[(1) Mr Rafed Abdel Mohsen Bader Al Khorafi (2) Mrs Amrah Ali Abdel Latif Al Hamad (3) Mrs Alia Mohamed Sulaiman Al Rifai v (1) Bank Sarasin-Alpen (ME) Limited (2) Bank Sarasin & Co Limited CA 002/2010 (1) Bank Sarasin-Alpen (ME) Limited v (1) Mr Rafed Abdel Mohsen Bader Al Khorafi (2) Mrs Amrah Ali Abdel Latif Al Hamad (3) Mrs Alia Mohamed Sulaiman Al Rifai v (1) Bank Sarasin-Alpen (ME) Limited (2) Bank Sarasin & Co Limited [2010] DIFC CA 001]

THE JUDICIAL AUTHORITY OF THE

DUBAI INTERNATIONAL FINANCIAL CENTRE

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

BEFORE: **DEPUTY CHIEF JUSTICE SIR ANTHONY COLMAN**
JUSTICE SIR JOHN CHADWICK
H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

Claim No: CA 001/2010

(1) MR RAFED ABDEL MOHSEN BADER AL KHORAFI
(2) MRS AMRAH ALI ABDEL LATIF AL HAMAD
(3) MRS ALIA MOHAMED SULAIMAN AL RIFAI

Appellants/Claimants

-and-

(1) BANK SARASIN-ALPEN (ME) LIMITED

Respondent/First Defendant

(2) BANK SARASIN & CO LIMITED

Second Defendant

AND

BETWEEN

Claim No: CA 002/2010

(1) BANK SARASIN-ALPEN (ME) LIMITED

Appellant/First Defendant

-and-

(1) MR RAFED ABDEL MOHSEN BADER AL KHORAFI
(2) MRS AMRAH ALI ABDEL LATIF AL HAMAD
(3) MRS ALIA MOHAMED SULAIMAN AL RIFAI

Respondents/Claimants

Hearing: **27 September 2010**

Counsel: Mr Kaashif Basit of KBH Kaanuun appeared for the Appellants/Claimants in CA 001/2010 and for the Respondents/Claimants in CA 002/2010.
Dr Mark Hoyle of Al Tamimi & Company appeared for the Respondent/First Defendant in CA 001/2010 and for the Appellant/First Defendant in CA 002/2010.
Judgment: **4 November 2010**

RE-AMENDED JUDGMENT

1.This is a hearing of appeals from a judgment of Justice Tan Sri Siti Norma Yaakob given on 7 July 2010. By that judgment she ordered that part of the Claimants' Particulars of Claim should be struck out on the grounds that claims for misrepresentation and negligence in the course of the provision of investment services had not been sufficiently pleaded in the sense that they lacked even the most basic factual foundation for liability.
2. The Claimants appealed against that decision but they also applied for permission to re-amend their pleading in order to introduce greater particularity while yet maintaining that their original pleading was sufficiently specific and that none of it should have been struck out. That application to re-amend is opposed only in part by the First Defendant.
3. The First Defendant appeals against the refusal of the Judge to strike out the claim founded on breach of contract, on the grounds of insufficient particularity, the claim for additional damages and the claim under Article 94 of the Regulatory Law or compensation for breach of the Regulatory Law or Rules or other legislation administered and enforced by the Dubai Financial Services Authority (the DFSA).
4. Finally, the Claimants appeal against the order of the Judge whereby she ordered the Claimants to provide security for costs in the sum of AED 3 million by bank guarantee to continue until final judgment or earlier order and to be provided by a bank in Dubai.
5. Only the First Defendant has so far participated in these proceedings. The Second Defendant carries on business and is incorporated in Switzerland and has challenged this Court's jurisdiction over it by proceedings which are part heard before Chief Justice Michael Hwang S.C. It has, therefore, taken no part in the present application.
6. In the course of the hearing of the Second Defendant's application to strike out the claim against it for want of jurisdiction, questions were raised as to the objectionable lack of clarity of the Claimants' case as expressed in the Particulars of Claim and, in the course of argument, counsel for the Claimants indicated an intention to apply to re-amend that pleading. Chief Justice Hwang dealt with the matter by adjourning the Second Defendant's application to strike out and giving the Claimants permission to apply for permission to re-amend their Particulars of Claim. This was expressly on the basis that their application was to be made before the hearing of this appeal which by then had already been fixed for 27 September 2010. At a case management conference by video conference convened by this Court on 20 September 2010 it was directed that the Claimants' application to re-amend the Particulars of Claim should be heard by this Court at the hearing of these appeals. The purpose of this direction was that in determining those issues on these appeals which went to the striking out of the Particulars of Claim, this Court should have before it such re-amendments to that pleading as it might permit on the Claimants' application.
7. In the event, the Claimants have applied to this Court for permission to make very substantial re-amendments to their Particulars of Claim. These have involved the deletion of very many paragraphs from, and the addition of a considerable body of text to, the pleading that was before the Judge. The allegations of misrepresentation, negligence and breach of contract remain, but each of them is constructed on a foundation largely consisting of cross-references to facts set out in detail in the first 95 paragraphs of the pleading.
8. Dr Mark Hoyle, on behalf of the First Defendant, has challenged only some of the proposed re-amendments

and has not opposed others. The starting point for this Court is, therefore, to determine whether permission should be given to the Claimants to re-amend by introducing those amendments to which the First Defendant objects.

9. The Claimants' allegations of breach of the Regulatory Law and DFSA Rules, misrepresentation, negligence and breach of contract arise from the following facts and allegations.

(a) The Claimants are Kuwaiti nationals ordinarily resident in Kuwait. The First Claimant is a prominent Kuwaiti businessman; the Second Claimant is the First Claimant's mother; the Third Claimant is the First Claimant's wife.

(b) The First Defendant is a private bank incorporated in Dubai and licensed and regulated by the Dubai Financial Services Authority under Licence No. F000009 on 27 February 2005; it is authorised to provide financial services in or from the DIFC. The Second Defendant is a private bank incorporated in Switzerland and is the parent company of the First Defendant. The Second Defendant was only recently served with these proceedings and was not involved in the hearing which gave rise to the Order currently being appealed.

(c) The Claimants' claim arises from investments (including leveraged investments) in various structured financial products in which the Claimants invested in 2007 on the advice of the First Defendant. The products themselves acted as collateral to loans to leverage the investments with the results that falls in the market-to-market value of the products triggered margin calls which, when unanswered, prompted the Second Defendant to close out the Claimants' investments at a catastrophic loss, currently calculated to be nearly US$75m.

(d) The Claimants made their investment objectives and requirements clear to the Defendants at the outset. The Claimants' investment objectives were to generate a return (estimated to be approximately 10% per annum) in order to finance interest payments on a loan advanced to the First and Second Claimants by Al Ahli Bank Kuwait ("ABK") for the purpose of undertaking investments outside Kuwait and provide some additional income. The Claimants required their investments to be low risk and cautious, incorporating full capital protection. The Claimants only invested in the relevant investment products because representatives of the First Defendant (a Mr Blonde and a Mr Walia) advised them that they would "never lose money" and that the risk of the investments not appreciating in value was "negligible". These claims were proved hopelessly over-optimistic. The inherent risks in the products were exacerbated by the fact that whilst the products guaranteed the periodic payments described as "coupon", these payments in fact came out of the capital value of the product, such that the value of the investments as collateral to the loan account would only remain sufficient if they enjoyed consistent and significant growth. The products were, thus, inherently unstable and unsuitable for the Claimants' investment objectives.

10. On behalf of the First Defendant, Dr Hoyle criticises paragraphs 127 and 128 of the re-amended pleading on the grounds that both paragraphs raise very serious allegations of fraud by reference back to a large number of paragraphs in the earlier, narrative part of the pleading which, in turn, lacked sufficient particularity to found such serious allegations.

11. Paragraphs 127 and 128 represent a key part of the pleading and of the First Defendant's submissions and we, therefore, set them out in full.

127. Further or alternatively, by its statement to the Claimants and/or their agents (in particular those through Mr Blonde and/or Mr Walia set out above in paragraphs 15, 20-22, 39-40, 46-47, 51, 53 and 76-77, and/or those in the recitals to the Additional General Terms of Business, separately or in combination). Sarasin Dubai expressly and/or impliedly represented that it had complied and that it would comply, with all applicable regulatory obligations in respect of the Claimants' proposed transactions. As

to these representations **("the Compliance Statements").**

(1) Each of sub-paragraphs 123(1) to 123(12) above is repeated mutatis mutandis.

(2) Further, in relation to falsity (and the awareness or knowledge of Sarasin Dubai in particular through Mr Blonde and/or Mr Walia that the representations were or were likely to be false as set out above) the Claimants rely on the facts and matters set out at paragraphs 107 to 109 above. In view of its status as an Authorised Firm Sarasin Dubai must or should have appreciated (in particular through Mr Blonde and/or Mr Walia as professionals who must have been, alternatively should have been familiar with the regulatory framework) what its regulatory obligations were and that its actions and those of its agents did not satisfy them.

(3) Sarasin Dubai is accordingly primarily and/or vicariously liable to each Claimant in damages for deceit and/or misrepresentation in respect of the Compliance Statements...

128. Further or alternatively, by its statements to the Claimants and/or their agents (in particular those through Mr Blonde and/or Mr Walia set out above at paragraphs 15, 20-22, 39-40, 46-47, 51, 53 and 76-77 separately or in combination). Sarasin Dubai expressly and/or impliedly represented that it had properly considered the Claimants' investment requirements and the nature of the products they were recommending and that it had reasonably concluded that the Investments and/or leveraging were suitable for the investment requirements. As to these representations **("the Proper Consideration Statements"):**

(1) They were false. In particular, Sarasin Dubai (and/or Mr Blonde and/or Mr Walia) had not properly considered the Claimants' investment requirements or the nature of the products they recommending. Further, Sarasin Dubai (in particular through Mr Blonde and/or Mr Walia) did not believe that the Investments and/or leveraging were suitable for the investment requirements, or was reckless as to whether they were suitable. Paragraphs 7, 12, 17-18, 21, 47, 49, 51, 77-77, 82, 91 and 102-109 above in particular are repeated.

(2) In the premises, the Proper Consideration Statements were made fraudulently. Alternatively in those premises, Sarasin Dubai (and/or Mr Blonde and/or Mr Walia) had no reasonable grounds for believing that its (or their) conclusion as to the suitability of the products was correct, and it was not.

(3) The Proper Consideration Statements were made by Sarasin Dubai (through Mr Blonde and/or Mr Walia) to the Claimants and/or their agents in order to, and did, induce them to enter into the contracts which they subsequently made with Sarasin Switzerland and Sarasin Dubai (and which are set out in more detail above) in reliance on them. As a result of their doing so, the Claimants suffered loss as set out below at paragraph 140.

(4) Accordingly, Sarasin Dubai is liable to the Claimants in damages for their loss for deceit and/or misrepresentation pursuant to Articles 10, 29, 30 and/or 31 of the Law of Obligations 2005. Further or alternatively, Mr Blonde and/or Mr Walia are so liable and Sarasin Dubai (as their employer) is vicariously liable for their conduct pursuant to Article 15(1) of that Law.

(5) Had Sarasin Dubai (and/or Mr Walia and/or Mr Blonde) not breached its (and/or their) obligations to the Claimants as set out above, it would not have recommended the products which it did and the Claimants would not have made the Investments referred to in paragraph 5 above and/or would have suffered smaller losses on them. Pending disclosure, particulars of the losses suffered by the Claimants as a result of the breaches of duty are set out below in paragraph 140.

12. We have considered those paragraphs in the earlier part of the pleading to which cross-reference is made and which must, therefore, be read together with paragraphs 127 and 128. In our judgment, the pleading technique of reference back to paragraphs setting out in narrative and chronological form the relatively complicated factual background in this case is an entirely legitimate method of expressing the factual basis of

a cause of action, whether in deceit or negligence or breach of contract. To have repeated all those factual details for each separate cause of action later in the pleading would have been unacceptably prolix.
13. Further, investigation of those earlier paragraphs to which cross-reference is made in paragraphs 127 and 128 leaves no doubt that the allegations of fact are, if proved, capable of founding the causes of action in deceit and misrepresentation relied on. Whereas, it may be that requests for further information could be made in relation to some of these matters pleaded, what matters is whether those facts *essential* to the foundation of the causes of action have been pleaded. We have no doubt that in respect of each of the allegations of deceit and misrepresentation the essential factual foundation has been set out.
14. Having regard to the fact that the Judge struck out the claims in negligence in the original pleading, it is right to add that we are satisfied that paragraph 133 of the re-amended pleading (to which the First Defendant does not object) adequately pleads allegations of negligence. We are also satisfied that the re-amended pleading adequately pleads the claims for breach of contract and the claim for additional damages under Article 40(2) of the Law of Damages and Remedies 2005.
15. It is further submitted on behalf of the First Defendant that in paragraph 107 of the re-amended pleading there is the heading "Breaches of Statutory Duty by Sarasin Dubai" which ought not to be permitted. This is followed in paragraph 108 and 109 by a very detailed list of those respects in which it is alleged that the First Defendant acted in breach of its regulatory duties. Then in paragraph 110 it is pleaded that these breaches of duty were committed intentionally or recklessly and that therefore the First Defendant is liable under Article 94 of the Regulatory Law to compensate the Claimants for such losses as were caused to them by those breaches of duty.
16. Dr Hoyle submits that in the DIFC Law there is no such thing as a general right to recover damages for breach of statutory duty. If the law does not expressly provide for such a remedy, no such right is available and the reference in paragraph 107 to "Breaches of Statutory Duty" is, therefore, impermissible.
17. This Submission is, in our view, completely misconceived. The words "Breaches of Statutory Duty by Sarasin Dubai" are used as a convenient heading to describe the allegations of breach of the DIFC regulatory regime which appear in the succeeding paragraphs and which are deployed to found the claim for an order for compensation under Article 94 of the Regulatory Law. The only claim in the Prayer, other than for breach of contract, misrepresentation and negligence, in respect of non-compliance with the regulatory regime is the claim under Article 94 of the Regulatory Law. Thus the amended pleading includes no claim for breach of statutory duty at large, but only a claim under Article 94.
18. The First Defendant, however, challenges the whole of that part of the amended pleading which sets out the Claimants' claim for compensation under Article 94. Dr Hoyle argues that this claim is bad in law and that it should be deleted from the amended pleading. This point was fully argued before the Judge who treated the issue as a preliminary issue of law which she decided in favour of the Claimants. The First Defendants now appeal that decision alongside their challenge to the inclusion of this claim in the amended Particulars of Claim.
19. The structure of the claim for breach of provisions of the Regulatory Law, DIFC Law No. 1 of 2004 is as follows:

> (i) failure by the First Defendant intentionally, recklessly or negligently in several distinct respects to comply with the requirements of the Regulatory Law;
> (ii) fraud or other dishonesty by the First Defendant in connection with matters arising under such law;
> (iii) loss and damage thereby caused to the Claimants;
> (iv) the jurisdiction of this Court under Article 94 to order the recovery of damages or for compensation on the application of a person who has suffered loss or damage as a result of such

conduct.

20. The submission by Dr Hoyle on behalf of the First Defendant is that this structure is deficient in one essential respect: stage (i) and stage (ii) cannot be relied upon to found a claim for damages or compensation unless they have first been independently determined as facts by the DFSA in accordance with its own investigatory procedures. Since in the present case there has been no such determination, the claim under Article 94 is bound to fail and must be struck out.

21. Article 94 provides as follows:

> **"94. Civil Proceedings**
>
> (1) Where a person:
>
> (a) intentionally, recklessly or negligently commits a breach of duty, requirement, prohibition, obligation or responsibility imposed under the Law or Rules or other legislation administered by the DFSA; or
>
> (b) commits fraud or other dishonest conduct in connection with a matter arising under such Law, Rules or legislation;
>
> the person is liable to compensate any other person for any loss or damage caused to that other person as a result of such conduct, and otherwise is liable to restore such other person to the position they were in prior to such conduct.
>
> (2) The Court may, on application of the DFSA or of a person who has suffered loss or damage caused as a result of conduct described in Article 94(1), make orders for the recovery of damages or for compensation or for the recovery of property or for any other order as the Court sees fit, except where such liability is excluded under the Law or Rules or other legislation administered by the DFSA."

22. The foundation of this argument is that Article 94 is an essential part of the enforcement regime under the Regulatory Law. Indeed, it is contained in Part 7 of the Regulatory Law which is the section relating to Enforcement. Thus the DFSA is empowered to conduct investigations into contraventions of the legislation it administers and for that purpose to conduct inspections, compulsorily obtain books and records and require individuals to participate in interviews under oath or affirmation. It can further refer any conduct which could constitute a breach of criminal law to the relevant local, Federal or international authority. Therefore, it is argued, the legislative intention underlying Article 94 must have been that in order for the jurisdiction of the DIFC Courts to be engaged there must first have been an investigation of the facts and a determination by the DFSA of intentional, reckless or negligent breach or of fraud or other dishonest conduct. The jurisdiction of this Court would then be confined to determining whether such conduct had caused loss or damage to the applicant and, if so, how much. Were it otherwise, there could be parallel investigations of the material conduct by both the DFSA and the Court with the possibility of inconsistent findings of fact. The availability of that limited jurisdiction could thus facilitate the enforcement of the Regulatory Law without derogating from the powers of the DFSA.

23. It is to be observed that Article 94(2) does not include any words which expressly qualify the reference to the conduct described in Article 94(1) by requiring that such conduct shall have been that determined by the DFSA. Article 94(1) having defined at (a) and (b) the conduct which gives rise to the liability to compensate, Article 94(2) simply specifies the remedy for such conduct both to the DFSA and to a person who has suffered loss and damage caused by such conduct.

24. Further, Article 94(2) also provides the DFSA with a remedy. In order to make good its entitlement to a remedy from the Court, the DFSA clearly has to establish facts which trigger the Courts' jurisdiction. For this purpose that which the DFSA has to establish by evidence must clearly be the very conduct which is said to have caused the loss and damage in respect of which the Court is asked to award damages or compensation. In such a case it is hardly conceivable that the DFSA could engage the Courts' compensatory jurisdiction

merely by establishing that, upon investigation, it had concluded that such conduct had occurred; leaving it to the Court simply to investigate causation and the quantification of damages or compensation.

25. If, as we consider that course was not open to the DFSA, neither could it be a permissible course for a person who claimed to have suffered loss and damage. The evidential route to the exercise of the Courts' compensatory powers must be the same in both cases.

26. It is further to be noted that the Regulatory Law provides for both penal and compensatory remedies in addition to those covered by Article 94. Thus, the primary medium of enforcement of the Regulatory Law is the Financial Markets Tribunal established under Article 1. Before that Tribunal, the DFSA acts as prosecuting authority (Article 33) and under Article 34 the Tribunal is given wide punitive powers as well as the power under Article 34(4)(c) to order the respondent to effect restitution or compensation to any person on such terms as it might direct. This compensatory power is not confined to any prescribed gravity of conduct, but is sufficiently engaged by *any* contravention of the regulatory regime.

27.Further, Article 89 provides the DFSA with the facility of applying to the Court to enforce undertakings which it has required to be given in the course of its enforcement of the Regulatory Law.

28. The provisions to be found in these Articles are not, in our view, inconsistent with Article 94 having the effect determined by the Judge. Whereas the enforcement and compensatory provisions to which we have referred are applicable in all cases of breach of duty under the regulatory regime, the right to apply to the Court under Article 94 is confined to breaches of the regulatory requirements of increased gravity — intentional, reckless or negligent breach or fraud or other dishonest conduct. In such cases we do not find it surprising that the Court should be accorded jurisdiction to award compensation provided that the applicant proves the relevant conduct and the consequent loss. The argument that it is inconceivable that it could have been intended that there could be separate investigations by the Financial Markets Tribunal or DFSA and the Court of the facts giving rise to breach of the regulatory regime becomes, in our view, untenable once it is appreciated that in many cases it may be quite unnecessary for the DFSA or Tribunal in the exercise of their respective regulatory functions to make any findings as to whether the conduct in question amounted to an intentional, reckless, or negligent breach of the regulatory rules. It might well be enough for it to be established merely that there had been conduct in breach and nothing more.

29. We, therefore, agree with the conclusion reached by the Judge that the claim for damages or compensation under Article 94 should not be struck out. On the proper construction of those provisions it is for the Court to determine whether the relevant conduct is intentional, reckless or negligent or involves fraud.

30. The Claimants' appeal against the Order of the Judge that they should provide security for costs in the sum of AED 3 million. RDC 25.101 and 102 provide:

> 19.101 The Court may make an order for security for costs under Rule 25.100 if it is satisfied, having regard to all the circumstances of the case that it is just to make such an order; and
>
> (1) one or more of the conditions in Rule 25.102 applies, or
>
> (2) ....
>
> 19.1012The conditions are —
>
> (1) The claimant is resident out of the UAE;
>
> (2) – (6) .....”
>
> There is no question but that all the Claimants are resident in Kuwait. Accordingly, it was a matter for the discretion of the Judge whether to order security to be provided. This Court will, therefore, only set aside the Judge's exercise of that discretion if satisfied that in exercising her discretion she failed to apply the correct applicable principles.

31. The Judge approached the exercise of her discretion by stating that the issue necessarily rested on the ability of the Claimants to satisfy any costs that might be ordered against the Claimants. She then

investigated the evidence of the Claimants' financial standing, observed that none of the Claimants had filed a statement of means and that the only evidence of the Claimants' assets was in the witness statement of Jonathan Richard Crook, their English solicitor, where he said:

> "The Claimants are of substantial means and are able to meet any future costs liability that they may be ordered to meet"

32. The Judge observed that there was no evidence of any assets within the UAE. She then referred to evidence in the witness statement of Rita Catherine Jaballah, of the First Defendant's solicitors, to the effect that the First Defendant had seven civil and four Municipal Misdemeanours filed against him in the Kuwait Courts and that he was the defendant in two pending civil cases involving mortgage enforcement proceedings against him and in which he had been required to give personal guarantees totalling US$237 million. Further, the Second Claimant was a defendant in four civil suits in the Kuwait Courts and in three mortgage enforcement cases in the Kuwait Courts, in which she was a defendant, she had been obliged to provide personal guarantees totalling US$200 million. The Third Claimant was also defendant in mortgage enforcement proceedings in Kuwait and had also had to put up a personal guarantee for US$96 million.

33. The Judge, also referred to evidence adduced by the First Defendant to show that the enforcement of any foreign judgment on costs in the Kuwait Courts would be capped at US$700, there being no reciprocal enforcement of foreign judgments arrangements between Kuwait and the UAE.

34. The Judge having referred to the US$700 limit, then approached the exercise of her discretion in the following words:

> "73. That may well be so but I am not concerned with the enforcement of any judgment that may or may not be entered against the Claimants at this point of time. What I am concerned is whether the circumstances of this case merit the exercise of my discretion to order security for costs against the Claimants.
>
> 74. I answer that affirmatively as the Claimants have failed to show that they have assets in the UAE which the First Defendant can turn to in the event the Claimants failed to honour any judgment as to costs which may be entered against them.
>
> 75. There is no direct evidence to establish that the Claimants are of substantial means as none of the Claimants have come forwarded with a statement as to their financial standing. Since all the conditions required by RDC 25.101 and 25.102 have been met, the First Defendant succeeds in its application to have security for costs."

35. Mr Kaashif Basit has submitted on behalf of the Claimants that the manner in which the Judge exercised her discretion was wrong in principle.

36. His interesting and well-presented argument may be summarised as follows.

> (i) The Judge was wrong in law in as much as she failed to take into account as a consideration relevant to the exercise of her discretion the ease of enforcement in Kuwait of an Order of the DIFC Courts.
>
> (ii) The Judge wrongly treated as decisive the Claimants' financial situation and in particular their lack of assets in the UAE, whereas this was at most only one of several relevant considerations or was irrelevant except in so far as it would hinder enforcement in Kuwait.
>
> (iii) The Judge was wrong on the evidence before her to conclude that the Claimants were not of substantial means when the First Defendant's evidence showed that the Claimants had all put up very substantial personal guarantees in pending Kuwait litigation and, therefore, must have very substantial means. By comparison with those amounts the total security applied for was relatively small.
>
> (iv) Even if it were open to the Judge to order the Claimants to provide security for costs, her

approach to quantification was wrong in law because the amount ought to have reflected the additional costs of enforcing a judgment in Kuwait and not the full costs of the present proceedings in the DIFC Courts, including the trial. In any event the Order ought to have been staged to provide for future costs as and when they were likely to be incurred.

(v) The Judge failed to consider the discretion under RDC 25.111 to require the First Defendant to give an undertaking in connection with an Order for security for costs despite having been asked by counsel to do so.

37. Underlying Mr Basit's argument, is the submission that RDC 25.109 is worded so as to require consideration not only of the financial standing of the Claimants but also the ease of enforcement of any judgment against them on costs. In this connection Mr Basit draws attention to the evidence before the Judge of Mr Alex Saleh, a lawyer practising in Kuwait, relied on by the First Defendant, that under Article 199 of Kuwait Law No. 38 of 1980 — the Civil and Commercial Procedures Law "CCPL" — it is provided as follows:

199

(1) An order may be issued for the execution, in Kuwait, of an order or judgment that has been rendered in a foreign country, in accordance with the same conditions as those provided for in the laws of that country in respect of the execution of judgments and orders rendered in Kuwait.

(2) An order of execution will be filed in the Al Kulliya Court, in accordance with the established rules laid down for the initiation of a suit; an order of execution may not be issued unless the following matters have been verified:

a. That the judgment or order was rendered by a competent court, in accordance with the law of the country wherein it had been rendered;

b. That the parties to the case; subject matter of the foreign judgment, have been summoned to appear and were duly represented;

c. That the judgment or order has become a res judicata according to the law of the court which rendered it;

d. That the judgment or order is not in conflict with an order or judgment that has already been rendered by a court in Kuwait and does not contain anything which is in violation of morality or public order in Kuwait.

38. It is the evidence of Mr Saleh that foreign judgments will only be enforced in Kuwait if the country from which the judgment is derived has entered into a reciprocal agreement or treaty with Kuwait for the enforcement of judgments or if there is a Kuwaiti Court case law precedent to the effect that there is reciprocity of enforcement as between Kuwait and the foreign state. In this connection Mr Saleh refers to two international agreements to which Kuwait and the UAE are parties namely the Agreement on the Enforcement of Judgments, Letters Rogatory and Service of Process (Decree No.41 of 1996) and the Riyadh Convention (Law No.10 of 2004) which provides for reciprocal enforcement of judgments. However, he expresses the view that, notwithstanding Article 24(2) of the DIFC Courts Law (Law No.10 of 2004) which provides for reciprocal enforcement of judgments, it is very uncertain whether the Kuwaiti Courts would enforce an order for costs of the DIFC Courts because DIFC is not a direct party to any treaty with Kuwait and there is no Kuwaiti precedent of reciprocal enforcement of the judgments of the DIFC Courts. Further, the general practice in the Kuwaiti Courts is to award to a successful litigant only a nominal sum for costs, generally not exceeding 200 Kuwaiti Dinars (US$700). Because a costs order is alien to Kuwaiti practice, it is Mr Saleh's opinion that a Kuwaiti Court might well refuse enforcement.

39. However, Mr Basit relies further on the evidence of the Claimants' expert, Mr Basem Almuthafer, a Kuwaiti advocate, who states that under Article 25 of the Riyadh Convention dealing with the recognition of foreign judgments it is provided that:

"(a) in the application of this Part, judgement means every decision – regardless of nomenclature – made in pursuance of judicial or jurisdictional procedures of any competent authority of any party".

Mr Almuthafer does not accept that to award more than a nominal amount in respect of the costs of a successful party is alien to Kuwaiti judicial practice. He refers to Article 119 of the CCPL which provides as follows:

"The Court will assess the legal fees at the request of the winner within the limit of his demand and in light of the actual costs borne by him and taking into account the subject matter of the claim and the level of proceedings brought before it."

He goes on to state that he has recently acted as an advocate in two cases where the Kuwaiti Courts have made Orders for the payment of the actual costs and further, with reference to Article 32 of the Riyadh Convention, that the Kuwaiti Courts, in accordance with that provision, will not examine the subject matter of a foreign courts' Order but will enforce it in full automatically if it complies with the Convention.

40. Mr Basit submits that, in view of the established process of enforcing DIFC Courts' judgments through an Order of the non-DIFC Dubai Courts, the Order to be enforced in the Kuwait Courts would be an Order of a Court of the UAE — a direct party to both relevant enforcement Conventions.

41. Finally, Mr Basit submits that the exercise of the DIFC Courts' discretion under RDC 25.101 ought to be informed by the judgment of the English Court of Appeal in *Nasser v. United Bank of Kuwait* [2002] 1 WLR 1868 in which it was held as follows:

(i) CPR 25.13 provided that orders for security for costs could only be made against a person who was resident neither inside the jurisdiction nor in a place where a costs claim could not be enforced under the reciprocal enforcement provisions of the Brussels and Lugano Conventions.

(ii) The effect of the Human Rights Act 1998 and in particular Article 6 — the right to a fair trial — was that discrimination on the grounds of national origin was prohibited, which meant that if, as was the case, the foreign claimant's impecuniosity was irrelevant in the case of a claimant in a Brussels or Lugano Convention country, it was impermissible to take impecuniosity into account when the Claimant was in a non-Convention country.

(iii) It followed that impecuniosity of a foreign claimant only became relevant where it precluded or hindered or added to the burden of enforcement abroad against such assets as did exist or where it was evidence of the risk that it was more likely that the claimant would take advantage of any available opportunity to avoid or hinder such enforcement abroad.

42. It is further submitted that, by analogy with the reasoning in the English authorities, the ease of enforcement of a DIFC Courts' Order against a Claimant in a country such as Kuwait which is a party to either of the two Conventions should be taken into account. Further, although the DIFC has no legislation equivalent to the English Human Rights Act, which has an impact on the way in which other legislation should be construed, the Vision of the Ruler of Dubai is in the following terms:

"A strong and effective justice system will bolster security, and the UAE will be diligent in its duty to defend and uphold the rights, interests and freedoms of all. Everyone will benefit from the judiciary's impartiality and its dedication to fairness and justice."

43. Given that basic concept, it is argued that the principles of Article 6 of the European Convention on Human Rights should be applied by this Court to the effect that it should not discriminate between impecunious residents of the UAE, against whom no order for security for costs is permissible, and impecunious non-residents by taking into account impecuniosity in the case of the latter. On that basis, and applying the reasoning in *Nasser*, supra, it is submitted, the First Defendant cannot make any justification for reliance on the financial position of the Claimants. In particular, it is not established that the financial position of any of

them would preclude enforcement or hinder or add to the burden of enforcement and there is no evidence to suggest that any of the Claimants would attempt to hinder enforcement of an order for costs abroad. Accordingly, only the ease or difficulty of enforcement in Kuwait and not the Claimants' financial position could be relevant.

44. As to difficulty of enforcement, the evidence supported the proposition that the Kuwait Courts would readily enforce an Order for costs of the DIFC courts, particularly if it had previously been converted into a judgment of the Dubai Court for the purposes of enforcement.

45. As to the amount of security, it is submitted that, by analogy with the reasoning in *Nasser*, supra, the Judge ought not to have used as a basis the likely costs of the proceedings in the DIFC Courts but the additional costs of enforcement in Kuwait compared with the UAE.

46. There can be no doubt that the words of RDC 25.101 — "if it is satisfied, having regard to all the circumstances of the case that it is just to do so" — give a wide discretion to the Court applicable in relation to each of the RDC 25.102 conditions for granting security for costs. That discretion has, however, to be exercised in accordance with established principles.

47. In this connection, it is important not to lose sight of the underlying purpose of such Orders. This was expressed by Lord Donaldson M.R. in *De Bry v Fitzgerald* [1990] 1 WLR 352 at pages 558 to 559:

> "a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded the costs of the action, he will have real difficulty in enforcing that order."

He further observed:

> "If this difficulty [in enforcing the order] would arise from the impecuniosity of the plaintiff, the court will of course have to take an account of the likelihood of his succeeding in his claim, for it would be a total denial of justice that poverty should bar him from putting forward what is prima facie a good claim."

and continued:

> "If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by significant expenditure of time and money, the defendant should be entitled to security."

48. Such Orders, therefore, have the purpose of protecting a defendant from the injustice that would be caused where, having successfully defeated the claim against him and having recovered an Order for costs against the claimant, he was then left in the position of being unable to enforce that Order. For this reason such Orders may be made against a claimant who is resident abroad and who has no assets within the jurisdiction against which a Costs Order can be executed. In those circumstances the Order for security is intended to remove the risk of irrecoverability of costs under a future order because of the difficulty of enforcing such an order in the foreign jurisdiction. Such difficulty may arise because of the unwillingness or inability of the foreign court to enforce a Costs Order; or because the claimant's assets are or have been made unavailable for execution or for some other reason.

49. It is to be observed that RDC 25.109 reflects this underlying purpose in these words:

> 25.109 An affidavit or witness statement in support of an application for security for costs should deal not only with the residence of the claimant (or other respondent to the application) and the location of his assets but also with the practical difficulties (if any) of enforcing an order for costs against him.

It is thus for defendant (as applicant) to adduce evidence of the place of residence of the claimant (as respondent), the place where his assets are located and of any practical difficulties of enforcing against

him any future order for costs. The claimant may then adduce evidence to the contrary. The burden of establishing facts sufficient to justify an order of security for costs rests on the applicant. If on the whole of the evidence the Court is not persuaded that the burden has been discharged, no Order can be made. It is clear, in our view – both from consideration of principle and from the express terms of RDC 25.109 – that difficulty of enforcement is a material consideration. It follows that in the exercise of her discretion the Judge ought to have had regard to all the evidence on that aspect and to have considered whether and to what extent it weighed in the final decision.

50. At paragraphs 72 and 73 of her judgment, which we have quoted above, the Judge said that she was: "not concerned with the enforcement of any judgment that may or may not be entered against the Claimants at this point of time." What (she was) concerned with "is whether the circumstances of this case merit the exercise of my discretion to order security for costs against the Claimants."
She thus left out of account the entire question of difficulty of enforcement. In our judgment that was contrary to principle and amounted to an incorrect exercise of discretion. It is, therefore, open to this Court to re-consider the application and to determine afresh how the discretion ought to be exercised. We have reached the conclusion that, on the evidence before us, which was that before the Judge, we are not satisfied that the applicant Defendant has established facts which could properly form the basis of an Order for security for costs. There are three reasons which lead us to that view.

51. Firstly, as to proof of difficulty of enforcement, as we have already indicated, there is conflicting evidence in the statements of Mr Saleh and Mr Almuthofer on the question whether an Order for costs made in the DIFC Courts would be readily enforceable in Kuwait. Although the effect of the Riyadh Convention would seem to be that all aspects of the judgments of other members of the Gulf Co-operation Council, including the UAE, will be enforced by the Kuwait Courts, on the evidence before us, we are quite unable to reach any conclusion as to the magnitude of the risk of inability to enforce in Kuwait a Costs Order by this Court. Further, there is no evidence as to what enforcement procedure would have to be employed or how long the process would take or how much it would cost.

52. Secondly, on the evidence before us, it is completely unclear whether the Claimants have available assets in Kuwait or elsewhere.

53. We have not found it necessary to express a view on the interesting question whether the alleged impecuniosity of the Claimants would, of itself, justify an Order for security for costs against them notwithstanding that, as is common ground, there is no legislation in the DIFC of equivalent effect to the Human Rights Act in England. In view of our conclusions as to this insufficiency of the evidence material to a decision on this application it is unnecessary to resolve that fundamental issue in the present case.

54. Thirdly, there is no sufficient evidence of the costs of the Defendant so far incurred or likely to be incurred up to and including the trial. Applicants for security for costs should always provide a detailed schedule showing the breakdown of their total figure for security. Were we otherwise minded to order security for costs, we would be unable to quantify the required amount with any sufficient accuracy.

55. Accordingly, we order as between the Claimant and the First Defendant that:

(1) The Claimants have permission to re-amend their Particulars of Claim in the form of the draft presented to this Court.

(2) There will be no order as to the Claimants' appeal against the Order of the Judge striking out that part of the Particulars of Claim in respect of the claims for misrepresentation and negligence.

(3) The First Defendant's appeal against the Order of the Judge refusing to strike out that part of the original Particulars of Claim in respect of Article 94 of the Regulatory Law is dismissed.

(4) The Claimants' appeal against the Order of the Judge for security for costs is allowed; and that Order is set aside.

(5) There will be liberty to apply on the question of costs.

Issued by
Mark Beer
Registrar
Date of Issue: 26 January 2011
At: 12pm