer of finance by its email to Krystal of 16 September 2024. Accordingly, it is only necessary to address the Judge's findings in relation to that issue.

7. The Judge referred to the general circumstances in which the parties signed a "Debt Raising Mandate" ("Mandate"), in terms which are not contentious.

8. The terms of the Mandate relevant to the issue raised by this appeal are as follows:

> "Acceptance of Offer Letter(s):
>
> Upon the successful submission of loan applications by KRYSTAL on behalf of the Company, any offer letter or loan proposal received from a financial institution or bank ("Bank Offer Letter") will be promptly communicated to the Company for their review and consideration.
>
> The Company agrees to diligently review the Bank Offer Letter and any associated terms and conditions provided by the Lenders. If the Company has any objections or wishes to reject the Bank Offer Letter, they shall communicate their objections or rejection in writing to KRYSTAL within seven (7) working days from the date of receipt of the Bank Offer Letter.
>
> In the event that the Company fails to communicate any objections or rejection in writing to the Krystal within the stipulated seven (7) working days, it shall be deemed that the Company has accepted the Bank Offer Letter in its entirety, including all terms, conditions, and associated fees.
>
> Krystal shall be entitled to collect their full consultancy fees as agreed upon between the parties, which shall be payable by the Company upon the Company's acceptance of the Bank Offer Letter, whether express or deemed.
>
> Krystal shall be entitled to collect their full consultancy fees as agreed upon between the parties, If the Client decides not to proceeds with the arranged Bank offer letter due to internal decision despite the offer letter is align with customer defined terms.

The Client acknowledges and agrees that KRYSTAL shall not be held responsible for any consequences or liabilities arising from the Client's failure to review and respond to the Bank Offer Letter within the specified timeframe."

9. The Judge noted that the Mandate was not exclusive and that Nextgen was entitled to and did approach and negotiate with parties other than Krystal and DIB.[3] The Judge further noted that as a result of Krystal's efforts, on 10 May 2024, DIB provided Nextgen with indicative terms and conditions for discussion purposes. On 31 May 2024, Nextgen responded by advising Krystal of the terms which it required if it were to obtain finance from DIB.[4]

10. On 20 June 2024, DIB informed Nextgen that it would consider internally if it would be prepared to offer Nextgen more favourable refinancing terms. On 11 September 2024, Krystal emailed to Nextgen a copy of an offer of finance from DIB together with a table indicating the variances between DIB's indicative offer in May 2024, and the offer now being made. As the Judge noted, some of the terms of the offer made in September 2024 were less favourable than the indicative terms previously offered and significantly less favourable than the terms which Nextgen had advised it required.[5] The offer from DIB included the following terms:

"Specific terms and conditions: is still pending - facilities will be allowed subject to Bank's Internal Sharia Supervisory Committee (ISSC) and legal counsel's approval - the process."[6]

11. None of the Judge's findings set out above are contentious - they are taken from the terms of non-contentious documentary evidence.

12. After summarizing the submissions made by the parties, the Judge turned to the specific issues which required determination, including the issue which is the subject of this appeal. Essentially, that issue is whether Nextgen failed to communicate any objections to or rejection of the offer in writing made by DIB to Krystal within seven working days from the date of receipt of the DIB offer, with the result that Nextgen is deemed to have accepted the offer and Krystal is entitled to collect its full consultancy fees.[7]

13. Nextgen contends that it communicated its objections to the DIB offer by its email of 16 September 2024 to Krystal, which is in the following terms:

"Thank you for your follow up to get the original facility agreement letter from DIB which was received by us on 11th September 2024. Although the approval process of DIB extended over months, we have noted that the approval from the Bank's internal Sharia Supervisory Committee (ISSC) and legal Counsel is still awaited and the said facility agreement letter is subject to their approval.

We had meanwhile circulated the letter to the Shareholder Board of NRIL. Please note that considering the delays in the approval from DIB, the NRIL Board has received an approval from another potential lending Bank. The terms have been carefully reviewed and a snapshot of the comparable are attached for your reference.

Considering the substantial difference in the commercial terms of lending between the 2 offers, the NRIL Board has not yet approved the DIB facility letter and is awaiting final comments from the UBOs. Although the DIB facility is awaiting the ISSC Board approval we assume their commercial terms will remain the same which are being taken as the base for internal review.

We will revert back to you with NRIL's final response as soon as possible."

14. The "snapshot of the comparables" attached to Nextgen's email shows that in all material respects, save perhaps one relating to the term of the loan, the terms offered by DIB were less favourable than the terms which had been offered by another potential lending bank. Further, as noted by the Judge, the terms offered by DIB were less favourable than the indicative offer which it had presented in May 2024, and significantly less favourable than the terms which Nextgen had indicated it required on 31 May 2024.

15. After referring again to the terms of the Mandate relating to deemed acceptance, the Judge succinctly expressed his reasons for concluding that Nextgen had communicated its objections to DIB's offer in the following portion of his reasons:

"47. There is a difference between "objections" and "rejection" in this context.

48. Objections imply that the Company may have specific concerns or issues with certain terms or conditions of the Bank Offer Letter. Communicating objections involves identifying aspects of the offer that the Company finds unacceptable or wishes to negotiate further. The presence of objections suggests that the Company is not entirely dismissing the offer but is seeking modifications or clarifications on specific points.

49. Rejection indicates a complete refusal of the Bank Offer Letter. If the Company communicates a rejection, it means that the Company is not willing to accept the offer in its current form and does not wish to proceed with it. Rejection is a more definitive and comprehensive refusal compared to objections, which may allow for further negotiation.

50. Nextgen's 16 September 2024 email identified and communicated to Krystal aspects of the DIB offer that it finds unacceptable. Its statements to the effect that it would further consider the offer and communicate its further response as soon as possible indicate that, whilst the offer was not acceptable, it was not entirely dismissing the offer and may be willing to further negotiate.

51. By its 16 September 2024 email, Nextgen communicated its objections to the final offer letter.

52. There was no deemed acceptance of the DIB final offer."[8]

The grant of permission to appeal

16. Krystal filed a Notice of Appeal which included a ground that:

"The CFI erred in interpreting the Respondent's emails as a formal objection"

amongst other grounds.

17. The Judge granted permission to appeal in respect of that ground, but refused permission in respect of all other grounds.

18. The Judge considered that the relevant ground of appeal asserted an evaluative error, rather than an error of fact, in that the error is said to lie in the evaluation of the undisputed content of the email of 16 September 2024 as against the contractual standard.[9]

19. The Judge expressed the view that Australian Courts had adopted a lower threshold for appellant intervention in cases in which the Trial Judge had no evaluative advantage over an appellate court citing *Warren v Coombes*[10] and *Fox v Percy*.[11]

20. The Judge expressed the view that by contrast, the English Courts applied a more deferential standard, particularly to evaluative judgments and applied the test of whether the decision was "plainly wrong". In this context, the Judge referred to English authority[12] for the proposition that "plainly wrong" meant a decision no reasonable Judge could have reached. The Judge summarised his view of the English authorities in the observation that:

> "Absent a material error of law or failure to consider relevant evidence, appellate courts will not interfere unless the decision is irrational or unsupported by evidence."[13]

21. The Judge considered that the DIFC Courts had followed the English approach, citing *Hormodi v Bankmed*.[14]

22. The Judge considered that an appellate court would be in as good a position as he had been to interpret the meaning of the email and noted that he had received no evaluative advantage from hearing oral evidence or assessing the credibility of witnesses. In his view the question of whether the appeal could only be allowed if it was "plainly wrong" raised a potentially important issue of general application which justified the grant of permission to appeal.

Does the "plainly wrong" standard apply to this case?

23. Given the views expressed by the Judge when granting permission to appeal, it is appropriate to determine whether the Court could only uphold this appeal if satisfied that the Judge's decision was "plainly wrong" in the sense described in the English authorities to which he referred.

24. Consideration of that question must commence with the identification of the relevant Rules of Court ("RDC"). RDC 44.117 provides that the Court of Appeal will allow an appeal from the decision of the Court of first instance where the decision of the lower court was:

> (a) Wrong; or
>
> (b) Unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

25. This provision is materially identical to the corresponding provision in the English Civil Procedure Rules.[15]

26. The DIFC Rules do not contain any further elucidation of the circumstances in which it will be open to the Court of Appeal to conclude that the decision of the Court at first instance was "wrong". It follows from the requirement that the Court of Appeal must be satisfied that the decision below was "wrong" that the Court of Appeal must be positively satisfied that the decision was erroneous. However, the circumstances in which the Court can be satisfied of error is a matter left to the Court rather than specified in the Rules of Court. In these circumstances, this Court, and appellate courts in other comparable common law jurisdictions have provided guidance with respect to the considerations which will apply to the identification of error in particular types of cases.

27. RDC 44.110 provides that every appeal will be limited to a review of the decision of the lower court unless the Court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing. Again, this provision is in substantially identical terms to the corresponding provision in the English Civil Procedure Rules (CPR).[16]

28. In *Assicurazioni Generali SpA v Arab Insurance Group (BSC)*[17] Clarke LJ noted that the relevant provision in the CPR reflected a change from the Rules of the Supreme Court (RSC) which had specified that appeals were to be by way of rehearing. However, Clarke LJ concluded that the distinction between a reference to a "review" in the CPR, and a "rehearing" in the RSC was more semantic than substantive, in that in both instances appeals were generally conducted by way of a review based on the record before the Court below, rather than by way of a hearing *de novo*. That observation is applicable to appeals in this Court, which are conducted by way of review on the record before the Court below, in the absence of any order to the contrary. Accordingly, any distinction between a "review" and a "rehearing" (as compared to a hearing de novo) can be put to one side for the purpose of identifying the nature of the error which must be established in order to justify appellate intervention.

[2002] EWCA CIV 1642.

29. It is now necessary to consider whether previous decisions of this Court have the effect perceived by the Judge at the time he granted permission, and require that this appeal could only be allowed if the Court is satisfied that the Judge was "plainly wrong".

30. *Al Khorafi v Bank Sarasin-Alpin (ME) Ltd*[18] was an appeal against findings of fact made by a trial Judge following a substantial trial in which significant oral testimony was adduced. In that context, the Court observed:

> "168. The burden on an Appellant in seeking to challenge findings of fact on the part of the trial judge is a heavy one. The trial judge had the benefit of being immersed in the entire trial. He saw and heard all the witnesses. He had the benefit of submissions from all parties both in preparation for the trial and in its wake. In the result, an appeal court will be highly resistant to overturning findings of fact not least those

which depend on the trial judge's assessment of the credibility of witnesses: see *Assicurazioni Generali v. Arab Insurance* [2003] 1 WLR 577.

169. In short, in common with the approach in other leading common law jurisdictions, it must be shown to this Court that the judge was clearly wrong: *McGraddie v. McGraddie [2013] UKSC 58, Anderson v. Bessemer* (1985) 470 U.S. 564, Housen v. Nikolaisen [2002] 2 SCR 235. In this respect we would adopt a passage from the judgment of the English Court of Appeal in Sohal v. Suri [2012] EWCA Civ 1064 as to the correct approach:

> 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 the 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 involves 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 Datec Electronic Holdings v United Parcels Service [2007] 1 WLR 1325 at [46] per Lord Mance).. "[19]

31. It is of particular significance to the issue raised in this appeal that the Court expressly adopted the decision in *Sohal v Suri*[20] in which it was observed that where the finding turns on matters in which the appellate court is in the same position as the Judge, the appellate court must make up its own mind as to the correctness of the Judge's finding (relying upon *Datec Electronic Holdings v United Parcels Services*[21]).

32. *DAS Real Estate v First Abu Dhabi Bank PJSC*[22] was another appeal from a decision made following a substantial and complex trial. One of the grounds of appeal was based on a challenge to a finding of fact made by the Judge on the basis of inference. Justice Giles cited the decision in Al Khorafi (above) for the proposition that the appellant had to establish that the drawing of the inference was plainly wrong and, as in Al Khorafi, expressly included within his reasons the portion of the decision in Sohal (above) cited in Al Khorafi, including the observation that in cases in which the finding turns on matters in which the appellate court is in the same position as the Judge, the appellate court must make up its own mind as to the correctness of the Judge's finding. The other members of the Court, Justice Tun Zaki Azmi and Justice Omar Al Muhairi agreed with Justice Giles.

33. *Hormadi v Bankmed (SAL)*[23] is the decision upon which the Judge relied at the time of granting permission to appeal. The appeal was brought from a decision dismissing an application to set aside a default judgment. In that context, Chief Justice Zaki Azmi observed:

> "21. As the Respondent rightly points out, in McGraddie v McGraddie [2013] the Supreme Court of England and Wales considered the principles governing when an appellate court would be able to interfere with findings of fact at first instance. McGraddie showed how the appellate court should intervene only in the very rare cases in which it is satisfied that the judge below was "plainly wrong".
>
> 22. The same applies here at the DIFC Courts. We cannot re-open the case nor re-try the issues heard at first instance, we can only determine whether the Learned Judge erred in fact or law and came to a decision which was plainly wrong or unjust..
>
> 28. . it appears on the factual matrix of this claim that the Appellant was served with the Claim Form at the address designated for service pursuant and likely failed to file an AoS in time. There is no evidence before this Court that the Learned Judge erred in his findings pertaining to the issue of the alleged premature filing and resulting Default Judgment."[24]

34. A number of aspects of this decision merit attention. First, the only authority cited in support of the proposition advanced is *McGraddie v McGraddie*.[25] That case was concerned with appeals against findings of fact made by a Judge based upon oral testimony following a substantial trial. There was therefore no occasion for the Supreme Court to consider the approach which should be taken in cases in which the appellate court was at no disadvantage, as compared to the trial Judge, in determining the question at hand.

35. Second, it would be wrong to construe the brief observations of the Chief Justice in *Hormadi* as a decision departing from the principles adopted in *El Khorafi* and *DAS*, to the effect that, in a case in which the appellate court was in as good a position as the trial Judge to determine the issue, it was obliged to do so. The cases are not mentioned by the Chief Justice, nor is any reference made to the circumstance in which the appellate court is in as good a position as the trial Judge to determine an issue. Further, in *DAS* the Chief Justice was a member of the Court which cited *Sohal* with approval.

36. Third, the observations were *obiter* given the observation that there was no evidence contrary to the Judge's finding that the claim had been duly served.

37. Accordingly, when properly analysed in the context of the circumstances of the particular case and the previous decisions of the Court of Appeal, *Hormadi* cannot be taken to stand for the proposition that in cases in which the appellate court is at no disadvantage to the trial Judge it can only intervene if satisfied that the Judge was "plainly wrong" in the sense described in the English authorities.

38. *Amira C Foods International DMCC v Idbi Bank Ltd*[26] concerned an appeal in a case where the question was whether conduct constituted an abuse of process. In that context the Court observed:

> "36. Before considering the arguments in any detail, we remind ourselves of the correct approach for this Court to take in considering an appeal from the judge in a case such as this. It is by now well established that, in deciding whether or not the second action amounts to an abuse of process, the judge has to make an evaluation - he is not exercising a discretion. Either the proceedings are an abuse of process or they are not. In making such an evaluation the judge has to balance a number of factors. An appeal court will be reluctant to interfere with the decision of the judge in making such an evaluation; and it will generally only interfere if the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or clearly not open to him so

that his decision is obviously wrong. Accordingly, although conceptually the two are and remain distinct, the line between the approach of an appellate court in reviewing the exercise of a discretion and its role in reviewing an evaluation of this kind is very narrow: *Al Khorafi* at para 3, citing *Aldi and Stuart v Goldberg Linde*."[27]

39. As the Court observed, that case involved the evaluation of a number of factors, some of which pointed in competing directions. Although the Court distinguished between a multi- factorial evaluation or assessment and the exercise of discretion, in relation to appellate review, similar considerations apply. Those considerations include the fact that the process involves a weighting of different and possibly competing factors in the context of the case as a whole. In such cases, the trial Judge will almost certainly have a significant advantage over an appellate court, because of his or her appreciation of the case as a whole. There is the further consideration that the responsibility for the exercise of discretion or the undertaking of a multi-factorial evaluative assessment is reposed in the Judge at first instance, not the Court of Appeal.

40. These considerations have been recognised in England and other comparable common law jurisdictions. The decision in *Amira* is in line with decisions in those jurisdictions and can be regarded as entirely orthodox.

41. However, it is important to note that the principles enunciated in these cases do not apply merely because a process of evaluation is involved. Rather, the principles are applied because the process of evaluation in those cases involves the attribution of weight to numerous factors, some of which may point in different directions, and which must be undertaken in the context of the case as a whole.

42. So, in the present case, the determination of whether the email of 16 September 2024 constituted an "objection" to DIB's offer could properly be characterised as an evaluation, or perhaps as a question of construction or of mixed fact and law. However, it is a determination of a different kind to a determination of, say, whether conduct amounts to an abuse of process or, to take another example, a determination as to where the balance of convenience lies for the purpose of injunctive relief. In such cases, the judge at first instance will have an appreciation of the case as a whole which will very likely give him or her an advantage over an appellate court. By contrast, the task of determining the effect of non-contentious facts under a contractual regime in a case as simple and straight forward as this one is not an exercise in which the Judge at first instance has any advantage over an appellate court, as the Judge recognised in this case.

43. Put another way, the fact that the judicial task involves a process of evaluation does not, of itself, mean that an appellate court is at a disadvantage as compared to the judge at first instance. Questions of fact and degree are involved.

44. Similar considerations apply to the assessment of cases which involve largely, perhaps exclusively, documentary evidence as compared to testimonial evidence. In the case under appeal, the documentary evidence is entirely non-contentious and very limited in scope. There are however cases in which the documentary evidence may be voluminous and require very detailed and careful evaluation assisted by the submissions of counsel. In such cases, any particular document may need to be evaluated in the context of the entire matrix of documentary evidence. If that evidence is substantial and complex, the trial Judge will almost certainly be in a better position to evaluate the evidence than an appellate court. Importantly, the cases where the trial Judge has an advantage over an appellate court are not at all limited to those involving the credibility of oral evidence.

45. And even where it is, theoretically, possible for an appellate court in a case that involves a substantial body of documentary evidence to attempt to fully absorb the detail of the case in an endeavour to eliminate the trial judge's advantage, such an exercise may involve a disproportionate expenditure of the resources of the court and of the parties as well as attendant delays for little or no prospect of improvement in the elimination of error: See *JSC BTA Bank v Ablyazov* (2018) EWCA Civ. 1176 (CA) at 42. These considerations, not only of the efficient use of judicial resources but also of fairness to the parties and the reduction of unjustified delay in the resolution of disputes, were recognized in *McGraddie v McGraddie* (2013) UKSC 58 at (3)-(4) as warranting circumspection on the part of an appellate court in concluding that the primary judge was wrong.

46. We will return to these considerations later in the reasons when we come to assess the appropriate approach to be taken in light of the authorities.

47. In addition to appeals from decisions involving the exercise of discretion or multi-factorial assessments or evaluations, cases in this Court and other comparable jurisdictions establish other types of case in which appellate intervention will be appropriately restrained by the need to establish error of law, procedural irregularity or the unreasonableness of the decision. Those categories of case include:

(a) Case management decisions - see *Standard Chartered Bank v Investment Group Private Ltd*;[28] and

(b) Decisions with respect to costs - see *Vitalo v Atlas Mara Management Services Ltd*[29]; *Melody v Melance*.[30]

48. Nextgen submitted that the decision in *Khoury v Mashreq Bank PSC*[31] supports the proposition that the "plainly wrong" principle applies to all appeals. That case involved issues with respect to:

(a) Whether the claim form was served within the period allowed; and

(b) Whether the DIFC Court had jurisdiction in respect of the claim.

49. In the context of the issue relating to the time within which service was effected, the Court observed:

"33. ...the question is purely one of fact. Admittedly, the Judge reached his conclusion based on the documents before him, rather than on a consideration of oral evidence. Even so, however, it was for the Judge to evaluate the evidence and it would not be right for this Court to interfere unless we were persuaded that he was wrong to reach the conclusion he did. We are not persuaded."[32]

50. With respect to Nextgen's submission, this observation does nothing more than apply the standard imposed by RDC 44.117 which requires the Court to be satisfied that the decision under appeal was wrong before it can intervene. The Court did not say that it had to be satisfied that the

decision was "plainly wrong" in the sense that it was not within the range of decisions reasonably open to the Judge at first instance.

51. The decision in *Khoury* provides no support for the proposition that there is a general principle to the effect that appeals can only be allowed if the appellate court is satisfied that the decision was "plainly wrong".

The DIFC cases - summary

52. This review of the previous decisions of this Court reveals that those decisions establish that an appellate court will properly exercise caution and apply the principles of restraint enunciated in the English cases (such as *McGraddie* and *Henderson v Foxworth*) in cases falling within the following categories:

(a) Appeals against findings of fact made by a Judge on the basis of oral testimony or, we would add, voluminous and complex documentary evidence;

(b) Decisions made in the exercise of a discretion, including the exercise of the discretion with respect to costs;

(c) Decisions made following the weighting and assessment of multiple possibly competing factors; and

(d) Case management decisions.

53. There is no prior decision of this Court to the effect that in a case in which an appellate court is at no material disadvantage in determining the question as compared to the Judge at first instance, the appellate court can only substitute its decision for that of the Judge at first instance if satisfied that the Judge was "plainly wrong". To the contrary, there are two previous decisions of this Court which expressly adopt English authority (*Sohal*) to the effect that in cases in which an appellate court is at no disadvantage as compared to the Judge at first instance it is the obligation of the appellate court to form and apply its own view of the matter.

54. This case is a paradigm example of a case in which the Court of Appeal is in as good a position to determine the issue as the Judge at first instance. Accordingly, this case provides a paradigm example of a case in which the Court of Appeal is obliged to determine the question raised by the appeal without any constraint other than the obligation of concluding that the decision under appeal was wrong before allowing the appeal.

55. However, there will be cases in which the question of whether the appellate court is at a disadvantage as compared to the Judge at first instance is not so clear as in this case. As we have already observed, the fact that the decision under appeal involves evaluation does not, of itself, necessarily establish that the appellate court is at a disadvantage, but it might sustain that conclusion, depending upon the particular facts and circumstances of the case. Similarly, we have also observed that the mere fact that the decision is primarily or exclusively based upon documentary evidence does not necessarily sustain the conclusion that the appellate court is at no disadvantage because there may be cases involving voluminous and complex documentary evidence in which the Judge at first instance has a very real advantage over an appellate court.

56. The decision of Clarke LJ in *Assicurazioni* provides a very helpful analysis of the extent to which questions of fact and degree are involved when an appellate court is assessing the degree of deference appropriately provided to the decision of the Judge at first instance. In that case his Lordship observed:

"14. The approach of the court to any particular case will depend upon the nature of the issues and the kind of case determined by the judge. This has been recognised recently in, for example, *Todd v Adam* [2002] EWCA Civ 509, [2002] 2 All ER (Comm) 1 and *Bessant v South Cone Incorporated* [2002] EWCA Civ 763. In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.

15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a "rehearing" under the RSC and should be its approach on a "review" under the CPR.

16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."[33]

57. In the same vein Clarke LJ cited the decision in *Pro Sieben Media AG v Carlton United Kingdom Television Ltd*,[34] in which it was observed:

"On the other hand, the standards applied by the law in different contexts vary a great deal in precision and generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision."[35]

58. Similarly, Clarke LJ cited the decision of *Robert Walker LJ in Bessant v South Cone Incorporated*[36] in which it was observed:

"How reluctant should an appellate court be to interfere with the trial judge's evaluation of, and conclusion on, the primary facts? As Hoffmann LJ made clear in Grayan there is no single standard which is appropriate to every case. The most important variables include the nature of the evaluation required, the standing and experience of the fact-finding judge or tribunal, and the extent to which the judge or tribunal had to

assess the oral evidence."[37]

59. In relation to findings of fact, Clarke LJ observed:

> "Thus the extent to which the findings of fact depend upon oral evidence or what Lord Hoffmann called the "penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance" will vary from case to case."[38]

60. So, in summary, there will be cases, such as this case, in which it is quite clear that the appellate court is at no disadvantage as compared to the Judge at first instance, with the result that the appellate court is obliged to substitute its decision for that of the Judge if it concludes that the Judge was wrong. On the other hand, there will be cases in which it is quite clear that appellate restraint and deference to the judge at first instance is entirely appropriate because the decision under appeal is:

(a) A finding of fact based upon oral testimony or complex documentary evidence; or

(b) An exercise of discretion; or

(c) A multi-factorial evaluative assessment involving the attribution of weight to possibly competing factors; or

(d) A case management decision

(e) One where the Court is required to consider and apply the Overriding Objective specified in RDC 1.6 and in particular, issues of proportionality.

61. However, there will be other cases which do not fall so clearly into one or other of these categories. In such cases, the observations made by Clarke LJ and in the decisions to which he refers to in *Assicurazioni* support the conclusion that the degree of deference appropriately given to the decision of the Judge at first instance will be a matter properly assessed by the Court of Appeal having regard to the particular nature and circumstances of the decision under review and the extent to which the appellate court considers that it is at a disadvantage as compared to the Judge at first instance.

62. The previous decisions of this Court, properly analysed and considered, do not require any modification or variation to produce an appropriately principled approach to the standards to be applied by this Court in assessing whether a decision under appeal should be overturned because it is wrong. In these circumstances, we do not consider it necessary to embark upon a broader review of the approach taken in comparable common law jurisdictions to assess the true extent of the differences in approach in those jurisdictions (although we tentatively incline to the view that those differences may be more semantic than substantive).

The ground of appeal

63. The ground of appeal raises a short point which can be succinctly addressed and resolved. Under the terms of the Mandate, after Nextgen received the offer of finance from DIB it had seven working days within which to either:

(a) Accept the offer; or

(b) Reject the offer; or

(c) Object to the offer; or

(d) Do nothing.

64. If Nextgen accepted the offer, the consultancy fee was payable to Krystal. Similarly, if Nextgen neither rejected nor objected to DIB's offer, it would be deemed to have accepted the offer and the consultancy fee would be payable. However, if Nextgen either rejected or objected to the offer, the consultancy fee was not payable.

65. It is clear from the terms of the email of 16 September 2004 that Nextgen neither accepted nor rejected DIB's offer. The question therefore is whether the email amounted to an objection to DIB's offer.

66. Krystal does not contend that it was necessary for Nextgen to use express words of objection such as "we object to the offer" in order to constitute an objection. That concession is appropriately made.

67. Counsel for Krystal submitted that in order to constitute an objection to the offer, it was necessary for Nextgen to convey an adverse comment in relation to the offer to Krystal. That submission should be accepted. However, it leads inexorably to the conclusion that the email of 16 September 2024 constituted an objection to DIB's offer.

68. The email commences with the observation that DIB's offer remains subject to further internal approvals within DIB and, to that extent, is not unconditional. The email goes on to refer to the delay in the provision of DIB's offer and the receipt of another offer from a competitive lender. Counsel for Krystal submitted that it should be inferred that the alternative offer was only indicative because the offeror is described in the email from Nextgen as a "potential lending Bank".

69. The Court does not accept that submission. The reference to the competitive offeror as a potential lender is entirely consistent with the fact that the offeror would not become an actual lender unless and until its offer was accepted, and does not sustain the inference that the offer was indicative only.

70. The email attached the "snapshot" of the comparable terms of the offers. It is clear from even the most superficial analysis of that "snapshot" that the offer from DIB is considerably less favourable than the offer from the alternative lender, described as "Bank X". The text of the email

describes the difference between the offers as "substantial" and can only be construed as meaning that the offer from DIB is substantially less favourable than the available alternative.

71. Further, it would also have been clear to Krystal from the terms of the offer summarised in the "snapshot" that DIB's offer was less favourable than the indicative offer it had made in May 2024, and fell well short of the requirements which Nextgen had notified to Krystal on 31 May 2024.

72. In these circumstances, there can be no doubt that the email of 16 September 2024 was commenting adversely on the offer from DIB and was therefore, on Krystal's submission, an "objection" to the offer.

73. Krystal relies upon the fact that the email to Krystal advised that the Nextgen Board would meet to consider the Bank's offer in due course. However, that observation goes only to the question of whether there had been an acceptance or rejection of DIB's offer, and it is clear that there was neither.

74. Krystal also relies upon an email sent by Nextgen to DIB a little earlier on the morning of 16 September 2024, in which it advised DIB that it would consider its offer, and made no adverse comment on the terms of the offer. It is said that this email sheds light upon Nextgen's state of mind or intention at the time, and is inconsistent with the conclusion that Nextgen objected to DIB's offer. This submission must be rejected for a number of reasons.

75. First, the fact that Nextgen chose not to indicate directly to DIB that its offer was less favourable than that received from an alternative lender does not support any inference as to Nextgen's intentions in relation to DIB's offer.

76. Second, the question which has to be determined is whether Nextgen communicated an objection to DIB's offer to Krystal within seven working days of receipt of the offer. A communication from Nextgen to DIB which was not sent to Krystal is irrelevant to the determination of that question.

77. Accordingly, the Judge was plainly correct to conclude that Nextgen had objected to the Bank's offer within seven working days of receipt of the offer, with the result that there was no deemed acceptance of DIB's offer. It follows that the appeal must be dismissed.

Costs

78. There is no reason why costs should not follow the event, and accordingly, Krystal will be ordered to pay Nextgen's costs of the appeal. Nextgen filed a Statement of Costs prior to the hearing. Although it is not clear from the terms of the Statement itself, it is assumed that the Statement includes Nextgen's costs of the application for permission to appeal, which the Judge ordered to be costs in the cause of the appeal.

79. The total claimed in the Statement of Costs is the amount of AED 180,701.35, including counsel fees, other disbursements and VAT. When invited, Krystal made no submissions in opposition to the quantum of the costs claimed. As the Court considers the hourly rates claimed for the various practitioners involved in the case to be generally in line with the rates identified in Registrar's Practice Direction No. 1 of 2023, and the times claimed to be reasonable, the costs will be allowed in full in the amount claimed.