DIFC Court dismisses US$500m claim against DIFCA and DIFCI

1. On 2 March 2022, the DIFC Court handed down judgment in *Hexagon Holdings (Cayman) Limited v (1) DIFC Investments and (2) DIFC Authority* [2019] CFI 013 (2 March 2022), one of the largest substantive claims ever heard by the DIFC Courts. The Judgment followed a 12 day trial in February. Justice Sir Jeremy Cooke dismissed the US$500m (AED 1.75bn) claim in its entirety.

2. The claim arose out of a joint venture agreement originally entered into in 2003 and amended in 2004 (*"the AJVA"*). Under its terms, the parties agreed to take various steps to establish a joint venture company which would develop plot PA-01, now one of the last undeveloped plots of land in the DIFC. The steps included the agreement of a shareholders' agreement on the basis of certain agreed principles in the AJVA, the incorporation of a joint venture company and the transfer of the land to the JVCo. The parties agreed to use best endeavours in good faith to achieve those steps as soon as reasonably practicable.

3. The Claimant alleged that the Defendants had breached those duties over the course of discussions which spanned from 2006 to 2012. As eventually put at trial, the Claimant's case became that the Defendants had never really intended to proceed with the joint venture and had engaged in the pretence of negotiations. Various other specific allegations were made about the parties' discussions in the period, including about the time it had taken to resolve variations to the project that had originally been conceived.

4. Justice Sir Jeremy Cooke wasted little time in dismissing these complaints, issuing his 106 page judgment just 8 days after the trial finished.

5. He found that the parties' obligations were confined by the terms of the AJVA to the project and financing terms described within it. His conclusion was that the Claimant had sought to vary those terms from the start, in part to obtain improved parameters for the project on matters such as permitted development size and mix of use, but also to seek improved financing terms. The AJVA had required the Claimant to fund the project entirely from "liquid finance". The Claimant had subsequently sought to limit – and ultimately eliminate – the cash investment which it was required to introduce. The Judge found that the Defendants had in any event acted in good faith at all times and had made concessions which they had no obligation to make.

6. The Judge further found that the allegations of breach of contract were all statute barred and any right to terminate on the basis of them would have been lost by the time the Claimant gave notice of termination in 2018.

7. The claim was put on the alternative basis that the Defendants had renounced the AJVA in 2012 and subsequently. This was also dismissed by the Judge. The Defendants had announced in 2012 that they did not consider themselves bound by the terms of the AJVA. However, having taken advice, they had subsequently reversed that view and had engaged in negotiations on the footing that the AJVA was binding. In 2018, they had issued a notice expressly requiring that the parties proceed in accordance with the terms of the AJVA. Any renunciation had therefore been withdrawn before it had been accepted.

8. On causation, the Judge found that the Claimant would not and probably could not have proceeded with the AJVA in any event. As to the former, the Claimant's witness had admitted in cross-examination that it was not "foreseeable" that the Claimant would proceed on the original financing terms. As to the latter, the evidence produced was inadequate and the

Claimant had failed to comply with a document production order, making adverse inferences appropriate.

9. The Judge also preferred the Defendants' evidence on quantum, which was to the effect that the proposed project would not have realised a profit for the Claimant, even on the Claimant's own assumptions, once cash flows were discounted for risk and accelerated receipt. The reasons given by the Claimant's expert for not applying discounting "made no sense". In any event, the Defendants' expert was not cross-examined on the issue.

10. The Claimant's approach to cross-examination of the Defendants' expert was commented on. The Defendant's expert had been cross-examined on his integrity – a challenge which the Judge found to have been "utterly misplaced" – but not on many of the critical points of difference between him and the Claimant's expert. The result was that the Court was bound to accept the Defendants' evidence. The Judge noted that he would have done so anyway, following cross-examination of the Claimant's expert.

11. The judgment is of interest for a number of reasons. It is one of the largest substantive claims ever to have been brought before the DIFC Courts. The Judgment provides helpful guidance on the meaning of good faith best endeavours and the effect of those obligations on duties to negotiate. The Judgment also sounds a further salutary warning about court procedure and the need to cross-examine witnesses on key points of dispute. Comments on the latter add to the growing body of DIFC authority which indicates that the Court will have a low tolerance for failures in that regard.

Tom Montagu-Smith QC of 3 Verulam Buildings acted for the Defendants, instructed by **Graham Lovett**, **Michael Stewart** and **Sophia Cafoor-Camps**.