[(1) Rafed Abdel Mohsen Bader Al Khorafi (2) Amrah Ali Abdel Latif Al Hamad (3) Alia Mohamed Sulaiman Al Rifai v (1) Bank Sarasin-Alpen (ME) Limited (2) Bank J. Safra Sarasin Limited (formerly Bank Sarasin & Co. Ltd) [2015] DIFC CA 008]

Claim No: CA 008/2015

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

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

IN THE COURT OF APPEAL
BEFORE JUSTICE SIR DAVID STEEL, JUSTICE SIR RICHARD FIELD AND H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

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

Claimants/Respondents

and

(1) BANK SARASIN-ALPEN (ME) LIMITED
(2) BANK J. SAFRA SARASIN LIMITED (formerly BANK SARASIN & CO. LTD)

Defendants/Appellants

Hearing: **27-28 November 2016**
Counsel: No representative appeared on behalf of the First Appellant
Hodge Malek QC and Yash Bheeroo instructed by Clifford Chance for the Second Appellant
Richard Hill QC and Sharif Shivji instructed by Hamdan Al Shamsi Lawyers and Legal Consultants for the Respondents
Judgment: **29 January 2017**
Amended Judgment: **22 March 2018**

AMENDED JUDGMENT

Summary of Judgment

The Court of Appeal – Justice Sir Richard Field, with Justice Sir David Steel and H.E. Justice Omar Al Muhairi in agreement – dismissed the appeal with costs to be assessed on the standard basis, if not agreed. The Appellants had appealed against the awards made against them following delivery of the liability judgment on 14 August 2014. However, the appeal of the 1st Appellant ("Sarasin-Alpen") was subsequently abandoned by its liquidator by reason of lack of funds. Accordingly, this appeal judgment concerns the appeal against quantum of the 2nd Appellant ("Bank Sarasin") alone.

Bank Sarasin's **first ground of appeal** was that the judge had effectively ignored the word "direct" in Article 65(2)(b) of the DIFC Regulatory Law.

The Court of Appeal found that the word "direct" in Article 65(2)(b) plainly evidences an intention to limit the loss for which compensation may be ordered under this provision to loss which is *closely causally connected to the payment or transfer in question*. It was not practically possible in the abstract to specify the situations where loss will be a direct result of making a payment or transfer to the counterparty of an unauthorised agreement. Instead, the Court must proceed on a case by case basis deciding on which side of the line the particular loss in issue lies.

Interest payable at an unexceptional rate on borrowed money used to make such a payment where the payee is well aware of the borrowing is a loss that is no less a direct result from the payment than is interest that could have been earned on a payment made from unborrowed money. The judge had not erred in holding (questions of mitigation and scope of duty apart) that the losses sought to be recovered by the Respondents under Heads (B), (C) and (D) were a direct result of the payments made to Bank Sarasin.

Bank Sarasin's **second ground of appeal** was that the judge wrongly rejected the Appellants' contention that the claims for Bank Sarasin and ABK interest and charges fell outside the scope of the Appellants' duty.

The Court of Appeal held that in contrast to the position under Article 94 of the DIFC Regulatory Law, the scope of duty principle has no application to claims for compensation under Article 65(2). Instead, the right to compensation under this provision arises *tout court* upon it being shown that: (i) a Defendant has made an agreement in the course of carrying on a Financial Services Prohibition; (ii) the Claimant has paid money or transferred property to the Defendant under that agreement; and (iii) the Claimant has suffered loss that is a direct result of such payment or transfer.

The Court of Appeal observed that if the scope of duty principle did apply to claims under Article 65 (2) (b), the judge had been correct to hold that the loss for which the Respondents sought compensation was consistent with the duty imposed by the Financial Services Prohibition contained in Article 41 of the Regulatory Law. The duty to abide by the Financial Services Prohibition is plainly a duty imposed to protect individuals such as the Respondents who lack experience of and expertise in assessing the risks and suitability of investment products. Further, as found by this Court in upholding the judge's decision that Bank Sarasin had breached the Financial Services Prohibition by advising the Respondents on the Notes, Bank Sarasin, through representatives of Sarasin-Alpen, steered the Respondents into purchasing the Notes when such investments were wholly unsuitable given the Respondents' stated requirements. Accordingly, adopting the approach of Rix LJ in *Rubenstein*, the compensation Bank Sarasin had been ordered to pay was consistent with the duty it owed to the Respondents not to conclude agreements in the course of acting in breach of the Financial Services Prohibition.

Bank Sarasin's **third ground of appeal** was that the judge had erred in failing to hold that the Respondents' failure to repay their borrowings from ABK and CBK was a failure to mitigate their losses that broke the chain of causation and/or rendered those losses too remote to be a direct result of the payments made for the Notes.

The Court of Appeal held that it was plain that when the judge said in paragraph 77, "there was still no evidence that the Claimants or any of them were in a position to repay the Sarasin loans before or after close-out…[or] to repay the ABK loans and facilities in full following close-out" he meant there was no evidence that the Claimants had available assets that they ought reasonably to have used to repay the ABK borrowings of USD 107 million at the time the Notes were purchased or the remaining USD 60 million in the period from the end of the close-out in December 2009. This was so because the judge would have been well aware that the Respondents had valuable assets many of which were securing their liabilities to ABK. He would also have been well aware that: (i) asset values had fallen and had remained diminished world-wide for a number of years following the Lehmann Brothers insolvency in September 2008; and (ii) there would be considerable costs implications in selling large blocks of shares to repay borrowings. Further, the Appellants had made no application for specific disclosure of documents relevant to the availability of assets the Respondents ought reasonably to have used to pay off the ABK borrowings. In these circumstances, the burden was on the Appellants to establish not simply that the Respondents had substantial assets but by reference to specific assets at specific times they had unreasonably failed to use the same to pay off the loans. However, the questions put to Mr Khorafi tended to be somewhat unfocussed and made no distinction between the position in December 2014 when, on the evidence of their lawyers, the Respondents would have been able to repay the USD 10.4 million damages under Head (A) if they lost the liability appeal, and the much earlier position starting from December 2009 when USD 60 million was owed to ABK.

The judge's finding that there was no evidence that the Respondents or any of them were in a position to repay the loans was a finding of fact and Bank Sarasin's case on this ground of appeal fell well short of what is required before this Court will substitute its own finding that the Respondents failed reasonably to mitigate its losses for the judge's finding to the contrary.

The duty to take reasonable steps to mitigate loss is a freestanding limitation on the scope of recoverable damages and it is neither necessary nor appropriate to analyse failures to mitigate in terms of foreseeability. Thus, if, as here, a Defendant fails to discharge the burden of proving that a Claimant failed to take reasonable steps of mitigation that is an end of the matter and the question of what was and was not foreseeable does not enter into the enquiry.

Bank Sarasin's **fourth ground of appeal** was that it was not open to the judge to allow the Respondents to claim as part of the Head (B) losses the interest charged on the USD 30 million borrowed by Mr Khorafi from Bank Sarasin which in part financed the purchase of the Calyon Witch Hat Note, an investment that was quite separate from the Notes purchased by the Respondents.

The Court of Appeal held that in calculating their total loss, the Respondents had proceeded on the basis that all the investments purchased with borrowed money should be unwound with credit given to the Appellants where an unwound investment had been profitable. Credit for the profit made on the Calyon Witch Hat Note (USD 162,380) was accordingly given in the calculation of the Head (A) losses. However, the USD 158,160 interest charges incurred on Mr Khorafi's USD 30 million facility from Bank Sarasin which financed the purchase of the Calyon Witch Hat Note were not included in Head (B).

The judge was well entitled, pursuant to his powers to do practical justice, to include the USD 158,160 interest charges in the Head (B) losses.

Bank Sarasin's **fifth ground of appeal** was that the judge erred in accepting the certificate of the Head of the Capital Execution Department of the Kuwait Ministry of Justice as sufficient proof by the Respondents that the interest due on the Mrs Al Rifai's guarantee account with ABK was the equivalent of USD 6,377,957.616 as at 19 September 2014.

The Court of Appeal held that although the Appellants made complaints to the judge about the Respondents' failure to disclose the bank statements in interlocutory hearings, they made no application for an order requiring specific disclosure of these documents; nor, as stated by the judge in paragraph 122 of the quantum judgment, did they run a case of selective disclosure at the quantum hearing. Further, the guarantee contract providing for a default rate of interest of 4% over LIBOR was before the Court and there was no dispute as to the authenticity of the certificate from the Capital Execution Department of the Kuwait Ministry of Justice. In these circumstances, the judge was well entitled to accept the certificate as reliable evidence as to the interest due on the ABK guarantee account.

ORDER

UPON hearing Counsel for the Second Appellant and Counsel for the Respondents on 27-28 November 2016

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1.The Appeal be dismissed.

2. Costs be awarded to the Respondents on the standard basis, to be assessed if not agreed.

Issued by:
Natasha Bakirci
Assistant Registrar
Date of Issue: 29 January 2017
Date of Reissue: 22 March 2018
At: 10am

JUSTICE SIR RICHARD FIELD:

Introduction

1. The appeal against quantum dealt with in this judgment constitutes the final chapter in proceedings begun as long ago as 2009 in which the Respondents claimed compensation for losses incurred as a result of purchasing wholly unsuitable investments on the advice and through the instrumentality of the Appellants.

2. The First Appellant ("Sarasin-Alpen") is a company incorporated in the DIFC which is now in liquidation. It was a joint venture between the Second Appellant, a Swiss Bank ("Bank Sarasin"), which owned 60% of its shares, and a Jersey company, Alpen Corporation Ltd ("Alpen"), which owned the remaining 40% of the shares. Under a shareholders' agreement, Sarasin-Alpen was given the exclusive right to market Bank Sarasin private banking products in the Middle East and the Asian sub-continent. Bank Sarasin also delegated to Sarasin-Alpen the role of introducing clients to Bank Sarasin and investigating their background.

3. At all material times Sarasin-Alpen was licensed and regulated by the Dubai Financial Services Authority (the "DFSA") as an Authorised Firm pursuant to DIFC Law No.1 of 2004 (the "Regulatory Law) with authority to: (i) arrange credit or dealings in investments; (ii) advise on financial products and/or credit; (iii) and arrange custody.

4. Bank Sarasin, on the other hand, was not authorised by the DFSA to provide any financial services within the DIFC.

5. As found by the then Deputy Chief Justice Sir John Chadwick (the "judge") in a judgment dated 21 August 2014[1] (the "liability judgment"), the Respondents, members of a wealthy Kuwaiti family, decided in 2007 to explore the possibility of making investments outside Kuwait financed by borrowing against uncommitted assets. They were told by Al Ahli Bank Kuwait ("ABK") that it would lend money for this purpose on condition that the funds advanced were used to purchase capital guaranteed investment products with an AA or higher rated bank. ABK introduced the Respondents to representatives of Sarasin-Alpen who were told by the Respondents that they wanted to invest money borrowed from ABK in investment products that would guarantee a 100% return on maturity and provide sufficient income to service the interest payable to ABK leaving over an element of surplus. The Sarasin-Alpen representatives assured the Respondents that Sarasin-Alpen could offer structured investment products in the nature of derivative instruments that would meet these requirements. Acting on Sarasin-Alpen's advice, the Respondents proceeded to purchase 3 tranches of structured financial products (the "Notes") from Bank Sarasin using USD 200 million borrowed in part from ABK and in part from Bank Sarasin itself.

6. The first tranche (the “REIT Notes”) was purchased on 28 June 2007 by the First Respondent (“Mr Al Khorafi”) and the Second Respondent, Mr Al Khorafi’s mother (“Mrs Al Hamad”). Mr Khorafi invested USD 30 million and Mrs Al Hamad invested USD 50 million. Each of them borrowed the purchase monies from ABK with which they had opened accounts.
7. On 24 July 2007, the second tranche of Notes (the “July 2007 SaraFloor Notes”) was purchased on Mrs Al Hamad’s behalf by Mr Al Khorafi, in whose favour Mrs Al Hamad had granted a power of attorney. The total purchase price was USD 100 million which was financed under a credit facility agreement made between Mrs Al Hamad and Bank Sarasin.
8. On 10 September 2007, Mr Al Khorafi purchased a further investment (the “Calyon Witch Hat Note) which was quite separate from the Notes purchased from Bank Sarasin.
9. The third tranche of Notes (the “February 2008 SaraFloor Notes”) was purchased in February 2008 by the Third Respondent (“Mrs Al Rifai”), who is Mr Khorafi’s wife. The total cost of this investment was USD 10 million financed by lending from both ABK and Bank Sarasin.
10. Each of Mr Al Khorafi, Mrs Al Hamad and Mrs Rifai entered into credit facility agreements with Bank Sarasin. The credit facilities made available to Mr Al Khorafi were under agreements dated 21 June 2007, 5 September 2007 and 20 December 2007, as revised by a letter dated 12 February 2008 reducing the amount of the facility to USD 51,600,000. Mrs Al Hamad’s credit facility agreement was dated 20 July 2007, as revised by a letter dated 26 July 2007 increasing the limit to USD 135 million. Mrs Al Rifai’s facility agreement was dated 12 February 2008 for an amount of USD 50 million.
11. Each of these credit facility agreements between the Respondents and Bank Sarasin stipulated for the provision of pledged assets held by Bank Sarasin as collateral which had to cover the “lending value”, namely the value of the collateral, minus margin, the margin being determinable by Bank Sarasin in its absolute discretion with a right to adjust it in line with prevailing conditions at any time without prior notice.
12. Each of the Respondents signed pledge agreements in favour of Bank Sarasin as collateral for their liabilities to the bank; and pledges given by Mr Khorafi on 26 July 2007 and Mrs Al Rifai on 5 April 2008 additionally covered, in the former case, claims Bank Sarasin had against Mrs Al Hamad, and in the latter case, claims Bank Sarasin had against Mr Khorafi.
13. On 29 September 2008, Bank Sarasin made a margin call against the accounts of Mrs Al Hamad and Mrs Al Rifai in relation respectively to USD 5,077,977 and USD 3,423,353. Payment was requested by 17 October 2008 at the latest. On 7 October 2008, the Respondents were informed by letter that the 17 October 2008 deadline no longer applied and payment had to be made by 8 October 2008. The Respondents failed to pay the margin demanded and on 8 October 2008 Bank Sarasin closed out the Notes held by each of the Respondents in accordance with the cross-collaterisation resulting from the pledges each had given to Bank Sarasin.
14. The closing out of the investments caused the Respondents substantial loss on their investments including fees and interest payable to Bank Sarasin and ABK.
15. On 23 September 2010, parts of Mr Khorafi’s and Mrs Al Hamad’s accounts with ABK were refinanced by a new loan in the amount of KWD 10.8 million from Commercial Bank of Kuwait (“CBK”).

16. In their claim against Sarasin-Alpen, the Respondents contended, inter alia[2], that: (i) Sarasin-Alpen had failed to carry out a sufficient investigation to satisfy themselves that the Respondents qualified as “Clients” as required by Rules 3.2.1 to 3.2.6 of the DFSA Conduct of Business Rules (“COB”); (ii) in advising the Respondents in respect of their purchase of the Notes, Sarasin-Alpen had failed, in breach of COB 6.2.1 (1), to give suitable advice having regard to the Respondents’ investment objectives and risk tolerance; and (iii) by reason of these breaches of DFSA regulations, the Respondents were entitled to be compensated by Sarasin-Alpen in respect of their losses pursuant to Article 94(1) & (2) of the Regulatory Law.

17. In their claim against Bank Sarasin, the Respondents contended, inter alia[3], that: (i) Bank Sarasin had itself, both through the actions of its own staff and the action of certain representatives of Sarasin Alpen, provided Financial Services in or from the DIFC in breach of the Financial Services Prohibition provided for in Article 41 of the Regulatory Law; and (ii) by reason of this breach of Article 41 the Respondents were entitled to an order that Bank-Sarasin should pay compensation pursuant to Article 65(2)(b) of the Regulatory Law.

18. Articles 65(1) & (2) and 94 of the Regulatory Law provide:

> "65(1) Subject to Article 65(5), a person who makes an agreement in the course of carrying on a Financial Service in breach of the Financial Services Prohibition or the Collective Investment Prohibitions, or who makes an agreement as a result of the making by himself or another person of a Financial Promotion which is in breach of the Financial Promotions Prohibition shall not be entitled to enforce such agreement against any party (a "relevant party") to the agreement.
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> 65(2) Subject to any agreement that may otherwise be reached between the parties, a relevant party may apply to the Court to recover: (a) any money paid or property transferred by him under the agreement; (b) compensation reflecting any loss sustained by the relevant party as a direct result of such payment or transfer; and (c) compensation for an amount becoming due that is dependent upon a contingency occurring under the relevant agreement, provided that such contingency shall have occurred prior to the relevant party being notified by the other party or by the DFSA that the agreement has been entered into in breach of the Financial Services Prohibition, the Collective Investment Prohibitions or the Financial Promotions Prohibition.
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> …
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> 94(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.
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> 94(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."

19. The judge upheld the Respondents' claims. He found that Sarasin-Alpen were not permitted under the Regulatory Law to treat the Respondents as "Clients" and conduct Investment Business on any of their behalves on the grounds that (i) the Respondents had not confirmed in writing that they each had USD 1 million in liquid assets; and (ii) Sarasin-Alpen did not have information which, on analysis, showed that the Respondents had sufficient financial experience and understanding to participate in financial markets. The judge also found that Sarasin-Alpen had given advice to the Respondents as to investments and credit and in doing so had failed to give suitable advice in that the Notes were entirely unsuited to the Respondents' expressed requirements because, in particular, their leveraging exposed the Respondents to the risk of margin calls which, due to the cross-collaterisation resulting from the pledges given to Bank-Sarasin, put all the Respondents' investments at risk. The judge further decided that the Respondents were entitled to an order under Article 94(1) & (2) of the Regulatory Law that they be compensated by Sarasin-Alpen in that the breach of COB 3.2.1 to 3.2.6 had been intentional[4] and the breach of COB 6.2.1(1) had been reckless. All of these findings were upheld by the Court of Appeal in its judgment dated 3 March 2016 (the "Court of Appeal Judgment").

20. The judge further held that the losses claimed against Sarasin-Alpen, namely: (i) those suffered on the sale

of the Respondents' investments with Bank Sarasin on the close-out; (ii) other fees and interest charged by Bank Sarasin; and (iii) other fees and interest charged by ABK, were caused as a result of Sarasin Alpen's breaches of COB 3.2.1-3.2.6 and COB 6.2.1(1). In reaching this conclusion the judge rejected[5] the Appellants' assertion that if Sarasin-Alpen had not committed these breaches of the DFSA Regulations, the Respondents would still have purchased the same or similar Notes and thus the Respondents had suffered no loss by reason of the alleged DFSA regulatory breaches. In the judge's view, there was no evidence to support this assertion; this was therefore a "nil transaction" case.

21. The judge also rejected[6] the Appellants' contention that the cause of the losses claimed was the Respondents' "unreasonable and "irrational" failure to pay the margin calls made by Sarasin-Alpen. He concluded that there was no evidence to support the proposition that the Respondents were in a position to meet the margin calls when made and within the time set by Bank Sarasin. Further, the calls had been made against Mrs Al Hamad and Mrs Al Rifai (there was no margin call against Mr Khorafi), yet in consequence of the cross-collaterisation under the pledges given to Bank Sarasin, all the Notes (including the REIT Notes held by Mr Khorafi) were closed-out on 24 hours' notice. This finding was upheld by the Court of Appeal in its judgment dated 3 March 2016.

22. Turning to the claim against Bank Sarasin, the judge found that, in breach of Article 41 of the Regulatory Law, Bank Sarasin had carried on the following Financial Services in or from the DIFC: (i) Dealing in Investments as Principal; (ii) Arranging Credit and/or Dealing in Investments; (iii) Advising on Financial Products and Credit; and (iv) Arranging Custody.

23. The Court of Appeal overruled findings (ii) and (iv) but upheld findings (i) and (iii).

24. In addition, the judge found that the Court should make an order for compensation pursuant to Article 65(2)(b) of the Regulatory Law. In making this finding he rejected a submission that Bank Sarasin had acted in good faith, reasonably believing that it was not in breach of the Financial Services Prohibition because it had acted in reliance of legal advice regarding the regulatory regime in the DIFC and the structure of its joint venture with Alpen Capital. The judge rejected this submission in light of Bank Sarasin's refusal to disclose the legal advice received on grounds of legal professional privilege.

25. In paragraphs 400 and 401 of the liability judgment, the judge rehearsed the Appellants' submission that there was an insufficient causal link between: (i) the original loan monies advanced by ABK; (ii) the investments in the Notes purchased by the Respondents; and (iii) the leveraging provided by Bank Sarasin, to satisfy the requirement that the losses were "sustained…as a direct result of the payments made by the [Respondents] to Bank Sarasin".

26. The judge then proceeded to state in paragraph 403 that he was satisfied that Bank Sarasin dealt with the Respondents in breach of the Financial Services Provision and that the Court should make an order for compensation pursuant to Article 65 (2)(b).

The Appellants' quantum appeals

27. Following delivery of the liability judgment on 14 August 2014, by an order issued on 28 October 2014 (the "28 October 2014 Order") and a further order issued on 3 November 2015 (the "3 November 2015 Order") consequent on the judge's judgment on quantum dated 7 October 2015 (the "quantum judgment"), the judge awarded the Respondents compensation in respect of a range of alleged losses held to be consequent on the aforesaid regulatory breaches committed by the Appellants. Included in the damages ordered to be paid by Sarasin-Alpen was the sum of USD 35,028,474 by way of additional damages awarded under Article 40(2) of the Law of Remedies and Damages (DIFC Law No 7 of 2005). Both Appellants appealed against the awards made against them with permission granted by the Chief Justice. However, Sarasin-Alpen's appeal was subsequently abandoned by its liquidator by reason of lack of funds. Accordingly, it is with Bank Sarasin's quantum appeal alone that this judgment is concerned.

The Award made under the 28 October 2014 Order

28. Under this award, Bank Sarasin was ordered to pay jointly and severally with Sarasin-Alpen the following amounts (respectively) to Mr Al Khorafi, Mrs Al Hamad and Mrs Al Rifai in respect of losses on the sale of the Respondents' investments in the Notes when the same were closed out by Bank Sarasin: USD 1,263,549; USD 8,540,000 and USD 641,500. The head of loss compensated by this award is hereinafter referred to as "Head (A)", this being the designation adopted by the judge in the quantum judgment and the 3 November 2015 Order. In the event, Bank Sarasin did not proceed with its appeal against this order.

The Awards made by the judgment on quantum dated 7 October 2015 and the 3 November 2015 Order

29. In his judgment on quantum dated 7 October 2015 and by the 3 November 2015 Order, the judge made the following awards to the Respondents against the Appellants jointly and severally in respect of: fees and interest charged to the Respondents by Bank Sarasin (Head (B)); fees and interest charged to the Respondents by ABK down to 18 September 2014 (Head (C)); and the interest charged to the Respondents by CBK after 18 September 2014 (Head (D)):

	Head (B) USD	Head (C) USD	Head (D) USD	Heads (B)+(C)+(D) USD
Mr Al Khorafi	1,225,160	3,454,172	0	4,679,332
Mrs Al Hamad	5,794,885	4,664,897	2,526,709	12,986,491
Mrs Al Rifai	1,443,972	5,473,630	0	6,917,602
All Claimants	8,464,017	13,592,699	2,526,709	24,583,425

30. As recorded above, the judge also ordered Sarasin-Alpen alone to pay USD 35,028,474 by way of additional damages awarded under Article 40(2) of the Law of Remedies and Damages.

31. At the quantum hearing, the Appellants contended on procedural grounds that the Respondents' claims for compensation in respect of Heads (B), (C) and (D) were inadmissible. The judge rejected this contention and Bank Sarasin wisely abandoned its appeal against this part of the quantum judgment.

32. The judge dealt with the claims against Bank Sarasin in paragraphs 64 – 88 of the quantum judgment. In paragraph 69 he held that the right to apply to the Court for compensation under Article 65(2)(b) of the Regulatory Law is independent of the right to apply under Article 65(2)(a) for the recovery of money paid or property transferred under an agreement that is unenforceable on the ground that it was made in breach of the Article 41 Financial Services Prohibition. This finding in my judgment was undoubtedly correct and was not challenged in the appeal.

33. The judge further held[7] that the transfer of monies from: (i) ABK to Bank Sarasin to fund the purchase of the REIT Notes by Mr Khorafi and Mrs Al Hamad; and (ii) from Bank Sarasin to fund Mrs Al Hamad's purchase of the July 2007 SaraFloor Notes and Mrs Al Rifai's purchase of the February 2008 SaraFloor Notes, were relevant transfers for the purposes of Article 65(2)(b) and that, subject to a number of specific defences that remained to be dealt with, the Respondents could recover compensation in respect of the actual borrowing costs of these monies. In the judge's view, if and to the extent that the inclusion of the word "direct" in Article 65(2)(b) suggested that in some cases the necessary causal link may be narrower under the Regulatory Law than under the Financial Services Markets Act 2000[8] (which he doubted), on the facts of the present case the word "direct" added nothing, it being the case that Bank Sarasin knew that the monies transferred to fund the purchases of all three tranches of the Notes were monies that had been borrowed by the Respondents for the specific purpose of making those purchases.

34. In paragraph 72, for the reasons he had given earlier in dealing with the claims against Sarasin-Alpen, the judge rejected Bank Sarasin's submissions that the claims for compensation under Heads (B), (C) and (D) should fail on the grounds that the losses involved fell outside the scope of the duties in respect of which Bank

Sarasin was held to have been in breach, or were too remote.

35. When dealing with Sarasin-Alpen's submission that the losses claimed against it were too remote and/or fell outside the scope of the duties breached, the judge made reference to the decision of the House of Lords in *South Australia Asset Management Corporation v York Montague* [1997] AC 191 (*"SAAMCO"*) and the judgments of Rix LJ in *Rubenstein v HSBC* [2012] EWCA Civ 1184 and *Zaki v Credit Suisse (UK) Ltd* [2013] Civ 14.

36. The issue in *SAAMCO* was whether a lender who had advanced money in reliance on a negligent over-valuation of property taken as security could recover damages from the valuer that reflected a fall in the market value of the property rather than just the difference between the negligent over-valuation and the valuation a competent valuer would have given.

37. This was a "nil transaction" case in that the lender would not have advanced the loan if the property had been competently valued.

38. In giving the principal judgment in the House of Lords, Lord Hoffmann said:

> "[14] A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by **Caparo Industries Plc. v. Dickman** [1990] 2 A.C. 605. The auditors' failure to use reasonable care in auditing the company's statutory accounts was a breach of their duty of care. But they were not liable to an outside take-over bidder because the duty was not owed to him. Nor were they liable to shareholders who had bought more shares in reliance on the accounts because, although they were owed a duty of care, it was in their capacity as members of the company and not in the capacity (which they shared with everyone else) of potential buyers of its shares. Accordingly, the duty which they were owed was not in respect of loss which they might suffer by buying its shares. As Lord Bridge of Harwich said, at p. 627: 'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.' In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed.
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> [15] How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: **Gorris v. Scott** (1874) L.R. 9 Ex. 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. Most of the judgments in the **Caparo** case are occupied in examining the Companies Act 1985 to ascertain the purpose of the auditor's duty to take care that the statutory accounts comply with the Act. In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies."

39. Later in his judgment, Lord Hoffmann gave the now famous example of a mountaineer about to undertake a difficult climb who, concerned about the fitness of his knee, goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee, in the course of which he suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee. Lord Hoffmann said that the doctor should not be liable for the mountaineer's injury, even though the mountaineer would not have gone on the expedition if he had been competently advised as to the state of his knee, because there is no sufficient connection between the subject matter of the duty and the injury. The doctor was asked for information on only one of the considerations which might affect the safety of the mountaineer on the expedition. There was no reason of policy which required that the negligence of the

doctor should require the transfer to him of all the foreseeable risks of the expedition.

40. In *Rubenstein*, the Defendant bank was found to have acted in breach, inter alia, of the UK Financial Services Authority's COB regulations 5.3.5 and 5.3.4 that required an authorised firm to ensure that advice given on investments was suitable for the client and not to make a personal recommendation of a transaction unless reasonable steps had been taken to ensure that the private client understood the risks involved. The Claimant had asked for advice on the investment of the proceeds due on the sale of his house. The adviser, a Mr Marsden, was told by the Claimant that he and his wife could not accept any risk as to principal and they were unlikely to need an account for more than a year, probably less. Mr Marsden suggested an investment in a Premier Access Bond (PAB) which would involve the purchase of units in AIG's Enhanced Variable Rate Fund (EVRF). He said this investment would be the same as cash deposited in one of the bank's deposit accounts. Acting on this advice, in September 2005 the Claimant invested GBP 1.25 million in an EVRF PAB but the advice was unsuitable because the EVRF invested in the market and so, unlike a deposit, the PAB was subject to market fluctuations. The Claimant's investment was still in place at the time of the failure of Lehmann Brothers in September 2008 and as a result of the ensuing financial crisis he made a substantial loss.

41. Section 50(1) of the Financial Services and Markets Act 2000 provides that a contravention by an authorised person of a rule is actionable at the suit of a private person who suffers as a result of the contravention subject to the defences and other incidents applying to actions for breach of duty. The issue before the England and Wales Court of Appeal ("EWCA") was whether the trial judge was correct to deny the Claimant compensation on the grounds that the Claimant's loss had been unforeseeable and too remote, and had not been caused by Mr Marsden's negligent recommendation but by the extraordinary and unprecedented financial turmoil which followed the collapse of Lehman Brothers. The EWCA overturned the decision of the trial judge and held that the Claimant was entitled to be compensated for the losses he had suffered. In the course of delivering the main judgment with which the other members of the court agreed, Rix LJ referred to Lord Hoffmann's mountaineer example:

> "[103] But what does the mountaineer's example teach us in the present case? An investment adviser, with his statutory duties of various kinds, owed to a consumer as a result of the latter's statutory status as a private person, who as adviser recommends a particular investment, which he must take care to be suitable for his client and, if a packaged investment, to be the "most suitable" on the adviser's menu, may well be responsible if some flaw in the investment turns out materially to contribute to some investment loss. The doctor did not advise, let alone recommend, his patient to go mountaineering: he merely told him that his knee was in good shape. Mr Marsden, however, not only advised Mr Rubenstein on the investment of his capital, he recommended a particular investment. He, so to speak, put him in it. If such an investment goes wrong, there will nearly always be other causes (bad management, bad markets, fraud, political change etc): but it will be an exercise in legal judgment to decide whether some change in markets is so extraneous to the validity of the investment advice as to absolve the adviser for failing to carry out his duty or duties on the basis that the result was not within the scope of those duties."

42. Rix LJ then went on to say:

> "[114] …. As Lord Hoffmann pointed out in **SAAMCO** in the passage cited above at [45], in a case of statutory duty the question as to scope of duty is to be answered by reference to the statute itself, and in such a context the position in negligence and contract will fall in behind the statutorily discerned purpose. If, however, the position in tort or contract, absent the context of statutory duty, might lead to a separate result, as it might, there seems to me to be no profit in considering that position first in a case where breach of statutory duty has been established. To do so increases the risk of error.
>
> [115] In the present case, therefore, it seems reasonably clear that the statutory purpose of the COB

regime pursuant to FSMA is to afford a measure of carefully balanced consumer protection to the "private person". That purpose is elucidated not only by the content of the COB rules themselves, but also by section 2 of FSMA, which speaks of "the protection of consumers", ie "securing the appropriate degree of protection for consumers" (section 2(2)(c) and section 5(1)) as among the regulatory objectives. The rules to be created by the regulatory authority are to be informed by a proper regard for "the differing degrees of risk involved in different kinds of investment…the need that consumers may have for advice and accurate information…the general principle that consumers should take responsibility for their decisions" (see section 5(2)). In the present case it is not suggested on this appeal (although it was at trial) that Mr Rubenstein is seeking to avoid responsibility for his decisions. These basic principles and purposes are reflected in the imposition under the COB rules of onerous duties (albeit in a well conducted operation these should not be difficult to achieve and they are couched for the most part in terms of "reasonable care") designed to ensure that the investment adviser understands his client and his client understands risk. Of course, much investment business is conducted with investors who are familiar, even expert, in investment markets. But in the present context of Mr Rubenstein and HSBC we are dealing with a consumer on the one side and an expert on the other.

[118] …Against the background of the facts found and of the origin of the transaction, and the scope of HSBC's duties, what connected the erroneous advice and the loss was the combination of putting Mr Rubenstein into a fund which was subject to market losses while at the same time misleading him by telling him that his investment was the same as a cash deposit, when it was not. Therefore, the correct selection of the cause of Mr Rubenstein's loss was the loss in value of the assets in which the EVRF (but not the SVRF) was invested. Therefore, unlike the case of the mountaineer's knee, advice and the loss were not disconnected by an unforeseeable event beyond the scope of the bank's duty. It was the bank's duty to protect Mr Rubenstein from exposure to market forces when he made clear that he wanted an investment which was without any risk (and when the bank told him that his investment was the same as a cash deposit). It is wrong in such a context to say that when the risk from exposure to market forces arises, the bank is free of responsibility because the incidence of market loss was unexpected."

[121] …Finally, the whole purpose of COB was to protect the consumer from a failure to understand risk. If Mr Marsden had done his duty, for instance by warning Mr Rubenstein that, because his investment was not like cash, its safety depended on the financial weather, then Mr Rubenstein would have either been on the qui vive for more advice, which he had been told he would not need, or, as was still more likely, he would have queried the investment, and that would have led to reformulated advice, or he would not have proceeded with the recommended investment.

[122] The question remains: if the scope of the bank's duty is not set by Mr Rubenstein's own timescale of up to one year, then what is it set by? Three years, ten years, twenty years? It is a good question, with some reminiscence of a similar question posed by Lord Hoffmann with respect to the length of the follow-on fixture in The Achilleas. Nevertheless, I consider that the question is answered by the factors mentioned above: and in any event, a period of three years is, in terms of a "cash" deposit, not significantly different from an indefinite period of about a year.

[123] Ultimately, the question of remoteness (at any rate in a contractual setting, which Lord Reid in **The Heron II** suggested was the more restricted one, because a claimant could stipulate contractually for his own protection) is a matter of the reasonable contemplation of the parties. In the context of statutory protection for the consumer, it seems to me that a bank must reasonably contemplate that, if it misleads its client as to the nature of its recommended investment, and thereby puts its client into an investment which is unsuitable for him, when it could just as easily have recommended something more suitable which would have avoided the loss in question, then it may well be liable for that loss. Lord Reid

contemplated, but he was thinking in the context of merchants, that a claimant could stipulate for his own protection. However, what may be true of merchants is not likely to be true of consumers. In effect the obligation of explaining matters properly to its clients is put by statute on the advising expert. In such circumstances, if HSBC is to be protected by some relevant, albeit indefinite, time limit for its advice, then perhaps the obligation of making that limitation clear rests on the recommending expert, not on the misled consumer.

[124] Where the obligation of a defendant is not merely to avoid injuring his claimant but to protect him from the very kind of misfortune which has come about, it is not helpful to make fine distinctions between foreseeable events which are unusual, most unusual, or of negligible account (cf Lord Reid in **The Heron II**). Whether the test of remoteness is expressed in the classic terms found in the leading authorities, or has to reflect that sense of balance (an exercise in judgment) to which Lord Hoffmann referred in **SAAMCO** at 212E (see [101] above), or has to take account of the manner in which the scope of duty may extend responsibility for even unusual events (see Supershield, cited at [108]-[109] above), in my judgment it should not be said that the loss which Mr Rubenstein has suffered by reason of HSBC's breach is to be regarded as too remote."

43. In *Zaki*, a Mr Zeid bought ten yield enhanced Notes from the Defendant bank (the "bank") that were linked to stock market indices or individual stocks. These investments were leveraged by loans made to Mr Zeid by the bank. Later, following the collapse of Lehmann Brothers, Mr Zeid failed to meet a margin call and the bank closed out all his positions resulting in a loss of US$ 69.4 million. Mr Zeid sued the bank for compensation contending that in respect of the first seven of the notes the bank was in breach of the statutory duties imposed by UK COB 5.3.5 to ensure that its advice as to the notes was suitable for him as a client and by UK COB 7.9.3 not to lend money to a private customer unless, inter alia, it assessed the client's financial standing based on information provided by him and took reasonable care to ensure that the arrangements for the loan and the amount concerned were suitable for the type of transaction proposed. Notes 8-10 were covered by UK COB 7.9.3 and UK COBS[9]2.1 which obliged the bank to take reasonable steps to ensure that a personal recommendation was suitable for its client. Upon Mr Zeid's death, his widow, Soheir Ahmed Zaki, took over the action.

44. The trial judge rejected the Claimant's claim, holding that it had not been established that Mr Zeid had been given unsuitable advice concerning the first seven notes and, although the advice concerning notes 8, 9 &10 was unsuitable and therefore in breach of UK COBS 9.2.1, Mr Zeid would have made the same investments even if there had been no breach of that regulation.

45. The Claimant's appeal against the judge's decision in respect of the first seven notes was dismissed on the basis that the trial judge had been entitled to find as he did that there had been no breach of UK COB 5.3.5; further, the attempt by counsel for the Appellant to open up the question of the suitability of the leverage provided on notes 1-7 on any issue of liquidity, as a matter of fact, was being beyond the scope of the appeal.

46. However, in paragraphs [103] to [107] of his judgment, Rix LJ considered (obiter) what would have been the position if there had been a breach of UK COB 7.9.3.

"[103] However, even if there had been some breach of either sub-rule (1) or (2) of COB 7.9.3, or if there might in theory have had to be a remission to the trial court to investigate the question of such breach further, additional matters are relied upon by the bank as making any success for the appellants beyond their reach. The bank submits that the judge has made conclusive findings against Mr Zeid on causation. The bank also submits that any liability in damages would either lie outside the scope of the statutory duties concerned or be limited, for instance to the extent that the lending exceeded suitable leverage. Finally, the bank relies on contributory negligence. I regard this passage of my judgment as being obiter.

[104] As for causation, this could in theory constitute an entirely separate ground for dismissing this

appeal. Although the judge did not think it was necessary to make any finding as to causation with respect to notes 1-7, Mr Beltrami submits that it must follow from the finding that Mr Zeid was the cause of his own losses on notes 8-10 that the same must be true with respect to notes 1-7.

[105] Mr Anderson does not I think submit otherwise as a matter of inferential fact, but he has a legal submission that the position is different for the purposes of a breach under COB 7.9.3 from that which obtains upon breach of COB 5.3.5, which is what the judge was dealing with. For these purposes Mr Anderson relies on the wording of COB 7.9.3 which is expressed in prohibitory terms, rather than positive mandatory terms. Thus COB 7.9.3 states that a firm "must not lend…unless", and there then follow the cumulative sub-rules (1), (2) and (3), whereas COB 5.3.5 states that a firm "must take reasonable steps to ensure" that any personal recommendation is suitable. On that basis Mr Anderson submits that it follows that, because any lending (or the arranging of lending) is prohibited unless the sub-rules are complied with, any breach of those sub-rules renders the firm liable for the full consequences of the lending. The question of causation is not what would have happened if the bank had not made an unsuitable recommendation, but what would have happened if the bank had simply refused to mediate the lending by CSAG, because it was not able lawfully to do so. If the lending simply was not there, how could Mr Zeid have suffered the losses he went on to incur? Mr Anderson points to the events of early 2008 when there was a shortfall of about $3 million on Mr Zeid's account. During this period Mr Zaki purchased two notes (on 1 February and 18 March 2008) without leverage (see the judge's judgment at para [47]). These notes are not among the ten notes made the subject matter of this litigation.

[106] I agree with Mr Anderson's submission to this extent: that if Mr Zeid would not have been able to purchase notes 1-7 without the assistance of funding from CSAG, then he could not have suffered the losses he incurred. The judge did not have to consider this possibility, because he did not consider that COB 7.9.3 was engaged. He only had to ask himself whether Mr Zeid would have bought the notes even if Mr Zaki had advised against them. If therefore, contrary to my holdings above, the bank had been in breach of COB 7.9.3, I do not consider that it would be safe to extrapolate from the judge's findings on causation in relation to notes 8-10 and COB 5.3.5 to what the position might have been in relation to notes 1-7 and COB 7.9.3 and the lending arrangements. Much might depend in such circumstances on what the nature of the hypothetical breach of COB 7.9.3 might be. But if the only problem was that the leverage afforded was too great, so that it might have to be assumed that leverage of, say, greater than 70% or 75% could not properly be afforded, there might have to be only a further limited enquiry: such as whether that would have impeded Mr Zeid's bullishness to any extent at all in the circumstances described at [33] above, especially where Mr Zeid had between $9 and $11 million of his own money on deposit, which he could have applied to make up any lending shortfall. It is unlikely that such an enquiry would produce anything like the loss figure put forward on this appeal of $46.1 million.

[107] In any event, it seems to me that Mr Anderson's submissions at this stage of the argument tended to confuse an issue about scope of duty with the question of causation. It may be open to argue that because the scope of the statutory duty is to be derived from the statutory purpose, and because there is an indication that the statutory purpose is to prevent lending in breach of the COB 7.9.3 sub-rules, therefore a firm in breach of COB 7.9.3 should be responsible for all the consequences of lending in such circumstances. However, the jurisprudence regarding scope of duty led by **South Australia Asset Management Corporation v. York Montague Ltd** [1997] AC 191 (**SAAMCO**), **Nykredit Mortgage Bank plc v. Edward Erdman Group Ltd (No 2)** [1997] 1 WLR 1627 (HL) and **Aneco Reinsurance Underwriting Ltd v. Johnson & Higgins** Ltd [2002] 1 Lloyd's Rep 157 (HL) (see also **Haugesund Kommune v. Depfa ACS Bank** (No 2) [2011] EWCA Civ 33, [2012] Bus LR 230) rather demonstrates to the contrary: that, even where there has been a breach without which no transaction would have taken

place at all, it does not follow that the defendant in breach is liable for all the losses suffered by the claimant in consequence of entering into the transaction.[3] In the present case I am doubtful that an investor would be entitled to be compensated in full for an otherwise suitable investment just because there has been some breach, of whatever kind, of COB 7.9.3. Suppose the sole breach was one of process under sub-rule (1), or was one of the requirement for express acceptance of clear terms under sub-rule (3): I do not imagine that there would be full compensation for an otherwise suitable investment which had in the event gone wrong. Suppose similarly that the only fault under COB 7.9.3 was that the lending arrangements came with unsuitably high leverage: I do not think that there would be compensation for losses in full, as distinct from losses to the extent of the unsuitable leverage. Thus, if leverage at, say, 70% would have been suitable, it would only be the losses on leverage in excess of such a figure which would be recoverable."

47. Adopting Rix LJ's observations in *Rubenstein* and *Zaki*, the judge expressed the view in paragraph 59 of the quantum judgment that: (i) losses caused by a Defendant's breach of duty in the "but for" sense may be irrecoverable on the basis that they fall outside the scope of duty in question; (ii) but, notwithstanding that there has been a breach of duty without which no transaction would have taken place, it did not necessarily follow that the Defendant would be liable for all the losses suffered by a Claimant in consequence of entering in to that transaction; (iii) nonetheless, there may be circumstances where taking account of the purpose of the statutory prohibition in respect of which the Defendant has been found to be in breach and of the nature of the breach, the correct conclusion on the facts is that the Defendant is liable for all the losses suffered by the Claimant as a consequence of entering into that transaction.

48. In paragraph 61 of the quantum judgment, on the basis that the position under Article 94 (2) of the Regulatory Law did not differ from the position under the comparable customer protection provisions in FMSA 2000, the judge adopted the approach taken by the House of Lords in *SAAMCO* and by Rix LJ in *Rubenstein* and *Zaki* and held, save in one respect referred to in paragraph 49 below, that compensation for the Head (B), Head (C) and Head (D) losses was not irrecoverable on the grounds that they fell outside the scope of Sarasin-Alpen's duty or that they were too remote. In the judge's view, COB 3.2.1, read with COB 3.2.2.1 is intended to protect the inexperienced investor from his or her own lack of understanding of the risks associated with sophisticated structured financial products; and the intention of the suitability requirement in COB 6.2.1 is that he or she is not sold products which are unsuitable having regard to his or her investment objectives.

49. In paragraph 63, the judge held that the Head (C) and Head (D) losses claimed by Mr Khorafi and Mrs Al Hamad were not all caused by breaches of duty under Article 94 (1) of the Regulatory Law because the ABK lending included a loan of USD 39.1 million used to fund personal expenditure and not the purchase of the Notes. If this loan had not been taken out or funds received on the close-out of the Notes in 2008 had not been used to repay it, there would have been a surplus after the close-out which could have gone partially to pay down the ABK lending thereby reducing the ABK principal loan and the interest which thereafter accrued thereon.

50. In paragraph 62, the judge rejected a submission that the chain of causation linking the Respondents' losses to Sarasin-Alpen's breach of COB 3.2.1 and COB 6.2.1 had been broken by reason of the failure by Mrs Al Hamad and Mrs Al Rifai to pay the margin call within the 24 hours' notice given on 7 October 2008. He had already held in the liability judgment that this failure did not break the chain of causation and in light of the decision of the Court of Appeal upholding the judge on this point, Bank Sarasin did not challenge the judge's finding on this issue in the quantum appeal.

51. In paragraphs 73-78, the judge addressed Bank Sarasin's contention that the Respondents' claims for compensation under Heads (B), (C) and (D) should be dismissed because, inter alia, the Respondents had failed to mitigate these losses by failing to repay the ABK loans in October 2008, or alternatively in 2010

when, instead of discharging the ABK loan using their own resources, they took on a refinancing loan from CBK to discharge the ABK indebtedness. The judge distinguished the case of *Al-Sulaiman v Credit Suisse Securities (Europe) Limited et al* [2013] EWHC 400 (Comm) where Cooke J held[10] that the Claimant had had the assets available to meet a margin call but had irrationally decided not to do so. In the judge's view[11], notwithstanding the further cross-examination of Mr Khorafi in the quantum trial, there was no evidence that: (i) the Respondents or any of them were in a position to repay from their own resources the ABK loans and facilities following the close-out in October 2008; or (ii) the taking out of the CBK loan to pay off the ABK loans was unreasonable in circumstances where ABK was pressing for payment and had obtained an order for the sale by the Kuwaiti Court over land which stood as security for its lending. There was also no evidence that the Respondents or any of them were in a position to pay off the CBK loan thereafter.

52. Having held that the Respondents were entitled to be compensated under Heads (B), (C) and (D), the judge dealt with a number of quantification issues arising under those Heads. We are concerned with two of those issues. In paragraphs 103 – 107 the judge considered whether the financing cost of an investment made by Mr Khorafi quite separately from the Notes could be added to the interest accruing on his US$ 30 million Bank Sarasin loan with Head (B). The investment in question was the Calyon Witch Hat Note referred to in paragraph 7 above. The premise of the Respondents' damages calculation was that all the investment activity financed by borrowings from Bank Sarasin and/or ABK should be unwound and credit given for any profits made on the investments. The profit on the Calyon Witch Hat Note (USD 162,380) without deduction of the interest charges incurred on borrowing the sum invested was therefore included in calculating the Head (A) figures. However, the USD 158,160 of interest charges incurred in financing the purchase of the Calyon Witch Hat Note was not included in Head (B). The Respondents argued that these charges should be and the Appellants argued they should not. In paragraph 107, the judge held that justice required that in computing the Head (B) losses the interest costs incurred in generating the profit on the investment should be included even though the inclusion of this loss in Head (B) was not "analytically correct".

53. The second relevant quantification issue concerned the interest claimable by Mrs Al Rifai under Head (C) in respect of an account she had with ABK in respect of a guarantee provided by ABK up to USD 27,500,000 in favour of Bank Sarasin in respect of the latter's financing of the purchase of the Notes. By Article 9 of the underlying guarantee contract, Mr Khorafi granted a mortgage in favour of ABK over a plot of land in Kuwait as security for Mrs Al Rifai's liability on the account and each of Mr Khorafi, Mrs Al Hamad and Mrs Al Rifai provided further security in the form of proprietary pledges over the shares they held in Global Logistics Company. By Article 4 of the guarantee contract, interest of 4% p.a. over LIBOR was payable on sums due under the contract. The LTV was 140%.

54. ABK brought a claim against the Respondents in the Kuwaiti Courts seeking enforcement of the mortgage over the plot of land and the Respondents filed a counter claim in these proceedings.

55. At the quantum hearing, the Respondents did not produce statements for Mrs Al Rifai's guarantee account with ABK for the period after December 2009 down to 18 September 2014 but instead, as proof of their claim against the Appellants, they relied on a certificate issued at their request by the Head of the Capital Execution Department of the Kuwait Ministry of Justice stating that the interest due on the account was the equivalent of USD 6,377,957.616 as at 19 September 2014.

56. The Appellants submitted that the certificate was not sufficient to prove the interest claimed, inter alia, because it did not disclose the details of how this figure for interest was calculated. The judge rejected this submission in paragraph 125 of the quantum judgment holding that the certificate was adequate evidence of the interest due to ABK on the account in question.

Bank Sarasin's grounds of appeal

Ground 1

57. Bank Sarasin's first ground of appeal was that the judge erred in holding that, irrespective of any contentions as to a failure to mitigate or scope of duty, the interest and other financial charges sought to be recovered under Heads (B), (C) and (D) were not a "direct result" of the payments to Bank Sarasin to purchase the Notes as required by Article 65(2)(b) of the Regulatory Law. In short, the judge had effectively ignored the word "directly" in that provision.

58. The word "direct" in Article 65(2)(b) plainly evidences an intention to limit the loss for which compensation may be ordered under this provision to loss which is closely causally connected to the payment or transfer in question. In my judgment, it is not practically possible in the abstract to specify the situations where loss will be a direct result of making a payment or transfer to the counterparty of an unauthorised agreement. Instead, the Court must proceed on a case by case basis deciding on which side of the line the particular loss in issue lies.

59. Counsel for Bank Sarasin, Mr Hodge Malek QC, drew the Court's attention to the judgment of David Richards J in re *Whiteley Insurance Consultants* [2008] EWHC 1782. The question for decision there was whether persons who had paid premiums under insurance contracts unlawfully issued by Whiteley Insurance Consultants ("WIC") had a claim for interest on the sums so paid under section 26 (2) of the FSMA which provided that the other party to an agreement made by an unauthorised person "is entitled to recover (a) any money or other property paid or transferred by him under the agreement; and (b) compensation for any loss sustained by him as a result of having parted with it."

60. In paragraph [27] of his judgment, David Richards J said:

> "…Compensation for the interest which could have been earned on the premiums would certainly be within section 26(2)(b)[12], but it may be that if a party could establish that he had paid the premium out of borrowed money he could recover the actual costs of borrowing incurred by him. The precise scope of the remedy provided by section 26(2)(b) raises difficult issues. Would it for example extend to profits which would have been earned on an alternative use of the money which the claimant can establish he would have pursued, or do the words "as a result of having parted with it" confine the remedy to more direct losses such as interest or, in the case of other property such as shares transferred by the investor under an agreement, dividends and other benefits which the investor would have received on the shares if he had retained them?"

61. Mr Malek submitted that since Article 65(2)(b) was based on s.26(2) of FMSA, the insertion of the word "direct" in the former provision must signify a legislative intention that compensation awardable under that provision was to be within a narrower compass than that provided for in s.26(2) FMSA. Mr Malek also suggested that it would be wrong to give the word "direct" a wide meaning out of a concern to see that broad justice was done in claims made under Article 65(2)(b). It would be wrong to do so because compensation for remoter losses is potentially available in an action in contract or tort and/or under Article 94(2).

62. Mr Malek also made two factual points in respect of the ABK and CBK loans. The ABK loans were taken out in advance of the purchase of the Notes from Bank Sarasin and Mr Malek argued that it followed that losses in respect thereof were not a direct result of the payments financed by the loans. As for the CBK loans, these were taken out after the Notes had been paid for in order to refinance the ABK loans and in Mr Malek's submission, the case for saying these were not a direct result of the payments for the loans was *a fortiori*.

63. In the course of his oral submissions, Mr Malek rightly took the view, in line with David Richards J's observations quoted above, that interest on a payment made under an agreement with an unauthorised person would be a loss that is a "direct result" of making the payment. In my judgment, interest payable at an unexceptional rate on borrowed money used to make such a payment where the payee is well aware of the borrowing is a loss that is no less a direct result from the payment than is interest that could have been earned on a payment made from unborrowed money. I am also of the view, for the reasons I give in paragraph

75 below, that the refinancing of the ABK debt by the loan taken from CBK was no less a direct consequence of the payments for the Notes than was the original ABK indebtedness. Accordingly, in my opinion the judge did not err in holding (questions of mitigation and scope of duty apart) that the losses sought to be recovered by the Respondents under Heads (B), (C) and (D) were a direct result of the payments made to Bank Sarasin for the purchases of the Notes.

Ground 2

64. Bank Sarasin's second ground of appeal was that the judge wrongly rejected the Appellants' contention that the claims for Bank Sarasin and ABK interest and charges fell outside the scope of the Appellants' duty.

65. It was submitted that whilst the judge was correct to have accepted in paragraph 59 of the quantum judgment that the scope of duty principle affirmed in *SAAMCO* applied to claims under the Regulatory Law, he ought to have considered the scope of Bank Sarasin's duty under Article 65 and not simply have applied to Bank Sarasin his reasoning in respect of the duties owed by Sarasin-Alpen in the context of Article 94.

66. With respect to the judge, I am of the opinion that, in contrast to the position under Article 94, the scope of duty principle has no application to claims for compensation under Article 65 (2). Instead, the right to compensation under this provision arises *tout court* upon it being shown that: (i) a Defendant has made an agreement in the course of carrying on a Financial Services Prohibition; (ii) the Claimant has paid money or transferred property to the Defendant under that agreement; and (iii) the Claimant has suffered loss that is a direct result of such payment or transfer.

67. If I am wrong about this, I think that the duty to abide by the Financial Services Prohibition is plainly a duty imposed to protect individuals such as the Respondents who lack experience of and expertise in assessing the risks and suitability of investment products. And, as found by this Court[13] in upholding the judge's decision that Bank Sarasin had breached the Financial Services Prohibition by advising the Respondents on the Notes, Bank Sarasin, through representatives of Sarasin-Alpen, steered the Respondents into purchasing the Notes when such investments were wholly unsuitable given the Respondents' stated requirements. Accordingly, adopting the approach of Rix LJ in *Rubenstein*, I would, if necessary, hold that the compensation Bank Sarasin was ordered to pay was consistent with the duty it owed to the Respondents not to conclude agreements in the course of acting in breach of the Financial Services Prohibition.

Ground 3

68. Bank Sarasin's third ground of appeal is that the judge erred in failing to hold that the Respondents' failure to repay their borrowings from ABK and CBK was a failure to mitigate their losses that broke the chain of causation and/or rendered those losses too remote to be a direct result of the payments made for the Notes.

69. As recorded in paragraph 51 above, the judge found there was no evidence that the Respondents or any of them were in a position to repay from their own resources the ABK loans following the close-out in October 2008. In the submission of Mr Malek, in so holding the judge overlooked evidence of the Respondents' wealth that was so compelling that this finding should be replaced by a finding by this Court that the Respondents did indeed have the required financial resources to pay off the ABK loans at the end of 2009 when the close-out was fully completed and accordingly the chain of causation had been broken by this failure to mitigate.

70. Amongst the factual points made by Mr Malek were the following:

(1) Mr Al Khorafi said during his cross-examination at the quantum hearing that to repay the ABK borrowing the Respondents would have needed to sell assets but their assets had been devalued at the time.

(2) There was ample evidence of the Respondents' very substantial wealth, including:

(a) the statement made by Mr Khorafi in his cross-examination that they were well off but they were not billionaires;

(b) the statement by the judge in the liability judgment that the Respondents were very wealthy;

(c) the statements in witness statements made by the Respondents' lawyers in late 2014 that the Respondents had the means to repay the USD 10,445,049 awarded under Head A if the Appellants' liability appeal was successful;

(d) Mr Khorafi had stated in a Personal Financial Position statement that he had assets in excess of liabilities of US$163 million as of 3 July 2007;

(e) Mrs Al Hamad held shares in NBK worth substantially in excess of US$30 million in 2007/2008 which were pledged as security for the ABK borrowing;

(f) details of the Respondents' assets in Schedule 2 to the Sarasin-Alpen's closing submissions in the liability hearing.

71. Mr Malek further submitted that: (i) the Respondents had consistently refused to provide disclosure to support their case that they could not afford to repay the loans and that the judge should have inferred from this that in fact they had sufficient means to repay their borrowings from Bank Sarasin and ABK; and (ii) since the Respondents were effectively relying on impecuniosity, the judge should have proceeded on the basis that the burden was on the Respondents to establish their alleged impecuniosity rather than on the Appellants.

72. I reject this ground of appeal for the following reasons. First, the Appellants made no application for specific disclosure of documents relevant to the availability of assets the Respondents ought reasonably to have used to pay off the ABK borrowings and, in the absence of a successful application for such disclosure the judge was not bound to draw the inference Mr Malek contended for. Second, the factual points made by Mr Malek were significantly unfocussed, covering a wide span of time beginning in 2007 before any loans were taken from Bank Sarasin and ABK, whereas the relevant period of time is the period from the end of 2009 through to September 2014. Thus Mr Khorafi's Personal Financial Position statement pre-dated the post Lehmann Brothers financial crisis and the assets deposed to were largely in unlisted shares and real estate in Kuwait. I also accept the submission of Mr Hill QC, counsel for the Respondents, that the value of Mrs Al Hamad's NBK shares was never materially above USD 30 million during the relevant period.

73. Third, it is plain that when the judge said in paragraph 77, "there was still no evidence that the Claimants or any of them were in a position to repay the Sarasin loans before or after close-out…[or] to repay the ABK loans and facilities in full following close-out" he meant there was no evidence that the Claimants had available assets that they ought reasonably to have used to repay the ABK borrowings of USD 107 million at the time the Notes were purchased or the remaining USD 60 million in the period from the end of the close-out in December 2009. I say this because the judge would have been well aware that the Respondents had valuable assets many of which were securing their liabilities to ABK. He would also have been well aware that: (i) asset values had fallen and had remained diminished world-wide for a number of years following the Lehmann Brothers insolvency in September 2008; and (ii) there would be considerable costs implications in selling large blocks of shares to repay borrowings. In these circumstances, the burden, in my opinion, was on the Appellants to establish not simply that the Respondents had substantial assets but by reference to specific assets at specific times they had unreasonably failed to use the same to pay off the loans. However, this was not the approach taken in the cross-examination of Mr Khorafi at the quantum hearing, the gist of whose evidence was that the Respondents could not afford to pay off the loans. Instead, the questions put to Mr Khorafi tended to be somewhat unfocussed and made no distinction between the position in December 2014 when, on the evidence of their lawyers, the Respondents would have been able to repay the USD 10.4 million damages under Head (A) if they lost the liability appeal, and the much earlier position starting from December 2009 when USD 60 million was owed to ABK.

74. Fourth, the judge's finding that there was no evidence that the Respondents or any of them were in a position to repay the loans was a finding of fact and in my judgment Bank Sarasin's case on this ground of appeal falls well short of what is required before this Court will substitute its own finding that the Respondents

failed reasonably to mitigate its losses for the judge's finding to the contrary.

75. I also reject Mr Malek's submission that this Court should overturn the judge's decision that the CBK refinancing of the ABK borrowings did not, in circumstances where ABK was seeking an order for the sale of the property mortgaged to secure the liability on Mrs Al Rifai's guarantee account, break the chain of causation. In my view, this finding was well within the generous ambit in which reasonable disagreement is possible. Further, if, as I have held, the judge was right to hold that the ABK interest charges were a direct result of the payments to Bank Sarasin for the Notes, then the CBK interest losses were also such a direct result because, as Mr Hill QC for the Respondents submitted, the rolling over of an amount due to one bank to another bank does not stop the loss continuing to be a direct loss for the purposes of Article 65(2)(b).

76. Mr Malek also argued that the alleged failure to mitigate by failing to pay off the loans rendered the Heads (B), (C) and (D) losses too remote since this failure was not foreseeable. In my view, the duty to take reasonable steps to mitigate loss is a freestanding limitation on the scope of recoverable damages and it is neither necessary nor appropriate to analyse failures to mitigate in terms of foreseeability. Thus, if, as here, a Defendant fails to discharge the burden of proving that a Claimant failed to take reasonable steps of mitigation that is an end of the matter and the question of what was and was not foreseeable does not enter into the enquiry.

Ground 4

77. Bank Sarasin's fourth ground of appeal is that it was not open to the judge to allow the Respondents to claim as part of the Head (B) losses the interest charged on the USD 30 million borrowed by Mr Khorafi from Bank Sarasin which in part financed the purchase of the Calyon Witch Hat Note, an investment that was quite separate from the Notes purchased by the Respondents.

78. As explained in paragraph 52 above, in calculating their total loss, the Respondents proceeded on the basis that all the investments purchased with borrowed money should be unwound with credit given to the Appellants where an unwound investment had been profitable. Credit for the profit made on the Calyon Witch Hat Note (USD 162,380) was accordingly given in the calculation of the Head (A) losses. However, the USD 158,160 interest charges incurred on Mr Khorafi's USD 30 million facility from Bank Sarasin which financed the purchase of the Calyon Witch Hat Note were not included in Head (B).

79. Mr Malek argued that given that: (i) no point was taken when the 28 October 2014 Order was drawn up awarding the Head (A) losses to the Respondents; and (ii) no subsequent application to amend the order was made under the slip rule, the Respondents were stuck with the figures in Head (A) and Head (B) and the judge should have so ruled.

80. I confess that I found Mr Malek's argument an unattractive one, for if it were accepted the Appellants would gain an uncovenanted reduction in their liability for the Head (A) losses. In my opinion, the judge was well entitled, pursuant to his powers to do practical justice, to include the USD 158,160 interest charges in the Head (B) losses. I accordingly reject this fourth ground of appeal.

Ground 5

81. Bank Sarasin's fifth ground of appeal is that the judge erred in accepting the certificate of the Head of the Capital Execution Department of the Kuwait Ministry of Justice as sufficient proof by the Respondents that the interest due on Mrs Al Rifai's guarantee account with ABK was the equivalent of USD 6,377,957.616 as at 19 September 2014.

82. Mr Malek argued that the judge should have held that the Respondents had failed to prove their case in a proper and regular way and made no award for any losses alleged to have been incurred on Mrs Al Rifai's account. In support of this argument, he advanced two principal contentions. First, he submitted that: (i) the Respondents had made selective disclosure of ABK bank statements and in particular did not disclose the statements for Mrs Al Rifai's guarantee account; and (ii) the reason given for this non-disclosure by the

Respondents – the statements post December 2014 were not available due to a dispute with ABK – was wholly unconvincing for the following reasons: (a) statements for this account were withheld in their entirety even for the period before December 2014; and (b) it was inconceivable that the Capital Execution Department of the Kuwait Ministry of Justice had been able to specify the interest sum in the certificate accepted by the judge without having sight of statements for the account.

83. Mr Malek's second principal submission was that the certificate from the Kuwait Ministry of Justice should not have been accepted as good evidence of the sum due because there was no explanation as to how the specified sum was calculated and no documents had been disclosed relating to the litigation between ABK and the Respondents in which the Respondents were pursuing a counter claim that might have resulted in a set-off, partial or entire, against the interest due to the bank.

84. As Mr Malek accepted in the course of his oral submissions, to succeed on this ground of appeal he had to show that the judge's acceptance of the certificate was outside the margin of appreciation that should be accorded to the judge in making a judgment on this aspect of the case. In my judgment, Bank Sarasin have failed to satisfy this heavy burden. Although it seems that the Appellants made complaints to the judge about the Respondents' failure to disclose the bank statements in interlocutory hearings, they made no application for an order requiring specific disclosure of these documents; nor, as stated by the judge in paragraph 122 of the quantum judgment, did they run a case of selective disclosure at the quantum hearing. Further, the guarantee contract providing for a default rate of interest of 4% over LIBOR was before the Court and there was no dispute as to the authenticity of the certificate from the Capital Execution Department of the Kuwait Ministry of Justice. In these circumstances, the judge was well entitled in my view to accept the certificate as reliable evidence as to the interest due on the ABK guarantee account.

Conclusion

85. For the reasons given above, I would dismiss this appeal with costs to be assessed on the standard basis, if not agreed.

JUSTICE SIR DAVID STEEL:

86. I agree with the reasoning and conclusions of Justice Sir Richard Field and have nothing to add.

H.E. JUSTICE OMAR AL MUHAIRI:

87. I agree with the above judgment and have nothing further to add.

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Natasha Bakirci
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