Rafed Abdel Mohsen Bader Al Khorafi v Bank Sarasin Alpen (ME) Limited [2018] DIFC CA 010

Claim No. CA-010-2018

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 JEREMY COOKE, JUSTICE JUDITH PRAKASH, H.E. JUSTICE SHAMLAN AL SAWALEHI

BETWEEN

RAFED ABDEL MOHSEN BADER AL KHORAFI

Claimant

and

BANK SARASIN ALPEN (ME) LIMITED

(In Liquidation)

Respondent

Hearing: **25 -26 November 2018**

Counsel: Mr. Ewan McQuater and Ms Camilla Bingham for the Claimant

Mr. Orland Fraser, QC, Mr Alastair Thomson and Mr. Andrew Rose for the Defendant

Judgment: **28 January 2019**

JUDGMENT

ORDER

UPON reviewing the Second Defendant's ("Appellant's") application for permission to appeal dated 9 May 2018

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

AND UPON hearing Counsel for the Appellant and Counsel for the Respondent on 26 November 2018

IT IS HEREBY ORDERED THAT:

1.The Second Defendant's appeal against the Order of the former Deputy Chief Justice Sir David Steel dated 18 April 2018 dismissing the Bank's Application to strike out these proceedings pursuant to RDC 4.16(2) as an abuse of process is granted.

2. The Claim Form issued on 6 April 2016 (as amended), the Particulars of Claim dated 9 January 2017 and the proceedings herein as against the Second Defendant are struck out.

3. The Claimants shall pay the Second Defendant its costs in the matter CFI-014-2016, the amount of which is to be agreed between the parties. If no agreement is made, the Court will make any necessary ruling following the making of short submissions in writing by both parties within 14 days of the date of this Judgment, unless another hearing is required.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of Issue: 28 January 2019

At: 10am

JUDGMENT

JUSTICE SIR JEREMY COOKE:

1.This is the Judgment of the Court.

2. The Second Defendant (the Bank) appeals against the order of Deputy Chief Justice Sir David Steel ("Sir David") dated 18 April 2018 in which he dismissed the Bank's application to strike out these proceedings pursuant to RDC 4.16(2) as an abuse of process, dismissed the Bank's alternative application to strike out the Second and Third Claimants as parties to the action but struck out the claims for breach of contract and statutory duty as time barred. There is no appeal by the Claimants against the strike out of the claims in contract and for breach of statutory duty. Sir David himself gave the Bank permission to appeal on 9 August 2018, after referring to the test laid down in the authorities for appellate review of first instance decisions on striking out for abuse of process, on the basis that "the prospects of success have just surmounted the threshold".

The Approach of the Appeal Court.

3. We were referred to a number of decisions on the correct test for the Appeal Court to adopt when considering decisions made by a first instance judge in relation to applications to strike out for abuse of process of court on the grounds here put forward, which are based on the rule first enunciated in *Henderson v Henderson*.

3.1 In *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748*,* Thomas L J (as he then was), at page 762, stated that the decision to be made by the first instance judge was not one made in the exercise of a discretion. There could only be one correct answer to the question whether there was or was not an abuse of process. Nonetheless, an appellate court should be reluctant to interfere with the decision of the judge where the decision rests upon balancing a number of factors in a broad merits-based assessment. He stated that, in the type of case where a judge has to balance a number of factors, such as that required in deciding whether or not there has been such an abuse of process, "an appellate court will be reluctant to interfere with the decision of the judge in the judgement he reaches on abuse of process by the balance of factors; it will generally only interfere with the judge if he has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him."

3.2 In *Stuart v Goldberg Linde* [2008] 1 WLR 823, Sir Anthony Clarke MR (as he then was) referred to that statement of principle and the need for an appellant, in order to succeed, to show that the judge "has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him or is plainly wrong". The line between the approach of an appellate court reviewing the exercise of a discretion and its role reviewing a decision of this kind was stated to be very narrow.

4. Sir David himself, when giving permission to appeal, referred to the latter decision and cautioned himself about giving such permission by reference to:

4.1 The fact that any review would be approached in a manner similar to the review of an exercise of discretion.

4.2 The permitted margin of appreciation in balancing the various factors which fall to be taken into account when making a "broad merits-based assessment", as required by the authorities when determining an application for strikeout on the basis of abuse of process.

4.3 His own conclusion that the Bank had "fallen well short of establishing an abuse of process".

5. He nonetheless gave permission to appeal, bearing in mind the enormous level of cost that had been expended on the prolonged and ill-tempered litigation which had begun in 2009, Claim No CFI 26/2009 ("the 2009 Proceedings") and was still not concluded in relation to matters of interest and costs in those proceedings by the time of his decision in the current action ("the 2016 Proceedings"), when concluding that the prospects of success just surmounted the threshold for the grant of permission.

6. We have taken fully into account the constraints against interfering with the decision of a highly experienced judge in a matter of this kind but have come to the conclusion that he did err in principle in his application of the tests set out in the authorities, did fail to take into account material factors and reached a conclusion which was plainly wrong and not open to him properly to reach. In particular he failed to apply the *Aldi* guidelines properly, failed to take proper account of the argument on issue estoppel arising out of the 2009 Proceedings which the Claimants are seeking to employ in pursuing the 2016 Proceedings and the prejudice thereby cause to the Bank and reached conclusions as to the time when the new claim could and should have been pleaded and an application made to the Court under the *Aldi* principle, which were plainly wrong. In doing so, he did not simply weigh competing factors in a manner that was open to him and arrive at a solution that this Court would not have done, but, with the greatest of respect to him, he failed to apply the law in a manner which requires this Court to interfere with his assessment.

The 2009 Proceedings and the 2016 Proceedings.

7. Sir David, set out the background and the nature of the two sets of proceedings succinctly in paragraphs 1-15, which we largely repeat here, with some additions, for the ease of the reader.

8. By application, in the Court below, the Bank sought to strike out the 2016 Proceedings pursuant to RDC 4.16(2) on the grounds that they constituted "an abuse of the Court's process", essentially on the basis that the claims made in the 2016 proceedings could and should have been made earlier and included in the 2009 Proceedings which had been instituted by the Claimants against the Bank and the First Defendant, its 60% subsidiary. In the alternative, in the event that the strike out application were to fail, the Bank sought an order striking out the Second and Third Claimants as parties to the 2016 proceedings and an order striking out the First Claimant's claim for breach of contract and breach of statutory duty on limitation grounds. In striking out the latter two causes of action, Sir David inherently recognised and accepted that those causes of action had accrued prior to 7 April 2010, which is a matter of significance in the context of the new claim and the date when it too could have been brought.

9. The primary focus of the 2016 proceedings is a claim in deceit (with no such applicable limitation period) arising from events in August 2007. The basis for the claim is said by the Claimants to have emerged in the evidence tendered in the 2009 proceedings. The 2009 Proceedings comprised a mis-selling action brought by the Claimants against both Defendants. The mis-selling complaint arose from the investment by the Claimants of some USD 200 million in financial products marketed by the Bank ("the Notes"), which included some $40 million of investment in August 2007 (about which there was no particular complaint, as those August investments gave rise to profit), in circumstances described later. In September/October 2008 the Bank made margin calls in regard to the Notes. When the calls were not met, the Bank closed the transactions out and sold the underlying assets leaving the Claimants with a significant overall loss.

10. The details of the lengthy 2009 Proceedings relating to liability are contained in the long judgments of the former Deputy Chief Justice Sir John Chadwick ("the DCJ") in CFI 026/2009 dated 21 August 2014, after an 11 day hearing, and of the Court of Appeal in CA 003/2015 dated 3 March 2016. Against the background of findings that both Defendants had breached their regulatory duties, it was held, following a 2 day Quantum hearing in March 2015, that the Bank was liable to pay damages in the amount of about USD 35 million (the Bank's appeal against the quantum judgment being eventually dismissed on 29 January 2017). The figure of USD 35 million was made up of USD 10.5 million of losses on the Notes themselves and about USD 24.5 million in respect of interest and bank charges incurred in relation to borrowing to fund the purchase of the Notes.

11. Reference should be made to those judgements to see the hard-fought nature of the action with extensive teams of lawyers involved, with apparently no stone left unturned in the pursuit of them. The costs incurred by the Claimants, we were told, were of the order of $19 million and the judgment itself shows that there were

complex issues as to the systems of law which applied to the different causes of action pursued. Whatever Sir David may have thought about the duration of the proceedings, which may have had some influence on his decision, we see no reason for criticism of the Bank for taking the jurisdiction argument that it did based on the jurisdiction clause in its agreements with the Claimants which was only over-ridden by this Court on appeal because the case against the First Defendant would inevitably take place in this jurisdiction regardless. It appears that every available point was taken by the First Defendant, which was found to have forged documents and behaved discreditably with the result that indemnity costs were awarded against it, but the Bank cannot be held accountable for First Defendant's failings in that regard . Given both the nature of the action and the fact that the Claimants themselves took unmeritorious arguments at the jurisdiction stage and subsequently, as set out below, we do not consider that such matters should impact on the issues before us, save as specifically mentioned in this judgment. If such matters did play a part in Sir David's thinking, they should not have done.

12. In the run-up to the quantum judgment of the DCJ (the hearing being in March 2015 and judgment on 7 October 2015) and to the liability judgment on appeal (the hearing being in September 2015 and judgment on 3 March 2016) the Claimants sought to introduce a head of loss amounting to USD 37 million said to have been sustained in regard to a real estate venture called the Al Khorafi Tower (the "Tower Project"). The contention was that this had foundered as a result of the purchase of the Notes, because money tied up in the mis-sold investments could otherwise have been used to pay sums due on the loans taken out for the pursuit of the Tower Project.

13. To understand the manner in which this new claim for a head of loss was dealt with, reference should be made to the terms of the order dated 28 October 2014 made by the DCJ following the publication of the liability judgment. This provided that the amount of the Bank's liability in respect of losses sustained by the Claimants other than losses on the Notes should be made up of "losses arising out of the Claimants' relationship with ABK". The order also provided:

> "8. The Claimants shall file and serve on the Defendants any evidence in support of their claims on quantum for the Quantum Determination ordered under paragraph 7 above by no later than 4pm on 20 November 2014. Subject to further order of the Court (for which the Claimants may apply in writing with a draft of the further evidence on which they seek to rely), such evidence shall be limited to evidence of events which have occurred since 10 July 2013 (being the last day of the trial in these proceedings)."

14. By way of explanation the DCJ said in his ruling:

> "9.The second matter which requires explanation is the restriction on further evidence I have included under paragraph 8 of my order. There is force in the Defendants' submission that this is not a case in which the Court was asked to order, or did order, a split trial. The evidence on which the Claimants are entitled to rely for the purpose of assessing the quantum of their claims is the evidence that was before the Court at the trial; subject to the possibility that the quantification of those claims may be affected by reason of post-trial events. It is for that reason that I think it right to restrict the evidence which the Claimants may adduce in support of their contentions on the Quantum Determination to post-trial matters, but I leave open the possibility that there may be some further matters which justice requires the Court to consider; and, if there is, the claimants may apply in writing to rely on evidence of those matters. But such application is to be made in advance of the Quantum Determination; and, in order to determine such application (if any), the Court will require to see, in draft at least, the further evidence which the Claimants seeks to rely."

15. In due course on 20 November 2014 the Claimants served a witness statement of the First Claimant (RAK4) in support of the Tower Project claim. In a ruling dated 13 January 2015 the DCJ excluded the claim (or rather the evidence in support of it). His reasoning was as follows:

"23.In those circumstances, the question for determination on this application is whether Mr Al-Khorafi's claim to losses which he suffered by reason of the forced sale under the order of the Kuwaiti Court of the plot on which the Tower was to be built is within the scope of paragraphs 3(b)(ii) and 5(b)(ii) of the Order of 28 October 2014. That is to say, whether those losses are "losses arising out of the Claimants' relationship with ABK".

24. In my view, the answer to that question is "No". In the context in which the Order of 28 October 2014 was made, including in particular the categories of loss which the Claimants had sought to recover as described in paragraph 428 of my judgment of 21 August 2014, the "Claimants' relationship with ABK" is properly to be understood as the relationship between ABK and the Claimants – in particular the First and Second Claimants – as borrowers from ABK in relation to the funding of their purchase of investments from the Second Defendant. The description "Claimants' relationship with ABK" cannot, in my view, be understood to include the relationship between Mr Al-Khorafi as guarantor of the RAFCO loan and ABK as lender to RAFCO under the agreement of 1 November 2007; nor to include the relationship between Mr Al-Khorafi as beneficial owner of RAFCO as borrower under that agreement and owner of the plot charged to secure that borrowing and ABK as lender.

25. In those circumstances, RAK 4 contains no evidence relevant to the claims which are to be quantified at the Quantum Determination. For that reason, I exclude reliance on RAK 4 at the hearing of the Quantum Determination."

16. The issue was considered on appeal by Justice Sir Richard Field. In his ruling dated 21 May 2015, he said as follows:

"34. As to the Claimants' remaining submission that, in any event, the DCJ should not have excluded RAK 4 as he did, effectively as a strike out, but should have considered whether the RAFCO losses were recoverable at the quantum hearing, in my opinion there is nothing in this contention. The 28 October Order was a matter of necessary (albeit unexceptional) case management with the object, inter alia, of giving directions for the quantum hearing both as to issues and admissible evidence. In promulgating those directions the DCJ proceeded as he was undoubtedly well entitled to do by reference to: (i) the fact that the trial had not been a split trial; and (ii) the recoverable losses as identified in his judgment which, so far as they arose out of the Claimants' relationship with ABK, were founded exclusively on losses arising out of the relationship between ABK and the Claimants as borrowers from ABK in relation to the funding of their purchase of the Sarasin investments."

17. Underlying the refusal to allow in this new head of damage when construing the terms of the order made by the DCJ of 20 October 2014 was the plain and obvious point that the claim for damages had been pleaded on a particular basis, seeking recovery on a "no transaction" basis, in order to recoup the losses on the investments and the costs of borrowing involved in those investments and nothing else. Hence the Claimants' stated position that the damages were identical whether they succeeded in showing a breach of contract, a tort, misrepresentation or regulatory breach. Unpleaded new heads of damage could not be brought in after the liability trial. All that could be done was to claim damages on the updated position with regard to the existing pleaded heads of loss.

18. The 2016 proceedings were issued in April 2016. The claims pursued are distinct from the claims made in the 2009 proceedings because they allege a different cause of action, although they also arise, directly or indirectly, from the mis-selling of the Banks' financial products. Allegations of fraudulent misrepresentation were made in the 2009 Proceedings but the judgment of the DCJ focused on the Claimants' allegations of breach of statutory duty, the regulatory framework and the suitability of the Notes having regard to the Claimants' profile and investment objectives. As regards the Bank, claims were advanced on the basis:

(a) That the Bank was in breach of DIFC regulatory law in carrying out unauthorised financial services.

(b) That the Bank acted in breach of contract, since the acts and omissions of the First Defendant (Sarasin-Alpen) and its employees in giving negligent and improper advice as to the financial products which it sold to the Claimants was to be attributed to the Bank.

(c) That the Bank was vicariously liable under DIFC law for the misrepresentation and negligence claims against Sarasin-Alpen, made by Mr Walia, the key individual involved there.

19. As appears hereafter, the first cause of action for breach of DIFC regulatory law was a late entrant into the lists, being allowed in by way of amendment to the existing Particulars of Claim on 15 April 2013 with the trial scheduled to commence on 19 May 2013. It was expressly the Claimants' case that the measure of damages was identical on each of the three causes of action set out above.

20. In the event, the Court concluded that the Bank had dealt with the Claimants in breach of the Financial Services Prohibition and thus was liable to pay compensation pursuant to Article 65(2)(b) of the Regulatory Law. As regards the contractual claims, the Court held that although a Financial Advisor's Contract arose between the Bank and the Claimants as a matter of Swiss law, any breach occasioned no damages as compensation was payable under the Regulatory Law. As regards the allegations of negligence against the Bank, the Court was again not persuaded that a valid claim could be satisfied by reason of any alleged failure to give advice as a matter of Kuwaiti law and, in any event, given the absence of any loss or damage in the face of the compensation claim, there was no valid claim.

21. As regards misrepresentation claims, the Court concluded that although misrepresentations were made, which were defined as "the Capital Protection Statements", "the Capital Appreciation Statements", "the Coupon Statements" and "the ABK Loan Repayment Statements", none were made fraudulently (although fraud had been specifically alleged) and were therefore not actionable. The DCJ concluded:

"427. I am not satisfied that the Claimants have established the misrepresentation claims which they advance, either against Sarasin-Alpen or against Bank Sarasin. I take the view that the applicable law in relation to the claims against Sarasin-Alpen [the First Defendant] is the Law of Kuwait; and I am not persuaded that, in the absence of fraud, those claims are actionable under that Law. If and in so far as the applicable law in relation to the claims against Bank Sarasin [the Bank] is that of Switzerland, there is no evidence before the Court upon which I can hold that that Law differs (and, if so, in what respects) from the Law of DIFC. I hold that the statements relied upon, being statements of opinion rather than statements of fact, give rise to no cause of action under the DIFC Law of Obligations."

22. The new claim as advanced in the 2016 proceedings focuses on a dishonest statement made by an agent of the Bank, Mr. Walia, in August 2007. The claim is made in deceit, or alternatively negligence, or negligent misstatement. Counsel for the Claimants, in cross- examination of Mr Walia accused him of lying when making that statement and the Claimants rely on findings made by the DCJ at paragraphs 207 to 212 of the judgment on this point:

"207. As I have said earlier in this judgment, by mid-August 2007, there was already a collateral shortfall on Mrs Al Hamad's account. On 14 August 2007 Mr Nair sent an internal email to Mr Zeuggin (at Bank Sarasin) in these terms:

"I have set up a conference call between the financial advisor & Client's son (Rafed Al Khorafi) for tomorrow afternoon. We will review the Portfolio in the current market conditions & also discuss the margin call. Mrs Amra [Al Hamad] continues to be on vacation in the South of France."

208. Mr Walia's evidence, at paragraph 163 of his witness statement, was that Mr Nair telephoned Mr Taha (but not Mr Al Khorafi) on 15 August 2013. He said this so far as material:

"163. Due to Mr Al Khorafi's leveraging strategy, as at 15 August 2007, a collateral shortfall existed on Mrs Al Hamad's account. The position on the accounts was brought to the attention of Mr Taha in a telephone call on 15 August 2007 with Mr Nair. This call was foreshadowed by Mr Nair in his email dated

14 August to Benjamin Zeuggin of Sarasin Switzerland's Credit Department…"

In the course of cross-examination (transcript, 26 May 2013, page 168, lines 7 to 23), Mr Walia Asserted that there was a formal margin call in August 2007. He said this:

"We called the client and said, 'your account is short by $10 million. You need to send in the money."

. . .

There was a telephone call. I don't exactly recollect when it was, but there was a telephone call where both Nair would have informed Alaa [Taha] and I myself called Mr Al Khorafi."

209. Neither Mr Taha nor Mr Al Khorafi accepted that there was a conference call about margin or collateral shortfall (or any call) from Mr Nair on 15 August 2007. Mr Taha said this, at paragraph 86 of his witness statement:

"86. I understand that the First Defendant's internal documents suggest that I had a call with Mr Nair and Mr Al Khorafi about a margin call. I was not involved in any such call and there was no suggestion at the time that there was any margin call on the account.

That evidence was not challenged in cross-examination (transcript, 22 May 2013, page 94 line 16 to page 103 line 6).

210. At paragraphs 88 and 89 of his fourth witness statement Mr Al Khorafi referred to a telephone call from Mr Walia:

"88. In around mid-August 2007, Rohit [Walia] called me on the telephone. It was usual for him to call me from time to time. I was in my car in London at the time with Mohammed [Nour] and was using a hands-free headset. Rohit asked me whether I had used all of the US$ 35 million that the bank had advanced to me in the previous month. He asked whether I was willing to invest a further US$ 10 million. He said it would make him look good in front of the bank if I was continuing to invest money. In particular, it would enhance his position before senior management in Switzerland. He also said it would be good generally for my relationship with the bank and would show that I was a special client. He said that, in the future, this would also mean that those at the bank would look on the relationship favourably and would put him in a stronger position with the bank when dealing with my interests. For example, if I wanted to borrow more money in the future, this would mean that senior management would look on me favourably. Since I had not used all of the US$ 35 million, I was happy to put some of that money back into Bank Sarasin. I told Rohit that I would do so. At that stage I was unaware of any problems with the account and thought that Rohit and Bank Sarasin were fantastic. I was happy to do what I could for Rohit since, on a personal level, I liked him very much, and I appreciated what he had already done for me. In particular, I believed that he had already offered me investment products which they only offered to select clients. I also thought it was a good idea to maintain and enhance my relationship with the bank. I do not recall Sharad [Nair] being on that call. If he was, he was simply listening in as I don't think he said anything and Rohit did not mention that he was participating.

89. I understand that the Defendants now allege that the purpose of this call was to discuss a collateral shortfall on the account and call for margin. I did not know what margin was until the bank made margin calls in September 2008, so I dispute that there was any mention of a collateral shortfall or margin at this point. I did not know until this dispute arose that the bank was comparing the value of the investments to the value of the loans. I also understand that the bank's documents indicate that they were trying to get hold of my mother but were unable to get hold of her because she was in the South of France and so they had the call with me. That cannot be correct. The bank had my mother's contact details and I was not aware of any effort to contact her. Further, my mother was not in the South of France then. My mother does not holiday in the South of France. I understand that she has only been once and that was about 10 years before."

That evidence was not challenged in cross-examination (transcript, 20 May 2013, page 85, line 23 to page 86, line 21).

211. Mr Nour, who was in the car with Mr Al Khorafi at the time of this telephone call stated, at paragraph 42 of his witness statement, that he overheard part of the conversation and that Mr Al Khorafi told him about it afterwards. He said this:

"42. Mr Walia asked me (sic) whether Mr Rafed had used all of the US$ 35 million that the bank had advanced to him in the previously month. He asked whether he was willing to invest a further US$ 10 million with Bank Sarasin back into Bank Sarasin. Mr Walia said that it Mr Walia and Mr Rafed look good in front of the bank if Mr Rafed was continuing to invest money. Mr Rafed told me that he had US$ 10 million and he was happy to invest it with Bank Sarasin. Mr Rafed did not mention to me that there was a collateral shortfall or margin call on the account. If he had, I would have asked what they were. I am also sure that I would have remembered if he had said that he needed to pay more money to keep the investments going."

That evidence was not challenged in cross-examination (transcript, 21 May 2013, page 84, line 24 to page 87, line 2).

212. On the basis of that evidence I am satisfied (i) that there was no conference call between Mr Nair, Mr Taha and Mr Al Khorafi on 15 August 2007, (ii) that Mr Nair called neither Mr Taha nor Mr Al Khorafi individually, (iii) that Mr Walia called Mr Al Khorafi, (iv) that there was no mention of collateral shortfall or the need for a margin payment in the course of that telephone conversation and (v) that Mr Al Khorafi made the payment of US$ 10 million to Bank Sarasin on 31 August 2007 for the reasons which he gave in his witness statement."

23. It is to be noted that the DCJ was wrong to say that there had been no cross- examination of Mr Al Khorafi at all on the subject of the margin call. Whilst the cross- examination on the point was short, it was specifically put to him by Counsel for the First Defendant that there had been a conversation in mid-August 2007 in which Mr Walia had told him of a collateral shortfall on his mother's account and that this needed to be covered by a payment of $10million. Mr Al Khorafi's response was that he had been asked to give back the $10 million of $35 million borrowed from the Bank in order to look good in front of the Board of Directors of the Bank, (Transcript Day 2, pages 88-89). There was no cross examination by the Bank on this, however and no cross examination of Mr Nour or Mr Taha on the issue.

24. This account of the events of August 2007, as recorded in the judgment of the DCJ has been adopted in the Particulars of Claim in the 2016 proceedings on the basis that it reflected a straightforward deceit (and/or breach of duty) by Mr Walia. It is the First Claimant's case that there is in effect an issue estoppel as to the validity of those causes of action. It is said that:

(a) The suggestion by Mr Walia that the payment was entirely voluntary so as to make the First Claimant "look good" and demonstrate that he was a "special client" was dishonest in that unknown to the First Claimant but to the knowledge of Mr Walia there were significant losses on the investment in the Notes and the Bank was making a margin call.

(b) Mr Walia was also in breach of duty in failing to advise the First Claimant that a margin call was being made or otherwise in providing accurate information as regards any collateral shortfall upon which the margin call was based.

25. The pleaded case further contends that the Bank is either directly or vicariously liable for Mr Walia's deceit and breach of duty. This is based on the propositions that Mr Walia made representations for which the First Defendant and the Bank were vicariously liable and/or that he was acting in the capacity of agent of the Bank, the same basis upon which it was alleged that the Bank was liable to the Claimants in the 2009 Proceedings. The attribution of responsibility on the part of the Bank was confirmed, it was contended, by the terms of the

liability judgment in the 2009 proceedings.

26. Thus, issue estoppel is put forward by the Claimants in their particularised case in the 2016 Proceedings both in respect of the statements made by Mr Walia and the ostensible authority with which he was clothed by the Bank to make them. If this is the true position, then liability is concluded against the Bank and the only issues to be resolved in the 2016 Proceedings relate to causation and quantum of loss and damage.

27. The Bank deny that there is any such issue estoppel in relation to the statements, because the statements in question were not truly "an issue" in the 2009 Proceedings. (The August exchanges did not feature in either party's list of issues submitted to the Court before the Trial). Similarly arguments are raised by the Bank on the question of issue estoppel in respect of the ostensible (and actual) authority alleged by the Claimants in the 2016 Proceedings, but since it was a major issue in the 2009 Proceedings whether or not the Bank was liable for statements made by Mr Walia, it is hard to see how an issue estoppel would not arise on the point of ostensible authority, subject to the distinction made by the Claimants in argument before us, namely a distinction between pre and post contractual statements.

28. As regards allegations of damage flowing from the deceit and/or breach of duty, the First Claimant pleads that he sustained substantial losses in regard to two real estate projects being carried out by Rafco International Real Estate Company ("RAFCO") in which he was the sole beneficial shareholder. The two projects were Tower Project referred to above and a shopping mall project in Kuwait (the Al Salmiyah Project). These projects were financed in part by a loan from Al Ahli Bank Kuwait ("ABK"). The First Claimant's case is that he was intending to meet repayments on this loan ("the RAFCO loan") from his own funds. The payments amounted to about USD 2 million bi-annually. But due in part to the payment of USD 10 million to the Bank as described above and/or other payments incurred in respect of the Notes, the First Claimant was unable to service repayments on the RAFCO loan as from June 2009. In the result, ABK foreclosed on the RAFCO loan and as a consequence the Tower was sold at a significant discount in June 2014 and the Al Salmiyah project terminated. Losses in regard to the Tower project are said to amount to about USD 150 million and in regard to the Al Salmiyah project to about USD 250 million. Further very substantial losses are claimed in respect of the failure of a share placement and listing of a company called RAK Real Estate on the London PLUS market, the assets of which were to be made up of RAFCO's interest in the Tower and the Al Salmiyah project.

The Decision of Sir David

29. Sir David, following a two-day hearing, issued a reasoned judgement in support of his order of 18 April 2018 in which he set out the principles which apply to the type of abuse of process relied on by the Bank and referred to the conventional starting point, as set out in *Henderson v Henderson* (1843) 3 Hare 114, in the following manner:

> "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time". Per Wigram V.C.

30. He then cited the classic passage in the speech of Lord Bingham in the House of Lords in the English decision in *Johnson v Gore Wood* [2002] 2 AC 1:

> "But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public

interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence and later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as collateral attack on a previous decision or some dishonesty, but where those elements are present, the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgement which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus, while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances, a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether abuse is justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part play in protecting the interests of justice."

31. It is to be noted that the essential question is whether or not the claim or defence, as the case may be, should properly have been raised in the earlier proceedings if it is to be raised at all, and it matters not whether it is not raised by reason of negligence, inadvertence or accident. The Court should embark on a broad, merits- based judgment, taking into account both the interests of the parties and the public interest in the process of litigation and the interests of justice.

32. Sir David set out the questions which the court should ask in the light of the authorities as: –

32.1 Could the new claims have been brought in the earlier proceedings?

32.2 Was it unreasonable not to bring the new claims in the earlier proceedings?

32.3 Does the bringing of the new claim unjustly harass the Bank?

33. He went on to say that the three questions would usually overlap substantially but that a positive answer to the first two questions would not lead the resolution of the fundamental issue identified by the third question, but in this he appears to have ignored Lord Bingham's dictum, as set out above, that the bringing of such a claim in later proceedings can, without more, amount to abuse if the court is satisfied that the claim should have been raised in the earlier proceedings if it was to be raised at all. The third question does not constitute a separate requirement as such but is part and parcel of the process of deciding whether the claim should have been brought in the earlier proceedings. Lord Bingham regarded the fact that it should have been raised in the earlier proceedings as capable of amounting to harassment in itself, without any additional element. A party should not be vexed twice in respect of the same cause of action and all matters which should properly be part of that action should be raised with it. As Lord Millett, in the same case stated, there is ultimately only one question, namely whether it is oppressive or otherwise an abuse of the process of the

court for proceedings to be brought which should have been brought as part of, or at the same time as, the previous litigation.

34. In this context, questions of unfairness and bringing the administration of justice into disrepute also arise. Reference was made by Sir David to the decision of the English Court of Appeal in *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748, where the head note, in summarising a passage in the judgment of Thomas L J (as he then was), states that, in complex commercial multi-party litigation, a party who wishes to pursue other proceedings whilst preserving a right in existing proceedings, must raise the issue with the court seized of the existing proceedings so that the court can express its view as to the proper use of its resources and on the efficient and economic conduct of the litigation. It is in the interests of the parties, of the public and of the efficient use of court resources that this should be done and there could be no excuse for failure to do so in the future. There are now at least five English Court of Appeal decisions to the same effect, stating that there can be no excuse and no exceptions to that principle, as forcibly pointed out by Arden LJ (as she then was) in *Okritie Capital International Limited v Threadneedle Asset Management Ltd*. [2017] EWCA Civ 274. A party who fails to take this course runs the risk of the later proceedings being struck out because of such failure. Even though the *Aldi* principle is not a "hard-edged rule of law", it represents an important facet of the broad, merits- based assessment of whether a second action constitutes an abuse of the process of the court.

35. Sir David recognised that the *Aldi* principle was consistent with the overriding objective and the need for parties to "put their cards on the table" but saw force in the reservation advanced by the Claimants that failure to raise the matter with the court would be of less weight in the DIFC Court than in England and Wales because of the absence of reference to the decision or its implication in the DIFC Rules ("the RDC"). We do not consider that he was right to accept any such reservation because the relevant rules operating in the DIFC are themselves the same as those which apply in England and Wales ("the CPR") and the underlying policy of the CPR and the RDC is identical. Reference should be made to RDC 1.6-1.9. The absence of any commentary to the RDC which makes express reference to these English Court of Appeal cases is nothing to the point, as the cases speak for themselves and the principle pre- existed *Aldi* in any event. We make it clear that the *Aldi* principle applies in the DIFC Court in its full rigour, as in England and Wales.

36. Sir David went on ostensibly to apply the principles in *Aldi* in his judgment but appears to have played down the importance of the point in saying that a breach of the *Aldi* guidelines was merely a factor in a broad, merits- based judgment, albeit pertinent as supporting a conclusion of abuse. He went on to say that in assessing the implications of any breach the court would inevitably seek to assess what would have happened if the necessary application had been made and regarded this as "the crucial question". The difficulty with that approach is that it may have the effect of diluting the effect of the failure which has been deprecated so heavily in common- law Courts of Appeal. Of course, if the making of such an application would have made no difference in the end, because it is clear that, if such an application had been made, the Court would have sanctioned the holding back of the claim or defence to be heard in a subsequent action, the point has validity, but if that is not clear, and there are a number of viable options which the Court might have adopted on such an application, the breach of the *Aldi* principle is not just pertinent to a finding of abuse but is highly significant. Furthermore, and this is of major importance, the effect of making the application prior to the first trial and obtaining the directions of the Court is that all parties know where they stand at the first trial and the importance of the issues which arise there and how they might impact on the matters held over to a further trial, whereas, if that is not done, questions of issue estoppel may arise in relation to matters where there is limited or no appreciation of their significance for the future, as the cause of action is not in mind at all. That is this very case, which Sir David did not recognise as an important factor. We consider that Sir David did not apply the *Aldi* guidelines in their full rigour and thus erred in principle in his approach.

37. Sir David decided that an application to amend the Particulars of Claim to include the new fraud claim

could not properly have been made at any time prior to the trial in the 2009 Proceedings. He found that the plea of deceit could not legitimately and safely have been pleaded prior to trial and in that respect he pointed out that a plea of deceit, being a plea of fraud, is one to which particular rules of professional duty apply. Not only does RDC 17.43 require "full and specific details of an allegation of fraud" to be pleaded but the requirements of the DIFC Court Code of Best Professional Practice prohibit a lawyer from pleading fraud unless he has clear instructions to do so and has reasonably credible material establishing a prima facie case of fraud. He took the view that no such reasonably credible material was present prior to trial but also proceeded to examine what would have happened on the basis that the witness statements served in April 2013 did present such credible material.

38. He referred to the Claimants' acceptance that elements of the claim had emerged in disclosure in August 2012 in the shape of 2 emails passing between the First Defendant and the Bank and that Mr Walia's role started to emerge in his witness statement, where the following appeared:

> "163. Due to Mr Al Khorafi's leveraging strategy, as at 15 August 2007 a collateral shortfall existed on Mrs. Al Hamad's account. The position on the accounts was brought to the attention of Mr. Taha in a telephone call on 15 August 2007 with Mr. Nair. This call was foreshadowed by Mr. Nair in his email dated 14 August to Benjamin Zeuggin of Sarasin Switzerland's Credit Department in which he states: "I have set up a conference call between the financial advisor & Client's son (Rafed Al Khorafi) for tomorrow afternoon. We will review the portfolio in the current market conditions & also discuss the margin call. Mrs. Amra continues to be on vacation in the south of France." A true copy of Mr. Nair's email dated 14 August 2007 is exhibited at D1-41.
>
> 164. In late August 2007 I also met with Mr. Al Khorafi in London at a hotel in the West End to discuss the margin call on Mrs. Al Hammad's account. Mr. Taha did not attend this meeting. I explained the position and performance of the portfolio and told him that the value of the products was declining which meant that there was a collateral shortfall on the account that need to be rectified with the deposit of additional funds. Mr. Al Khorafi did not express any surprise or confusion when I told him that a margin call has been made on the account and that additional funds were required to be deposited to cover the collateral shortfall. Indeed a few days following this meeting on 31 August 2007, the sum of USD 10 million was received on Mr. Al Khorafi's Sarasin Switzerland account. As there was a cross pledge in place under the Deed of Pledge signed by Mr. Al Khorafi in London on 26 July 2007 the monies received to Mr. Al Khorafi's account could under the terms of the Deed of Pledge satisfy the margin call on Mrs. Al Hamed's account."

39. Sir David said that the position remained confused until clarification in cross-examination and that credible material was needed to establish that the statement was made by Mr Walia on behalf of the Bank within the scope of his authority (ostensible or actual), which had been rigorously challenged by the Bank and that it was only during -the cross examination of Mr Walia that he outlined his role as customer relationship manager in giving a forewarning of a margin call prior to a formal margin call by the Bank.

40. He, nonetheless, went on to consider the position as if an application had been made to the Court to amend in April 2013 following service of witness statements and concluded that the DCJ would not have permitted any adjournment of the 2009 Trial and that, in consequence, either leave to amend would have been given but with the matter to be pursued at a further hearing or directions would have been given that the matter should be pursued in fresh proceedings, as has now occurred. "A legitimate duplication of hearings" would thus have occurred, one way or the other, as would occur with the 2016 Proceedings, if allowed to continue.

41. He dismissed the Defendants' arguments that, without any such application and notification of the deceit claim now being pursued, the course of the 2009 Proceedings might have been different, by saying that Mr Walia had been found to be an unreliable witness by the DCJ. He concluded that the 2016 Proceedings did not

amount to unjust harassment since the outcome was the need for a separate trial which would, on the counterfactual, as he saw it, have happened in any event. There was therefore no material, let alone prejudicial, burden placed on the Bank.

42. He also said that there were funding difficulties for the Claimants in bringing any new claim in April 2013 because their litigation funders Vannin, would not have been prepared to make funds available for a substantial enlargement of the claim at that stage. This is not a point which troubles us because both parties accepted in front of us that this was a makeweight point which could not be determinative in any way. Moreover, as the Bank pointed out, there was evidence that the Claimants own financial assets were more than sufficient to pursue any point they wanted to pursue, with about $72million available between them.

43. We therefore turn to the questions which Sir David posed for himself, focussing on them initially, rather than setting out seriatim at this stage the 13 separate Grounds of Appeal advanced by the Bank, since the key issues arise in relation to these questions, with limited weight to be attached to the Grounds which do not relate to them. With the greatest of respect to the experienced Judge and the deference which is to be accorded his decision in an application of this nature, we are unable to see how he arrived at the conclusions that he did for the reasons set out in the following paragraphs and consider that he could not properly have reached those conclusions and was plainly wrong.

Could the new claim have been brought in the 2009 proceedings?

Fraud

44. The Claimants pleaded in their Particulars of Claim in the 2009 Proceedings that the portfolio statements produced to them in September 2007 recorded that the investments had sustained losses of between 3.2% and 9.7% but that such losses were not specifically drawn to the attention of the First or Second Defendants.

45. From the terms of the Defences put forward in those proceedings, the Claimants knew that each Defendant was saying that the First Claimant had been told of the collateral shortfall and the need for additional margin.

45.1 The Claimants knew in December 2010 from the First Defendant's Amended Defence that the latter's case was that not only were portfolio statements couriered to the First Claimant monthly which revealed the position on the shortfall in collateral but that the position on the accounts of the First Claimant and his mother was expressly brought to the attention of the Claimant's accountant, Mr Taha, on 15 August 2017 with the collateral shortfall thereby shown. The First Defendant had further pleaded that on 31 August 2007 the sum of $10 million was received on the First Claimant's account with the Bank specifically to resolve the issue of shortfall. The pleading contained a statement of truth signed by Mr Walia. On the Claimants' case, that had never happened, and he had never been told about losses on the investments which required more collateral in support. To the contrary, he was later to say in his witness statement that on 15th August 2017 he had been asked to provide $10million as an additional investment and not by way of margin in order to make him look good to the Directors of the Bank.

45.2 Further, the Claimants knew, at the end of February 2012, from the Bank's own Defence, that its case was that the payment of $10 million had been made by the First Claimant for the purpose of covering that margin shortfall and that portfolio statements were sent to the First Claimant monthly which revealed the state of the investment account, the reduction in value and the need for the additional collateral.

46. The First Claimant, through his lawyers, must therefore have known that it was both the First Defendant's case and the Bank's case that he had been informed of the collateral shortfall directly or indirectly and had produced funds (with the aid of a loan from the Bank) to meet it, knowing that was its purpose. It was the First Claimant himself, following disclosure by the Bank of documents which suggested that a telephone call might have taken place (see below), who, in his witness statement of 4 April 2013, gave evidence of a telephone call

in mid-August 2007, when Mr Walia asked whether he had used all the $35 million lent to him by the Bank in the previous month and whether he wished to invest an additional $10 million. Mr Walia said that it would make him look good in front of the Bank if the First Claimant was continuing to invest money and that it would be good for the latter's relationship with the Bank, showing that he was a special client, with the result that the Bank would look on him favourably when dealing with his interests. In consequence he put in $10 million. There was thus no mention of collateral shortfall or margin call at all, and Mr Taha was not party to the call. On his own evidence therefore, by then, the First Claimant must have been aware of the reason given to him for remitting $10 million and that what was being said by the two Defendants was wrong. He also must have known that he had therefore been deceived into making the payment, if it was in fact required and utilised to make up a collateral shortfall, as the two Defendants were saying in their Defences.

47. The First Claimant must therefore be taken to have known from the time of the statements of case filed by the two Defendants that they were giving a reason for the production of the $10 million to the Bank which, on his case, was false, and which inevitably meant that he had been deceived as to the reason for remitting the money. When Mr Walia asked him to put in further funds, at a time when additional collateral was required and it was his intention that the funds be so used, as the Defendants were saying he had been informed at the time, the inevitable conclusion, on his case was not only that they were lying in maintaining that he had been told of the true purpose but that they had deliberately misled him as to the true purpose at the time. That true purpose was, on both Defendants' cases, known to Mr Walia at the time, which meant that in saying what the First Claimant said he had said, Mr Walia had to have known that what he was telling the First Claimant about the purpose was false, when he requested the First Claimant to pay the money to the Bank. The First Claimant must, therefore in February 2012, on seeing the statements of case of the two Defendants, have understood that when Mr Walia had asked him to make a further investment of $10 million from the loan made to him by the Bank, the true purpose was to make good a collateral shortfall and that he had been misled into making further investments with the Bank by Mr Walia in that call.

48. Whilst the point is made that the focus of the 2009 Proceedings was on mis-selling and on representations made in April 2007 prior to the investment of funds, so that attention might not necessarily have been paid to this issue, the fact that the First Claimant did know and understand the Defendants' case that margin had been requested in August 2007 is expressly confirmed by the Claimants' response to a Request for Further Information in relation to the Particulars of Claim in the 2016 Proceedings. On 11 May 2017, in reply to the question "when and how did the First Claimant first become aware of the alleged fact that the $10 million was sought in relation to a margin call made by Bank Safra Sarasin?" the following answer was given:

> "the Claimants first became aware that it was the Defendants' case that the $10 million was sought in relation to a margin call when the Defendants' Defence in the 2009 Proceedings was served in February 2012. The Claimant did not become aware of the full facts until the cross examination of Mr Walia during the trial in the 2009 Proceedings in May and July 2013"

49. Whilst attempts have been made to resile from that position and to explain it away as intending to refer to the knowledge of the First Claimant's lawyers, as opposed to the First Claimant himself, that is not a permissible escape route for the First Claimant.

> 49.1 The Further Information contained a Statement of Truth, signed by the First Claimant's solicitor, in the following terms: "the Claimants believe the facts set out in this Response… are true, and I am duly authorised to sign this statement of truth on their behalf"
>
> 49. 2 The RDC provide expressly for this situation:
>
> **"22.21**
>
> Where a party is legally represented, the legal representative may sign the statement of truth on his behalf. The statement signed by the legal representative will refer to the client's belief, not his own. In

signing he must state the capacity in which he signs and the name of his firm where appropriate.

22.22

Where a legal representative has signed a statement of truth, his signature will be taken by the Court as his statement:

1) that the client on whose behalf he has signed had authorised him to do so;

2) that before signing he had explained to the client that in signing the statement of truth he would be confirming the client's belief that the facts stated in the document were true; and

3) that before signing he had informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts."

50. There has been no waiver of privilege by the First Claimant in relation to the circumstances in which this Further Information came to be given and the Court can therefore only proceed on the basis that his lawyers were authorised to say that he was first aware of the Defendants' case that the $10 million was sought in respect of a collateral shortfall/margin call in February 2012 and that the necessary steps referred to in RDC 22.22 had been followed.

51. This material, in the shape of the Further Information, was put before Sir David in the hearing before him but is not referred to at all in his judgment in April 2018. He appears to have failed to take it into account. Instead, he referred in paragraph 27 of his judgement to the First Claimant's evidence in a witness statement dated 22 August 2017, where the latter said at paragraph 14 that he did not know until very shortly before trial in 2013 that the Defendants and Mr Walia, the Managing Director of the First Defendant, were claiming that the $10 million which he was asked to deposit in August 2007 was in order to meet a margin call, rather than being (as he was told at the time) a goodwill payment to make him look good with the Bank. Sir David stated in his judgement that "on the material available (and the DCJ's finding on credibility) he saw no reason to reject the First Claimant's evidence in that witness statement. We are unable to see how he could properly have come to that conclusion in the light of the clear pleaded case advanced in the Further Information just a few months before that Witness Statement. The contradiction has not been the subject of any proper explanation. Nor can the pleaded case be explained away without a full waiver of privilege in relation to the manner in which it came to be formulated. Given that the pleading corresponds with the position revealed by the documents and given the existence of this inconsistency in the First Claimant's case, the Court cannot accept the inconsistent statement most favourable to his position, and must proceed on the basis of the formally pleaded position and what the documents show.

52. It is not enough for the Claimants to say that the First Claimant had stated the position in his witness statement in August 2017, which the Court should accept unless cross- examination revealed its falsity. Even on a summary judgment application, "the Court is not bound to take everything a party says in its witness evidence at face value and without analysis. Factual assertions may have no real substance, particularly where they are contradicted by contemporaneous documents" (per Sir David Steel in *The Estate of Christos Papadopoulis v Standard Chartered Bank*, Claim no CFI-004 2017).

53. It is evident that, even if the First Claimant had not studied the Defences of the two Defendants in February (and he might well not be expected to do so), from February 2012 onwards, the Claimant's lawyers knew that there was a conflict of evidence as to what information had or had not been given in August 2007 in documents provided, in a telephone call or calls to Mr Taha and the First Claimant himself – or, as later emerged, at a meeting between the latter and Mr Walia. They must have appreciated the significance of that conflict of evidence, which, whilst not central to the issues between the parties in the 2009 Proceedings in the same way as it is for the 2016 Proceedings, was that, if the First Claimant had been asked for additional margin in August 2007 and had acceded to the request without demur, this would lend support to the Defendants' position that he was well aware of the risky nature of the Notes in which the Claimants had

invested because they had led speedily to a shortfall in collateral. That was the very point made to the DCJ by the Claimants in their closing submissions as to the significance of Mr Walia lying about the matter. The exchanges between Mr Walia, Mr Nair, the First Claimant and Mr Taha were therefore important in the context of the 2009 Proceedings, albeit not critical in the same way as in the 2016 Proceedings. This was not a minor point which could have escaped the attention of the Claimant's lawyers, who consisted of a significant team and who, as competent professional advisers would inevitably have taken the point up with the First Claimant, as is demonstrated by the Further Information given in May 2017, if taken at face value.

54. It is thus not possible to draw any distinction between the knowledge of the First Claimant himself and that of his solicitors, even if that were relevant, which it is not, since the question is whether the point could have been pursued in the 2009 Proceedings and the knowledge of the lawyers is sufficient for that purpose. In any event, it is apparent from the history of this matter that the First Claimant has employed extensive teams of lawyers to act on his behalf in litigation against the Defendants and the only possible conclusion which can realistically be reached is that proper advice was given to him, and instructions taken from him, not only when furnishing the Further Information referred to, but also in relation to the defences of the First Defendant and the Bank when they were served.

55. In the circumstances, we are unable to ascertain the basis for Sir David's uncritical acceptance of paragraph 14 of the First Claimant's Witness Statement of 2 August 2017 that he "did not know until very shortly before trial in 2013 that the Defendants –and Mr Walia, the Managing director of the First Defendant – were claiming that the US$10m which Mr Walia asked to be deposited in August 2007 was in order to meet a margin call, rather than being (as he told me at the time) a goodwill payment to make me look good with the Second Defendant". Sir David said in his Judgement that he saw no reason to reject the First Claimant's own evidence to that effect on the material available and in the light of the DCJ's finding on the respective credibility of the First Claimant and Mr Walia. The reality is that the whole sequence of exchanges in the 2009 Proceedings and the First Claimant's formal Further Information with its specific answer to the question about the first date of his knowledge, in May 2017, contradicted that statement and rendered it incapable of belief. He knew the position in February 2012.

56. In August 2012 disclosure was given by the Defendants of:

56.1.1 The email dated 14 August 2007 from Mr Nair of the First Defendant to Mr Zeuggin of the Bank, referred to in paragraph 207 of the DCJ's judgment on liability, as set out above, which referred to a telephone call which was to take place the next day with the First Claimant in which a review of the portfolio in the current market conditions and a margin call was to be discussed.

56.1.2 An internal message dated 2 September 2007 from Mr Nair to others at the First Defendant, including Mr Walia, referring to Mr Walia's meeting with the First Claimant in London the previous week and the receipt of $10m into his account as collateral.

57. It was the Bank's submission before Sir David that by August 2012, at the latest, the Claimants and their lawyers could have applied to amend the Claim Form and Particulars of Claim in the 2009 Proceedings to include the very claim for deceit which is now pleaded in the 2016 Proceedings. They had argued for February 2012 but were inclined, in their oral reply submissions, when pressed by the Judge, to accept that August 2012 was the critical date. In the light of the material to which we have referred, we consider the Bank's submission unanswerable. By the end of February 2012, the basis of the defences of the First Defendant and the Bank were clear to the First Claimant and an application to amend could have been made after such time as was necessary for consideration, advice and reflection- a year or so before trial. The production of the documents referred to in the preceding paragraph of this Judgement in August 2012 reinforced that position, inasmuch as they suggested that a telephone conference call was arranged for 15 August between Mr Nair/ Walia and the First Claimant and that a meeting had occurred in the week preceding 2 September 2012

between the latter and Mr Walia. An application could and should certainly have been made in August 2012 or shortly thereafter.

58. The next stage in the 2009 Proceedings of significance, leaving aside the various directions hearings in the meantime, was the exchange of Witness Statements in April 2013. What the Claimants' Witness Statements show (paragraph 42 of Nour, paragraph 86 of Taha and paragraphs 88-91 of the First Claimant's Witness Statements) is a clear awareness of the Defendants' case, as previously pleaded. This, in itself, demonstrates the knowledge of the Defendants prior to service of Mr Walia's statement and paragraphs 163-164 thereof, which spelt out the First Defendant's case in more detail.

59. Sir David found that the position was confused until clarification in cross- examination but the reality is that Mr Walia's witness statement stated his position clearly that he had told Mr Al Khorafi of the collateral shortfall and that more margin was needed. The statement merely reinforced the point of which the Claimants and their lawyers had been aware since February 2012, some 14 months earlier

60. This Court has no hesitation in concluding that the plea of fraud which is now made in the 2016 Proceedings could have been made at the latest in August 2012 and a fortiori shortly after August 2012. It could still have been made in April 2013. This is subject to the authority issue to which we now turn.

Authority

61. It is submitted by the Claimants that there were difficult issues of Mr Walia's authority, actual, ostensible or implied, which meant that a claim in fraud could not properly be pleaded at least until disclosure of the 14 August 2007 email which revealed that the Bank and the First Defendant had discussed the need for a request for margin to be made to the First Claimant, which could be seen as evidence of actual authority to make a margin call. It is said that, given the professional constraints which operate in relation to Counsel raising a plea in fraud, that plea could not properly have been made until this authority issue was clarified. It appeared to be accepted in argument that some Counsel might have been prepared to plead fraud against the Bank on the basis of what Mr Walia had told the First Claimant in August 2007 as to the reason for remitting $10,000 to the Bank, but it was maintained that there were sufficient professional constraints operating upon Counsel to mean that it could be seen as improper to do so on the basis of the material available in February 2012 – April 2013.

62. The supposed difficulty arises out of the distinction made by Counsel for the Claimants between ostensible/apparent authority on the part of Mr Walia to make representations binding on the Bank at the pre-contractual stage before the Notes were bought, a matter fully canvassed in the 2009 Proceedings, on the one hand, and his ostensible/apparent authority to represent the Bank in contractual matters such as calling for margin or asking for additional collateral where there was a shortfall in margin in order to avoid a "formal margin call", on the other. It is now said that the emails in August 2007 evidence actual authority given to the First Defendant and Mr Walia to discuss such matters with the First Claimant, but that, seen on their own, without the exchange of witness statements in April 2013, any counsel would have thought long and hard before pleading fraud on the part of Mr Walia for which the Bank was liable, whether vicariously and/or because he was the Bank's agent in making the deceitful request he did make in August 2007, and whether by reason of actual or ostensible authority. The Claimants point to the various arguments which were taken in the 2009 Proceedings and are now taken in the 2016 proceedings as to the lack of agency, ostensible or actual authority and vicarious liability on the part of the Bank for Mr Walia's acts and omissions.

63. The distinction which the Claimants seek to draw, is, in our view, an artificial one. This can be seen from the Claimants' approach in the 2009 Proceedings and the pleas advanced by them in both those proceedings and the 2016 Proceedings.

64. In the 2009 Proceedings:

64.1 The claim for breach of statutory duty against the Bank itself, as not being licensed to carry out

financial services in the DIFC, was introduced by way of amendment in April 2013, one month or so before the trial. It proceeded on the basis that although the First Defendant was authorised by the DFSA to provide financial services in the DIFC, the Bank, as a Swiss bank had no licence to do so but in fact did so itself in entering into the investment transactions with the Claimants and the loans relating thereto.

64.2 Reliance was placed by the Claimants on the sending of emails by the First Defendant attaching letters from the Bank making margin calls on 29 September 2008 as constituting "management and execution" of the Claimants' accounts and investments in the DIFC.

64.3 Claims were made for breach of statutory duty, breach of contract and misrepresentation against the First Defendant.

64.4 At paragraph 122 of the Re-Re-Amended Particulars of Claim, the Claimants alleged that in dealing with the Claimants, the First Defendant and/or Mr Walia and/or Mr Nair acted as agents for the Bank and that pursuant to Article 32 of the Swiss Code of Obligations, their acts and omissions were to be imputed to the Bank which was therefore liable as a matter of Swiss law for the wrongs pleaded against the First Defendant and Mr Walia. This was particularised as including the misrepresentations set out in paragraphs 123 – 127 and/or the failure to take reasonable care to prevent harm to the Claimants, as set out in paragraphs 128 – 132.

64.5 At paragraphs 123 – 128 of the pleading, the Claimants relied upon a series of misrepresentations allegedly made by Mr Walia and/or Mr Nair, referred to as "the Capital Protection Statements", "the Capital Appreciation Statements", "the Coupon Statements", "the ABK Loan repayment Statements", " the Compliance Statements" and "the Proper Consideration Statements", all of which were said to have been made fraudulently, alternatively negligently.

64.6 At paragraph 129 of the pleading it was alleged that the First Defendant and/or Mr Walia and/or Mr Nair provided services for the Bank and/or a relationship of service and/or acted as the Bank's agent in relation to the transactions complained of.

64.7 At paragraph 130 it was alleged that the First Defendant and/or Mr Walia and/or Mr Nair were strictly liable to the Claimants in deceit and/or misrepresentation and that the Bank (as their principal or the person receiving services from them under the relationship of service) was fixed with vicarious liability for their conduct in respect of each of the misrepresentations set out above under the DIFC Law of Obligations.

64.8 At paragraph 131 it was alleged that the Bank was liable to the Claimants primarily or vicariously in damages for deceit or for the misrepresentations pursuant to the Law of Obligations.

65. In the 2016 Proceedings:

65.1 In paragraph 18, the Claimants alleged that the First Defendant provided investment advice and sold financial products of the Bank and in doing so was acting not only on its own behalf but also as agent for the Bank with actual, alternatively ostensible, authority.

65.2 At paragraph 19, is alleged that the Bank sold investment products to the Claimants through the First Defendant, that Mr Walia and Mr Nair acted as customer relationship managers for the Bank in respect of the Claimants, and that Mr Walia acted as agent for the Bank with, at all material times, actual or alternatively ostensible authority.

65.3 In paragraphs 118 – 124, the Claimants alleged that the Bank was liable for the deceit of Mr Walia under one system of law or another, pleaded in the alternative, on the basis (set out in paragraph 119) that he was all material times acting as agent with apparent or ostensible authority and/or auxiliary for the Bank with the result that the Bank was to be taken to have made the representations which he made in August 2007 (as set out in paragraph 66) and the implied representations (set out in paragraph 67) as inherent therein. It was said that the Bank was directly liable for those representations or alternatively it

was vicariously liable for them.

65.4 In paragraphs 125 – 128 it was again alleged that the Bank was vicariously liable for Mr Walia's/ the First Defendant's breach of advisory duty in failing to tell the First Claimant that the payment of $10 million was in relation to a margin call.

65.5 In paragraphs 129-132, it was alleged that the failure to advise amounted to a deceitful implied representation that there was nothing to disclose.

65.6 In paragraphs 133 – 136, it was alleged that the Bank was vicariously liable for Mr Walia's/the First Defendant's failure to give accurate information as to the true reason for the requested $10 million.

65.7 In paragraphs 137 – 141, it was alleged that the failure amounted to a deceitful implied representation that there was no material information to disclose.

66. In the Further Information given by the Claimants on 11 May 2017, to which we have already referred on the question of knowledge of the Claimants of the Bank's case, it was said that the actual and/or ostensible authority given to the First Defendant by the Bank "extended to all matters connected to the provision of advice and information about the Notes generally by its employees and agents, including Mr Nair and Mr Walia" (emphasis added). It was also said that "the manner in which the ostensible authority arose is res judicata between the Claimants and the Second Defendant [the Bank]." The Claimants sought to resile from this plea in argument, saying that there was no issue estoppel in relation to actual authority and that the plea of issue estoppel only took them a certain distance because it operated only for pre- contractual representations and not in relation to representations that a margin call was being made or would be made if further collateral was not put up. That is not how this or any of the Claimant's other pleadings in either the 2009 or 2016 Proceedings read. This paragraph of the Further Information is all encompassing where ostensible authority is concerned, in accordance with the case put in the 2009 Proceedings.

67. In argument before us, the Claimants sought to draw the distinction in authority to which we have already referred, but on any sensible reading of the pleadings in both the 2009 Proceedings and the 2016 Proceedings, it is clear that the Claimants have alleged and continue to allege that the First Defendant, Mr Walia and Mr Nair had the widest possible ostensible authority in representing the Bank in all matters relating to the Notes and investments and have never had any difficulty in making such allegations, including pleas of fraud and deceit on the part of Mr Walia and Mr Nair for which it was said that the Bank was to be vicariously liable or liable as principal.

68. In the judgment of the Court of Appeal dated 5 January 2012 dealing with the jurisdiction issue relating to the position of the Bank and its reliance upon the exclusive jurisdiction clause found in the Trust Agreements and Deeds of Pledge, the Court had cause to analyse the Re-Amended Points of Claim in the 2009 Proceedings and the claims made against the Bank therein, in the context of the relationship between the Claimant and the Bank. At paragraph 55, the following appears:

"It thus appears that in substance the relationship between the Claimants and Sarasin Dubai [the First Defendant] and Sarasin Switzerland [the Bank] was one which had the following salient characteristics.

(i) Client contact was exclusively within the province of Sarasin Dubai for all purposes to the effect that Sarasin Dubai was the only medium of communication between the Claimants and [the Bank].

(ii) Sarasin Dubai in the persons of Mr Nair and Mr Walia, was a marketing emanation of [the Bank] in the sense that one of its functions under its relationship with its majority shareholder was to sell investment products established by [the Bank] or its holding company Rabobank Nederland.

(iii) In the course of its marketing function, Sarasin Dubai offered advice to the Claimant either from its own judgement and/or from information or advice obtained from [the Bank].

(iv) The process of investment management was conducted by [the Bank] and/or Rabobank.

(v) In the current and Custody Account Application Forms, Sarasin Dubai is designated the "External

Adviser" in relation to the Claimants and therefore must have been an agent, intermediary or subsidiary of [the Bank] "appointed by special authorisation or other special contractual agreement to act as so-called designated representatives in accordance with the Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence". In that capacity Sarasin Europe would have had the function of ascertaining the precise identification of the applicant and verifying all such information so as to satisfy the obligations (largely designed to prevent money laundering) which [the Bank] have assumed under the Swiss Banks' Code of Conduct.

(vi) Sarasin Dubai was responsible to [the bank] for providing to the Claimants the contractual documents which had to be completed to set up the different specific contractual links with [the Bank] and for receiving back the documents with the Claimants' signatures so as to conclude each of the parts of the contractual structure required for the investments to be made.

(vii) Most if not all communications from Mr Nair, Mr Walia and Ms Naz, except for meetings with the Claimants or Mr Taha, were made from Sarasin Dubai's premises in the DIFC.

(viii) All the contracts entered into by the Claimants which appertain to their acquisition from [the bank] of the investment products and the funding of such acquisitions were contracts between the Claimants and [the Bank]."

69. From that point on in the proceedings, the Claimants could never have had any compunction in pleading the widest possible authority on the part of the First Defendant, as they duly did in both sets of proceedings. The First Defendant was the only medium of communication between the Claimants and the Bank and represented the "shopfront" of the Bank in DIFC. The Claimants never had any dealings direct with the Bank and always dealt with it through the First Defendant and in particular Mr Walia and Mr Nair. As such the Claimants would always have looked on the First Defendants as being the instrumentality through which the Bank operated in the DIFC.

70. We consider therefore that Sir David was plainly wrong in seeing difficulties in pleading the actual or ostensible authority of the First Defendant and to say, as he did in paragraph 29 of his judgment that it was only when, in the course of cross- examination, Mr Walia outlined his role as customer relationship manager in giving a forewarning of a margin call prior to a formal margin call by the Bank, that the Claimants were able to make such a plea. It was always the Claimants's case that Mr Walia had the widest possible actual or ostensible authority to represent the Bank because he was the Bank's point of contact with them for all purposes. The First Defendant in the persons of Mr Nair and Mr Walia represented the Bank, so far as the Claimants were concerned and, on their case, the Bank was content that they should do so.

71. There is, further, no material difference between calling for additional margin and asking for additional collateral to make good a shortfall. Nor is there any material difference between doing so orally, whether on the phone or in a meeting, and making a written margin call, although a Bank which wishes to rely on such a call to exercise its contractual rights will usually issue a written demand so that it is fully evidenced. Many margin calls are requested orally and margin put up and written calls follow, where necessary, if there is no adequate response and the Bank may need to enforce contractual rights. Mr Walia's ostensible authority, on the case always made by the Claimants, extended to making a margin call, seeking additional collateral to make good a shortfall or making statements relating to the relationship between the First Claimant and the Bank which were intended to hide the fact that additional margin was needed. It matters not which way the deceit is expressed. There is no relevant distinction between them, nor any relevant distinction between pre and post contract misrepresentations, as is shown by the Claimants' reliance on issue estoppel in its pleadings as preventing the Bank from arguing otherwise in relation to ostensible authority to make the very representations of which complaint is made in the 2016 Proceedings.

72. Thus, from the earliest stages of the 2009 Proceedings,

72.1 the Claimants pleaded that the Bank were liable for the fraudulent misrepresentations made by Mr Walia and/or Mr Nair as referred to above. Those misrepresentations were allegedly made in meetings in April 2007 and some were allegedly repeated in meetings in June and July 2007. The allegations were expressly pleaded on the basis that the representors did not believe in the truth of their statements and that they were made, knowing them to be untrue or not caring whether or not they were true or untrue.
72.2 The Claimants also expressly pleaded that Mr Walia had actual, implied or ostensible authority to make representations on behalf of the Bank as well as the Second Defendant.

73. In April 2013, witness statements were exchanged in which Mr Nour and the First Claimant gave express evidence about a telephone call from Mr Walia in mid- August 2007 in which the First Claimant was asked for further investment without reference to a need for further cross collateral, whilst Mr Taha denied taking part in any call of that nature. It is plain that the Claimants knew and appreciated that the case of the two defendants was that such a call or meeting had taken place where collateral was sought and their witness statements were designed to deal with that case. It is now the Claimant's case that it was on receipt of the witness statements served on behalf of the Defendants that they first came to know that the deceit claim was open to them and only when Mr Walia was cross examined on Day 6 at p 167 onwards that they fully appreciated the point. This is not tenable given the terms of their own witness statements which show a clear awareness of the point, even if they were not aware earlier. The witness statement of Mr Walia referred at paragraph 164 to a meeting (not a telephone call) with the First Claimant in late August 2007 at which the margin call on his mother's account was discussed and that, because of the decline in value of the investments there was a collateral shortfall on the account which needed to be rectified by the deposit of additional funds. This led to the payment of the $10m on 31 August on the First Claimant's account, which, by reason of the cross- pledge between his account and that of his mother could be used to satisfy the margin call on her account.

74. It can thus be seen that the First Claimant's and Mr Walia's witness statements which were exchanged testified to different occasions – a telephone call on the one hand and a meeting on the other. Each however was addressing the same point, namely whether or not the reason for the provision of the $10 million was the need for additional collateral and what was said by Mr Walia when requesting such payment in that regard. It is beyond argument therefore that, by this stage, the First Claimant had already appreciated that, on his own case, Mr Walia had deceived him into making a payment and his statement addressed the issue of what was in fact said by the latter to him.

75. The Liability Judgment of the DCJ at paragraph 395 set out his conclusion, based on the case put by the Claimants, that, in practice, the Bank dealt with the Claimants through Mr Nair as its own Client Relationship Manager and that it was immaterial that he was employed by the First Defendant. His role, vis a vis the Bank was indistinguishable from what it would have been if he had been employed by the Bank. He concluded that this made it impossible for the Bank to say that, in its dealing with the Claimants, it was not carrying on activities which constituted a Financial Service in or from the DIFC and impossible for the Bank to maintain that it was not doing so in breach of the Financial Service Prohibition. Thus, the DCJ accepted that, for all material purposes, the acts of Mr Walia were those of the Bank in respect of the representations with which he was concerned.

76. Given the existing pleas of fraud made by the First Claimant against the Second Defendant and the plea of vicarious liability of the latter for Mr Walia's statements and/or his ostensible, implied or actual authority to bind the former, there was no possible objective basis on which the First Claimant and his advisers could feel inhibited in pleading a fraudulent misrepresentation about the purpose of the request for $10 million. The parties' cases on the existence and content of the alleged meeting/telephone call in August 2007 were clear by February 2012 at the latest and the Further Information furnished by the First Claimant recognised that, by that point, he had the necessary knowledge upon which any plea of fraud could be based. In practice the

defence of the Bank added little to the defence of the First Defendant on the point, save to show that the Bank's case corresponded to that of the First Defendant. Joinder of issue on the First Defendant's case on this point inevitably meant that the First Claimant's case had to be that he had been fraudulently misled and there was never any problem about pleading ostensible authority in relation to what had been said by Mr Walia as he was, in the eyes of the Claimants, always speaking on behalf of the Bank with whom they had no dealings save through the First Defendant.

77. The issue of authority therefore was never a barrier to the Claimants pleading the claim they now wish to pursue.

78. Moreover, it will be noticed that the Claimant amended its case in April 2013 to include the claim against the Bank for its breach in providing financial services through the medium of the First Defendant. The Claimants had no difficulty in putting this case forward and it is impossible to see what difficulty there would have been in putting forward the case that, when making fraudulent statements in connection with the investments made, Mr Walia and the First Defendant were acting for the Bank in that respect also.

Loss and Damage

79. The Claimants would have had no professional or practical difficulty in pleading that they had suffered loss and damage as the result of the deceit either, although that loss would not have been as readily quantifiable at the time as it is now. Nonetheless there is no doubt that the cause of action in deceit had accrued long since and damage had been suffered which would, when quantified, turn out to be substantial. According to the Particulars of Claim in the 2016 Proceedings, the loss claimed flows from the alleged inability of the First Claimant in June 2009, because of the unavailability of the $10million, to make loan interest repayments to ABK on the RAFCO Loan on the Tower Project or of the payment due to the Landlord under the Al Samiyah Agreement. This led to:

> 79.1 ABK attaching funds of the First Claimant on 1 November 2009 and cancelling the loan on 10 November 2009, filing an execution case in the Kuwait Court the same day, with consequent halting of the construction of the Tower Project, although the eventual auction of the partially completed property did not take place until 12 June 2014.
>
> 79.2 ABK advising the Landlord on Al Samiyah that it had cancelled the RAFCO Loan and was seeking enforcement of the loan from Rafco, guaranteed by the Frist Claimant. On 11 April 2010 the Al Samiyah Agreement was terminated by agreement between RAFCO and the Landlord.

80. In the period February 2012 – April 2013, the Claimants would have had no difficulty in pleading loss and damage by reference to those matters which had occurred at the time and claiming substantial sums representing lost expenditure and/or loss of profits. To the extent that the loss was unquantifiable, the Claimants could have sought decisions in principle with detailed assessment of losses to follow, or declarations of entitlement in respect of such loss as flowed from the deceit.

81. In consequence, the plea of deceit could properly have been made by the Claimants, on the basis of their prior pleadings and the information they had as to the nature of the case being made by the Defendants by August 2012 and a fortiori, shortly afterwards or in April 2013.

Should the new claim have been brought in the 2009 proceedings?

82. The Claimants relied on the decision of a two judge English Court of Appeal in *Playboy Club London Limited v Banca Nazionale Del Lavoro* Spa [2018] EWCA Civ 2015 for the proposition that a party was not precluded by the doctrine of abuse of process from pursuing a case in fraud in new proceedings which could have been pursued in earlier proceeding but constituted a weak case on the material available. We do not accept that the decision is authority for that proposition, although reference is made to "a speculative and weak case". The decision turned on its particular facts and the discreditable behaviour of the defendant. There the defendant had equivocated and sought to advance a case which was not truly open to it on the pleadings, had

failed to make relevant disclosure about its employee. It could not be said that the case in fraud should have been made at that trial, when clear facts only emerged in the cross examination as to that employee and similar fact evidence, supporting the claim of fraud. That is far from the facts of the instant case, where the Claimants had pleaded fraud already against the Bank and could not objectively have had any reason not to do so on the basis of their own case, once they knew what the Defendants' were saying about the events of August 2007.

83. It appears to us self-evident that, if such a plea was capable properly of being made in the 2009 proceedings, in circumstances where all the relevant witnesses were going to be present and would be cross-examined about any conversation in August 2007 in the context of that action, the new claim should prima facie have been brought in those proceedings. Whilst the point was not of central importance in those proceedings in the same way as it is now said to be critical in causing a recoverable loss of over $1 billion, it is clear from the Claimants' oral opening and closing submissions to the DCJ that the alleged conversation was seen by the Claimant as of some significance since, as we have already said, if the issue of margin had been raised in August 2007 and cross collateral provided without objection, the First Claimant would be seen to have acknowledged that the recommended investments were risky in nature and the strength of his case on mis-selling diminished.

84. The Bank, it would appear, did not see this alleged conversation as a matter of great importance since its counsel did not cross-examine the First Claimant about it at all at the trial in the 2009 Proceedings. Counsel for the Second Defendant did so but not at any great length, with the result that, when the trial judge came to write his judgement, he had forgotten that any such cross examination took place and stated, incorrectly, in his judgement, that the evidence of the First Claimant, in his witness statement on the subject, had gone unchallenged. The other witnesses of the Claimant were not cross examined on the point at all.

85. This irony is reinforced by the fact that the Claimants now contend that the findings of the trial judge as to the deception which took place in August 2007 constitute res judicata/issue estoppel with the result that the issue of liability is concluded against the Bank and all that remains is causation, remoteness and assessment of damages flowing therefrom- to the tune of $1 billion, on its case. It is, in our view, again self-evident that if the Bank, had understood that any claim for $1 billion depended upon the terms of this alleged telephone conversation, not only would it have cross-examined on the matter, but it would have gone to much greater lengths in an attempt to gainsay the First Claimant's evidence, to the extent that it could. Prima facie however, the DCJ's findings constitute an issue estoppel which would operate against the Bank in relation to what was and was not said on that occasion. It would be hard to persuade a Court that these finding were collateral and incapable of giving rise to the operation of the doctrine. For the reasons given, it is also hard to see how the finding of ostensible authority would not give rise to its operation. There is therefore an obvious prejudice to the Bank which arises from the fact that the potential claim was known to the Claimants and not pursued in the 2009 Proceedings, not made known to the Defendants and is now said to be concluded against it on liability.

86. It was therefore important for the Claimants to bring the deceit claim in the 2009 Proceedings and not to leave it hanging, whether deliberately, in the hope that material might emerge in cross examination to strengthen such a claim, or by inadvertence in failing to see that it properly belonged within the framework of the 2009 Proceedings. They then opportunistically seek to make capital of the cross-examination in new proceedings following the DCJ's refusal to admit evidence of real estate losses at the quantum stage of the 2009 Proceedings, in order to claim such losses on an even greater scale following determination of quantum at a mere $35 million. Whether or not the importance of bringing the deceit claim in the 2009 Proceedings, as opposed to deferring it, presented itself to the minds of the Claimants and their advisers, the fact that they did not then pursue it is highly significant because of the potential issue estoppel point, which amounts to a very

strong and effectively determinative factor in assessing whether that claim should have been brought in the 2009 Proceedings. This Sir David failed to take into consideration.

87. We conclude that not only could the Claimants have sought to amend to add the deceit claim against the Bank in the 2009 Proceedings but that they should have done so in August 2012 and a fortiori later. Even if the point only crossed their collective mind in April 2013 in actuality, they should then have sought to do so or raised the point with the Court in accordance with the *Albi*

88. The gravamen of the injustice and vexation visited upon the Bank from the failure to include the deceit plea in the 2009 Proceedings or to seek the Court's directions thereon is plain from the allegations of issue estoppel now made as to the deceit, on the one hand, and the ostensible authority of Mr Walia to commit the Bank and render it liable for his statements, on the other.

Does the Aldi principle apply and if so with what result?

89. It will be apparent from the conclusions we have reached thus far that the *Aldi* principles apply here and that we can see no basis upon which the Claimants, if acting as they should, in accordance with the *Aldi* guidelines, could have failed to apply to the Court to seek guidance, even if not to amend, and that such an application would have fallen to be made, at latest in August 2012 with the obligation, as set out in *Okritie* to do so as soon as possible after the point arose. It matters not for present purposes whether it could have been done in the period between February and August 2012 because, for reasons which will appear, we consider that the result of any such application would not have been the postponement of the hearing of liability of the deceit claim, a result very different from that envisaged by Sir David on the basis of his assumption of an application made in April 2013.

90. Contrary to the Claimant's submissions and Sir David's conclusions, the result of an application to the Court could not conceivably have given rise to the position that the parties are now in. Had an application to amend been made to add the deceit claim before September 2012 the Court would have ensured that the application be heard speedily, if necessary by video link, given the potential effect on the trial fixed for 19 May 2013.

90.1 There had been a Case Management Conference on 19 April 2012 and it was not until some time after 22 May 2012 that the trial date was fixed.

90.2 A further interlocutory hearing took place on 27 August in relation to disclosure and that would have presented a clear opportunity for the matter to be aired in Court. It is inevitable that the matter would have been considered then if raised by the Claimants by then as it should have been.

90.3 In our view, with 9 months to run before the trial in September 2012, a Court would have given permission to amend and allowed the claim in, requiring liability and quantum (at least in terms of causation and issues of principle) to be determined at the trial.

90.4 If both parties had considered and agreed that disclosure on causation and quantum was so extensive that it could not be dealt with before the scheduled date, with any expert evidence required, then, since the Trial had only been fixed some 3 months earlier, at most, a Court would not have felt the reluctance to adjourn that trial that it undoubtedly would with an application in April 2013, one month before trial.

91. On 13 January 2013 there was another Case Management Conference where an application to amend could have been made or directions sought in accordance with By this time the trial was only 4 months away but there can be no doubt that the Court would a have ordered that the liability aspect of the deceit claim be heard at trial, with possibly some issues of principle in the damages claim also, although that does not appear likely. Causation and quantification of loss would, by then, probably have had to be heard separately because of the need for disclosure and potential expert evidence.

92. We have come to the clear conclusion that the end result of any directions hearing in that period from

August 2012 to January 2013 would have been the grant of leave to amend with the liability aspect of the deceit claim included in the trial in the 2009 Proceedings, unless the parties agreed otherwise. Whether or not quantum would have been included would depend upon the time when the application took place within that period and the width of disclosure required. The Court would have ensured that the liability aspect of it would be heard in the 2009 Proceedings because it concerned the very conversations which were in any event to be the subject of evidence from the protagonists in those proceedings and decisions as to how quantum would be dealt with would be made on a pragmatic basis, with regard to the amount of work required and the time it would take. On any view the issue of liability would have been determined once and for all without any element of duplication between hearings or potential issue estoppels arising. The savings in costs and court time were such that any other solution is unthinkable, absent any different agreement between the parties as to the future course of the proceedings.

93. If liability only was added to the trial scheduled for May 2013, the additional work to be done in preparation would have been limited. Self -evidently the matter would have to be the subject of additional pleadings on all sides, but, given the relatively confined ambit of the liability issue, that could have been done by all parties within a matter a few weeks at most. There would not seem to be any need for additional disclosure because the issue as to what was said was recognised as already present in the litigation as appears from the statements of case to which we have referred and from the witness statements which were in due course exchanged and the cross examination to which we have also referred. The importance of the point would have been recognised since the Claimants would be saying that substantial damages turned on it. The parties would doubtless have gone to much more trouble in the production of fuller witness statements and cross examination would have been much more extensive, both of the Claimants' and the Defendants' witnesses, in consequence. In particular, the Bank would have had a much greater interest in cross examining the First Claimant, Mr Taha and Mr Nour, and would have done so at length, to the extent that it felt that any ground was left uncovered by the First Defendant in its cross examination. In the overall context of the trial that might have added a day to the evidence and less than that in submissions made to the Court, but all parties would have had the opportunity to present their cases fully in the knowledge of what was at stake.

94. As to quantum the Court would have wanted at the very least an outline pleading on quantum so that the parties knew what the consequence of the deceit issue might be and any arguments of principle and (potentially) causation determined, but it would in any event have been clear that the scale of losses would be substantially greater than those which were claimed in the existing statement of case. It would of course have been in the interest of the Claimants to proffer a full pleading of quantum at the earliest stage possible and to give disclosure in order to have the matter heard at the trial scheduled for May 19 2013. If quantum could be fitted into the timetable it would be, and we take the view that had the directions hearing taken place at any stage before mid- November 2012, quantum would have been included in the trial, even if in fact, it was never reached (as actually occurred in the trial which did take place, because of mathematical issues in working out the losses which were not difficult to assess in principle).

95. As already mentioned, it is significant that the Claimants' application to amend the claim to include the Regulatory Claim against the Bank was made by an Application Notice dated 14 March 2013 and was determined on paper by the DCJ on 15 April 2013. Had there been an application to amend to include a deceit claim, which doubtless would have been opposed, it may well have been necessary to hold a hearing, whether or not using video link procedures but, even at that late stage, the Court would have done everything in its power to make sure that the matter came on quickly because of the potential effect on the trial. What the order made on 15 April demonstrates is the strong likelihood of the retention of the trial date with the inclusion of any additional cause of action which could properly and reasonably be fitted in without adding hugely to the body of evidence, if shortage of time militated against that. With a skeleton pleading of

quantum only, the liability aspect could still properly have been pleaded and determined with 35 days to go towards trial.

96. In such circumstances, we take the view that the impact of any *Albi* application, even as late as April 2013, would have resulted in a hearing of the liability aspect of the deceit claim with all parties aware of the significance of it. The Court would have ensured the avoidance of the situation which has arisen, where the gravamen of the injustice and vexation visited upon the Bank arising from the failure to include the deceit plea in the 2009 Proceedings or to seek the Court's directions thereon, is plain from the allegations of issue estoppel in the 2016 Proceedings as to the deceit, on the one hand, and the ostensible authority of Mr Walia to commit the Bank and render it liable for his statements, on the other.

Further element of abuse

97. When attention is focused on the damages claimed in the 2009 Proceedings, and in particular those which the Claimants sought to introduce into that action following judgement on liability, it can be seen that all the damages now sought in the 2016 Proceedings as claimable as a result of the fraudulent statement in August 2007 were capable of being claimed as a result of the mis-selling allegations made in the 2009 Proceedings.

98. As set out above, the First Claimant sought to introduce a head of loss following the liability judgement which related to the Tower Project, a loss consequential on the tying up of his assets in the investments recommended by the First Defendant, which meant that he was allegedly deprived of funds to repay loans which he had taken out in connection with that project, with the result that he was unable to keep up repayments of those loans with consequent foreclosure by the lenders and the failure of the Tower Project to achieve the profits for him and/or his company that would otherwise have been made. The DCJ rejected that claim as unpleaded and outwith his order of 28 October 2014, thus being made too late in the 2009 Proceedings, restricting the First Claimant to the pleaded claim based on the losses on the investments and the losses incurred in relation to the specific loans taken out to make those investments. Damages were assessed on the "no transaction" basis- as if there had been no mis-selling by Mr Walia for whom the Bank was responsible, but were said by the Claimants to include consequential real estate losses.

99. The losses now claimed in the 2016 Proceedings are all losses of the same kind, resulting from the $10 million and other funds being tied up in the Notes when, had a margin call been made known, funds would have been withdrawn and monies would be available to repay loans and achieve profits from the projects from which the Claimants were effectively excluded. The fact that these losses were theoretically claimable as a result of the mis-selling, just as much as from the deceit claim, is shown by the attempt to include the Tower Project in the quantum hearing in the 2009 Proceedings.

100. Seeking to claim a new head of loss in new proceedings resulting from the same cause of action as that pursued in earlier proceedings would fall foul of the *Henderson v Henderson* principle but no case was cited to us where new heads of loss which were not claimed in earlier proceedings but which could have been so claimed were struck out in new proceedings on a different cause of action and, absent special facts, we can see no basis for any such application if the cause of action itself does not run foul of the rule.

101. Having said that, however, what is shown by the history of claims for losses is the Claimants' opportunism. Having won on liability before the DCJ they then sought to include much more substantial real estate losses. Having been awarded $35m instead of the $75m claimed and, apparently, having not recovered from the First Defendants the full amount claimed from them, although recovering the lesser judgment sum from the Bank (with interest and costs yet to be resolved) , the Claimants have again looked for a way of increasing their recovery, to include the Tower Project and other real estate losses, by pleading a new cause of action which was available to them and known to be available to them, long before the trial in the 2009 Proceedings. The issues of causation would doubtless be hard fought but the opportunistic nature of the 2016 Proceedings reinforces the nature of the abuse in seeking to raise a cause of action which, if it was to be heard

at all, could and should have been brought into the 2009 Proceedings by applying to amend, at latest by late August 2012, alternatively, later but before the May 2013 trial.

Harassment

102. The rule in *Henderson v Henderson* and the *Aldi* principle have been infringed by the Claimants in bringing the 2016 Proceedings against the Bank which would, if we did not strike out these proceedings, be faced with fighting another action involving arguments on issue estoppel which are capable of giving rise to appeal, a potential trial involving the same witnesses as in the 2009 Proceedings about the same August 2007 exchanges if issue estoppel does not apply, with the Claimants already having had a dry run in cross examination of Mr Walia (a course of which the English Court of Appeal has disapproved in *Clutterbuck v Cleghorn* [2017 EWCA Civ 137 at paragraphs 103-14 and *Stuart v Goldberg Linde* (ibid) at page 97at H). If issue estoppel does apply, The Bank is effectively fixed with liability on a cause of action which could and should have been pursued in the 2009 Proceedings on an unpleaded cause of action of which they were not aware at the time of those proceedings. The new claims for damages are large and give rise to significant issues of causation, investigation of which would require considerable disclosure and investigation of evidence at substantial cost. This is, in such circumstances, undoubtedly vexation and harassment of the Bank, which should never have been put in this position.

103. We also see nothing which vitiates the conclusion of harassment in the Bank reserving its position on receipt of the Claim Form and Particulars of Claim in the 2016 Proceedings as to abuse of process in order to consider whether or not there was such abuse in the commencement of them. That and the seeking of Further Information which was in due course provided in April 2017 was a prudent course in order properly to analyse and assess the situation before launching a strike- out application, which was duly done on 1 June 2017, within 6 months of service of the Particulars of Claim. The absence of an immediate application on service of the Particulars of Claim could not, in any event, make any difference to the answers to the questions which the Court has posed.

Conclusion

104. In the circumstances and for the reasons set out above, we allow the appeal and strike out the Claim Form issued on 6 April 2016 (as amended), the Particulars of Claim dated 9 January 2017 and the proceedings herein as against the Bank.

105. In the ordinary way, costs follow the event and in the light of our conclusions, it appears that the Claimants must pay the Bank its costs of the 2016 Proceedings and we invite the parties to seek to agree the order which should be made. If there is no such agreement, the Court will make any necessary ruling on paper following the making of short submissions in writing by both parties, unless there is good reason to hold another hearing, which we doubt.

JUSTICE JUDITH PRAKASH

106. I agree with the abovementioned judgment and have nothing further to add.

H.E. JUSTICE SHAMLAN AL SAWALEHI

107. I agree with the abovementioned judgment and have nothing further to add.

Issued by:
Ayesha Bin Kalban
Assistant Registrar
Date of Issue: 28 January 2019
At: 11 am