محكمة قطر الدولية
ومركز تسوية المنازعات
QATAR INTERNATIONAL COURT
AND DISPUTE RESOLUTION CENTRE

**In the name of His Highness Sheikh Tamim bin Hamad Al Thani,**

**Emir of the State of Qatar**

**Neutral Citation: [2023] QIC (A) 4**

**IN THE QATAR FINANCIAL CENTRE**

**CIVIL AND COMMECIAL COURT**

**APPELLATE DIVISION**

**[On appeal from [2022] QIC (F) 14]**

**Date: 11 July 2023**

**CASE NO: CTFIC0018/2021**

**DARUNA FOR REAL ESTATE BROKERAGE CO LLC**

**1st Claimant**
**1st Appellant**
**1st Respondent in Defendant's Application**

**SHEIKH NASSER BIN ABDULRAHMAN BIN NASSER AL THANI**

**2nd Claimant**
**2nd Appellant**
**2nd Respondent in Defendant's Application**

**v**

**LESHA BANK LLC**

**Defendant**
**Respondent to Claimants' Applications**
**Appellant**

**JUDGMENT**

**Before:**

**Lord Thomas of Cwmgiedd, President**

**Justice Sir William Blair**

**Justice Dr Rashid Al-Anezi**

**Order**

1. Lesha Bank LLC is granted permission to appeal, but the appeal is dismissed.

2. Daruna For Real Estate Brokerage Co. LLC is granted permission to appeal and the appeal is allowed to the extent of increasing the damages payable to QAR 14,122,949.

3. Lesha Bank LLC must pay the cost of the appeals to be assessed if not agreed.

**Judgment**

**Introduction**

1. Both parties seek permission to appeal from the judgment of the First Instance Circuit (Justices Lord Hamilton, Fritz Brand and Dr Muna Al-Marzouqi) handed down on 14 August 2022 giving judgment for damages in the sum of QAR 13,722,949 in favour of the Claimants (Daruna for Real Estate Brokerage Co LLC ('**Daruna**') and Sheikh Nasser bin Abdulrahman bin Nasser Al Thani ('**Sheikh Nasser**')) against the Defendant (Qatar First Bank LLC now renamed Lesha Bank LLC (the '**Bank**')) for breach by the Bank of a financing agreement which the Court found was made between the Bank and Daruna. Since the hearing at First Instance, the Bank has changed its legal representation: the lawyers appearing before us did not appear before the First Instance Circuit.

2. The Bank contends that the First Instance Circuit was wrong in holding that there was an agreement between the Bank and Daruna. Daruna and Sheikh Nasser contend that there was such an agreement, and the First Instance Circuit was wrong in dismissing their further

claims for damages in the sum of over QAR 900m. For the reasons set out below, we grant Daruna and the Bank permission to appeal.

3. It is necessary to make clear at the outset that the First Instance Circuit faced a formidable difficulty. Daruna filed with its claim and the response to the defence a total of 41 documents; the Bank filed 3 documents with its defence. Despite the fact that the First Instance Circuit by order dated 7 April 2022 required both parties to file and serve witness statements and any further documents they wished to rely on, both parties took the position that they had no witness statements and no additional documents to file. At the hearing on 22 May 2022, no oral evidence was called or given. The result was that it was evident even from the documents before the Court that there was an incomplete account of the transactions which are the subject of the dispute.

4. The Bank through its new legal representation contended as its first ground for seeking permission to appeal that the failure by the parties to put the necessary documents before the First Instance Circuit had the consequence that the Court did not have the material necessary to analyse the legal structure of the financing arrangements. The Bank contended that the appeal raised significant issues of law, particularly relating to project finance and structures commonly employed, and it was therefore important that the legal analysis was based upon a proper understanding of the facts relating to the financial arrangements.

5. The Bank sought therefore to adduce 19 further documents on appeal. As it was the Bank, as we shall explain, that was the party that arranged the structure of the agreements, the fault was that of the Bank and its then advocate. As this Court has sought on many occasions to make clear, all the relevant documents and evidence must be adduced before the First Instance Circuit as the trial court; it is only in rare circumstances that this Court will permit parties to adduce before it on appeal materials or other evidence that was not before the First Instance Circuit. The consequences of the failure to adduce materials or other evidence must be borne by the party responsible and its advocates. In this case, having reviewed the documents which the Bank wished to place before the Court, we considered that it would in all the circumstances be fair and just to all parties to allow the Bank to place before the Court on this appeal the additional documents. The documents explain more fully the factual background on which the legal analysis depends. As noted, neither party had adduced any written or oral evidence before the First Instance Circuit and the additional

documents therefore could not be used to undermine or contradict such evidence. We have, however, only drawn on those documents for the purpose of explaining matters that are undisputed. As we allowed the Bank to put these documents before the Court, we permitted Daruna to adduce 7 additional documents relevant to its claim for damages.

6. It is convenient therefore to set out the factual background as it appears from the documents before us.

**The factual background**

The projects to build workers' accommodation

7. The Government of Qatar introduced in 2014-2015 a policy to provide better accommodation for construction workers who were employed in Qatar, particularly for projects relating to the FIFA World Cup 2022 and other infrastructure.

8. One of the Qatari companies that became interested in developing and operating this type of accommodation was Daruna, a Qatari company of which Sheikh Nasser was Chairman. The shares in it were held by Sheikh Nasser's holding company and by Global Buildings Solutions Ltd, a US real estate developer. There were two related sites in which they were interested – Umm Slal Mohamed Plot 4 for about 4,000 beds, and a much bigger site at Al Khor initially for 28,000 beds but subsequently for 32,000 beds.

9. On 5 April 2015, Gulf Systems for Contracting & Services WLL ('**Gulf**') submitted a tender to the Ministry of Municipality and Urban Planning (later known as the Ministry of Municipality and Environment) (the '**Ministry**')) for a design, build and operate agreement for integrated workers' accommodation at Umm Slal for 4,000 beds.

10. In anticipation of the award of the contract, on 8 September 2015 Gulf entered into a subcontract with Daruna. Under the subcontract, Daruna would carry out the work if the contract was awarded to Gulf by the Ministry. Under sub clause 3.b.ii, Daruna was to be responsible for its own financing.

11. On 22 October 2015, the Ministry entered into a contract with Gulf.

The interest of the Bank and the letter of 14 August 2016

12. Daruna entered into discussions with the Bank about the provision of finance for the Umm Slal project in about January 2016. Although the background to those discussions was not before the First Instance Circuit, it is evident from the documents provided to us that Daruna was looking for a partner to finance 70-80% of the project at Umm Slal which then had an estimated cost of QAR 160m. The Bank became interested in financing the project through debt and equity and it envisaged a structure that would involve one or more special purpose vehicle ('**SPV**') companies and a joint venture company to manage the project. Daruna initially engaged the Bank as its exclusive financial adviser on the projects at Umm Slal and Al Khor on the terms of an Engagement Letter dated 2 February 2016.

13. The discussions continued during the first part of 2016. It was evident by March 2016 that financing the projects was complicated by the fact that the land on which the accommodation would be built could not be used as security as it was government owned. In July 2016, the Bank's Investment Committee approved the financing of the project at Umm Slal for QAR 180m on the basis of a 60:40 debt equity ratio. The full equity would amount to QAR 72m, with the Bank contributing 70% of the equity (QAR 50.4m) and Daruna 30% (QAR 21.6m). The equity would be provided in two tranches; as Daruna had already invested QAR 10m in Umm Slal, the Bank's initial contribution was to be QAR 23.3m to keep the equity ratio at 30:70. The Bank's internal documents made clear that the transaction would be structured through a joint venture company and the Bank would hold its interest in the joint venture through an SPV, in part to allow the Bank to sell off part of its equity investment to outside investors.

14. On 14 August 2016, the CEO of the Bank wrote to Sheikh Nasser about the Umm Slal Plot 4 Project in the following terms:

> *We are pleased to inform you that the Executive Committee of the Board of Directors of Qatar First Bank has approved our equity investment of a seventy percent (70%) stake in the Umm Slal Plot 4 Project with Daruna.*
>
> *This approval allows us to assure you that pending the satisfaction of conditions precedent and documentation, the funds are approved, segregated and ready for distribution.*
>
> *We have discussed at length with your management team the next steps in satisfying the conditions precedent and documentation and have formed a team to fast track this process.*

*This is a milestone in our relationship and we reiterate our commitment to this partnership, and are working towards a rapid closing of the transaction as soon as possible.*

15. The First Instance Circuit held at paragraphs 14-18 of its judgment that this letter, subject to the conditions contained in it and documentation, was intended to be of a legally binding nature and constituted an offer by the Bank to Daruna to enter into a contract directly with it in the nature of a joint venture to fund, in the proportions agreed, the carrying out and completion of the project.

16. The First Instance Circuit recorded at paragraph 20 of its judgment that Sheikh Nasser stated at the hearing that as the offer was acceptable, Daruna terminated discussions with other potential financiers; that statement was not challenged by the Bank.

The agreements signed

17. After that letter, work began on the documentation. Later in 2016:

    i. The Bank formed a wholly-owned and directly held subsidiary Qatari company, First for Real Estate Development LLC ('**FRED**').

    ii. Daruna entered into a shareholders' agreement with FRED for the formation of a joint venture company to be known as Umm Slal Four Accommodation ('**USFA**') with the shares to be owned 70% by FRED and 30% by Daruna. USFA was to carry out the contract with Gulf under the management of FRED under the supervision of a Board of Directors, four of whom were to be appointed by FRED and one by Daruna. The chairman was to be Sheikh Nasser (clauses 8 and 9). Clause 28 provided for dispute resolution before a competent court and clause 29 for the agreement to be governed by the laws of Qatar. The provisions for finance were set out in clause 5.

18. The First Instance Circuit held at paragraph 21 that the entering into of this agreement was the acceptance of the offer contained in the letter of 14 August 2016.

The position of the financing and the structure executed in 2017

19. It appears from the documents provided to us that a considerable delay occurred because of legal structuring issues. Although the original intention of the Bank was that it would

provide the majority of the equity and debt, liquidity and other regulatory constraints meant that the Bank was unable to provide the debt financing. As we have set out, the land on which the accommodation was to be built could not be used as security. This meant that Qatari banks could not for regulatory reasons provide loans secured by the land as the development was classed as a real estate development. Steps were therefore taken by the Bank to source the debt from another bank. By about February 2017, the Bank was offered terms under a facility from Mashreq Bank, a UAE bank based in Dubai.

20. For reasons which were not explained to the First Instance Circuit, the arrangements agreed with FRED were not taken forward. However, it was clear from the documents put before us that for regulatory reasons, the Bank as a QFC company was unable to hold its interest in USFA, a non-QFC Qatari company, through FRED as its wholly-owned subsidiary. The documentation was therefore re-arranged, structured and agreed in April 2017 as follows:

    i. The Bank formed a company called Kuthban Real Estate LLC ('**Kuthban**') with the Bank having a shareholding of 49% and the PRO Partnership having 51%. The latter satisfied regulatory requirements for the Bank to be able to hold shares in USFA, a non-QFC Qatari company; it did not affect the Bank's beneficial ownership of Kuthban. The share capital of Kuthban was QAR 200,000. The management of Kuthban was the subject of a shareholders' agreement between the Bank and the PRO Partnership.

    ii. The shareholding in USFA was arranged so that Kuthban in place of FRED owned 70% and Daruna owned 30%. As the First Instance Circuit noted at paragraph 7, the Bank's Financial Statements for 2021 recorded that the Bank had an effective interest in USFA of 70%.

    iii. A shareholders' agreement relating to USFA was entered into between Daruna and Kuthban. This agreement was not before the First Instance Circuit, but it had found correctly, based on statements in other documents, that it was on materially the same terms as the agreement with FRED. In essence, it gave complete control of the management to Kuthban. The most relevant terms were the financing terms set out in clause 5 (which were identical to those in the agreement with FRED save in relation to the first sentence of clause 5.2) and

the choice of law clause, clause 29. As regards financing, it was agreed so far as relevant as follows:

*5.1 Initial Financing*

*(a) It is specifically agreed between the Shareholders that they shall initially contribute by way of Shareholder Loans an amount of seventy-two million Qatari Riyals (QR 72,000,000) to the Company (the "Initial Shareholder Loans"); such contributions to be made in proportion to their respective equity interests in the Share Capital being fifty million four hundred thousand Qatari Riyals (QR 50,400,000) for KUTHBAN and twenty one million six hundred thousand Qatari Riyals (QR 21,600,000) for DARUNA.*

*(b) Payment of the Initial Shareholder Loans shall be made by the Shareholders and received into the bank account of the Company within fifteen (15) days of the issuance of the Company's CR.*

*(c) All Initial Shareholder Loans made by the Shareholders to the Company shall be Sharia compliant.*

*(d) The Shareholders agree that the Company will seek to raise by way of Islamic financing an amount of one hundred and eight million Qatari Riyals (QR 108,000,000) to part fund the Project (the "Loan").*

*(e) ....*

*(f) ....*

*5.2 Complementary Financing*

*(a) In the event where the Loan could not be obtained by the Company within a time frame agreed by shareholders representing at least 75% of the Share Capital in accordance with Clause 5.1. it is expressly agreed that the Shareholders shall contribute by way of complementary Shareholder Loans an amount of one hundred and eight million Qatari Riyals (QR 108.000,000) to the Company (the Complementary Shareholder Loans); such contributions to be made in proportion to their respective equity interests in the Share Capital being seventy five million six hundred thousand Qatari Riyals (QR 75.600.000) for KUTHBAN and thirty two million four hundred thousand Qatari Riyals (QR 32.400.000) for DARUNA. For the avoidance of doubt, the Shareholders expressly agree that no further approval or consent shall be required in relation to the payment of the Complementary Shareholder Loans.*

*(b) Payment of the Complementary Shareholder Loans shall be made by the Shareholders and received into the bank account of the company within fifteen (15) days of the date(s) agreed by the Shareholders representing at least 75% of the Share Capital for payment of the Complementary Shareholder Loans.*

*(c) All Complementary Shareholder Loans made by the Shareholders to the Company shall be Sharia compliant.*

*5.3 The Parties acknowledge that payment of the Initial Shareholder Loans and of the Complementary Shareholder Loans in strict accordance with the agreed timeframes is of critical importance to*

*the success of the Project. Accordingly, each Party agrees to defend, hold harmless and indemnify the other Party for and against any claim, loss, damage, cost, charge and/or liability that may arise on account of the breaching Parties' failure to pay the contribution amount(s) in accordance with the agreed timeframes.*

*5.4 If any Shareholder fails to provide its proportion of the Initial Shareholder Loans and/or the Complementary Shareholder Loans pursuant to Clauses 5.1 and 5.2 within the period as agreed in accordance with Clause 5.2 (the "Failing Shareholder"), the other shareholder ("Funding Shareholder") shall be entitled, but not bound, to advance the Failing Shareholder's contribution in such proportions as the Funding Shareholder may agree (the "Advance Contributions").*

*...*

*Clause 29: Governing law*
*This Agreement shall be governed by and construed in accordance with the laws of Qatar. To the extent possible, it is agreed that such rules or provisions of Qatar law which conflict with Sharia principles, as determined by the Sharia Supervisory Board of QFB, shall not apply.*

21. It was the Bank's case that the agreement as to financing between the parties was solely that contained in the shareholders' agreement between Daruna and Kuthban relating to USFA. The Bank itself was under no obligation to provide finance for the project. If there had been any such agreement (which the Bank strongly denied), that was superseded by the shareholders' agreement.

22. At about the same time, it was agreed that as Daruna had spent QAR 10.5m on the project and QAR 3.2m of operating expenses, the initial contribution of the Bank by way of equity to reflect the 70:30 ratio would be QAR 24.5m. The Bank transferred this sum to Kuthban on 21 May 2017. An internal Bank Investment Report for Q4 2017 records that this meant that to complete the equity part of the financing, Daruna would in due course have to contribute QAR 7.9m and the Bank QAR 26.2m.

23. In May 2017 the agreements under which Gulf had in 2015 entered into a sub-contract with Daruna to build and operate the contract were amended to reflect the new financing structure so that:

    i. On 25 May 2017 Gulf entered into a sub-contract with USFA.

ii. USFA entered into a sub-sub-contract with Daruna under which the guaranteed maximum price for the works was QAR 180m.

The difficulties in obtaining debt finance

24. Daruna and USFA then sought bids from contractors to build the accommodation; a number of bids were submitted, but the problem that faced the parties was finding the finance needed to enable the building contract to be signed.

25. The blockade of Qatar announced in June 2017 made matters much more difficult as it brought to an end the availability of the facility from Mashreq Bank. Withdrawal of deposits from the Bank meant its liquidity was such that it thought it could neither provide the debt, nor a guarantee.

26. To meet these difficulties, Daruna attempted to negotiate with the contractors on the basis that the contractor would provide the finance itself. It was the case of Daruna that it had agreed with one of the contractors that it would enter into the contract provided that it was paid the amount of equity capital that Daruna and the Bank were to provide; it would then finance the contract itself until completion. This case was disputed by the Bank on the basis of an exchange of emails put before us. An appellate court is not the forum in which such a point can be resolved; if this was a material matter, it should have been raised before the First Instance Circuit. However, although it was not raised before the First Instance Circuit, this dispute makes no difference as its resolution is not necessary for our decision in the light of the actions taken by the Bank in March and April 2018.

The actions of the Bank in March and April 2018

27. The First Instance Circuit found at paragraph 8 that it was clear that more funds were required and that Mr Scott Strachan, an Executive Director of the Bank and Chairman of Kuthban, recommended that the Bank make such funds available proportionate to its 70% interest, but the Board of the Bank declined to do so despite Daruna having made clear it would make its proportionate contribution by tendering a cheque for the relevant amount. Although those findings are plainly correct and are not susceptible of challenge before us, it is necessary to set the matters out in a little more detail as derived from all the documents that were before the First Instance Circuit and those before us.

28. By the end of 2017, Daruna had cleared the Umm Slal site and was ready to start. At a meeting on 15 January 2018, Sheikh Nasser requested that the Bank confirm its commitment to pay the 70% share of the final costs of any General Contractor under any building contract that was agreed by Daruna.

29. Mr Scott Strachan replied by email on the same day as follows:

> *As discussed and agreed at today's meeting:*
>
> *1. Under clause 6.2 of the Sub-Contract agreement between USFA and Daruna, the Guaranteed Maximum Price is QR180,000,000 and Daruna is solely responsible for any excess.*
> *2. Under clause 5.1 of the Shareholders' Agreement between Daruna and Kuthban, the parties agree to inject QR200,000 of equity and QAR72,000,000 of Initial Shareholder Loans, both in proportion 70% Kuthban, 30% Daruna. It further states that a third-party Loan of QR108,000,000 will be sought.*
> *3 Under clause 5.2, if USFA is unable to secure a Loan, the shareholders agree to inject Complementary Shareholder Loans in the amount QR75,600,000 from Kuthban and QR32,400,000 from Daruna.*
>
> *Kuthban will adhere to its obligations under both contracts and expects Daruna to do likewise. This means that if Financing is not available, Kuthban will be required under the agreement to inject a further loan of up to QAR75,600,000, being its 70% share of the shortfall based on the Guaranteed Maximum Price of QAR180,000,000. Any amount in excess of this will be Daruna's sole responsibility.*

The email set out the sums that had been paid to date and what needed to be paid by way of completing the capitalisation of the equity of USFA as we have set out at paragraph 22, above. The amount due from Daruna by way of capital call was QAR 7,877,051.

30. On 6 February 2018, Daruna tendered a cheque drawn on Sheikh Nasser's holding company for the amount Mr Strachan had specified, thus making clear it could and did contribute its share of the equity due.

31. Discussions between Mr Strachan and Daruna continued into March 2018 as to options for raising the finance or adjusting the equity. Many of the emails were sent by Mr Strachan in his capacity as a director of the Bank.

32. By 14 March 2018, the conclusion had been reached by the Investment Committee of the Bank that the only way forward was for the shareholders to commit to funding USFA by way of loan capital pro-rata to the shareholding to a total of QAR 200m. Mr Strachan's

view was that this sum was needed to enable the works contract to be awarded on a conventional basis with monthly payments and a sum for contingencies, instead of the type of agreement being negotiated by Daruna under which the contractor would have provided the finance. Correspondence from the Bank to the Public Works Authority indicate that there were difficulties in arranging acceptable terms with the then potential contractor. However, emails show that the reality was that by now the Public Works Authority was running out of patience.

33. Mr Strachan, writing on Kuthban paper and as Chairman of Kuthban, on 22 March 2018 put forward a proposal for financing subject to the confirmation of the Bank's investment Committee; it was accompanied by a letter signed by the CEO of the Bank confirming the offer of a facility by the Bank to Kuthban subject to approval of the Bank's Investment Committee and the Board.

34. On 28 March 2018, the Investment Committee approved the further investment by a majority and referred the matter to the Board setting out the advice of the Investment Committee to proceed. The Bank produced no documents to us which set out the decision of the Bank or when it was made. However, it is clear that the Board at some time in April 2018 declined to authorise the provision of further finance as the First Instance Circuit found.

35. On 23 April 2018, in response to a letter written by Daruna, the Bank took the position that there was no contractual or legal relationship between the Bank and Daruna; Daruna therefore should address any claims to USFA or Kuthban. On 14 May 2018, Daruna made clear its view that the Bank was a party to the agreement for financing through the actions of Mr Mohamed Sahil (Head of Corporate Services at the Bank) and Mr Strachan.

36. On 11 December 2018, as the First Instance Court found at paragraph 9, the Ministry terminated the contract with Gulf (which was, as explained above, the contract through which the rights and obligations of the project flowed to Daruna and the Bank).

**The decision of the First Instance Circuit**

37. The First Instance Circuit found (as we have set out above) that the letter of 14 August 2016 constituted an offer by the Bank to provide the funding which was accepted by

entering into the shareholders' agreement with FRED; the interposition of Kuthban made no difference as it was acting as agent for the Bank (paragraph 23):

i. This accorded with the financial realities (paragraph 25).

ii. The Bank dealt throughout directly with Daruna paragraph 26).

iii. The Bank's legal obligation was never transferred to FRED or Kuthban (paragraph 27).

38. The First Instance Circuit held, in the alternative, that the financing agreement was concluded between the Bank and Daruna by conduct (paragraph 22).

39. There was no ceiling to the Bank's financial obligation as none was agreed (paragraph 24). This had no effect on the legally binding nature of the agreement, though as the First Instance Circuit observed, at paragraph 29, circumstances might arise where a limit could be implied. The Court held it was not necessary to consider that issue further as the Bank was not contractually entitled on the evidence to refuse the provision of further finance.

40. The Bank did not dispute that if there was a direct contractual obligation, it was in breach in failing to provide the finance (paragraph 33).

41. The First Instance Circuit considered that the alternative claim advanced in tort (which it did not find easy to understand) did not succeed. As no issue arose on the appeal, it is not necessary for us to consider this further.

**Was the Bank under an obligation to Daruna to provide finance, and if so, was it in breach?**

42. It is convenient first to consider whether the Bank was under any obligation to Daruna to provide finance for the Umm Slal project and if so, whether it was in breach of that agreement.

<u>The grounds of appeal</u>

43. Mr Simon Hale on behalf of the Bank advanced seven main grounds of appeal on the question of its liability, the first of which set out reasons as to why further documents should

be placed before the Court. We have dealt with this at the outset of the judgment and have read the further documents. The remaining grounds can be summarised:

i. The Bank was under no contractual liability whether the law to be applied was the law under the QFC Contract Regulations 2005 or the Qatari Civil Code.

ii. The letter of 14 August 2016 was not an offer – it was a statement of pre-contractual intent. The letter was not sufficiently definite and subject to conditions precedent and documentation. The Bank had no intention to be bound.

iii. Daruna did not accept the offer. The First Instance Court was wrong to find that the offer was accepted by signing the shareholders' agreement with FRED or Kuthban.

iv. The contract was not concluded by conduct.

v. The First Instance Circuit made no clear findings on the obligations owed by the Bank; it was wrong therefore to conclude there were any breaches of any agreement made. The letter of 14 August 2016 did not set out the terms on which further funding was to be made available; the First Instance Circuit was wrong in the conclusion it reached as to the terms of the obligation.

vi. The First Instance Circuit failed to analyse other documents before it. The Court should have analysed the shareholders' agreement from which it was clear that the obligation for finance was solely that of Kuthban under the shareholders' agreement as set out in particular in clause 5 (these terms are set out above so far as relevant in full). Under the terms of clause 25 of that agreement, any earlier agreement was superseded. The agreement was also subject to the express choice of the law of Qatar.

We are very grateful to Mr Hale for the succinct and clear way in which he advanced the argument on behalf of the Bank

44. Daruna contended that the Bank's appeal was out of time. The First Instance Circuit was in any event correct in its decision that the Bank made an agreement to provide finance and was in breach of that agreement.

**The issues on the appeal on the issue of the obligation of the Bank**

45. The issues in the appeal on liability were:

    i. Was the Bank's appeal filed in time?

    ii. What was the applicable law?

    iii. What were the contractual agreements for the financing of the project?

    iv. Was the Bank in breach of those agreements?

Was the Bank's appeal filed in time?

46. It is clear from the Court's records that the appeal was filed by the Bank within the permitted 60-day period. It is correct that there was a change of legal representation of the Bank, but no power of attorney or other formality was required in this Court to enable the Bank's lawyers to file the appeal on behalf of the Bank. Daruna's first contention therefore must fail, and we turn to consider the merits of the application.

What was the applicable law?

47. As the First Instance Circuit explained at paragraphs 10-12, the parties were directed by the Court to identify the system of law which they contended should be applied by the Court pursuant to paragraph 8 of Schedule 6 to QFC Law No. 7 of 2005 (the '**QFC Law**'), which requires this Court to apply the QFC Law and Regulations unless the parties have explicitly agreed to apply another law. Daruna complied with the direction and stated that they relied on the laws and regulations of the QFC, but also on "*the contractual and tort liabilities established under Qatari National Law*". The Bank did not comply with the directions. At the hearing, both Daruna and the Bank indicated orally that they wanted the Court to apply Qatari national law. As the First Instance Circuit said, this was highly unsatisfactory. In the end the Court decided to examine the position under both QFC law and Qatari national law and held that the position was the same.

48. The Bank contended that the matters recorded by the First Instance Circuit did not amount to an agreement between the parties which displaced the duty of the Court to apply another system of law in place of the law of the QFC under paragraph 8 of Schedule 6 to the QFC Law:

> *Without prejudice to Clause (1) of Article (18) of the QFC Law, The Civil and Commercial Court, with its First and Appellate Circuits, shall apply The QFC Law and regulations issued by virtue of that Law, on the subject matter of the dispute, unless the parties have explicitly agreed to apply another law provided that such law is not inconsistent with the Public Order of The State.*

This paragraph must be read with paragraph 3 of article 18 of the QFC Law which provides:

> *The QFC Laws and Regulations shall apply to The Contracts, Transactions and arrangements conducted by The entities established in, or operating from The QFC, with parties or Entities located in The QFC or in the State but outside The QFC, unless the parties agree otherwise.*

49. In our view these provisions require this Court to apply the QFC Law unless there is an explicit agreement to apply another law. The explicit agreement will ordinarily be found in the contract between the parties. There may be circumstances in which the parties reach an agreement subsequent to the contract to apply another law, but unless the parties have themselves reached such an agreement, the Court should simply apply the QFC Law and Regulations. It should not be the task of the Court to enquire of the parties what law the parties want applied to the case, unless the parties themselves have made an explicit agreement.

50. In the present case we do not consider that the statements made by the parties as recorded in the judgment of the First Instance Circuit did amount to an explicit agreement. However, clause 29 of the shareholders' agreement between Kuthban and Daruna provided for the national laws of Qatar to apply to that agreement; that was plainly an explicit agreement. Assuming for present purposes that the provision of that agreement is also material to the governing law of any agreement between the Bank and Daruna, the question therefore arises as to whether such a provision is "*another law*" within the meaning of paragraph 3 of article 18 of the QFC Law.

51. That question has been touched on, but not decided, in *Aycan Richards v Perera and International Financial Services Qatar LLC* [2020] QIC (F) 17 and *Khadija Al Mahroon v*

*Ooredoo Group* [2023] QIC (F) 5. It is not necessary for us to decide this question in the current case as there is, as would be anticipated in relation to a financing transaction of this kind, no material difference between the QFC Law and Regulations and the Qatari Civil Code as the national law applicable in Qatar outside the QFC. We consider that the issue as to the meaning of "*the law of Qatar*" is an issue which is better determined in a context where any difference between the Qatari Civil Code and the QFC Contract Regulations 2005 is material. We see, however, the considerable force of the observation that the provision in an agreement which provides that the governing law is the law of Qatar is not an agreement to apply another law, as the law of the QFC is part of the applicable law of Qatar.

What were the contractual agreements for the financing of the project?

*The decision of the First Instance Circuit*

52. As we have set out, the Bank contends that the decision of the First Instance Circuit was wrong on the ground that the letter of 14 August 2016 was not an offer capable of acceptance for project financing of this type, that such offer was not accepted by the signing of the shareholders' agreements, and that no agreement was made by conduct. This is a formidable contention, and in our view, therefore, permission to appeal should be given.

53. It is clear, particularly with the benefit of the full background which we have set out as derived from the documents before us, that the letter of 14 August 2016 was not an offer that was capable of acceptance. The terms of the letter are set out in paragraph 14 above. It stated that the Board of Directors had approved the Bank's equity investment in the project, but the letter was not in itself of a legally binding nature. It was a statement of the Bank's intention to provide finance for the project on the basis of detailed terms to be agreed, particularly as to the amount and terms of the financing, and the signing of formal documentation. As the Bank submits, this would include agreement on essential matters such as the extent of the parties' liability, termination rights, and choice of law and jurisdiction. Although there might be circumstances where a bank might make an offer capable of acceptance to enter into an unlimited commitment, that would be highly unusual.

54. The letter mentions that the Bank is working towards a rapid closing of the transaction. Once the letter is viewed in context of the further negotiations and the subsequent shareholders' agreements as regards FRED and Kuthban, there can be little doubt that the

parties considered that the terms of the agreement to provide finance and the documentation in which the terms were set out would make detailed provision of the kind set out in the shareholders' agreements; there can also be in our view little doubt that the commitment to provide finance would only become binding when those terms were agreed.

55. We cannot therefore uphold the basis on which the First Instance Circuit determined that the Bank was under an obligation to Daruna.

*Were the financing arrangements contained solely in the shareholders' agreement between Daruna and Kuthban?*

56. It was the Bank's further contention that in consequence of the fact that the letter of 14 August 2016 was not an offer capable of acceptance, the only liability to provide finance became that of Kuthban as set out in the shareholders' agreement between Kuthban and Daruna in respect of UFSA.

57. It was argued by the Bank, in the alternative, that if the acceptance of the offer in the letter of 14 August 2016 was made through entering into the shareholders' agreement, then the obligation of the Bank was superseded by this agreement with the consequences that:

    i. the obligation became that of Kuthban and not the Bank;

    ii. the terms of the financing obligations became those set out in clause 5 and limited in any event in that way; and

    iii. the obligations under the letter of 14 August 2016 were no longer of any effect because of the provisions of clause 25.

58. In the light of our decision on the effect of the letter of 14 August 2016, it is not necessary for us to consider the alternative argument, the critical question is whether the Bank is liable itself or whether (as it contends) the only obligation to provide finance was that of Kuthban under the terms of the shareholders' agreement.

59. As the Bank rightly points out, financing transactions routinely involve contractual structures with different corporate entities, and it is for the parties by their agreements to

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

60. On that basis, the Bank submits that the true picture was that:

    i. On the project execution side, the Bank was protected from claims by Gulf because such claims would be made against either USFA under the sub-contract, or against Daruna under the sub-sub-contract.

    ii. On the project finance side, the Bank was protected from direct claims by Daruna because such claims would be made against Kuthban under the USFA shareholders' agreement (and before that against FRED under the 2016 agreement).

    iii. None of the agreements protected the Bank from the risk of losing its investment in the project if it did not go forward – however that was the level of risk which the Bank was prepared to accept. It ultimately made provision in its accounts for losses of around QR 24.5m.

61. The question as regards liability to Gulf does not arise. The question for the Court is whether, as submitted by the Bank, the true picture is that the claims in respect of funding could only be made against Kuthban. In this respect, the Bank's letter of 14 August 2016 is material, not as a legally binding instrument in itself, but as an indication of the parties' intentions. With its reiteration of the Bank's "*commitment to this partnership*", it is very unlikely, in our view, that either party would have expected that commitment to be restricted to Kuthban.

62. In our view it is clear in the circumstances we have set out that Daruna only agreed to the agreement being structured though the shareholders' agreement with Kuthban on the basis that the Bank would remain obliged to provide the finance as set out in clause 5 of the shareholders' agreement and would ensure that the obligations of Kuthban under that agreement were honoured by the Bank:

i. As the Bank accepted at first instance, Sheikh Nasser had ceased seeking alternative finance when the Bank made its commitment in August 2016 on the basis that the Bank itself would be undertaking the financial obligations.

ii. Kuthban had a capitalisation of QAR 200,0000 when the required finance was for a project of QAR 180m.

iii. Daruna would never have agreed to the obligations in relation to the project being undertaken by Kuthban without the clear understanding that the Bank itself would remain liable to provide the finance through Kuthban.

iv. When Mr Strachan was engaged in negotiations in 2018, he did so on behalf of the Bank as the Bank had undertaken the obligation to provide the finance through Kuthban. It is right that the formal offer was made on Kuthban paper and in his capacity as Chairman of Kuthban, but that simply reflected the formal structure. It did not in any way indicate that it was Kuthban that had assumed the sole obligation.

v. The minutes of an Investment Committee meeting of 28 March 2018 record Mr Strachan as saying that:

> *Theoretically, QFB is insulated from [a lawsuit by Sheikh Nasser] since it invested through a Qatari SPV; however, there remains a risk the courts "look through" these SPVs and Sheikh Nasser might try to sue QFB directly.*

This is exactly what has happened.

63. Whether this question is viewed through the application of the QFC Contract Regulations 2005 or the Qatari Civil Code, the same conclusion is reached, as would be expected. There is no material difference. The Bank's submission based on article 228 of the Qatar Commercial Companies Law (Law No. 11 of 2015) as to the responsibility of a parent company for the obligation of its subsidiaries does not detract from this conclusion, because on the facts of this case the liability arises not from the corporate relationship but from the contractual arrangements between the parties.

Was the Bank in breach of its obligations?

64. As we have set out, the advocate then representing the Bank before the First Instance Circuit accepted that the Bank was in breach of its obligations by its refusal to advance further funds (see paragraph 33 of the First Instance Circuit's judgment).

65. The Bank sought to resile from that position and argue before us that the Bank was not in breach and in the alternative that Daruna had suffered no loss. Although it accepted that Daruna could put up the required QAR 7.8m as the second tranche of the equity funding from its side under clause 5.1 as we have set out at paragraphs 22 and 30 above, it contended that by March 2018 Daruna would have had to have made its required contribution under clause 5.2 of the shareholders' agreement by way of "Complimentary Financing" as the loan could not be obtained. Daruna was not in a financial position to be able to do so and was unable to fulfil its obligations. Furthermore, that would have entailed the entire failure of the financial arrangements and Daruna would have suffered no loss from the Bank's decision not to provide further finance as the entire project would have collapsed (as in the event it did).

66. This was not a contention advanced before the First Instance Circuit, though it was accepted that the advocate then representing the Bank could have advanced the argument had he so wished. It is not therefore an issue that we can permit to be advanced before this Court. It is also important to note that so far as the material before the Court shows, this was not a point raised by the Bank in the contemporaneous correspondence or at any time prior to the bringing of the appeal. Furthermore, there is no evidence to support such a contention. If the Bank had wanted to adduce evidence and advance the contention, it should have done so before the First Instance Circuit. Instead of pursuing that course, the Bank accepted that it was in breach and that breach had caused loss to Daruna.

67. Although we have given permission to appeal, in our view the decision of the First Instance Circuit was correct in the result for the different reasons we have set out. We therefore dismiss the appeal on the issue of the Bank's liability to pay damages.

**The damages payable**

68. Three heads of damages were claimed by Daruna before the First Instance Circuit:

i. QAR 15,318,949, "*as the value of the direct damage incurred to 04/O2/2019*".

ii. QAR 142,086,937, "*as the value of the damage, loss profits and incurred losses due to the loss of the project*" at Umm Slal.

iii. QAR 700,000,000 "*as compensation… for the loss of reputation of Daruna and its loss of the market credit and the projects*" – this head of damage essentially relates to the much bigger Al Khor project in respect of which the parties were not in the event engaged.

Daruna made no claim for interest. Sheikh Nasser explained to the First Instance Circuit that this was for religious reasons.

The decision of the First Instance Circuit

69. The First Instance Circuit rejected Daruna's contention that the assessment of the claim should be referred to an expert for assessment on the grounds that damages are, at least ordinarily, governed by the law of the forum, and the Court would therefore assess them paragraph 36. The Court would apply article 100 of the QFC Contract Regulations 2005 which gives a right to damages: "*provided that only loss arising directly from the breach or other loss which can fairly or reasonably have been within the contemplation of the parties at the time the contract was made can be recovered*."

70. As the First Instance Circuit observed at paragraph 40, the evidence before the Court was scant despite its order and directions that the parties file and serve "*such witness statements and any additional documents (whether concerned with liability or quantum of damages/ compensation or both) as they respectively seek to rely on*". No application was made to the First Instance Court to adduce late evidence.

71. The First Instance Circuit held that the claim for direct damage succeeded to the extent of QAR 13,722,949, but dismissed the other two claims.

Darnua's grounds of appeal

72. Daruna's grounds of appeal were that the First Instance Circuit was wrong to reduce the damages under head (i) for direct damages by way of reimbursement of outlay, and wrong

to reject the much larger claims for loss of profit (QAR 142m) and damage to reputation (QAR 700m).

*Direct damages – wasted expenditure*

73. The First Instance Circuit categorised the head of claim for direct damages at paragraph 42 as being in substance for the reimbursement of the financial outlay by Daruna on the project which was rendered fruitless by the Bank's breach of contract.

74. Daruna put forward its quantification of QAR 15,318,949 on the basis of a letter dated 5 December 2017 from Sheikh Nasser to Mr Abousaleh and Mr Strachan. Sheikh Nasser told the First Instance Circuit that the figure included matters not within the Plot 4 project (paragraph 40). It was explained to us by Sheikh Nasser that the matters not included related to the claim in respect of Al Khor and as the loss of the Al Khor project was a consequence of the Bank's breach of contract, it was wrong to deduct that sum.

75. The Bank's representative conceded before the First Instance Circuit that it could not be disputed that QAR 13,722,949, a figure set out in Mr Strachan's email of 15 January 2018 as the capital expenditure of Daruna on the project, represented a proper measure of damages. The First Instance Circuit held this had been proved.

76. We consider that the Bank's advocate was right to make this concession before the First Instance Circuit and the First Instance Circuit was right to characterise this claim as the reimbursement of financial outlay by Daruna which had been rendered fruitless by the Bank's breach of contract. For reasons we explain in relation to the third head of the claim for damages, we consider that the sum expended under this head in relation to Al Khor was not recoverable.

77. During the course of the appeal an issue arose as to whether the sum awarded by the First Instance Circuit under this first head of claim properly reimbursed Daruna for the losses it had sustained. The First Instance Circuit had awarded the amount of the wasted expenditure without compensating Daruna for the lost investment opportunities that would have been available to Daruna by the use of those funds if deployed elsewhere. This is a consideration which can arise in cases where no interest is claimed as is the case in Islamic financing. We gave the Bank the opportunity to make submissions in writing on this issue.

78. The Bank contended that we should not entertain such a claim as it had not been raised before the First Instance Circuit. We do not agree. In cases where the Claimant's loss is not properly compensated as in cases (by way of example) where interest is not sought in Islamic financing, it is incumbent on a court to consider whether the sum it has awarded properly compensates the Claimant for the use it would have made of the sums if they had been invested elsewhere.

79. The Bank submitted further that in any event for such a claim to succeed, it would be necessary first to identify the sums in respect of which there had been a lost investment opportunity and then the lost investment opportunity would have to be strictly proved. The Bank claimed that the funds actually contributed by Daruna were far less than QAR 13,722,949 as some of the sums credited to Daruna in the accounts did not represent actual expenditure but were an adjustment for Daruna's general work in the Umm Slal project; the actual contribution had never been ascertained as Daruna had failed so submit to an audit.

80. However, the approach of the First Instance Circuit to the assessment of the wasted expenditure was correctly made (as we have explained at paragraphs 74 and 75, above) on the basis of the evidence before the First Instance Circuit as to the capital expenditure incurred by Daruna. As the First Instance Circuit found that the amount of the capital expenditure was QAR 13,722,949, that is the sum which instead of being used for the Umm Slal project would have been available for use elsewhere. We therefore consider that, on the findings of the First Instance Circuit, that was the amount which would have been available for other investment opportunities and is therefore the relevant sum by which the compensation for lost investment opportunities should be assessed.

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

82. We therefore allow Daruna's appeal under this head to that limited extent.

*Damages from the loss of the project at Umm Slal*

83. The First Instance Circuit held that there was no oral or written evidence of loss of profit which satisfied the requirement of proof of such loss relating to the project at Umm Slal (paragraphs 43-45). The First Instance Circuit noted there was a term sheet for the sale of some of the accommodation to the Qatar Insurance Company. The First Instance Circuit concluded that:

    i. There was no evidence before it to show that the project would, but for the Bank's breach of contract, have been successfully completed; at the time of the Banks' breach, no building contract had been concluded and the only works carried out were earthworks. The First Instance Circuit concluded that there was nothing that proved to the requisite standard that there would have been successful completion.

    ii. There was no oral or other evidence to prove the profit (income less expenditure) that would have been; no attempt was made to use a March 2016 draft feasibility study to demonstrate the profit that might have been made.

84. In the appeal it was submitted by Sheikh Nasser, who argued the appeal on behalf of Daruna with fluency and skill, that the feasibility study which was commissioned written by Jones Lang Lassale in March 2016 showed that a net income of QAR 33m was anticipated, producing over the projected period a return of QAR 470m which had been discounted to 30% of that figure to reflect the anticipated profit. Occupancy rates were high, and the loss of profit was therefore certain. Moreover, the Bank could not credibly dispute the figures as it had been prepared to make the investment on the basis of that study.

85. Despite the forceful argument made by Sheikh Nasser, we cannot see any basis for holding that the First Instance Circuit was wrong. This was a case where a court could and, taking into account the size of the claim, should make the assessment of damages. This was not a case for reference to an expert whether under the law applied by this court or by the national courts of Qatar, as it was well within the ordinary competence of a court to make that assessment – see *Business Box Consultancy LLC v Abdulla Al Darwish Fakhro* [2012] QIC (A) 8 at [25] where the court said in relation to courts that had a civilian tradition:

*Such courts no longer treat it as axiomatic that what might appear, at first sight, to be a factual enquiry which requires expert evidence, actually requires expert evidence. It is for the trial judge to determine if the case can in fact be resolved without expert evidence. This question has been considered by the Qatari Court of Cassation in many cases, for instance, in decision 29 of 2007, decision 125 of 2008, decision 68 of 2009, decision 163 of 2011 and decision 93 of 2012. In Decision 29 of 2007, dated 19 June 2007, the Court of Cassation for instance stated that the court is not obliged to grant a request for an expert if it can decide the case on the papers already submitted to the court. In Decision 125 of 2008, dated 24 February 2008, the Court of Cassation stated that the appointment of an expert in the case is a matter for decision by the trial court within the exercise of its powers; it is for it alone to determine whether adoption of the procedure for an expert is necessary or unnecessary. The Court of Appeal had found there was sufficient evidence before the court to enable the court to adjudicate the dispute without the need for an expert.*

86. For the court to make the assessment, as the First Instance Circuit pointed out, evidence was needed to prove the project would have been successfully completed and of the profits that would have been made; although the feasibility study was a step in the right direction, as Sheikh Nasser demonstrated, it was not the type of evidence required which would have shown the position at the date of the Bank's breach. Moreover, as this Court has said on a number of occasions, the appropriate court for the necessary evidence is the First Instance Circuit.

*Damages for loss of other opportunities (Al Khor)*

87. The First Instance Circuit held there was no evidence to show that if the project at Umm Slal had been completed successfully, it was likely that Daruna would have been engaged to carry out other projects and if so, what the profitability would have been. There was no evidence of loss of reputation by Daruna; although it was argued that Sheikh Nasser suffered a loss of commercial reputation, no claim had been made for that loss.

88. In his submissions to us, Sheikh Nasser told us that the greater part of this claim related to the profits that would have been made from the Al Khor project which would have had 32,000 beds and was therefore 8 times the size of Umm Slal. We were given some very broad figures which showed the basis on which the claim of QAR 700m had been advanced. In our view, the First Instance Circuit was entirely correct in the view it took of this claim. There was no evidence before it which began to establish the loss claimed.

89. There was also a claim by Sheikh Nasser for his personal loss of reputation. We have no doubt that to those who do not know the facts relating to this matter, as we have set them

out, there may have been a concern about the business reputation of Sheikh Nasser. However, he was not a party to the agreement between Daruna and the Bank and there is therefore no basis on which he personally can maintain a claim. It may be some small recompense for it now to be clear from this judgment that Sheikh Nasser at all times acted carefully and with adherence to proper standards for the conduct of business; the failure to deliver on this project was substantially due to the actions of the Bank which broke without any legal justification the agreement it had made.

**Conclusion and costs**

90. For reasons set out above, the Bank is granted permission to appeal, but the appeal is dismissed. Daruna is granted permission to appeal, and the appeal is allowed to the extent of increasing the damages payable to QAR 14,122,949. The Bank must pay the cost of the appeals to be assessed if not agreed.

**By the Court,**


**[signed]**

**Lord Thomas of Cwmgiedd, President**

A signed copy of this judgment has been filed with the Registry.

Representation:

The Appellants/Respondents and Claimants were represented by Sheikh Nasser (appearing in person), and Mr Mohamed Kamel, Mana N. Jashan Law Firm (Doha, Qatar).

The Appellant/Respondents and Defendant were represented by Mr Niall Clancy, Simmons & Simmons Middle East LLP (Doha, Qatar), and Simon Hale of Counsel (4 Pump Court, London, UK) (neither of whom appeared in the First Instance Circuit).