IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

FURSA CONSULTING

Claimant

and

AJAY SETHI

Defendant

ORDER WITH REASONS OF H.E. DEPUTY CHIEF JUSTICE ALI AL MADHANI

UPON the Part 8 Claim Form being filed on 19 August 2022 and amended on 25 August 2023 (the "Claim")

AND UPON hearing counsel for the Claimant and the Defendant in the Trial held before me on 24 and 25 May 2023 (the "Hearing")

AND UPON reviewing the case file

IT IS HEREBY ORDERED THAT:

1. The Claim is dismissed.

2. The parties shall file and serve short submissions on costs, no more than approximately five pages long, within five days of this Order.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 5 October 2023
At: 2pm

SCHEDULE OF REASONS

1. This application is brought entirely on the basis that the Claimant is entitled to be paid a success fee arising from an agreement entered into between the Claimant, Defendant and Channel 2 Group Corporation M FZ LLE on 7 January 2022 which formally appoints the Claimant as the exclusive financial advisor for the Defendant seeking financing from reputable lenders in the UAE with the objective of restructuring a loan and financing a drawdown payment for the acquisition of 49 apartments in Barsha Heights (the "Agreement"). The underlying issue in these proceedings relates to the interpretation of the success fee provision in clause 2(ii) of the Agreement in light of a facility letter provided by Emirates NBD (hereinafter "ENBD" or "the lender") dated 22 March 2022 (the "Facility Letter").

2. The Claimant's position is that under clause 2(ii) of the Agreement, a successful transaction occurred as the Defendant accepted and signed the Facility Offer Letter, and upon which a success fee of 2% of the total value of the approved facility became due and was owed to the Claimant forthwith. As a result, an invoice of 7 May 2022 for AED 920,000 was raised plus 5% VAT which was due to be paid by the Defendant within 30 days of the signing of the Facility Offer Letter. However, the Defendant's position was that the Claimant would only be paid subject to a successful outcome arising from the Facility Offer Letter, thereby any compensation shall solely be linked to an approval of a debt facility which the Defendant could drawdown at his discretion.

3. The Defendant says it could not be construed that a success fee of AED 966,000 was payable to the Claimant upon signing of any document, notwithstanding the fact that ENBD was still in the process of ascertaining the creditworthiness of the Defendant and whether it should offer the Defendant an approved and sanctioned facility. Accordingly, there were further investigation that needed to be made by ENBD to enable it to proceed to the final stage of sanctioning the transaction. As a result, the success fee of signing the facility letter was zero because no debt facility had been approved at that point. In reply, the Claimant contends that if a facility is not granted solely based on the Defendant's failure in producing conditional documents, the Claimant shall nonetheless be entitled to full compensation as stipulated under the Agreement.

4. The material issues which give rise to this application will be fully set out in this Judgment, however I summarise below those matters which are relevant to this application. I have carefully reviewed all submissions of all parties including oral 4 of 22 submissions at the hearing of this application (the "Hearing") and if I omit reference to an argument or an authority that had been relied on this does not mean that it has been overlooked or not considered.

Background relevant to these proceedings

5. I will briefly set out the chronological events which are relevant to this Application:

The Claimant is a consultancy firm which provides debt advisory and corporate services to corporate and institutional clients since 2014. The

Claimant has had a longstanding relationship with the Defendant and they have entered into multiple engagement letters to assist with the Defendant's financing. The Defendant is a businessman and a chairman of Channel 2 Group Corporation MFZ LLE which is based in the UAE.

6. On 7 January 2022, the Claimant, Defendant and Channel 2 Group Corporation M FZ LLE entered into an Agreement appointing the Claimant as the exclusive financial advisor for the Defendant seeking a liability buyout from Emirates Islamic Bank ("EIB") of Dubai Islamic Bank ("DIB") financing up to AED 45 million along with new financing of AED 28 million for the acquisition of 49 apartment and with down payment of AED 12 million and up to AED 15 million of working capital facilities for Channel 2 Group total amounting up to AED 88 million against a mortgage of properties valued approximately at AED 190 million. The Claimant's agreed scope of work as set out below comprised of the following services:

(a) to obtain business and financial information from the client [the Defendant];

(b) provide an information memorandum for the purposes of submitting identified counterparties, banks or institutions, to obtain credit facilities;

(c) outline available options for cost-effective alternatives;

(d) identifying suitable counterparties;

(e) design an appropriate process for the Transaction

(f) coordinate with legal advisors and various other parties involved in the Transaction; and

(g) assist the client in negotiating and concluding the mandate with counterparties.

7. The Claimant initially approached EIB with the proposed transaction, however the proposed arrangement was rejected purportedly due to the Defendant's history of bad account conducts with other banks and considering EIB's internal credit restrictions, EIB demonstrated its inability to pursue such arrangement further.

8. Prior to the signing of the Facility Letter, the Claimant stipulates that ENBD's terms and conditions were discussed at length with the Defendant and only after being satisfied the Defendant accepted and signed the Facility Letter.

9. On 11 March 2023, an email was sent from ENBD to the Defendant setting out their proposed key terms and conditions, all key terms were discussed at length between the Claimant and the Defendant.

10. On 30 March 2022, the Claimant arranged and obtained a Facility Letter from ENBD in which it involved ENBD to buy-out the Defendant's existing debt liabilities of up to AED 46 million from DIB, that amount included a tranche of AED 18 million towards the existing liabilities and AED 28 million for the acquisition of 49 apartments in Barsha Heights, in Dubai (the "Transaction"). The Defendant accepted and signed the Facility Letter which included a condition that if all the terms and conditions are adhered to by the Defendant and all required documents are presented, the loan would be facilitated.

11. On or around May 2022, an invoice of AED 966,000 was raised by the Claimant in connection with their success fee arising from the scope of work and services in arranging the facility for the Defendant. It is not disputed between the parties that this amount has not been paid.

12. On 20 June 2022, the Defendant provided ENBD with a Trade License copy of Unique Parts Trading LLC. On the same day, the Claimant informed ENBD of the termination of the Agreement due to a breach and that any communication between the ENBD and the Claimant pertaining to the Project Facility should cease. It is disputed between the parties as to whether that notification influenced ENBD to terminate the project facility.

13. On 21 June - 24 June 2022, ENBD asked for further documents concerning Unique Parts Trading and other property related documents in connection with the Transaction for the validity and enforceability of the financing of the facility offer.

14. On 30 June 2022, ENBD sent a letter notifying the Defendant that the Facility Letter had been cancelled. On 4 July 2022, the Defendant emailed ENBD expressing his frustration in failing to finalise the Transaction.

Submissions relevant to these proceedings

15. I will chronicle the parties' submissions in detail to demonstrate the way in which the competing contentions have evolved throughout these proceedings.

16. The Claimant submits that it was commercially understood between the parties that its services were engaged by the Defendant to seek a new debt facility, raise a working capital and to finance a drawdown payment for the acquisition of 49 apartments in Barsha Heights. The Agreement which the parties entered into prescribed that the Claimant shall be awarded compensation upon a successful transaction. As far as the Claimant's case is concerned, a successful transaction means that following the Defendant's signing and accepting ENBD's Facility Letter, a compensation of 2% of the amount approved under the facility letter becomes payable to the Claimant. As such, the Claimant stipulates that a successful transaction as defined under clause 2(ii) of the Agreement has no direct link and was by no means subject to actual sanctioning and availability of the drawdown payment by ENBD simply because the Facility Letter was subject to extensive and conditional precedent contingent on the Defendant producing those key documents to ENBD to enable the facility to be sanctioned and obtain an approval from the lender.

17. The Defendant responds contending that his understanding of a successful transaction is in conflict with that of the Claimant, in a commercial context, the Defendant deemed a successful transaction to be an approved or a sanctioned facility debt by the lender and the success fee of 2% identified under clause 2(ii) of the Agreement only became due and payable to the Claimant subject to an approved and sanctioned debt facility by ENBD, in this case, the debt facility had not been approved by the lender. By virtue of the fact that ENBD had not approved or sanctioned this facility debt, no success fee became due and payable to the Claimant. The Defendant further argues that it is commercially absurd for the Claimant

to suggest that a success fee is payable upon the issuance of the facility offer by ENBD, when in fact the payment of the success fee of 2% is wholly and directly linked to drawdown of the debt facility sanctioned by ENBD, because the Facility Letter did not result in sanctioning of the debt facility which the Defendant could draw-down to fulfil the commercial purpose of the Agreement, therefore no success fee was payable to the Claimant.

18. In support of the Defendant's assertion, he relies on the wording of clause 1(g) of the Agreement which clearly states that during the advisory period, the "Advisor will assist the Client in negotiating and concluding the mandate with counterparties". As far as 7 of 22 the Defendant was concerned, a conclusion of the mandate means that a transaction would achieve its intended purpose which is restructuring the debt acquisition of 49 apartments so there will be a debt facility for that commercial purpose.

19. The Defendant said that in order for the Claimant to be compensated for its services and receive the success fee of 2% from the total facility value, the Claimant had to ensure that the Defendant enters into a binding facility Agreement with ENBD. The Facility Letter issued by ENBD was not a binding Agreement which would allow for drawdown of the debt facility, this analysis is based on the notion that the Facility Letter was subject to conditions precedents and any other non-exhaustive requirements of ENBD.

20. In response to the Defendant's submission, the Claimant contends that the sole object of the commercial contractual relationship was duly served and completed by the Claimant. By virtue of the Agreement, the Claimant's scope of work was conditional on providing a facility offer from a reputable lender and following the signing of ENBD's facility offer, the Claimant had completed their contractual obligation. It was by no means agreed that the Claimant would assist the Defendant in compliance with the disbursement conditions set out in Schedule 1 of the Facility Letter.

21. The Defendant refutes the Claimant's allegations that it was not part of their agreed scope of work to assist the Defendant in compliance with the disbursement conditions set out in the facility offer letter, indicating that the Claimant was required in accordance with their Agreement to provide support and ensure that the documents required under Schedule 1 of the Facility Letter are produced accordingly to the ENBD for the approval and sanctioning of the debt facility. In support of the Defendant's submission, he relies on the continued correspondence between ENBD and the Claimant whereby the Claimant was the primary channel between the Defendant and ENBD, even after the signing of the Facility Letter which suggest that if in fact the Claimant expected a success fee of 2% it would not have facilitated and continued to assist the Defendant with this Transaction if its primary contractual obligation had only been confined to the Defendant signing a Facility Letter with a lender.

22. As part of the Defendant's submission, it was contended that it would not make any commercial sense to enter into an Agreement with the Claimant without their assistance in successfully securing the Transaction with ENBD. It was the Defendant's understanding that a payable compensation of 2% was only contingent if the debt facility offered by ENBD was capable of being drawdown as this would fulfil the main 8 of 22 objective of the commercial purpose of the Agreement. Considering there was no successful transaction on the 90 days anniversary of the Agreement, the Agreement between the Claimant and the Defendant automatically terminated.

23. In response, the Claimant contended that a successful transaction was not prompted due to the Defendant's failure to produce disbursement conditions prescribed in Schedule 1 of ENBD's Facility Letter. Based on this contributory failure, the debt facility offered by ENBD was not capable of being drawn down by the Defendant. A successful transaction was not frustrated based on the Claimant's failure in assisting the Defendant to achieve its commercial objective, rather it was largely based on the Defendant's failure in attaining conduct letters from Bank of Baroda for the outstanding debt advanced to Unique Parts Trading LLC, where the Defendant is a major shareholder. The Claimant further contended that the Bank of Baroda had advanced various banking facilities in favour of Unique Parts Trading and due to a repayment default on part of the Defendant, Bank of Baroda took legal action for recovery of its outstanding dues. As such, when a conduct letter was not provided to ENBD, the lender requested for an updated AECB report from Unique Parts Trading to verify the account conduct, this measure was taken as an alternative to the conduct letter and was an effort on part of ENBD to complete the disbursal requirements as parts of Schedule 1 of the Facility Letter.

24. The Claimant acknowledged that its assistance and correspondence with ENBD continued even after the Defendant had signed and accepted the facility offer, albeit their conduct could be construed as beyond the agreed scope of work, the Claimant continued to facilitate this Transaction in good faith and in aim to ensure that the Defendant was able to drawdown the funds of the facility in a timely manner.

Findings of facts on the disputed issues

25. I now turn to make findings of fact on the underlying disputed issue. In that context it is necessary to make observations as to the credibility and reliability of the witness of fact.

Mr Farook

26. Mr Farook gave evidence on behalf of the Claimant. His evidence was given through a video link. It was quite properly, subject to searching cross examination. It would be fair to say that Mr Farook's recollection of the events was in some respects detailed.

27. Mr Farook explained and clarified his understanding on the difference between condition precedents documentation and disbursal documents, as far as the Claimant's mandate was concerned for this particular project facility. Mr Farook mentioned that it involved preparing a credit proposal tailored to the objectives of the Defendant which is ultimately shared with the credit committee of the lender, the committee's role is to analyse and review the proposal to be satisfied of the collateral terms provided by the Defendant, the committee then provides its comments and decide if the lender should reject or approve the facility proposal. Based on the proposal and review of the documents, the lender approved the facility, the documentation team prepared and issued a facility letter for the Defendant which was subject to certain terms and conditions and further documents.

28. As far as the drawdown payment for the acquisition of 49 apartments is concerned, the Claimant was tasked to put together a memorandum of the transaction explaining to the lender if its repayments will be generated from rental assignments, the amount of the rent the apartments will be generating and the valuation of the apartment in the event of any volatility in the market price to ascertain if the lender's debt is covered or otherwise, which was provided by the Claimant. As such, the creditworthiness of the Defendant had been established prior to the lender having

issued its Facility Letter.

29. Albeit the Court had the benefit of Mr Farook's testimony and his answer in cross examination, however given the factual evidence that had been submitted by the parties, Mr Farook's testimony did not add to my consideration of the factual issues one way or another. I have determined the factual issues based on all evidence submitted by the parties, factual witness statements and the assessment of the witnesses during their cross examination.

Mr Khan

30. Mr Khan gave evidence on behalf of the Claimant. His evidence was given through a video link. It was quite properly, subject to searching cross examination. It would be fair to say that Mr Farook's recollection of the events was in some respects detailed.

31. In his cross examination, Mr Khan confirmed that it was part of their scope of work to prepare and receive all documentation which the banks would require prior to issuing the facility in favour of the Defendant which was consistent with paragraph 13 of Mr Farook's witness statement.

32. However, during his cross examination when Mr Farook was asked to confirm if the Claimant's scope of work had terminated at the point of the lender issuing a Facility Letter, Mr Farook confirmed that the Claimant's scope of work did not end once the lender issued the Facility Letter, which was inconsistent with Mr Farook's witness statement and the Claimant's case in general. In fact, it appeared from his cross examination that the Claimant was contractually obligated to assist the Defendant until the drawdown of the debt facility has been sanctioned by the lender.

33. Through the Claimant's counsel's best efforts in rephrasing the question to Mr Khan, in which he later explained that their continued assistance following the issuance of the Facility Letter was done out of "good faith" and based on the parties previous commercial relationship, the Claimant felt that they should proceed assisting the Defendant until the lender approves the payment of the project facility.

Mr Sethi

34. Mr Sethi was the principal witness in support of his case, and he gave evidence by a video link. It is clear to me that he understood that the Claimant would assist him in securing the drawdown payment of the project facility to enable him primarily to acquire the 49 apartments and to restructure his existing debt.

35. The Claimant's counsel pointed to inconsistencies in the Defendant's oral testimony suggesting that he was not a credible witness, and the Court should not rely on its evidence. The inconsistencies that had been pointed in the Claimant's closing submissions were merely academic points and would not have any effect on the overall question - what was the intention of the parties when they entered into an Agreement and whether the Claimant had fulfilled its contractual obligation under the Agreement.

Discussion and analysis

36. Before dealing with the material issues, it might be worth mentioning that the relevant appliable law in the present context is the laws of the DIFC as agreed and set out under clause 12 of the Agreement. As such, the Claimant's reliance and reference to the UAE Civil Code and Federal Law is not applicable in these circumstances.

37. The entry of the Agreement is not denied by the parties, however what appears to be at the heart of this dispute is the true meaning and the interpretation of clause 2(ii) of the Agreement in light of the Facility Letter issued by ENBD and in the context of the parties' relationship and what they had intended to mean given the facts and the 11 of 22 circumstances of the case. As such, the preliminary issue which falls to be decided is as to whether the arrangement between the parties which we are concerned with in these proceedings falls within the scope of a successful transaction which takes us to the question at which point did the success fee crystallise, if in fact it did.

38. For the purposes of the Agreement, a transaction was essentially defined as the Claimant seeking a liability buy-out of the Defendant's debt obligations towards DIB for up to AED 45 million by EIB along with new financing of AED 28 million for the acquisition of 49 apartments in Barsha Heights and a working capital for Channel 2 Group Corporation. However, surprisingly a successful transaction has been defined as the "acceptance and signing off the Facility Offer Letter by the Client [the Defendant] issued by the bank". The Defendant disputes the Claimant's entitlement to recovery of the success fee on the basis that it has not been activated under the terms of the Agreement. This is because the Defendant understood the commercial purpose of the Agreement was to obtain a new debt facility to enable him to restructure his existing debt and that his liability to the success fee (being 2% of the project facility) has not crystalised as it would have only been triggered had the lender sanctioned the drawdown payment of the project facility.

39. Under the Agreement, the fees of the Claimant were structured into two processing opportunities, an assignment fee and a success fee. Traditionally, the assignment fee is a flat fee usually charged by consultancy firms and banks which their clients, here being the Defendant, would be liable to pay for facilitating the transaction. In these circumstances, the assignment fee was waived by the Claimant and assumingly this adjustment was based on a calculated commercial risk for a higher payment which the Claimant would receive on the success fee charging the Defendant 2% of the total value of the project facility. The Claimant relies on the last sentence of clause 2(ii) which sets out the timing of when the success fee is to be paid, indicating that the Defendant's liability to the success fee arises within a maximum of 30 days from the date of signing the Facility Letter or the drawdown payment sanctioned by the lender, whichever comes earlier. The timing of the Defendant's liability in paying the success fee to the Claimant is linked to the eventuality of either at the date of signing the Facility Letter or the drawdown payment of the project facility.

40. In my view in order for the Court to ascertain the objective meaning of a contractual provision, it will be guided Article 49 of the DIFC Contract Law which provides that "(1) a contract shall be interpreted according to the common intention of the parties (2) if such an intention cannot be established, the contract shall be interpreted according to 12 of 22 the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances." Further, Article 51 which stipulates that "in applying Article 49 and 50, regard shall be had to all the circumstance, including (a) preliminary negotiations between the parties (b) practices which the parties have established between themselves; (c) the conduct of the parties subsequent to the conclusion of the contract; (d) the nature and the purpose of the contract; (e) the meaning commonly given to terms and expressions in the trade concerned; and (f) usages."

41. Having said that, it is important to assess both the language of the clause and the commercial context in which it was drafted, the following consideration will be relevant to the Court's analysis: the overall purpose of the clause and the contract, the facts and the circumstances known or assumed by the parties at the time of the contract was executed; and the natural and ordinary meaning of the clause.

42. The natural meaning of the language used; commercial common sense cannot be relied on to undervalue the importance of the language of the provision which is to be construed. It is my view that the Court should be slow at rejecting the meaning of the provision simply because one of the parties made a bad bargain, it is not for the Court to improve the positions of the parties by re-writing the contract. However, where there is ambiguity and more than one possible construction, which is the heart of this dispute, the court will select the interpretation that makes the most commercial sense, the presumption being that the parties would not have intended an uncommercial result.

43. As such, when interpreting the competing meanings of a "successful transaction" under the Agreement, I will only be concerned in identifying the intention of the parties by reference to "what a reasonable commercial person having all background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean": *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [para 14].

A successful transaction

44. Now turning to the Facility Letter, it is my understanding that it was a conditional binding contract, and it was necessary for the Defendant to satisfy those conditions set out in Schedule 1 for there to be an approved drawdown payment of the project facility.

45. In my view, the interpretation of a "successful transaction" could clearly have two different meanings in light of the parties' relationship, the commercial purpose of the proposed transaction and the conduct of the Defendant subsequent to the termination 13 of 22 of the Agreement. In order to understand this case, it is essential to understand the Claimant's basic business model, and, in my view, there are two ways of analysing the Claimant's business structure. One is where the Claimant would offer its professional financial services by assisting its clients in facilitating a transaction with proposed lenders subject to an assignment fee of AED 50,000. I will call this the assignment fee model ("Assignment Feel Model"). The other is assisting clients in negotiating and concluding the mandate with the relevant counterparties which may be subject to various conditions that will need to be satisfied to cash out the drawdown payment or closing the transaction. I will call this the successful transaction model ("Successful Transaction Model"). Once the Claimant finalised the mandate and achieved the Defendant's commercial objectives, this would instantaneously activate the Claimant's entitlement to 2% success fee of the value of the project facility, being AED 966,000.

46. It is entirely clear from the Defendant's evidence and cross examination that he thought about exclusively engaging the Claimant in terms of its Successful Transaction Model - his expectation was that the Claimant's services would enable him to reach his ultimate commercial objectives. The Claimant's involvement under the Assignment Fee Model would realistically be confined to carrying out the activities itemised under paragraph (a) - (e) of the agreed scope of work, however where the Claimant is exclusively engaged and expected to carry out work which fell within the Successful Transaction Model it ought to have carried out all activities prescribed under paragraph (a) - (g) of the agreed scope of work, particularly assisting the Defendant in negotiating and concluding the mandate with the relevant counterparties.

47. From my reading of the Agreement, it was clear that the Successful Transaction Model was expected to be engaged, the proposed transaction which the Defendant approached the Claimant for its professional financial support was one that would enable him in obtaining the drawdown payment and I make this observation based on the scope of work which clearly indicates that the Claimant was engaged to complete and finalise the mandate with the relevant counterparties, here being ENBD. The mandate in question could not have been finalised at the point of paragraph (e) of the agreed scope of work otherwise the scope of work set out in the Agreement would have been revised to fit the type and the nature of work which the Claimant was expected to deliver throughout the entirety of the transaction. Considering the Claimant had failed to achieve the Defendant's primary commercial objective, I cannot see how the Claimant could possibly be entitled to a successful transaction fee, the exercise which they have carried out falls within the Assignment Fee Model which in essence 14 of 22 they have waived their fee in anticipation of a higher success fee payment (2% of the project facility).

Intended purpose

48. It is my opinion that the Assignment Fee Model was neither the intended purpose nor the intended effect of the arrangement prescribed under the Agreement. It is therefore inappropriate to seek to invoke it in these circumstances by recovering a fee for services that fell within the Successful Transaction Model. The question of purpose takes us to the question of how the arrangement between the parties were thought to have been intended. The purpose of the arrangement as far as the Defendant is concerned is for the project facility to have been sanctioned by the lender and restructure of its existing debt with DIB. For the Claimant, the arrangement was to simply assist the Defendant in facilitating an approved facility letter, albeit the evidence is in rivalry with what the Claimant had intended to carry out as part of its scope of work.

49. What is more important in this regard that at no point was the Defendant given any reason or indication to believe that the Successful Transaction Model was not being engaged in that arrangement. I therefore do not believe that it can be argued that the Assignment Fee Model was entirely the operation of the Claimant's scope of work or that their potential success fee was conditional on it carrying out services that was under the ambit of an Assignment Fee Model.

50. One final point on "purpose" of the arrangement, the Defendant's position is that it cannot have been his purpose to have approached the Claimant and sought its professional services to only be provided with a conditional Facility Letter, in his opinion it could not make any commercial sense to engage a consultancy service that would only provide it with an approved Facility Letter that was contingent on various conditions. The point here is that the purpose of the arrangement was to permit the Defendant to acquire 49 apartments with an approved project facility payment (which was admitted by the Claimant) and with just a conditional approved Facility Letter, it could not have possibly be construed as a successful transaction when additional conditions needed to be satisfied to reach a point in the transaction where the Defendant's commercial purpose had been fulfilled.

51. I move on to address the Claimant's submissions and defences.

52. The Claimant's counsel argued that it would be against the "norms and principles of any commercial transaction" if the Claimant is denied its success fee entitlement particularly when it had offered its professional services in securing an approved Facility Letter, which entailed a tiresome negotiations with various banks, submitting a memorandum of the proposed transaction, detecting the relevant risks on the Defendant's financial circumstances and identifying solutions and avenues to circumvent a refusal from ENBD.

53. It certainly would be against the norms and principles to charge a success fee of 2% of the project facility by way of only securing a conditional Facility Letter which required a non-exhaustive list of evidence to be submitted to the lender prior to ENBD sanctioning the proposed project facility payment. The Claimant submits that the Defendant expected the Claimant to discharge its scope of work for free which demonstrates the Defendant's mindset towards the professional services offered by the Claimant. This is a weak and unpersuasive argument because it was the Claimant's decision in waiving the assignment fee of AED 50,000 in anticipation of a higher fee being 2% success fee from the value of the project facility. It was a commercial risk which the Claimant agreed to proceed on this particular occasion.

54. In my view, the Claimant's Successful Transaction Model was clearly engaged by the Defendant, in which he contemplated that the Claimant would assist to the last item of its agreed scope of work, namely reaching the point where the Defendant's existing debt had been restructured and he had obtained the relevant new financing payment to acquire the 49 apartments. To the Defendant's mind, he had not contemplated that he would be liable in paying the Claimant a success fee amounting to AED 966,000 without reaching the conclusion of the transaction. In this case, there was no facility that was actually approved or sanctioned by the lender.

55. The Claimant's proposition that its scope of work was conditional only in obtaining an approved facility from the lender, must fail. The question which arises and comes to mind is, if the success fee is in fact linked to the Defendant's signing the approved Facility Letter (30 March 2022), by virtue of the Agreement, the Claimant's contractual entitlement of the success fee was triggered on 30 April 2022, however the Claimant continued to assist the Defendant during the advisory period and only raised an invoice of their entitlement to a 2% success fee of the project facility on 7 May 2022. One way to approach this delay of contractual entitlement is that it could be suggested that the Claimant's scope of work was not just conditional on securing an approved facility letter 16 of 22 otherwise the Claimant would have invoiced the Defendant forthwith and ceased to act on its behalf after the date of signing the approved Facility Letter.

56. If the argument here is that the Claimant was primarily engaged to assist to the point of securing a conditional approved Facility Letter, and it was on the Defendant to provide additional documents and evidence prescribed in the Facility Letter to the satisfaction of the lender. This is a questionable proposition to make, particularly when the Defendant under clause 3 of the Agreement was precluded from engaging another financial advisor to assist or liaise with the lender during the term of the engagement letter which compels the argument that the Claimant was expected to proceed in assisting the Defendant to the point of fulfilling a successful transaction.

57. A final point to make relevant to the Claimant's scope of work, if and to the extent of the Claimant's agreed scope of work did not include assisting the Defendant in securing an approved and sanctioned debt facility, the Claimant should have ceased in its continuous representation on behalf of the Defendant following the signing of the Facility Letter to prevent the confusion between their mandated scope of work and acting in "good faith". The Claimant's continued attempt to facilitate an approved debt facility with the lender compels the conclusion that their success fee was clearly linked to a successful outcome transaction approved and sanctioned by the lender. The Claimant could not have been formally appointed to only secure a facility offer letter from a lender which may or may not result in a successful outcome, the Claimant was clearly mandated to provide the Defendant with an approved and a sanctioned debt facility which would be capable of a drawdown payment enabling the Defendant to fulfil its commercial purpose of the engagement.

58. As such, it is my view that a successful transaction did not crystalise because the lender did not sanction or make the facility available that could be capable of being drawdown by the Defendant. A successful transaction as far as the evidence is concerned, would entail a restructuring of the Defendant's existing debt and being offered a new financing payment for the acquisition of the relevant properties in Barsha Heights. My analysis is based on the facts that were known to the parties at the time of entering into the Agreement, when interpreting a contractual provision, one can only consider the facts and the circumstances which existed at the time of the contract, and which were known or reasonably available to both parties. As such, it cannot be right that when the Court is interpreting a contractual provision, to take into account a fact or a circumstance known only to one of the parties. It is admittedly obvious that the Claimant was conscious of the Defendant's overall objective and the primary purpose 17 of 22 of the proposed transaction was to obtain a new debt facility to enable the Defendant to restructure his existing debt and acquire the relevant apartments. Both witnesses of the Claimant, Mr Farook and Mr Khan admitted in their oral evidence that the Defendant's commercial purpose was to have access to the project facility payment to allow him to acquire the 49 apartments.

59. As it has been set out, the substantive issue between the parties in this case is the interpretation of a successful transaction and if that has been satisfied by the Claimant to trigger its entitlement of a success fee. Having considered that there are possible interpretations as to what may constitute a successful transaction, the Court preferred the interpretation that was more consistent with the business common sense and rejected the other. What made commercial sense to the Court was by reference to the overall purpose and other provisions of the Agreement. Having considered the extrinsic facts of the case, it is my finding that the Defendant's interpretation of the definition of a successful transaction was more preferable and befitting of its business dealings with the Claimant. In ascertaining the commercial meaning of a successful transaction, the Court was also guided by the rule of "contra proferentem" which came into operation pursuant to the ambiguity of clause 2(ii) of the Agreement. The application of the rule will, to the extent of this case, operate in a way that any ambiguous words of a contractual provision will be construed and interpreted against the draftsman: *Burton v English* [1883] 12 QBD.

60. It is not disputed between the parties that the Agreement was drafted by the Claimant and considering that there are competing meanings to the definition of a successful transaction, the doctrine of contra proferentem rule dictates that where there is doubt to the meaning of a contractual provision, the ambiguity should be applied in favour of the other party [the Defendant] and the party that drafted the contract [the Claimant] shall live with the consequences.

Timing of the success fee

61. Turing to the eventuality of when the Defendant becomes liable in paying the success fee. By virtue of the wording set out under clause 2(ii) which prescribes that a "success fee of 2% of the total project facility approved by the lender. This fee shall be payable net of payments made

under clause 2(i) above. "Project facility" means "UAE Dirham value of gross amount of the credit facilities sanctioned by banks or institutions under this transaction".

62. The definition of the term "success fee" in the Agreement itself clearly indicates that it was linked to actual sanctioning and availability of a facility by the bank and not a mere conditional Facility Letter, the Claimant's entitlement of 2% success fee is attributed to a facility that is available and can be drawn down at the discretion of the borrower. It cannot be taken to mean the issuance of a document, wherein a large non-exhaustive list of documents or information is requested for the lender prior to sanctioning the transaction and approving the drawdown payment.

63. Even on this analysis, the Claimant says that but for the Defendant's failure in providing the required documents to the lender this impeded a successful transaction and it is on those grounds that the Claimant should still be entitled to its full compensation.

64. In support of its proposition, it relies on the last paragraph of clause 2(ii) which states that "in the event the Advisor [Claimant] shall have signed a facility offer letter for the project facilities, from any bank(s)/financial institutions(s) with the agreed terms and conditions as per the information memorandum of the Transaction, and (i) the client unilaterally decided to withdraw (backs out) or cancel the Transaction or this LOM; and/or (ii) the Client performs some acts or omits to perform some act, time also being the important essence of the understanding hereof, or otherwise which results in the failure of achieving the financial closure of the Transaction as agreed in the LOM, whether in part of in full, the Advisor shall be entitled to claim full compensation, as per the terms of this LOM, for its efforts".

65. This takes me to the question which arises from this argument - to what extent, if at all, can the Claimant rely on this statement as a method of recovering its success fee from the Defendant. From my reading of the last paragraph of clause 2(ii) of the Agreement, it sets out a unique scenario wherein the Claimant would have signed the Facility Letter on behalf of the Defendant and if the Defendant later withdrew, cancelled the Transaction or failed to perform some acts which resulted in failure of achieving the financial closure of the Transaction, in such scenario, the Claimant would certainly be entitled to claim compensation.

66. Further, my reading of the last paragraph of clause 2(ii) is that it is not relevant to the current context of these proceedings, particularly when the Facility Letter was signed by the Defendant on 30 March 2022. In addition, the wording pertaining to the recovery of fees, indicates that the Claimant shall be entitled to "compensation", it does not say or refer to the fact that the Claimant would be entitled to a success fee of 2% of the 19 of 22 total project facility. As such, the Claimant's argument is misconceived and shall be dismissed.

Termination

67. The Defendant stipulates that the Agreement between the parties automatically terminated on 7 April 2022 by virtue of clause 6 of the Agreement which says that "unless otherwise agreed between the parties to renew in writing, this LOM will automatically terminate upon the occurrence of (i) financial close of the Transaction or (ii) on the 90 days anniversary date of this LOM, whichever is earlier (the "Advisory Period or the Term")". As such, given that the financial close of the Transaction did not successfully occur, the Agreement had effectively been terminated on its 90 days anniversary or on 7 April 2022. Therefore, the Defendant says that the Claimant does not have any claim for a success fee under the Agreement.

68. My views on the termination point nullifying the Claimant's financial entitlements, is an immaterial issue to the entirety of the case, the deciding factor as far as this Court is concerned does not turn on the termination of the Agreement, rather the issue here is what amounted to a successful transaction, was it part of the Claimant's scope of work to assist the Defendant to achieve its commercial objective or was the success fee triggered based on the available factual evidence.

69. My findings and analysis, thus far, are not based on the premise that the Claimant's entitlement of a success fee did not arise because the Agreement between the parties reached its 90 days anniversary date. In fact, I find this argument to be misconceived and must be dismissed, because the flipside of that submission is, had the Claimant been successful in achieving the Defendant's commercial objectives (restructuring of the existing debt and new financing to acquire the 49 apartments) on 8 April 2022, the implication of the Defendant's argument would suggest that the Claimant should not be entitled to its success fee of 2% because the process in concluding the mandate with the lender took longer than 90 days.

70. The absurdity of that argument is that the Defendant would still be liable even if the process went beyond the anniversary date of the Agreement, provided that the Claimant had achieved a successful transaction. I rely on the wording contained in the last paragraph of clause 6 of the Agreement, which states that "upon the termination of Advisor's services under this LOM, this LOM shall have no further force or effect 20 of 22 except that: (i) any fees that are to be paid to the Advisor in accordance with the terms of this LOE".

71. In essence, the eventuality of the Agreement being terminated is in fact linked to a successful financial close of the Transaction or closing the mandate with the lender, as set out under clause 6(ii). Thereby, the Defendant's argument that the termination point of the Agreement is linked to clause 2 of the Agreement (success fee of 2%) is correct. Had the Claimant fulfilled its agreed scope of work and concluded the mandate with ENBD achieving a successful transaction for the Defendant, meaning a sanctioned payment of the project facility, beyond the 90 days anniversary date of the Agreement, the Claimant would undoubtably be entitled to its 2% success fee from total value of the project facility.

72. However, given the fact that this Court has concluded that the Claimant failed to achieve a successful transaction, where it was part of its scope of work to assist the Defendant in negotiating and concluding the mandate with the lender, because a mere signing of a conditional approved facility letter did not amount to a financial close of the Transaction or in fact it constituted to a successful transaction. A success fee did not arise in these circumstances.

Previous established conduct of the parties

73. In addition to the intended purpose of the Agreement, the Court also relied on the established conduct of the parties, which has been addressed earlier in this Order pertaining to the current Transaction considering the parties understanding of the ultimate objective to be achieved. I will now address the parties initial conduct prior to entering to the Agreement. As far as the factual evidence is concerned, I note that the parties have entered into similar engagements in the past and none of the engagements yielded a positive outcome for the Defendant and all previous

engagement letters have automatically expired. It could be assumed that the parties have entered into this type of payment terms where the Claimant's success fee or compensation was linked to an actual positive result as it made commercial sense to agree to those payment structures, otherwise it would have resulted in a scenario where the Defendant would have been liable in paying the Claimant several times despite not receiving any funds or credit facilities from lenders.

Conclusion

74. Considering that the Court has found in favour of the Defendant, the other submissions made by the Claimant involving the Defendant's misreporting facts on the number of precedent conditions that were required to be submitted to the lender in a limited amount of time, although irrelevant, nonetheless will be addressed very swiftly.

75. I found the Claimant's proposition based on "but for" the Defendant's failure in providing documents within the time period set out in the Facility Letter, to be an immaterial point. The issue in this case does not turn on timing of submitting the condition precedent, the validity or the enforceability of the evidence provided, instead the heart of this dispute is whether the Claimant fulfilled its agreed scope of work to be entitled to its 2% success fee. The distinction which the Claimant intended to draw between the disbursal documents which were submitted on behalf of the Defendant prior to the Facility Letter being issued to the precedent conditions set out in schedule 1 of the Facility Letter to demonstrate that but for that their immeasurable assistance, ENBD would not have agreed to offer a Facility Letter.

76. In that distinction, the Claimant explained that there is a difference between disbursal documents and conditions precedent. The precedent conditions have been collated by the Claimant on behalf of the Defendant and was shared with ENBD at the first stages and this channel of communication and formulated proposal guided the lender to approve the facility and issue a facility letter to the Defendant subject to further documentation which was required to be shared prior to a drawdown payment of the project facility. As such, the Claimant says that it should not be penalised for the Defendant's failure in providing conduct documents in a timely manner and to the satisfaction of ENBD.

77. The distinction drawn between the disbursal documents and conditions precedent is neither here nor there, the Claimant was contracted by the Defendant to assist in achieving its commercial goal and that could not have been achieved at the point of signing the Facility Letter. The introductory paragraph of the Facility Letter suggests that there is a second phase of the Transaction before the lender could approve a sanctioned payment of the project facility value and it was the Claimant's obligation to conclude the mandate with the lender. I rely on the following wording, ENBD "has agreed to make available the facilities listed in the Clause titled Facilities below [.] to the Original Borrower [.] and subject to terms and conditions stated in (i) this letter 22 of 22 [.] including the conditions precedent attached as Schedule 1 (the "Conditions Precedent").

78. It is not a material point whether the Defendant did not provide evidence in a timely manner, its neither a relevant point for the Claimant to rely on the notion that it had assisted the Defendant in negotiating with ENBD to provide him with a facility Letter, because we return to the starting point, has the Claimant fulfilled its contractual obligations under the Agreement to be entitled to recover its success fee. The simple answer is no. The Court does not intend to penalise the Claimant rather give effect to what the parties have intended to achieve as a result of entering into this Transaction. It is wholly disingenuous for the Claimant to claim its success fee of 2% based on the Defendant signing a Facility Letter, when it was clear that during the advisory period, it was agreed that it would negotiate and conclude the mandate with the lender to the point of where the lender sanctions the payment of the project facility.

Cost

79. The parties are directed to provide short submissions on costs, no more than approximately five pages long, within five working days of this Order.