66. It is submitted on behalf of Bank Sarasin (at paragraph 37 of the Updated Joint Statement on Quantum) that liability under Article 65(2) of the Regulatory Law is restricted to the aggregate of (i) loss of use of the money advanced by Bank Sarasin for the purchase of the Notes until liquidation of the Notes in the sums charged by it, which Sarasin-Alpen quantifies as US$6,234,181, (ii) loss of use of the sums advanced by ABK from the date of purchase of the Notes until their liquidation, which it quantifies as US$6,643,454 and (iii) loss of use on the shortfall on liquidation of the Notes (US$10.4 million), from the date of the liquidation until December 2014, which it quantifies as US$1,503,164.

67. In response to the submissions advanced on behalf of Bank Sarasin as to the extent of the power of the Court to order compensation under Article 65(2)(b) of the Regulatory Law, the Claimants submit that all of the losses claimed are a direct result of the monies transferred by the Claimants to the Defendants: they dispute that (at least in the present context) the quantification of loss for the purposes of Article 65 of the Regulatory Law differs from (or is narrower than) quantification of loss for the purposes of compensation under Article 94(2) of that Law. It is said that the relevant transfer of monies, for the purposes of Article 65(2)(b), was the transfer of monies from ABK to Bank Sarasin on the Claimants' instructions. ABK had provided loan facilities to Mr Al Khorafi and Mrs Al Hamad to enable that transfer to be made; and debited the sum transferred to their ABK loan accounts. In those circumstances, it is said, it cannot be argued that the losses were outside the scope of Article 65.

68. In any event, it is said that this point has also already been determined by this Court; and is now subject to an appeal to the Court of Appeal. Reference was made to paragraph 5 of Bank Sarasin's grounds of appeal and to paragraphs 73 to 89 of the skeleton argument filed for the appeal on its behalf (paragraphs 77 to 80 of which replicate paragraphs 24 to 27 of the skeleton argument which it put before this Court).

69. In my view the right to apply to the Court for compensation under paragraph (b) of Article 65(2) of the Regulatory Law is independent of the right to apply under paragraph (a) of that Article for the recovery of money paid or property transferred under an agreement which is unenforceable because it was made in the course of carrying on a Financial Service in breach of the Financial Services Prohibition: there is no reason, as it seems to me, to read paragraph (b) of that article as ancillary to

paragraph (a). But, as I have said, Bank Sarasin is correct in contending that compensation under paragraph (b) is limited to loss sustained as a direct result of the payment or transfer made under the agreement: there is no freestanding right under Article 65(2) to apply for compensation in respect of loss sustained as a result of entering into the agreement if that loss was not a direct result of a payment or transfer made under it.

70. I accept the Claimants' submission that, in the present case, the transfer of monies from ABK to Bank Sarasin to fund the purchase of the REIT Notes by Mr Al Khorafi and Mrs Al Hamad in June 2007 was a relevant transfer of monies for the purposes of Article 65(2)(b) of the Regulatory Law. Further, as it seems to me, the transfer of the monies borrowed by Mrs Al Hamad from Bank Sarasin itself to fund the purchase of the July 2007 SaraFloor Notes and the transfer of the monies borrowed by Mrs Al Rifai from Bank Sarasin to fund the purchase of the February 2008 SaraFloor Notes were relevant transfers for the purposes of that article.

71. It is important to keep in mind that – on the facts in the present case – it was known to Bank Sarasin that the monies transferred to fund the purchases of the REIT Notes, the July 2007 SaraFloor Notes and the February 2008 SaraFloor Notes were monies which had been borrowed by Mr Al Khorafi, Mrs Al Hamad or Mrs Al Rifai for the specific purpose of making those purchases. In those circumstances, it seems to me that the answer to the question whether the Claimants can recover compensation in respect of the actual costs of borrowing those monies is "Yes". There is nothing in the observations of Mr Justice David Richards in *Whitely* which supports a contrary conclusion; and, if and to the extent that the inclusion of the word "direct" in Article 65(2)(b) of the Regulatory Law suggests that, in some cases, the causal link may be narrower under the Regulatory Law than it was under the FSMA 2000 (which I doubt), on the facts in the present case the word adds nothing. It follows that I am satisfied that (subject to the other defences to which I am about to turn) compensation can be claimed against Bank Sarasin under Article 65(2)(b) in respect of (i) interest and fees charged by Bank Sarasin on the monies borrowed by Mrs Al Hamad and Mrs Al Rifai and transferred to fund their respective purchases of the SaraFloor Notes (head (B) losses), (ii) interest and fees charged by ABK on the monies borrowed by Mr Al Khorafi and Mrs Al Hamad and transferred to fund their purchases of the REIT Notes (head (C) losses) and (iii) interest and fees charged by

CBK on the monies borrowed by Mrs Al Rifai to refinance the ABK loans and facilities.

72. For the reasons which I have set out in the preceding paragraphs of this section of my judgment I reject the Defendants' submissions that the claims to compensation under heads (B), (C) and (D) should be dismissed on the grounds that the losses claimed fall outside the scope of the duties in respect of which the Defendants have been held to be in breach or are too remote.

Whether the claims to compensation under heads (B), (C) and (D) should be dismissed on the grounds that the Claimants failed to mitigate the losses in respect of which they now claim

73. In developing the submission that the claims to compensation under heads (B), (C) and (D) should be dismissed on the grounds that the Claimants failed to mitigate the losses in respect of which they now claim, it was submitted that:

(1) The claimants were at all times subject to a duty to take reasonable steps to mitigate their loss; and cannot recover for loss that which was reasonably avoidable (*McGregor on Damages*, 19th edition, paragraph 9-004).

(2) The failure to repay the Sarasin loans in October 2008 (or alternatively thereafter) was a failure to mitigate loss and so any claim for interest and charges paid thereafter is irrecoverable.

(3) The failure to repay the ABK loans in October 2008 (or alternatively thereafter) was a failure to mitigate loss and so any claim for interest and charges paid thereafter is irrecoverable; and

(4) The failure to repay the ABK loans by 2010 and the decision to take out the CBK loan in 2010 (and/or the failure to repay it in 2010 or later) was a failure to mitigate loss and so irrecoverable.

In support of those submissions the Court was referred to *Al-Sulaiman* ([2013] EWHC 400 (Comm), at paragraphs [203] to [207] and [210] to [211]). It was said that, if the Claimants had acted reasonably and produced the necessary funds to extinguish their indebtedness after the Notes were sold in October 2008 (or,

alternatively, shortly afterwards), they would not have suffered the losses claimed under heads (B), (C) and (D).

74. In *Al Sulaiman* the claimant, Basma Al Sulaiman ("BAS"), who had entered into a series of leveraged transactions on the advice of the defendants, Credit Suisse, sought compensation in respect of losses resulting from alleged breach of statutory duty under section 150 of the FSMA 2000. It was said on her behalf that she was an inexperienced investor, that the risks of leveraged transactions had not been properly explained to her, and that had proper explanation been given, she would not have purchased the investments in question. Following the collapse of Lehman Brothers and of two Icelandic banks in September and October 2008 and the consequent collapse in both the equities and fixed interest markets, the value of the Notes that she had purchased (both those linked to equities and those linked to interest rates) did drop significantly, with the result that margin calls were made which she did not meet. The Notes were sold in order to recoup the amount of the loans; but the proceeds were insufficient to do so. BAS claimed the losses which (as she said) she incurred by investing in Notes she would not have purchased at all, had she been properly advised. At paragraph [167] of his judgment the judge (Mr Justice Cooke) rejected the suggestion that BAS would not have invested in the Notes, had she been told of the risks of which she said she was not told: he held that investment in these Notes represented exactly the kind of "calculated risk" that she wanted to take. But, nevertheless, he went on to consider whether (if he were wrong in that conclusion) the lack of advice as to the risks was the cause of the losses which she claimed. In that context he held (at paragraph [203]) that:

> "[203] ...It is effectively now recognised that BAS had the assets available to pledge by way of guarantee for the extant margin call, had she wished to do so. A schedule of her available assets, as disclosed (and there is good ground for thinking that there were further assets which remained undisclosed), was produced by Plurimi's counsel in the course of argument, showing some $14m- $15m of assets which could have been readily pledged, plus $10m of jewellery, without looking to her real property and contents valued in excess of $60m. There were both personal and trust assets which were apparently available for pledge. She made no approach to her personal bankers, nor to the JP Morgan managers of the BAS 2003 Trust nor to the trustees of the Smile Trust. She never produced the guarantee which was available from Citibank. With available guarantees of $5.8 million, the benefit of the use of the $11 million deposit to pay off loans, the effect on leverage of selling Note 19 and the use of the net proceeds to repay further loans, there should have been no difficulty in producing a further guarantee to meet the shortfall, with all the other assets at her disposal. Alternatively, she could have asked for time and indicated a willingness to come up with

> collateral which it is highly likely, would have been acceptable. This was not done."

At paragraph [205] the judge held that it was clear that BAS had no intention of producing further margin; and that, if there had been an intention to meet the call, there would have been a request for more time to pay and, "as everyone realised at the time, BAS would have been perfectly capable of providing the collateral sought". He went on, at paragraph [207], to say this:

> "[207] In my judgment it is plain that a decision was made not to meet the margin call. This was probably done in the hope that [the bank] would not insist on the additional collateral. Such an approach is so irrational as to be almost incomprehensible, explicable only if it really was thought that [the bank] would not liquidate the account. Even then, when it became apparent that her bluff was being called, she could possibly have retrieved the position, but no attempt was made to do so. Not meeting the margin call suggests blind irrational pique at [the bank's] movement of the goal posts on LTV."

75. It was in the light of those findings of fact that Mr Justice Cooke reached the conclusions which he did as to the causation of the losses suffered on liquidation of the claimant's account. He said this (at paragraphs [210] and [211]):

> "[210] In these circumstances, it would not be possible to say that any failure on the part of [the defendants] adequately to explain collateral, margin, margin calls and the consequences of failure to meet such a call was the cause of BAS' losses. Not only did RR advise the sale of Notes, which BAS declined to do in September and October, which would have changed the LTV ratio beyond recognition, but he advised her to put up margin, in the shape of guarantees which she also failed to do. Even in a market in turmoil, as it was in October/November 2008, the decision on her part not to follow RR's advice to sell Notes and not to provide additional margin, when she was plainly in a position to do so, provides a break in any chain of causation. Her view of the market was such that she did not want to sell and that may or may not have been a rational view. But, having taken the decision not to sell, the failure to produce margin is explicable only as an attempt to play 'hard ball' with CSAG or as the result of a fit of pique. The losses occurred by reason of the fall in value in the Notes and BAS' deliberate and irrational decision not to meet a margin call, not from any failure to explain that margin calls could occur when the Notes were purchased.
>
> [211] BAS accepts that the investments were suitable for her in the sense that she was able to meet any margin call but her decision not to provide additional margin even in the market of October/November 2008 and thereby incur losses of the order of $30 million is so extraneous to the failure to advise and would in any event constitute a failure to mitigate, that the losses cannot be laid at [the defendants'] door. Whilst these matters should not be considered with hindsight, by looking at the improvement in the market which has taken place in the years since, it is clear that the provision of additional collateral would appear to any sensible person as the prudent course to adopt and a deliberate failure to produce additional margin and thereby precipitate the distressed sale of all the Notes, whether capital protected or not, completely nonsensical."

76. It is, if I may say so, entirely understandable that, in the light of the findings of fact which he had made, Mr Justice Cooke reached the conclusions which he did in *Al Sulaiman*. But, in the absence of comparable findings of fact in the present case, those conclusions provide no assistance to the defendants.

77. There are no comparable findings of fact in the present case. As I have said, earlier in this judgment, I addressed the submission that the claims for compensation in the present case must fail on the grounds that the loss or damage in respect of which compensation was claimed was not caused as a result of the Defendant's breaches of the Financial Services Prohibition, but by the Claimants' failure to pay the margin calls on their accounts, at paragraphs 310 to 315 of my judgment of 21 August 2014. I held that there was no evidence to support the proposition that the Claimants were in a position to meet the margin calls, when made, within the time set by Bank Sarasin. It is not open to the Defendants to re-open those issues in the context of the Quantum Determination. And I have held, earlier in this judgment, that, notwithstanding the further cross-examination of Mr Al Khorafi at the hearing of the Quantum Determination, there was still no evidence that the Claimants (or any of them) were in a position to repay the Sarasin loans before, or after, close-out in October 2008; that there was no evidence that the Claimants (or any of them) were in a position to repay the ABK loans and facilities in full following close-out and the transfer of the proceeds of the Notes in October 2008 or thereafter (save by further borrowing from CBK); that the submission that the decision to take out the CBK loan in 2010 was unreasonable in the circumstances that ABK was pressing for payment and had obtained an order for sale from the Kuwaiti Court over land which stood as security for its lending; and that there was no evidence that the Claimants (or any of them) were in a position to repay the CBK loan thereafter.

78. For those reasons I reject the Defendants' submissions that the claims to compensation under heads (B), (C) and (D) should be dismissed on the grounds that the Claimants failed to mitigate the losses in respect of which they now claim.

Whether the claims to compensation under heads (B), (C) and (D) should be dismissed on the grounds that this is not a nil transactions case

79. It was submitted on behalf of Bank Sarasin that quantification of the claims under heads (B), (C) and (D) on a "nil-transaction basis" was misconceived in law; and, in

any event, is not open to the Claimants on the facts in the present case. Those submissions were adopted by Sarasin-Alpen.

80. In support of the contention that quantification of the claims on a "nil-transaction basis" is misconceived in law, the Defendants submit that:

(1) The "so-called" nil-transaction basis has no application to a claim for compensation under a statute: properly understood it is a now redundant distinction relating to transactions induced by negligent advice. Reliance was placed on the observations of Lord Hoffman *SAAMCO* ([1997] 1 AC 191, at page 218F:

> "Every transaction induced by a negligent valuation is a 'no-transaction' case in the sense that *ex hypothesi* the transaction which actually happened would not have happened. A 'successful transaction' in the sense in which that expression is used by the Court of Appeal (meaning a disastrous transaction which would have been somewhat less disastrous if the lender had known the true value of the property) is only the most common example of a case in which the court finds that, on the balance of probability, some other transaction would have happened instead. The distinction is not based on any principle and should in my view be abandoned."

(2) The "nil transaction" approach cannot be used as a substitute for proof. If, as is likely in the present case, a party would have entered into a different transaction, he must bring into account what would have happened. Again, reliance was placed on observations of Lord Hoffman in *SAAMCO* (*ibid,* at page 217):

> "The calculation of loss must of course involve comparing what the plaintiff has lost as a result of making the loan with what his position would have been if he had not made it. If for example the lender would have lost the same money on some other transaction, then the valuer's negligence has caused him no loss."

and on the observation of Lord Bingham of Cornhill in his dissenting judgment in *Reeves v Thrings & Long* [1996] PNLR 265, 278B:

> "I accept that had the true position been explained he would not have entered into this transaction at all, but I incline to think that he would be over-compensated by this measure, since whatever he had invested in on the eve of the current recessionary cycle might well have led to loss."

(3) In the present case, the Claimants had the opportunity to borrow large sums of money from ABK. It is inconceivable that Mr Khorafi would have refused to

accept the loans. He was not bound to invest the money with Bank Sarasin; and if he had not done so he would have invested the money elsewhere. In those circumstances the Claimants are required to prove their actual loss: that is to say, the loss directly caused by paying money over under the transactions with Bank Sarasin after taking into account any loss that would have been directly caused by paying money over under the alternative transactions with another financial institution.

(4) The Claimants have made no attempt to discharge the burden of proof which is upon them.

81. In support of the contention that quantification of the claims on a "nil-transaction basis" is not open to the Claimants on the facts in the present case, the Defendants submit that:

(1) The "nil-transaction basis" on which the Claimants rely in quantifying their claims under heads (B), (C) and (D) were not pleaded: it first emerged in the Griffin May 2013 Report which was disclosed on 7 May 2013, shortly before trial. It is said that, in addition to being misconceived in law, (i) "the so-called 'nil-transaction basis' is a fabrication" which "appears to have been devised by someone who realised there were causation problems with the Claimants' case in or around April 2013" and that "Mr [Al] Khorafi tailored his evidence in order to fit in with it"; and (ii) "the so-called 'nil-transaction basis' takes no account of the fact that Mr Al Khorafi borrowed and paid away sums not related to the purchase of the Notes".

(2) For the first three and a quarter years of the life of these proceedings it was consistently the case of the Claimants: (i) that, before April 2007, their principal banking relationship was with ABK, (ii) that ABK had recommended that they approach Sarasin-Alpen and (iii) that ABK had introduced Sarasin-Alpen to Mr Al Khorafi as "the Middle Eastern Branch of Sarasin Switzerland"; but that in April and May 2013 (just before the trial was to commence) the Claimants' case changed, in that it was alleged (iv) that the Claimants had had no relationship with ABK before April 2007 and (v) that ABK had insisted that the money lent to the Claimants was invested with Bank Sarasin (rather than merely recommending that the Claimants seek advice from Sarasin-Alpen).

(3) It was to be inferred from the change in the Claimants' case that, in the period leading up to trial, "someone realised that the case as presented thus far faced insuperable difficulties in relation to causation" – in that, if ABK merely recommended that the Claimants seek advice from Sarasin-Alpen, the Claimants would have to bring into account the losses they were likely to have suffered in any event on alternative investments (given that they were embarking on these investments on the eve of the global financial crisis) – and that, in order to avoid that problem, "Mr [Al] Khorafi tailored his evidence in his fourth witness statement and at trial to support the 'nil-transaction' theory that first emerged (for the first time) on 7 May 2013".

(4) No adequate explanation was given for the change in the Claimants' case; the evidence shows that had the Claimants not invested with the Bank Sarasin they would have invested with another financial institution; and the "so-called 'nil-transaction basis'" fails because it takes no account of the fact that Mr Al Khorafi borrowed and paid away sums not related to the purchase of the Notes.

82. In support of the submission that Mr Al Khorafi has failed to explain the change in his evidence, it was said that:

(1) In later evidence, he denied the truth of the statement in his witness statement dated 1 August 2010 that, prior to April 2007, his family's principal banking relationship was with ABK; saying that the witness statement was in English and that he did not easily read English (although, at paragraph 15 of that witness statement, he had claimed a good understanding of written English).

(2) His oral evidence that he was told by one Muna Sharwa that ABK would only lend money to him if it was invested with Sarasin was "an entirely new piece of evidence" which was "made up on the spot"; and was inconsistent with the pleaded case and the way in which the case was opened.

(3) The evidence of Mrs Al Hamad was to the effect that ABK was willing to lend money to them to invest outside Kuwait and that Bank Sarasin was recommending certain investments: there was no suggestion that money coming from ABK had to be invested with Bank Sarasin.

83. In support of the submission that, had they not invested with Bank Sarasin, the Claimants would have invested with another financial institution, it was said that:

(1) The Claimants' case was first advanced on the basis that, in or around April 2007, one of Mr Al Khorafi's friends had pointed out to him that he had significant assets, inherited from his father, which "were just sitting there and not working for him"; had suggested to him that he should be using those assets to raise money and then investing that money; and had said that there were plenty of attractive investment opportunities outside Kuwait. Borrowing against assets in order to invest was not a course of action which Mr Al Khorafi had thought of before his friend's suggestion; but that suggestion made sense to him; and so he started to think about whether it would be possible to raise money (and, if so how much money) against his assets. Following that suggestion, not only did Mr Al Khorafi decide to raise money on his own assets; he also decided to persuade his mother, Mrs Al Hamad, to borrow against her assets. He sent Mr Taha to approach the Kuwaiti banks to ascertain which of them would be willing to lend against his and his mother's assets; and to identify the best terms on which such lending could be obtained. Mr Taha came back to him with the information that ABK was offering a good deal.

(2) The case on that basis was fully described in a letter from the Claimants' then lawyers dated 27 January 2009:

> "7. Prior to April 2007 our Clients had had no dealings with either BSAME [Sarasin-Alpen] or BSCL [Bank Sarasin]. Our Clients' principal banking relationship at the time was with Al Ahli Bank ('ABK') in Kuwait with whom we understand BSAME and BSCL have a relationship.
>
> 8. In around April 2007 ABK agreed to advance US$ funds to Mr Al Khorafi and Mrs Al Hamad for the purpose of undertaking investments outside Kuwait. Mr Al Khorafi was also interested in optimising his asset base and undertaking a broader range of investments with a view to increasing his income stream. It was agreed with ABK that the funds advanced should be used to purchase capital guaranteed investment products, although no discussions took place as to the precise nature of those products.
>
> 9. ABK stated that it was unable to advise as to the investments that would be suitable. However, Mr Steve Cherian, Head of the Structured Products Unit at ABK, recommended that Mr Al Khorafi discuss the position with BSAME. Mr Cherian explained that BSAME was the Middle East branch of BSCL and that BSCL was a successful Swiss private bank. He recommended that Mr Al Khorafi

> discuss the position with Mr Sharad Nair ('Mr Nair'), the Managing Director of BSAME who was based in Dubai and who would be able to provide Investment advice."

(3) It is clear that the suggestion that the Claimants would only have invested with Bank Sarasin is untrue. Mr Al Khorafi was looking to raise money for investment purposes generally, ABK was willing to lend to him and his mother very large sums on the strength of their assets and ABK recommended, but did not insist upon, the investment being placed with Bank Sarasin. The only requirement from ABK was that the investment be placed with an investment bank rated AA or higher. The "nil transaction" basis is not supported by the facts.

84. In support of the submission that the "so-called 'nil-transaction basis'" fails because it takes no account of the fact that Mr Al Khorafi borrowed and paid away sums not related to the purchase of the Notes, it was said that:

(1) That the Claimants borrowed US$39.1 million for purposes unrelated to the purchase of the Notes. There is no finding that these loans were made in breach of the Financial Services Prohibition.

(2) That, on the basis of the Griffins May 2013 Report the Claimants take "the patently absurd position" that loan transactions that had nothing to do with the purchase of the Notes and for which Mr Al Khorafi received value are in some way causally linked with the claim under Article 65 of the Regulatory Law. There is clearly no link with the sale of the Notes. The interest payable in respect of the personal loans cannot be loss sustained by the relevant party as a direct result of the payment of any money under an agreement made in breach of the Financial Services Prohibition, in that, in relation to those loans, (i) the Claimants did not in fact pay any money to Bank Sarasin, rather they borrowed money; (ii) there is no loss – the Claimants received the loans, used the money and purchased assets or discharged liabilities with the loans; and (iii) no right to compensation under Article 65 in respect of the personal loans has been held to exist.

85. In response to those submissions, the Claimants strongly deny the allegation that the nil-transaction case was manufactured and that Mr Al Khorafi adjusted his evidence in his fourth witness statement to further that case. It is said that the Claimants have

always made it clear that their claims were advanced on the basis that this was a nil-transaction case; and that the Defendants knew, at the trial, that that was the case which they needed to address. The Defendants cross-examined extensively at trial on the issue whether the Claimants would have entered into an alternative transaction if the transactions with Bank Sarasin had not gone ahead. The Defendants failed on that issue; and it is now the subject of their pending appeal.

86. The Claimants submit that this Court has already held that compensation for losses should be assessed on a nil-transaction basis. They rely on paragraph 7 of the schedule of reasons to my Order of 28 October 2014; and, in particular on my observations that:

> "to investigate on a counter-factual basis what they would have done if they had not made the investments which they did make, would produce only one answer: they would have not borrowed (as they did) in order to make investments which did not have the criteria which they required."

It is said that this Court has already reached the counter-factual conclusion that there would have been no investments in structured financial products, no ABK lending and no Bank Sarasin lending; and that, on the basis of that counter-factual conclusion, compensation under each of heads (B), (C) and (D) is properly recoverable.

87. The Claimants are correct to point out that the Order of 28 October 2014 provides (at paragraph 6) that the Defendants make payments to the Claimants of payment of the amounts quantified in paragraphs 3(a) and 5(a) - amounting in aggregate to some US$10.4 million - within 14 days. As I have said, earlier in this judgment, in making that order I rejected the Defendants' submission that, on a proper reading of my judgment of 21 August 2014, I had not determined that that sum should be payable by way of compensation in respect of losses sustained by reason of the Claimants' investment in the Notes (head (A) losses). In particular, I rejected the Defendants' submissions that to measure compensation by reference to the loss on the sale of investments was naive and over simplistic (because it was a measure based on a no-transaction approach); that, in order properly to measure compensation, it was necessary to make a counter-factual analysis of what would have happened if the investments with Bank Sarasin had not been made; and that, in particular, it was necessary to ask whether, if the Claimants had not invested with Bank Sarasin, they would have invested elsewhere and, if so, in what they would have invested and

what the consequence of such investment would have been. I rejected those submissions for the reasons set out in paragraphs 6, 7 and 8 of the schedule to the Order of 28 October 2014 (which I have set out earlier in this judgment). Put shortly, I held that, on the facts in the present case, the only proper conclusion (given the Claimants' investment criteria and my finding that an investment which satisfied those criteria was not available) was that there was no question of the Claimants ever proposing to invest in some other product: they should have been advised that a product having the characteristics they required was not one which could be obtained. I held that it was appropriate, in this case, to measure compensation on a "no-transaction" basis: in the sense that, in comparing the position in which the Claimants were with the position in which they would have been if the Defendants had not been in breach of the Financial Services Prohibition, it was appropriate to assume that, absent the breaches of the Financial Services Prohibition which had been found against the Defendants, (i) Mr Al Khorafi and Mrs Al Hamad would not have taken loans from ABK in June 2007 for the purpose of investment in structured financial products, (ii) Mr Al Khorafi and Mrs Al Hamad would not have invested in the REIT Notes, (iii) Mrs Al Hamad would not have taken loans from Bank Sarasin in July 2007 for the purposes of investment in structured financial products; (iv) Mrs Al Hamad would not have invested in the July 2007 SaraFloor Notes; (v) Mrs Al Rifai would not have taken loans from Bank Sarasin in February 2008 for the purposes of investment in structured financial products; and (vi) Mrs Al Rifai would not have invested in the February 2008 SaraFloor Notes.

88. In my view the Claimants are correct to contend that it would be wrong to re-visit, in this Court, the question whether compensation should be measured on a "no-transaction" basis: that is a matter for the Court of Appeal. There is no distinction, in this context, between compensation (under head (A)) in respect of losses on investments which would not have been made and compensation (under heads (B), (C) and (D)) in respect of interest charges and fees in respect of loans which would not have been taken. It follows that I reject the Defendants' submissions that the claims to compensation under heads (B), (C) and (D) should be dismissed on the grounds that this is not a nil transaction case.

89. I turn, therefore, to address the assessment of losses under heads (B), (C) and (D) on the basis that, in principle, compensation under those heads is recoverable.

Compensation under head (B): Fees and interest charged to the Claimants by Bank Sarasin

90. As I have said, the Claimants seek compensation for losses under head (B) in the amount of US$10,578,267. The individual claims are these:

	Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All claimants US$
Head (B) losses	1,338,266	7,733,387	1,506,614	10,578,267

91. Claims in those amounts were first made in reliance on the Griffins May 2013 Report. At paragraph 4.1 of that report, it was noted that, in its amended defence dated 22 December 2010, Sarasin-Alpen had quantified losses accruing on capital investments undertaken by the Claimants in the amount of US$10,445,049. As I have explained, that became an agreed quantification in respect of head (A) losses; and was the basis for the figures in paragraphs 3(a) and 5(a) of the order of 28 October 2014. At paragraph 4.2 of the May 2013 Report it was noted that Sarasin-Alpen did not include in that quantification of losses accruing on capital investments "any interest, charges and/or other penalties incurred by the claimants as a result of entering structured investment agreements as referred to within the Amended Defence"; and that that quantification did not take into consideration "the effects of drawdowns on the credit facilities offered by the defendants that were not invested in the structured investment agreements referred to within the Amended Defence". The report identifies "a number of gains/losses and costs arising on the claimants' Sarasin accounts that the first Defendant omitted" which are summarised at section 4.3:

		Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All Claimants US$
Fiduciary gains	(a)	141,100	96,834	116,509	354,444
Interest incurred on Sarasin accounts	(b)	-165,680	-14,602	-968,183	-1,148,465
Fees incurred on Sarasin accounts	(c)	-216,686	-7,815,619	-654,940	-8,687,245
Unreturned fiduciary call in Sarasin accounts	(d)	-1,097,000	0	0	-1,097,000
Aggregate of omitted items	(b)+(c)+(d)	-1,479,366	-7,830,221	-1,623,123	-10,932,710

Additional costs and losses not included by Sarasin-Alpen	(b)+(c)+(d)-(a)	1,338,266	7,333,387	1,506,614	10,578,267

Particulars of those transactions appear in Appendix 10 of the Griffins May 2013 Report.

92. By the date of the Quantum Determination the Defendants' quantification of the Claimants' losses under head (B) remained zero; on the basis that they could succeed on one or more of the points raised in their primary response. In the alternative, the Defendants advanced a quantification of the Claimants' losses under this head in the amount of US$7,691,355. That amount was attributed to the individual Claimants as follows:

	Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All Claimants US$
Head (B) losses	1,100,670	5,794,885	795,800	7,691,355

93. It can be seen from the Updated Joint Statement on Quantum (at paragraph 8) that the difference between the Claimants' quantification under this head (US$10,578,267) and the Defendants' quantification (US$2,886,912) is said to be attributable to a difference in methodology; in that the Claimants' quantification has been made on what is described as a "nil transaction basis" - that is to say, by reversing all fees and interest actually charged by Bank Sarasin – but the Defendants' quantification has been made on the basis that only those fees and interest charged in respect of the loans which funded the investment in the Notes purchased by the Claimants should be reversed. In my view, for reasons already explained earlier in this judgment, the Defendants' approach is to be preferred: the Claimants or their advisers have misunderstood that the effect of quantification on a no-transaction basis, in this case, is to reverse only those fees and interest charges in respect of loans which funded investment in the Notes. The appropriate assumption is that (absent the breaches of the Financial Services Prohibition found against the Defendants) it is those loans (and only those loans) that would not have been made.

94. In the alternative – on the basis that it is only those fees and interest charged in respect of the loans which funded the investment in the Notes that should be reversed - the Claimants quantify their loss under this head as US$8,337,102. It can be seen from the Updated Joint Statement on Quantum (at paragraphs 9 and 10; and, in particular, from the table at paragraph 10) that the difference (US$645,747) between the Claimants' alternative quantification (US$8,337,102) and the Defendants' quantification of loss under this head (US$7,691,355) is said to be attributable to the following items:

(1) The Defendants have not included the sum of US$179,450 said by the Claimants to be due to Mr Al Khorafi in respect of interest and early repayment.

(2) The Defendants have not included the sum of US$158,160 said by the Claimants to be due to Mr Al Khorafi in respect of overdraft interest on the facility which funded the Calyon Witch Hat note.

(3) The Defendants have not included the further sum of US$3,477 said by the Claimants to be due to Mr Khorafi in respect of overdraft interest charge on his account and unrelated to his personal use.

(4) The Defendants have included a credit balance of US$3,670 on Mr Al Khorafi's account.

(5) The Defendants have not deducted the sum of US$141,101 in respect of a fiduciary gain made by Mr Al Khorafi.

(6) The Defendants have not included the sum of US$14,602 said by the Claimants to be due to Mrs Al Hamad in respect of interest on an overdraft balance which arose on her account following liquidation of her investment in the Notes.

(7) The Defendants have not deducted the sum of US$96,824 in respect of a fiduciary gain made by Mrs Al Hamad.

(8) The Defendants have deducted a debit balance of US$648,172 in respect Mrs Al Rifai.

(9) The Defendants have not deducted the sum of US$116,509 in respect of a fiduciary gain made by Mrs Al Rifai.

Making these adjustments, it is said that – adopting the Defendants' methodology – the Defendants' quantification should be increased from US$7,691,355 to US$8,337,102.The position is shown below:

		Claimants' adjustments US$		Defendants' quantification US$	Claimants' alternative quantification US$
Mr Al Khorafi					
	(1)	179,450			
	(2)	3,477			
	(3)	158,160			
	(4)	3,670			
	(5)	141,101	+196,316	1,100,670	1,296,986
Mrs Al Hamad					
	(6)	14,602			
	(7)	96,834	-82,232	5,794,885	5,712,653
Mrs Al Rifai					
	(8)	648,172			
	(9)	116,509	+531,663	795,800	1,327,463
			645,747	7,691,355	8,337,102

As I shall explain, item (1) has been substituted for the amount (US$216,686) described in the table at paragraph 4.3 of the Griffins May 2013 Report as "fees incurred on Sarasin accounts"; items (2) and (3) are comprised in the amount (US$165,680) described in that table as "interest incurred on Sarasin accts"; and item (4) is an addition to the amount (US$1,097,000) described in that table as "unreturned fiduciary call in Sarasin account". It can be seen that items (6) and (8) appeared in the table ("interest accrued on Sarasin accounts"); and that items (5), (7) and (9) also appeared in that table ("fiduciary gains").

95. The Defendants dispute each of the adjustments sought by the Claimants. They adhere to their contention that (if not zero) the losses claimed under this head should be quantified at US$7,691,355. In taking that position, the Defendants rely on two reports prepared by KPMG AG - a report dated 15 December 2014 ("the

second KPMG December 2014 Report"), to which there is an addendum dated 10 January 2015, and a report dated 25 February 2015 ("the KPMG February 2015 Report") – and on a letter from KPMG AG dated 2 March 2015 written in response to the Griffins February 2015 Report ("the KPMG March 2015 letter"). As in the case of the Griffins reports, the KPMG reports and the March 2015 letter were not adduced as expert evidence, in the conventional sense; rather they were prepared to assist the Defendants in responding to the claims and their contents were adopted by counsel in making submissions on their behalf.

96. I turn, therefore, to examine the items in respect of which the Claimants seek adjustments to the Defendants' quantification. In doing so, I have in mind that those adjustments are advanced by the Claimants on the basis that the Defendants are correct to take the view that it is only those fees and interest charged in respect of the loans which funded the investment in the Notes that should be reversed.

97. *Item (1): US$179,450 said to be due to Mr Al Khorafi in respect of interest and early repayment.*

It can be seen from paragraph 5.3 of the Griffins February 2015 Report that the Claimants advance the figure of US$179,450 in substitution for the earlier figure of US$216,686, which had appeared in the table at section 4.3 of the Griffins May 2013 account ("Fees incurred on Sarasin accounts"). The earlier figure (US$216,686) was the aggregate of US$78,328 charged to Mr Al Khorafi on loans of US$4.1 million which had been made to him by Bank Sarasin and US$138,358 charged to him as a penalty for early repayment of those loans in the post-close out period.

98. At paragraph 4.3.2.3 of the second KPMG December Report it had been said that that that interest charge and early repayment penalty were not directly related to the funding of the Notes:

> "USD 78,328.55 of loan interest expense on [Mr Al Khorafi's] Sarasin current account no. 6.00566.2 4000 with Bank Sarasin was driven by USD 4.1 million of loans drawn by [Al Khorafi] on various dates from April 28, 2008 until the forced repayment date of October 10, 2008. These USD 4.1 million were not transferred to any of the Claimants' bank accounts with Bank Sarasin or ABK through which the Notes investment activities were funded and executed. Further, there was USD 138,357.92 of early repayment penalties related to those loans."

99. In advancing the substituted figure of US$179,450, the Claimants have deducted US$37,236 from the earlier figure of US$216,686. The reason for the adjustment appears in paragraph 5.3 of the Griffins February 2015 Report:

> "...the facility of $4.1 million was not used entirely for third party payments. The net external payments/drawings were $704,562.76 [as set out in paragraph 5.2 of that Report]. The maximum interest, adopting the approach of KPMG that could be excluded is $37,236.39 ({$216,686.47/$4.1m} x $704,562.76) compared with the $216,686.47 ($78,328.55 + $138,357.92). This gives an adjusted figure of $179,450.08 (being $216,696.47 less $37,236.39)."

100. The Defendants do not accept the premise that the facility of US$4.1 million was not used entirely for third party payments. At section 2 of the KPMG March 2015 letter it is demonstrated – by comparing drawdown under the facility against contemporary payments (amounting in aggregate to US$4,204,541) – that the whole of the facility was used by Mr Al Khorafi for personal expenditure unrelated to the purchase of the Notes. It is said that:

> "In section 5.2 of [the Griffins February 2015 Report], Griffins refer to a table with a deposit of USD 10,000,000.00 against eight payments aggregating USD 10,704,562.76, for a net expenditure of USD 704,562.00 as proof that the USD 4,100,000.00 was not used to fund personal expenditures of [Mr Al Khorafi].
>
> This is incorrect. In fact the last four payments in Griffins table aggregating USD 4,204,541.64 were funded by [Mr Al Khorafi's] USD 4,100,000.00 loan plus USD 107,000.00 fiduciary deposit redemption. These are the same payments as set out in our table above. The USD 10,000,000.00 deposit and four payment transactions aggregating USD 6,500,021.12, which were paid between August 31, 2007 and February 2, 2008, are unconnected with the USD 4,100,000.00 loan. Accordingly these transactions have no impact on the fact that USD 4,100,000.00 in personal payments was funded by the USD 4,100,000.00 loan."

101. I find that analysis persuasive. I am not satisfied that the Claimants have established that the premise on which they seek to include item (1) in Mr Khorafi's claim under the head (B) losses - that is to say, that the facility of US$4.1 million was not used entirely for payments to third parties in respect of personal expenditure – is well founded. I disallow that item.

102. *Item (2): US$3,477 said to be due to Mr Al Khorafi in respect of overdraft interest charged on his account and unrelated to his personal use.*

At paragraph 4.3.2.2 of the second KPMG December 2014 Report, it is said that the figures in the table at paragraph 4.3 of the Griffins May 2013 account ("Interest

incurred on Sarasin accnts") were reconciled to the overdraft interest expense in the Claimants' current account statements of Bank Sarasin for the period from June 28, 2007 to December 31, 2012 The overdraft interest expense balance in Mr Al Khorafi's account was US$3,476.65. It was said that that overdraft interest expense was driven by an overdraft balance, funding payments that were not credited to any of the Claimants' accounts with Bank Sarasin, or the Claimants' accounts with ABK. On that basis, the Defendants took the view that that Mr Al Khorafi's overdraft interest expense of US$3,477 was not directly related to the funding of the Notes. Notwithstanding the Claimants' contention that this small amount of overdraft interest is unrelated to the funding of payments for personal expenses – a contention said in the Updated Joint Statement on Quantum to be based on paragraph 7.19(c) of the Griffins January 2015 Report and paragraph 5.5 of the Griffins February 2015 Report; but not, in my view, supported by the contents of those paragraphs - I am not persuaded that the Defendants were wrong to take that view. I disallow that item.

103. *Item (3): US$158,160 said to be due to Mr Al Khorafi in respect of overdraft interest on the facility which funded the purchase of the Calyon Witch Hat note.*

The parties disagree on the question whether the interest accruing on the US$30 million loan from Bank Sarasin to Mr Al Khorafi was US$158,160 (as the Defendants contend) or US$162,380 (as the claimants contend); but the adjustment sought by the Claimants reflects the defendants' figure.

104. The Defendants' position is based on paragraphs 4.3.2.2. and 4.3.2.3 of the second KPMG December 2014 Report; where it is said that:

> "4.3.2.2 Interest incurred on Sarasin Accounts
>
> The overdraft interest expense balances in [Mr Al Khorafi's, Mrs Al Hamad's and Mrs Al Rifai's] Sarasin accounts were USD 3,476.65, USD 14,601.92 and USD 972,227.45 for a total of USD 990,306.02, which is lower than the USD 1,148,465.66 in the claim [at paragraph 4.3 of the Griffins May 2013 Report], representing a difference of USD 158,159.64.
>
> The overdraft interest expense overstatement of USD 158,159.64 is a classification error as it actually belongs to loan interest expense described in Section 4.3.2.3.
>
> ...
>
> 4.3.2.3 Fees incurred on Sarasin Accounts
>
> We reconciled the 'Fees incurred on Sarasin Accounts' balances presented in the Claim Report to the loan interest expense figures in the account statements for Claimants' current accounts with Bank Sarasin...from June 28, 2007 to December 31, 2012...According to these bank account

statements, the loan interest expense in [Mr Al Khorafi's, Mrs Al Hamad's and Mrs Al Rifai's] Sarasin accounts were USD 379,516.55, USD 7,815,618.84 and USD 654,940.22 respectively for a total of USD 8,850,075.61, which is higher than the USD 8,687,245.53 in the claim for a difference of USD 162,830.08 (all attributable to [Mr Al Khorafi's] Sarasin current account).

In the analysis of these account statements, we assessed whether loan interest expense was related to loans that directly funded Notes investments.

The loan interest expense understatement of USD 162,830.08 represents a classification error of USD 158,159.64 from overdraft interest expense (see section 4.3.2.2), USD 4,043.93 from fiduciary deposit net interest income (see section 4.3.2.1) and a reconciliation difference between the Claim Report figure and the account statements of USD 626.53. We have made adjustments, accordingly, to increase the claim by USD 162,830.08.

In the following, we set out loan interest expense amounts that we do not consider to be directly related to the loans funding the Notes investments:

...

- USD 162,830.08 of loan interest expense on [Mr Al Khorafi's] Sarasin current account no. 6.00566.2 4000 with Bank Sarasin was driven by a USD 30 million loan that was used to purchase a USD 40,000,000 notional variable rate Calyon investment. The USD 30,000,000.00 loan was drawn by [Mr Al Khorafi] on September 13, 2007 and repaid on October 15, 2007. We observe that this interest expense of USD 162,830.08 is not directly related to the funding of the Notes investments."

105. The Claimants rely on paragraph 5.5 of the Griffins February 2015 Report; which is in these terms:

"5.5 The KPMG report of 15 December 2014 at 4.3.2.2. seeks to disallow all interest payments on the Sarasin accounts as it does not directly relate to Note investments. The interest in question totals $1,148,456. This is a good example of the very narrow scope applied by KPMG. We do not take that narrow view of the Sarasin accounts.

The breakdown of the interest was identified at 4.3 of [the Griffins May 2013 Report] and subsequently modified in [the Griffins January 2015 Report] as follows:

- C1 - $165,680.82
- C2 - $14,601.92
- C3 - $972,227.45

Total - $1,152,509.59

For C1 [Mr Al Khorafi] $162,380.08 relates to interest on a $30m (31 day) investment as part of the overall investment activity.

..."

106. In support of the contention that the US$30 million investment in the Calyon variable rate note (described as "the Calyon Witch Hat Note") was part of "the overall

investment activity", the Claimants submit (in the Updated Joint Statement on Quantum) that credit has been given for the profit realised on that investment (US$206,451.56) in the computation of head (A) losses - in the agreed figure which was the subject of paragraphs 3(a)(i) and 5(a)(i) of my Order of 28 October 2014 – and that consistency requires that interest costs incurred in generating that profit should be taken into account. They refer to paragraph 4.3 of the Griffins May 2013 Report and Appendix 10 to that Report.

107. The Claimants' submission that credit was given in the computation of head (A) losses for the profit realised on the investment in the Witch Hat Note has not been contradicted by the Defendants. In my view, that submission is correct. On a true analysis it may be said that the inclusion of that profit (US$206,451) in the computation of head (A) losses was an error - or, in the alternative, that the interest costs incurred in generating that profit ($162,380) ought to have been off-set against that profit figure in computing the profit – so that the agreed figure understates the head (A) losses. But the Court has not been invited to re-open the computation of head (A) losses; and, in the absence of agreement, I doubt whether this Court would have power to do so. In those circumstances, it seems to me that (although analytically incorrect) justice requires that, in computing head (B) losses, the interest costs incurred in generating the profit on the investment in the Witch Hat Note should be allowed in the sum claimed under item (3).

108. *Item (4): US$3,670 included by the Defendants as a credit balance on Mr Al Khorafi's account.*

It can be seen from paragraphs 4.3.2.4 and 4.3.2.5 of the second KPMG December 2014 Report that this sum (US$3,670) represents a credit account balance in favour of Mr Al Khorafi generated by accrued interest on an investment of US$10 million in a fiduciary deposit.

109. The Defendants took the view that the fiduciary deposit was unrelated to investment in the Notes – having been funded by Mr Al Khorafi's own inward payment - and was an asset of Mr Al Khorafi which should be added to the amount (US$1,097,000) claimed in the table under paragraph 4.3 of the Griffins May 2013 Report in respect of "Unreturned fiduciary call in Sarasin account". It is that addition which gives rise to the Defendants' figure (US$1,100,670) in respect of the losses attributable to Mr Al Khorafi under this head.

110. The Claimants, for the reasons set out in paragraph 5.7 of the Griffins February 2015 Report, submit that credit and debit balances are irrelevant to the computation of loss - in that they simply reflect separate claims between the Claimants and Bank Sarasin which are not the subject of claims or counterclaims in these proceedings – and that this credit balance should not have been taken into account in their favour. In my view the Claimants are correct on this point. I allow item (4).

111. That is not, of course, a ruling that Bank Sarasin does not owe Mr Al Khorafi US$3,670 in respect of the credit balance on his account. It is only a ruling that, on a true analysis of the position, that is not a sum to be taken into account in the computation of losses under head (B).

112. *Item (5), item (7) and item (8): US$141,000, US$96,834 and US$116,509 included by the Defendants as credits due to Mr Al Khorafi, Mrs Al Hamad and Mrs Al Rifai, respectively, in respect of fiduciary gains.*

It can be seen from paragraph 4.3.2.1 of the second KPMG December 2014 Report that these items – described as "fiduciary gains" - represent interest income less commissions on fiduciary deposits (net interest income). The Defendants say that the Claimants' computation of the fiduciary gain in respect of Mrs Al Rifai (US$116,509) is understated by US$4,044 and that the true figure should be US$120,553; but nothing turns on that.

113. The Defendants take the view that the Claimants' investments in fiduciary deposits are unrelated to their investments in the Notes; and that, accordingly, all net interest income should be removed from the damage calculation in paragraph 4.3 of the Griffins May 2013 Report. The Claimants' response (in reliance on paragraph 5.6 of the Griffins February 2015 Report) is that a wider view should be taken of investment activity; and that these gains should be taken into account (as deductions) in computing the losses "in accordance with the nil transaction basis". In my view, the Defendants are correct on this point. I reject the adjustments sought in respect of items (5), (7) and (9).

114. *Item (6): US$14,602 said to be due to Mrs Al Hamad in respect overdraft interest charged on her account.*

It can be seen from paragraph 4.3.2.2 of the second KPMG December 2014 Report that overdraft interest of US$14,602 accrued on Mrs Al Hamad's account in respect

of an overdraft balance that arose because the proceeds from the liquidation of the Notes investment were insufficient to cover both the loan by Bank Sarasin funding that investment, and a US$35 million loan to her by Bank Sarasin which was not related to that investment. It is said that:

> "4.3.2.2. The USD 35 million loan not related to the [Notes] investment had been granted on July 25, 2007, and its proceeds paid out on the same day to [Mr Al Khorafi's] bank account at HSBC...Both the loan related to the [Notes] investment and the loan not related to the investment were called by Bank Sarasin on October 10, 2008, which resulted in an overdraft of the current account of [Mrs Al Hamad] because the proceeds of the liquidation of the [Notes] investment did not cover the amount of the loans...The proceeds of the liquidation of the [Notes] investments, however, would have been sufficient to cover the loan used to fund these investments. The overdraft, and related overdraft interest, therefore, did not arise directly as a result of the investment liquidation and the loan used to fund these [Notes] investments, but rather due to the additional loan not related to the investment."

115. It is on the basis that the post-liquidation overdraft would not have arisen but for the additional US$35 million loan that the Defendants take the view that the interest which accrued on that overdraft is not recoverable as a loss under head (B). The Claimants (in reliance on paragraph 7(19)(c) of the Griffins January 2015 Report and paragraph 5.5 of the Griffins February 2015 Report submit that is a "narrow view" and should be rejected. I am satisfied that the Defendants' view is correct. I disallow this item.

116. *Item (9): US$648,172 said to be due to Mrs Al Rifai in respect of a debit balance on her account.*

It appears from paragraph 4.3.2.5 of the second KPMG December 2014 Report that this sum (US$648,172) represents the overdraft balance on Mrs Al Rifai's current account with Bank Sarasin at December 31, 2012; and that that balance arose from transactions related to the Notes as well as from other transactions. It is said that there has been no activity on the account since December 31, 2012, the balance has remained unchanged to October 31, 2014; and that it represents an obligation of Mrs Al Rifai to Bank Sarasin. Although it is accepted in the report that:

> "Mrs Al Rifai's. debit balance of USD 648,172.00 was not related to the Notes investments..."

the Defendants have deducted that sum from the Claimants' computation of losses under head (B) on the ground that it is a liability of Mrs Al Rifai which they are entitled to off-set.

117. The Claimants submit in this case (as in the case of item (4)) that credit and debit balances are irrelevant to the computation of loss - in that they simply reflect separate claims between the Claimants and Bank Sarasin which are not the subject of claims or counterclaims in these proceedings – and that this credit balance should not have been taken into account in their favour. In my view Claimants are correct on this point. I allow item (9).

118. Again (as in the case of item (4)) that is not, of course, a ruling that Mrs Al Rifai does not owe Bank Sarasin US$648,172 in respect of the debit balance on her account. It is only a ruling that, on a true analysis of the position, that is not a sum to be taken into account in the computation of losses under head (B).

119. *Summary of adjustments in respect of head (B) losses*

Making the adjustments that I have allowed – and adopting the Defendants' methodology – the Defendants' quantification should be increased from US$7,691,355 to US$8,494,017. The computation is shown below:

		Claimants' Adjustments US$		Defendants' Quantification US$	Claimants' alternative Quantification US$
Mr Al Khorafi	(3)	+158,160			
	(4)	- 3,670	+154,490	1,100,670	1,255.160
Mrs Al Hamad				5,794,885	5,794,885
Mrs Al Rifai	(8)		+648,172	795,800	1,443,972
			+802,662	7,691,355	8,464,017

As can be seen, the losses are attributed to the individual claimants as follows:

	Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All claimants US$
Head (B) losses	1,225,160	5,794,885	1,443,972	8,464,017

Compensation under head (C): Fees and interest charged by ABK

120. The Claimants seek to recover compensation under this head in the sum of US$18,726,823 in respect of all fees and interest charged by ABK on the loan facilities granted to Mr Al Khorafi, Mrs Al Hamad and Mrs Al Rifai to fund their investment in the Notes subsequently purchased from Bank Sarasin. That sum is attributed to the individual Claimants as follows:

	Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All claimants US$
Head (C) losses	5,747,909	5,487,040	7,491,895	18,726,844

121. By the date of the Quantum Determination the Defendants' quantification of the Claimants' losses under head (C) remained zero; on the basis that they could succeed on one or more of the points raised in their primary response.

122. In the alternative, the Defendants' position, as set out in the table at paragraph 18 of the Updated Joint Statement on Quantum, in the table at paragraph 8 of the Skeleton Argument on behalf of the First Defendant for the Quantum Determination and at paragraph 77 of that Skeleton Argument was that, in any event, losses under this head must be quantified at zero; on the basis that the Claimants have failed to prove any of the losses which they claim. In summary it was said that the Claimants had provided inadequate (and selective) disclosure of ABK bank statements and other documentation; and that it is to be inferred that the ABK documentation which has been deliberately withheld would have undermined the Claimants' case in respect of head (C) losses (in that it might have disclosed credits from ABK or others which cancelled out the alleged losses, or that the alleged losses were not caused by the Defendants' actions or were too remote). A table of ABK documents which (as alleged) were selectively disclosed and withheld was set out under paragraph 73 of that Skeleton Argument. A case of selective disclosure was not pursued at the hearing of the Quantum Determination. In so far as it is necessary to do so, I reject the submission that head (C) losses must be quantified at zero on the ground of inadequate and selective disclosure.

Compensation under head (C): Fees and interest charged by ABK

120. The Claimants seek to recover compensation under this head in the sum of US$18,726,823 in respect of all fees and interest charged by ABK on the loan facilities granted to Mr Al Khorafi, Mrs Al Hamad and Mrs Al Rifai to fund their investment in the Notes subsequently purchased from Bank Sarasin. That sum is attributed to the individual Claimants as follows:

	Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All claimants US$
Head (C) losses	5,747,909	5,487,040	7,491,895	18,726,844

121. By the date of the Quantum Determination the Defendants' quantification of the Claimants' losses under head (C) remained zero; on the basis that they could succeed on one or more of the points raised in their primary response.

122. In the alternative, the Defendants' position, as set out in the table at paragraph 18 of the Updated Joint Statement on Quantum, in the table at paragraph 8 of the Skeleton Argument on behalf of the First Defendant for the Quantum Determination and at paragraph 77 of that Skeleton Argument was that, in any event, losses under this head must be quantified at zero; on the basis that the Claimants have failed to prove any of the losses which they claim. In summary it was said that the Claimants had provided inadequate (and selective) disclosure of ABK bank statements and other documentation; and that it is to be inferred that the ABK documentation which has been deliberately withheld would have undermined the Claimants' case in respect of head (C) losses (in that it might have disclosed credits from ABK or others which cancelled out the alleged losses, or that the alleged losses were not caused by the Defendants' actions or were too remote). A table of ABK documents which (as alleged) were selectively disclosed and withheld was set out under paragraph 73 of that Skeleton Argument. A case of selective disclosure was not pursued at the hearing of the Quantum Determination. In so far as it is necessary to do so, I reject the submission that head (C) losses must be quantified at zero on the ground of inadequate and selective disclosure.

Compensation under head (C): Fees and interest charged by ABK

120. The Claimants seek to recover compensation under this head in the sum of US$18,726,823 in respect of all fees and interest charged by ABK on the loan facilities granted to Mr Al Khorafi, Mrs Al Hamad and Mrs Al Rifai to fund their investment in the Notes subsequently purchased from Bank Sarasin. That sum is attributed to the individual Claimants as follows:

	Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All claimants US$
Head (C) losses	5,747,909	5,487,040	7,491,895	18,726,844

121. By the date of the Quantum Determination the Defendants' quantification of the Claimants' losses under head (C) remained zero; on the basis that they could succeed on one or more of the points raised in their primary response.

122. In the alternative, the Defendants' position, as set out in the table at paragraph 18 of the Updated Joint Statement on Quantum, in the table at paragraph 8 of the Skeleton Argument on behalf of the First Defendant for the Quantum Determination and at paragraph 77 of that Skeleton Argument was that, in any event, losses under this head must be quantified at zero; on the basis that the Claimants have failed to prove any of the losses which they claim. In summary it was said that the Claimants had provided inadequate (and selective) disclosure of ABK bank statements and other documentation; and that it is to be inferred that the ABK documentation which has been deliberately withheld would have undermined the Claimants' case in respect of head (C) losses (in that it might have disclosed credits from ABK or others which cancelled out the alleged losses, or that the alleged losses were not caused by the Defendants' actions or were too remote). A table of ABK documents which (as alleged) were selectively disclosed and withheld was set out under paragraph 73 of that Skeleton Argument. A case of selective disclosure was not pursued at the hearing of the Quantum Determination. In so far as it is necessary to do so, I reject the submission that head (C) losses must be quantified at zero on the ground of inadequate and selective disclosure.

123. On the basis of the ABK documents that were disclosed the Defendants (relying on the KPMG February 2015 Report), quantify the fees and interest charged by ABK in the period up to 14 December 2009 at US$9,219,076; which they attribute to the individual Claimants as follows:

	Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All Claimants US$
Head (C) losses	3,454,172	4,664,897	1,100,007	9,219,076

124. In the further alternative, it is said that the Claimants have failed to provide any, or any sufficient, documentation to enable the Court to quantify fees or interest under this head for periods after 14 December 2009; and that, accordingly, the claim under this head must be limited to the period up to that date and quantified at zero for periods thereafter.

125. In relation to the period after 14 December 2009 the Claimants rely on a document dated 12 October 2014 and issued by the Head of Capital Execution Department, Ministry of Justice, Kuwait, in execution proceedings brought by ABK against the claimants to enforce security over real property in Kuwait in respect of a loan of US$27.5 million, with interest. The document records that the interest accrued on the loan over the period from 15 December 2009 to 18 September 2014 in the amount of US$6,377,957. Notwithstanding the criticisms of this evidence by the Defendants – and, in particular, the observations in paragraph 4.2.2 of the KPMG February 2015 Report, where it is said, correctly, that the document of 2 October 2014 fails to provide details concerning the calculation of interest in that amount (US$6,377,957) – I accept the document as sufficient evidence of the interest charged by ABK over the period stated. I reject the Defendants' contention that head (C) losses after 14 December 2009 must be quantified at zero.

126. On that basis, again relying on paragraph 4.2.2 of the KPMG February 2015 Report (and attachment 12 to that Report), the Defendants quantify the head (C) losses accruing after 14 December 2009 at US$4,373,623.21: that is to say, in an amount which is lower by US$2,004,333.95 than the amount claimed by the Claimants. It is common ground that the whole of the interest accrued after 14 December 2009 (US$4,373,623) is to be attributed to Mrs Al Rifai.

127. In quantifying the losses under this head (C) at US$9,219,076 up to 14 December 2009 and US$4,373,623 thereafter, the Defendants have taken the view (as in the case of the losses under head (B)) that only those fees and interest charged in respect of the loans which funded the investment in the Notes purchased by the Claimants should be reversed. As I have said, I accept that the Defendants are correct to take that view.

128. The Claimants' position is that (adopting the Defendant's methodology) the quantification of their loss under this head is US$17,290,893; being the aggregate of US$10,912,936 in respect of the period up to 15 December 2014 and US$6,377,957 in respect of the period 14 December 2009 to 18 September 2014. It can be seen from the Updated Joint Statement on Quantum (at paragraph 16 and, in particular, from the table at paragraph 18) that the difference (US$3,698,194) between the Claimants' alternative quantification (US$17,290,893) and the Defendants' quantification of maximum loss under this head (US$13,592,699; being US$9,219,076 + US$4,373,623) is said to be attributable to two items:

(1) The Defendants have over-deducted (as a result, it is said, of an error in computation) the sum of US$1,693,860 - comprising (a) US$931,623 in respect of Mr Al Khorafi and (b) US$762,237 in respect of Mrs Al Hamad – from interest which accrued on their respective ABK accounts prior to 15 December 2009.

(2) The Defendants have not included the sum of US$2,004,334 said by the Claimants to be due to Mrs Al Rifai in respect of the period after 14 December 2009.

With the addition of these sums, the Defendants' quantification of maximum loss under this head should be increased from US$13,592,699 to US$17,290,893. The reconciliation is shown below:

	Item	Claimants' Adjustments US$	Defendants' quantification US$	Claimants' alternative quantification US$
Losses accrued prior to 15 December 2009				
Mr Al Khorafi	(1)(a)	+931,623	3,454,172	4,385,795

Mrs Al Hamad	(1)(b)	+762,237	4,664,897	5,427,134
Mrs Al Hamad			1,100,007	1,100,007
		+1,693,860	9,219,076	10,912,936
Losses accrued after 14 December 2009				
Mrs Al Rifai	(2)	2,004,334	4,373,623	6,377,957
		3,698,194	13,592,699	17,290,893

129. The Defendants dispute each of the adjustments sought by the Claimants. In examining the items in respect of which those adjustments are sought, I do so (as in the case of the adjustments sought under head (B)) on the basis that it is only those fees and interest charged in respect of the loans which funded the investment in the Notes that should be reversed.

130. *Items (1)(a) and (1)(b):US$931,623 and US$762,237 said to be due, respectively, to Mr Al Khorafi and Mrs Al Hamad.*

It is convenient to address items (1)(a) and (1)(b) – in aggregate US$1,693,860 - together.

131. The issue which underlies the dispute between the parties as to these items turns on the appropriate treatment, post close-out on 10 October 2008, of fees and interest attributable to the Claimants' personal loans from Bank Sarasin (said to amount to US$39.1 million) which were unrelated to the funding of the Notes purchased from Bank Sarasin. The background is explained at paragraph 4.4.2.1 in the second KPMG December 2014 Report:

> "4.4.2.1...Bank Sarasin extended [Mr Al Khorafi] and [Mrs Al Hamad] USD 39.1 million in non-Note related loans which were never paid. On October 10, 2008 Bank Sarasin offset and closed the USD 39.1 million in loans and accrued interest of USD 337,872 against the proceeds from liquidating the Notes held in their accounts. Accordingly, [Mr Al Khorafi] and Mrs Al Hamad] received a benefit of USD 39,437,872.00 on that date because this loan obligation was removed."

132. In reliance on the second KPMG December 2014 Report, the Defendants took the view that an amount equal to that benefit (US$39,437,872) should be applied, as at 10 October 2008, to Mr. Al Khorafi's and Mrs. Al Hamad's ABK Note-related loans. The effect would be notionally to reduce the aggregate balance then outstanding on those ABK

Note-related loans from US$ 60,000,000 to US$ 20,562,128. Paragraph 4.4.2.1 of the second KPMG December 2014 Report goes on to explain that, on the basis of that notional reduction, interest in the reduced amount of US$1,260,162 would have accrued on the two ABK Note-related loan accounts between 10 October 2008 and 8 November 2009 (the date on which ABK closed out the US$60 million loans which then, in fact, remained outstanding and transferred the balance to Mr Al Khorafi's and Mrs Al Hamad's current accounts). That re-calculated figure for the interest on the ABK Note-related loan accounts (US$1,260,162) is US$2,088,509 less than the interest (US$3,677,135.30) which did, in fact, accrue on the existing US$60,000,000 loans which remained outstanding. On the basis of the second KPMG December 2014 Report, the Defendants made three further adjustments to the interest claimed:

(1) They added an amount of US$105,275.63 in respect of overdraft interest on the notional balance of US$20,562,128 transferred to Mr Al Khorafi's and Mrs Al Hamad's ABK current accounts over the period 9 November 2008 to 14 December 2014.

(2) They deducted US$159,062.08 in respect of interest debited to Mr Al Khorafi's ABK current account for the period 10 April 2007 to 8 November 2008; being interest accrued on a loan of US$865,000 drawn by him on 10 April 2007 which (as they contend) was not related to investment in the Notes.

(3) They deducted US$3,879.73 in respect of interest debited to Mrs Al Rifai's ABK current account on 17 May 2009; being interest which had accrued over the period 31 March 2009 to 17 May 2009 on a loan of US$568,000 made to her by ABK on 31 March 2009 to cover a guarantee fee of US$550,000 (and accrued overdraft interest of US$18,000) in respect of a guarantee in the sum of US$27.5 million issued by ABK in respect of her investment account at Bank Sarasin which (as they contend) was not related to investment in the Notes.

133. The combined effect of the recalculation of interest and the three further adjustments was to reduce the claim for interest from US$10,481,302 to US$8,006,662; a reduction of US$2,474,640. The adjustments are summarised in the concluding sub-paragraphs of paragraph 4.4.2.1 of the second KPMG December 2014 Report:

"4.4.2.1

The adjusted claim of USD 8,006,662.37 represents interest on the ABK loans funding the Notes which started with a balance of USD 80,000,000 on June 28, 2007, reduced by the USD 20,000,000.00 loan transfer from Bank Sarasin on June 10, 2008 and finally reduced by the USD 39,437,872.00 financial benefit mentioned above on October 10, 2008 to the balance of USD 20,562,128.00 which runs to December 14, 2009, the final scope date of our work.

[Mr Al Khorafi's] adjustment of USD 1,470,328.66 comprises removing USD 1,372,772.55 of interest representing his share of the USD 39,437,872.00 financial benefit (USD 19,718,936) from October 10, 2008 to November 8, 2009, adding USD 61,505.97 in interest on his share of the financial benefit from November 9, 2009 to December 14, 2009 and removing USD 159,062.08 of interest on his loan unrelated to the Notes.

[Mrs Al Hamad's] adjustment of USD 1,000,430.97 comprises removing USD 1,044,200.63 of interest representing her share of the USD 39,437,872.00 financial benefit (USD 19,718,936) from October 10, 2008 to November 8, 2009 and adding USD 43,769.66 in interest on her share of the financial benefit from November 9, 2009 to December 14, 2009.

[Mrs Al Rifai's] adjustment removes USD 3,880.00 of interest on her loan which is unrelated to the Notes funding."

134. Shortly before the hearing of the Quantum Determination in March 2015, the Defendants had further thoughts as to the appropriate treatment, post close-out on 10 October 2008, of fees and interest attributable to the Claimants' personal loans from Bank Sarasin which were unrelated to the funding of the Notes purchased from Bank Sarasin. Their revised position was explained in section 4.2 of the KPMG February 2015 Report:

"4.2. In accordance with our application of the nil transaction methodology, we seek to remove the causative effect of the personal loans unrelated to the Notes transaction from the claim. We did this by assuming that the personal loans and accrued interest thereon had been used to pay down part of the ABK loans and considering what would have happened in that scenario. We consider this to be the correct assumption. . . .

However, an alternative method to remove the causative effect of the personal loans from the claim is to assume that the USD 39,100,000.00 in personal loans were never borrowed at all by [Mr Al Khorafi] and [Mrs Al Hamad] and consider what would have happened in that scenario.

If the USD 39,100,000.00 in personal loans had never been borrowed at all by these Claimants, there would, at the time of the margin calls, have been excess assets in the Claimants' Sarasin accounts, including fiduciary deposits, after set off, which could have been transferred back to the Claimants and used to partially pay down their ABK loans. Accordingly, we have reduced the principal balances of the Claimants' ABK loans by the USD 41,186,566.82, being USD 39,100,000.00 in loan principal and USD 2,086,566.826 in interest on October 11, 2008 and we have also taken into account subsequent guarantee payments paid to/received from Sarasin."

The explanation of the revised methodology adopted continues at paragraph 4.2.1 of the KPMG February 2015 Report:

> "4.2.1 Fees and Interest charged by ABK until December 14, 2009
>
> Our conclusion on the quantum related to the fees and interest charged by ABK until December 14, 2009 is USD 9,219,076.03.This is lower than the amount set out in [the second KPMG December 2014 Report] of USD 9,331,684.37 by USD 112,608.34..."

US$9,331,684.37 was the aggregate of US$8,006,662.37 in respect of interest and US$1,325,022.00 in respect of Note funding related fees. After explaining the basis upon which the sum of US$8,006,662.37 in respect of interest to 14 December 2009 had been calculated in the second KPMG December 2014 Report, paragraph 4.2.1 of the KPMG February 2015 Report continued:

> "4.2.1...In this report, we deducted the full amount of interest on the USD 39,100,000.00...loans of USD 2,086,566.82 instead of only the accrued interest of USD 337,871.88 on close-out date. Deducting the full amount of interest is more appropriate as it reflects all of the interest costs on the USD 39,100,000.00 in personal loans that were charged to the Sarasin accounts. These interest costs would not have been charged to the Sarasin accounts if the USD 39,100,000.00 in loans were never granted. Applying the full amount of interest increased the ABK loan principal deduction applied on close-out date by USD 1,748,694.94 from USD 39,437,871.88 to USD 41,186,566.82. Accordingly, the amount of recalculated interest on [Mr Al Khorafi's] and [Mrs Al Hamad's] ABK loans to December 14, 2009 fell by USD 112,608.34 to USD 7,894,084.03. Adding the USD 1,325,022.00 of Note funding related fees, which are unchanged from our December 15, 2014 report, brings this adjusted head of loss to USD 9,219,076.03."

135. It is said on behalf of the Claimants that, in reaching their computation of the losses sustained by Mr Al Khorafi and Mrs Al Hamad, the Defendants have over-deducted by US$1,693,860 in respect of the interest to be allowed on the borrowings by Mr Al Khorafi and Mrs Al Hamad from ABK. The Claimants' position is set out at paragraph 5.9 of the Griffins February 2015 Report. After citing the second, third and fourth sentences of the passage from section 4.2 the KPMG February 2015 Report (set out above) – that is to say, from "Deducting the full amount ..." to "...$41,186,566.82." – it is said that:

> "5.9...In addition KPMG have reduced ABK's interest by a further $1,043,243.51 for a reason that we have not been able to identify. Referring to their Executive Summary [at section 2 of the KPMG February 2015 Report] the difference they have disallowed is $3,129,810.33 (being $12,348,886 less $9,219,076.03). The $1,043,243 is calculated after deducting $337,871.88 (discussed above at [5.8]) and $1,748,694.94 from the $3,129,810.33 KPMG have disallowed. Our comments below relate to the sum of $1,043,243.51 plus $1,748,694.94, namely $2,791,938.45 which KPMG have disallowed.

> We do not accept KPMG's analysis and we refer to our comments above in relation to the use of bank facilities. For the reasons stated above we do not accept there is a $39.1m personal loan. We accept that the facility of $35m was transferred to HSBC, however we could only identify a further $704,562.76 after allowing for the net drawings of [Mr Al Khorafi] and payments to third parties (see above).
>
> The sum of $50m was initially transferred from [Mrs Al Hamad's] ABK account to Sarasin. This sum was invested and at the time of the close-out there was an account balance of $35,064,505.74 at [Mrs Al Hamad's] Sarasin account which was utilised in repaying the $35m facility which had matured with accrued interest. Had the facility not been taken out this sum would have been available to repay [Mrs Al Hamad's] facility with ABK which was approximately $30m (the original $50m facility had been reduced by a transfer from [Mrs Al Rifai] which was unrelated to the personal expenditure). The interest accruing on [Mrs Al Hamad's] ABK account from 01/10/2008 was $1,067,485.55.
>
> The above calculation of interest concerns $30m of the facility of the $35m. A further calculation would be needed for the $5m which was ultimately borne in [Mrs Al Rifai's] Sarasin account (by virtue of her transferring funds which reduced [Mrs Al Hamad's] facility with ABK to approximately $30m) from 10 October 2008. Had [Mrs Al Rifai] not reduced [Mrs Al Hamad's] exposure to ABK from $50m to $30m the entire interest attributable to the $35m facility would have been borne by Mrs Al Hamad. However, as [Mrs Al Rifai] transferred funds to Mrs Al Hamad the effect of this was, [Mrs Al Rifai] had to bear $5m of the $35m facility (as [Mrs Al Hamad's] exposure was limited to her $30m facility with ABK). The calculation of [Mrs Al Rifai's] interest on that $5m can be ascertained by apportioning the interest on her Sarasin account from 10 October 2008 of $972,221.70 between the total indebtedness of $31,019,791,83 and the amount attributable to the balance of the $35m facility borne by [Mrs Al Rifai], namely $5m. This results in interest of $156,709.90 ({$5m/$31,019,791.83} x $972,221.70). This sum was borne by the Sarasin account, not by ABK as KPMG's approach suggests.
>
> The interest attributable to the personal drawings/third party payments of [Mr Al Khorafi] of $704,562.76 (using LIBOR + 2%) for the period from close out on 10 October 2008 until 14 December 2009 is $30,639.88.
>
> In summary, using KPMG's approach the maximum interest to disallow on the ABK account is $1,067,438.55 plus $30,639.43, being $1,098,078.43. The total interest allowing for the proportion of interest incurred on [Mrs Al Rifai's] Sarasin account relating to the $35m facility is $1,098,078.43, plus $156,709.90, being $1,254,788.43. This contrasts with KPMG's deduction of $2,791,938.45. The difference on calculations on the ABK accounts is therefore $2,791,938.45 less $1,098,078.43, being $1,693,860.02."

136. The Defendants' response to that analysis – as appears from their comment on the Claimants' suggested adjustments in the table at paragraph 18 of the Updated Joint Statement on Quantum – is that it is not sufficiently detailed to assess its correctness and relevance.

137. In my view the Claimants' analysis is flawed: in that (i) it adopts an incorrect figure (US$35,704,563; being the aggregate of US$35 million and US$704,563) in place of US$39.1 million as the amount of the personal loans and (ii) it adopts an incorrect

figure (US$12,348,886) as the base from which to calculate the deduction which the Defendants have made in respect of the interest claim.

138. The first of those errors has been addressed earlier in this judgment. As I have said, in the context of considering head (B) losses, I find the analysis at section 2 of the KPMG March 2015 letter - where it is demonstrated, by comparing drawdown under the facility of US$4.1 million against contemporary payments (amounting in aggregate to US$4,204,541), that the whole of that facility was used by Mr Al Khorafi for personal expenditure unrelated to the purchase of the Notes - persuasive.

139. The second of those errors requires further explanation. It can be seen from paragraph 5.9 of the Griffins February 2015 Report that the figure taken in that paragraph as the Defendants' deduction from the claim in respect of interest and fees accrued on the ABK accounts prior to 15 December 2009 (US$2,791,938) is derived from the KPMG February 2015 Report. It appears from the table in section 2 ("Executive Summary") of that report that KPMG had reduced the amount claimed by the Claimants (US$12,348,866) to US$9,219,076: a reduction of US$3,129,810. From that figure (US$3,129,810) the Claimants have deducted US$337,872; to which reference is made at paragraph 5.8 of the Griffins February 2015 Report (where it is said to represent accrued interest on Mr Al Khorafi's and Mrs Al Hamad's Sarasin accounts and so not to relate to the ABK accounts at all). US$2,791,938 is the difference between US$3,129,810 and US$337,872. The amount claimed by the Claimants (US$12,348,866) shown in the Executive Summary at section 2 of the KPMG February 2015 Report is derived from figures in the table at paragraph 4.4 of the Griffins May 2013 Report. It is clear that that figure includes fees of US$1,332,017 in addition to interest of US$11,041,869 (a figure which includes "debit interest suspended" of US$744,202). After arithmetical adjustment (explained in the second KPMG December 2014 Report) the figure for interest claimed (excluding fees) was taken by the Defendants as US$10,481,302; as can be seen at paragraph 4.2.1 of the second KPMG December 2014 Report. It is that figure, rather than the figure of US$12,348,866, which provides the appropriate base from which to calculate the deduction which the Defendants have made in respect of the interest claim.

140. In those circumstances I reject the adjustments sought by the Claimants under items (1)(a) and (1)(b).

141. *Item (2): US$2,004,334 said to be due to Mrs Al Rifai in respect of the period from 14 December 2009 to 18 September 2014.*

The aggregate amount claimed by Mrs Al Rifai under head (C), US$7,491,895, included US$1,113,938 in respect of the period prior to 15 December 2009. It can be seen from the table at paragraph 4.4 of the Griffins May 2013 Report that US$1,100,007 of that sum was attributable to "fees incurred on letter of credit"; and the balance, US$13,931, was attributable to "interest incurred on loans" (US$3,879.73) and "interest incurred on ABK account" (US$10,049.49). The defendants have included only the sum of US$1,100,007 in their quantification of pre-15 December 2009 losses. The Claimants have not sought to include the sums attributable to interest as an adjustment to the Defendants' figure.

142. The dispute is as to the amount to be allowed in respect of interest charged by ABK on a US$27.5 million loan to Mrs Al Rifai for the period 14 December 2009 to 18 September 2014. The Claimants' figure is US$6,377,957: being the amount of interest shown on a certificate issued by the Kuwaiti Ministry of Justice on 12 October 2014 to which I have already referred. The Claimants rely on the analysis in the section of the Griffins January 2015 Report headed "Settlement monies paid to Sarasin by ABK/ABK debit to C3 account":

> "6.5 At paragraph 10.2.10 of [the Griffins May 2013 Report] it was identified that Sarasin had 'called in' a guarantee provided to it by ABK. As a consequence ABK had debited the account of [Mrs Al Rifai] by $27,500,000 on 14 December 2009, providing a letter of credit for a 3 year term to [Mrs Al Rifai]
>
> 6.6 At Appendix M...of the Grant Thornton report [dated 20 November 2014] we note a translation of a Ministry of Justice document dated 12th October 2014 Execution File number 0910848580 that identifies the following as repayable to ABK by [Mrs Al Rifai]: -
>
> $26,808,170.79 capital
>
> $6,377,957.16 interest
>
> Total $33,186,127.95
>
> 6.7 The sum identified in the Ministry of Justice Execution file document as a loan to be repaid was the same value as the overdrawn balance that appears at paragraph 9.3 of [the Griffins May 2013] Report and is not an additional identified cost. The interest ordered to be paid by the claimants was, however, an additional cost of $6,377,957.16.
>
> 6.8 ...
>
> 6.9 Without Sarasin calling on their guarantee from ABK, the claimants would not have been ordered by the Ministry of Justice to settle the additional $6.377m of interest."

143. As I have said, the Defendants' primary case is that the amount of interest charged on this loan has not been established by evidence, and so should be quantified at zero; but, in the alternative, they quantify this interest at US$4,373,623. The difference between the Claimants' figure (US$6,337,957) and the Defendants' figure (US$4,373,623) is US$2,004,334.

144. The Defendants' figure (US$4,373,623) is reached – as explained in paragraph 4.2.2 of, and Attachment 12 to, the KPMG February 2015 Report - by recalculating the interest that would have accrued on the basis of a notional reduction to the loan principal on Mrs Al Rifai's ABK loan account; that is to say, on the basis of the loan principal as it would have been if there had been no set-off of the US$39.1 million of personal loans by Bank Sarasin to Mr Al Khorafi and Mrs Al Hamad against the proceeds of the liquidation of the Notes. As in the case of the pre-15 December 2009 interest, it is said that, following the close-out of the Claimants' accounts with Bank Sarasin, the proceeds of the liquidation of the Notes were used to offset the Claimants' personal loans, together with all accrued interest; that, if the Claimants had not taken those personal loans from Bank Sarasin, that set off would not have taken place and the call on the ABK guarantee (and so the amount debited by ABK to Mrs Al Rifai's loan account) would have been less than it was. In those circumstances, it is said, correctly in my view, that in quantifying the losses under this head, it is incorrect to include the interest which accrued on the whole amount of the principal outstanding on Mrs Al Rifai's ABK loan account; outstanding after that set off had taken place; and the claimants' quantification should be adjusted accordingly.

145. If, as I hold, the adjustment of interest is correct in principle, the Claimants do not challenge the recalculated figure. Accordingly, I disallow the Claimants' proposed amendment under item (2).

146. *Summary of adjustments in respect of head (C) losses*

Given that I have rejected the Defendant's submissions that head (C) losses should be quantified at zero (either in whole or in respect of the period after 14 December 2009); and have also rejected the adjustments to the Defendants' alternative quantification (US$13,592,699) sought by the Claimants, the head (C) losses are quantified at that figure, attributed to the individual Claimants as follows:

	Mr Al Khorafi	Mrs Al Hamad US$	Mrs Al Rifai	All Claimants

	US$		US$	US$
Head (C) losses	3,454,172	4,664,897	5,473,630	13,592,699

Compensation under head (D): Fees and interest charged by CBK

147. The Claimants seek to recover compensation under this head in the sum of US$7,520,100 in respect of all fees and interest charged by CBK on the loan facilities granted to Mrs Al Hamad to fund the repayment of the ABK loans, with interest on that sum from 30 April 2014 (to be assessed). The Claimants submit that the interest on the CBK loan should be included in the losses which Mrs Al Hamad has suffered for the same reason as (they say) the interest on the ABK loans should be included in their losses under head (C): in that the CBK loan was incurred in order to refinance lending by ABK to fund the purchase of the Notes purchased from Bank Sarasin. The whole of that sum is attributed to Mrs Al Hamad:

	Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All Claimants US$
Head (D) losses	0	7,520,100	0	7,520,100

148. The Defendants' primary position is that the Claimants are not entitled to any compensation under this head; on the basis that, had Mr Al Khorafi and Mrs Al Hamad not taken personal borrowings of US$39.1 million from Bank Sarasin – that is to say borrowings used for personal expenditure wholly unrelated to the Notes transactions - the loans from ABK would have been paid off on close-out from the proceeds of liquidation of the Notes and the CBK loan taken out by Mrs Al Hamad to re-finance lending by ABK would not have been required. Therefore, fees or interest charged in respect of the CBK loan are not recoverable by the Claimants; the claim under this head must fail; and, accordingly, the Defendants' quantification under this head is zero.

149. In advancing their primary contention, the Defendants rely on the analysis in section 4.3 of the KPMG February 2015 Report:

> "4.3...The purpose of the KWD 10,697,384.42 loan granted to [Mrs Al Hamad] on September 29, 2010 was to refinance the outstanding indebtedness amounts of USD 37,574,220.44 on [Mr Al Khorafi's] (USD

> 12,684,236.16) and [Mrs Al Hamad's] (USD 24,889,984.28) ABK accounts at September 29, 2010...
>
> As mentioned in section 4.2 above, the alternative method of removing the causative effect of the personal (non-Note related) loans was to decrease the ABK loan principal balance by USD 41,186,566.82 in loan and interest at October 11, 2008 which would have reduced the ABK loan principal to USD 18,813,433.18. After recognising the USD 21,660,000.00 incoming guarantee payment from Sarasin on December 14, 2009, the cumulative Claimant principal loan balance (representing [Mr Al Khorafi's and [Mrs Al Hamad's] loans) would have been a negative USD 2,846,566.82 (see Table 2). This means that Mr. [Al Khorafi's] and [Mrs. Al Hamad's] ABK loans would have been effectively paid off on December 14, 2009 if they had not taken the personal loans. Accordingly, there would have been no need for CBK to refinance their indebtedness on September 29, 2010. Therefore, we consider this claim amount at zero".

150. Without prejudice to their primary contention, the Defendants take a procedural objection to the Claimants' quantification under this head. It is said that, in claiming interest of US$7,520,100 in respect of interest accrued up to 30 April 2014, the Claimants have changed their case – in that the claim had been for interest of US$4,564,819.21 to 31 July 2012 (with interest to be assessed) – and that the new claim is based upon new documents not previously disclosed and only provided to the Defendants under cover of a List of Documents dated 18 February 2015. The Defendants contend that the Claimants should not be permitted to rely on this new documentation: on the ground that it falls outside the scope of the orders of 28 October 2014 and 4 February 2015. Reference is made to that point at section 4.3 of the KPMG February 2015 Report:

> "4.3...According to the Letter from Hamdan Al Shamsi...dated February 17, 2015, the Claimants' claim for fees and interest charged by CBK from September 29, 2010 to April 30, 2014 is now USD 7,600,000.00. This is because the Claimants now include fees and interest charged by CBK from July 31, 2012 to April 20, 2014 based on the Additional CBK Documents..., to which there is a dispute as to their admissibility. These Additional CBK Documents also include a loan extension facility which increased the principal of the CBK loan from KWD 10,697,384.42 to KWD 11,100,000.00 and for which the Claimants have not provided any explanation. Further, the Claimants claim additional interest subsequent to April 30, 2014 which they have not yet quantified."

As I have said, at the date of the Quantum Determination, the losses claimed under this head had been quantified at US$7,520,100 (with interest from 30 April 2014) rather than at US$7,600,000 (the figure mentioned in the letter of 17 February 2015). Although the Defendants adhere to their contention that interest charged by CBK should be quantified at zero, section 4.3 of the KPMG February 2015 Report

includes a re-calculation of the interest accrued on the CBK loan (on the basis of "the limited information provided") in the amount of US$7,484,813.65.

151. The Claimants' response to the contention that, had the Claimants not taken personal borrowings of US$39.1 million, the loan from CBK taken out by Mrs Al Hamad would not have been required, is that the Defendants have erred in consolidating the losses of Mr Al Khorafi and Mrs Al Hamad. If their respective losses are treated separately – as the Claimants submit they should be – the correct conclusion (applying the Defendants' methodology) is that Mrs Al Hamad's losses under this head should be quantified at US$2,538,622.

Head (D) losses	Claimants' Adjustments US$	Defendants' quantification *US$*	Claimants' alternative quantification US$
Mrs Al Hamad	2,538,622	0	2,538,622

152. In contending that (adopting the Defendant's methodology) the correct conclusion is that the Defendants' quantification of Mrs Al Hamad's losses under this head should be adjusted upwards from zero to US$2,538,622, the Claimants rely on the analysis in paragraph 5.11 of the Griffins February 2015 Report:

> "5.11 ...
>
> KPMG at 4.2 of their 25 February report have produced a consolidated loan schedule to justify why no interest accrues on the CBK account.
>
> We disagree with a consolidated approach. The CBK interest resulted from repayments made to [Mr Al Khorafi's] and [Mrs Al Hamad's] ABK accounts. In the analysis of personal expenditure above only [Mrs Al Hamad's] ABK account is relevant, therefore any interest payable in relation to the [Al Khorafi] balance represents a valid claim. The interest attributable to the [Al Khorafi] account is {$7,520,100,27 x [Mr Al Khorafi's] advance ($12,684,236.16)} ÷ {the total of [Mr Al Khorafi's] and [Mrs Al Hamad's] advances ($12,684,236.16 + $24,889,984.28) $37,574,220.44}[;that is to say] $2,538,621.60."

If the interest accrued on the CBK loan is taken to be US$7,484,813.65 (as recalculated in section 4.3. of the KPMG February 2015 Report), rather than US$7,520,100.27 (as calculated by Griffins) the interest to Mr Al Khorafi's account (adopting the methodology in the Griffin February 2015 Report) reduces by US$11,912.00 to US$2,526,709.60.

153. The issue between the parties in relation to quantification of head (D) losses turns on whether the Defendants are correct to contend that it is appropriate to treat those losses, as between the individual Claimants, on a consolidated basis – so that losses suffered by Mrs Al Hamad in paying off the balance on Mr Al Khorafi's ABK loan account are not to be taken into account – or whether the Claimants are correct to contend that the losses incurred by each Claimant must be quantified on an individual basis – so that losses suffered by Mrs Al Hamad in paying off the balance on Mr Al Khorafi's ABK loan account are to be taken into account in quantifying the compensation which she can claim. In advancing the case for treatment on a consolidated basis the Defendants assert (in the table at paragraph 25 of the Updated Joint Statement on Quantum) that a consolidated approach should be adopted "given that, *inter alia*, the Claimants' accounts were seen as one account as evidenced by the Swift messages exchanged between ABK and [Mrs Al Hamad] and operated as one account by reference to the Powers of Attorney on the accounts." I am not persuaded that the Defendants are correct in that contention. It seems to me that the appropriate course is to quantify the losses incurred by each Claimant on an individual basis.

154. In my view there is no substance in the Defendants procedural objection to the late production of documents which support the calculation of the total interest accrued in respect of the CBK loan; but given the late stage at which the supporting documents were produced – and the possibility that that may have caused the Defendants some practical difficulties in calculation - I think it appropriate to resolve the dispute as to figures in favour of the Defendants; and to adopt their figure for total accrued interest (US$7,484,813.65) rather than the Claimants' figure (US$7,520,100.27). The effect is that I allow the adjustment sought by the Claimants in the amount of US$2,526,709.60; not in the amount of $2,538,621.60 as sought.

155. *Summary of adjustments in respect of head (D) losses.*

For the reasons set out in the preceding paragraphs, the head (D) losses are quantified at US$2,526,709, attributed to the individual Claimants as follows:

	Mr Al Khorafi US$	Mrs Al Hamad US$	Mrs Al Rifai US$	All Claimants US$
Head (D) losses	0	2,526,709	0	2,526,709

Summary of conclusions as to the quantification of losses under heads (B), (C) and (D)

156. For the reasons set out in this judgment, the heads of loss are quantified as follows:

	Head (B) US$	Head (C) US$	Head (D) US$	Heads (B)+(C)+(D) US$
Mr Al Khorafi	1,225,160	3,454,172	0	4,679,332
Mrs Al Hamad	5,794,885	4,664,897	2,526,709	12,986,491
Mrs Al Rifai	1,443,972	5,473,630	0	6.917,602
All Claimants	8,464,017	13,592,699	2,526,709	24,583,425

Other issues

Assumed costs of financing cash flows

157. In the event that the Claimants do not succeed on their claim under head (D) to fees and interest charged by CBK, they seek compensation for the costs of financing their cash flows. They quantify this loss as US$734,369, and attribute it equally between Mr Al Khorafi and Mrs Al Hamad. But, it is conceded that this claim does not arise if the Claimants are able to recover on the CBK interest claim: if they were this claim would be double-counting.

158. The Defendants dispute this claim; on the ground that there is no evidence to support it. It is said that, in fact, there were no cash inflows to the Claimants: on the contrary, the relevant accounts showed a positive position at the relevant time; and so there were no such costs. In any event, it is said that the Claimants have adduced no evidence that, if there were cash inflows, these were funded by them by borrowing: rather it is said to be an assumption that cash inflows were funded by borrowing. The Defendants submit that the Claimants cannot advance a claim for loss based on an unsubstantiated assumption.

159. Given that the Claimants have succeeded on their claim under head (D) – at least in part – I find it unnecessary to add to the length of this judgment by addressing this issue.

Multiple damages under Article 40(2) of the Law of Remedies and Damages

160. The Claimants seek an award of multiple damages against Sarasin-Alpen, pursuant to Article 40(2) of the Law of Remedies and Damages (DIFC Law No 7 of 2005). The article is in these terms:

> "40(2) The Court may in its discretion on application of a claimant, and where warranted in the circumstances, award damages to an aggrieved party in an amount no greater than three (3) times the actual damages where it appears to the Court that the defendant's conduct producing actual damages was deliberate and particularly egregious or offensive."

161. Sarasin-Alpen's primary response to the claim for multiple damages is that, on a true construction, Article 40(2) of the Law of Remedies and Damages has no application to an award of compensation under Article 94(2) of the Regulatory Law. It is submitted, first, that the Regulatory Law contains a complete code of all remedies available for breach of that Law and that, if a remedy cannot be found in the Regulatory Law, it is not available for breach of that Law; and, second, that the Law of Damages and Remedies applies only to claims for damages which fall within the scope of that legislation – that is to say, claims under the Law of Contract (DIFC Law No 6 of 2004) and the Law of Obligations (DIFC Law No 5 of 2004) - and does not apply to claims under other enactments.

162. In support of the first of those contentions – that the Regulatory Law contains a complete code of all remedies available for breach of that Law - it was pointed out on behalf of Sarasin-Alpen: (i) that Article 65 of that Law contains a provision as to the consequences which follow if a person enters into an agreement in breach of the Financial Services Prohibition (the agreement is unenforceable, and the innocent party may apply to the Court to recover money paid and/or compensation); (ii) that Articles 73 and 80 contain provisions enabling the DFSA to enter premises and obtain information; (iii) that Article 76 contains a provision enabling the DFSA to place restrictions on dealing with property; (iv) that Articles 84 and 92 contain provisions enabling the DFSA or any aggrieved person to apply for injunctions, search warrants or orders prohibiting transfer of assets; (v) that Article 85 contains a general contravention provision; (vi) that Article 87 contains powers for the DFSA to impose fines; and (vii) that Article 94 contains a provision enabling a person who has suffered loss or damage to apply to Court for compensation. It was said that there is no provision, either in Article 94 or elsewhere in the Regulatory Law, for an award of multiple damages (or for any other kind of exemplary damages). In those

circumstances it is said to follow that there is no ability to award triple/additional damages for breach of the Regulatory Law. Reliance was placed, by way of analogy, on the decision of the Court of Appeal of England and Wales (dismissing an application for leave to appeal) in *Collins v Office for the Supervision of Solicitors* [2002] EWCA Civ 1002 ("*Collins*").

163. In support of the second of those contentions – that the Law of Damages and Remedies applies only to claims for damages under the Law of Contract and the Law of Obligations (and, it is said, to the law of restitution) – it was submitted that, although Article 40(2) is contained within Part 4 ("Remedies"), it is clear from the structure of the Law of Damages and Remedies that it only applies to claims that fall within Part 2 ("Damages under the Law of Contract"), or within Part 3 ("Damages in Law of Obligations"), or within Part 5 ("Remedies in the Law of Restitution).

164. I reject the submission that, on a true construction, Article 40(2) of the Law of Remedies and Damages has no application to an award of compensation under Article 94(2) of the Regulatory Law. In my view it is open to the Court, as a matter of jurisdiction, to award compensation in the form of multiple damages against Sarasin-Alpen in the present case. I reach that conclusion for the following reasons:

(1) I accept that the Regulatory Law contains a complete code of all remedies available for breach of that Law; and that, if a remedy cannot be found in the Regulatory Law, it is not available for breach of that Law. But the remedies for which the Regulatory Law provides include those in Article 94(2). Under that article the Court may make "orders for the recovery of damages or for compensation...or for any other order as the Court sees fit". There is no reason to read that article restrictively, so as to exclude a power to award multiple damages to an aggrieved party in circumstances where the general law so permits.

(2) *Collins* provides no assistance to the Defendants, even by analogy. The question in that case was whether the Office for the Supervision of Solicitors (a regulatory body) owed any private law duty to a complainant in carrying out its functions under the relevant regulatory legislation. It was held – refusing leave to appeal – that it was plain that it did not. The Court of Appeal of England and Wales was not concerned with the quite different issue which arises in this case: what are the remedies available to the Court under

regulatory legislation in circumstances where a private individual has been found to have acted in breach of that legislation.

(3) There is no reason to read Chapter 3 ("Other Remedies") of Part 4 ("Remedies") of the Law of Damages and Remedies restrictively, so as to confine its scope to cases brought under the Law of Contract or the Law of Obligations. Article 34 of the Law of Damages and Remedies (in Chapter 1 ("General") of Part 4) is in these terms:

> "34. Remedies stipulated under this Law
>
> Where this Law provides that a person may claim or otherwise has a right to or is entitled to compensation, damages, restitution, specific performance, or any other relief or remedy the Court may, on application made by such a person, make orders accordingly, together with any other order as the court sees fit, except where the making of any particular order may be excluded under this Law."

Article 35 provides, so far as material:

> "35 Other orders
>
> (1) Where a person commits a breach of any requirement, duty or obligation which is imposed under any DIFC Law the Court may, on application of any person who is aggrieved by such conduct or has suffered loss or damage arising from such conduct, make one or more of the following:
>
> (a) an order for damages;
>
> (b) an order for compensation;
>
> ...
>
> (g) any other order that the Court thinks fit.
>
> ...
>
> (3) The Court may make an order under this Article in addition to or as an alternative to any order it is empowered to make elsewhere under the Law or under any other law, except as such Law or other law may otherwise provide."

Article 37 (in Chapter 3 of Part 4) gives the Court power to make binding declarations on points of law or fact whether or not any other remedy is claimed; Article 38 gives the Court power to grant an injunction "in all cases in which it appears to the Court to be just and convenient to do so..." and Article 40(1) gives the Court power, in any case where it has jurisdiction to entertain an application for an injunction or specific performance, to award damages in addition to, or in substitution for, an injunction or specific performance. That is the legislative context in which Article 40(2) must be read.

165. I turn, therefore, to the question whether an award of compensation in the form of multiple damages against Sarasin-Alpen would be warranted in the circumstances: that is to say, whether Sarasin-Alpen's conduct "producing actual damages was deliberate and particularly egregious or offensive".

166. It is submitted on behalf of Sarasin-Alpen that that requirement is not met in the present case. It is said that the only finding of deliberate misconduct that has been made against Sarasin-Alpen was the finding, in my judgment of 21 August 2014, that in categorising the Claimants (and each of them) as "Clients" Sarasin-Alpen filled in the AGBCs so as to give the impression that those documents had been completed by the Claimants themselves. That conduct, it is said, was not the conduct which produced "actual damages" as required by Article 40(2) of the Law of Damages and Remedies; rather, it is said, the conduct which produced "actual damages" was, as the Court found, the recommendation of unsuitable investments. The Court found that conduct to have been reckless: it did not find that it was deliberate. Further, it is said, the Court has made no finding that the conduct of Sarasin-Alpen was "particularly egregious or offensive".

167. If, contrary to the submissions to which I have referred in the previous paragraph, the Court were to hold that the conduct of Sarasin-Alpen in producing actual damages was deliberate and particularly egregious or offensive, it is further submitted (i) that the power to award compensation in the form of multiple damages is to be exercised, as a matter of discretion, only "where warranted in the circumstances"; (ii) that Article 40(2) of the Law of Damages and Remedies gives no further guidance as to the principles upon which the Court should exercise its discretion; and (iii) that, in those circumstances, the Court should have regard, by analogy, to the principles which would guide the courts of England and Wales in determining whether to award exemplary damages. The Court was referred to *Kuddus v Chief Constable of Leicestershire* [2002] 2 A.C. 122, [5], [32] and [52] and [80] for an authoritative statement of those principles. It is said to be plain that the present is not a case under which exemplary damages would be awarded under the law of England and Wales; and it is submitted that, by analogy, the Court should hold that (even if there were jurisdiction to do so) this is not an appropriate case to award multiple damages under Article 40(2) of the Law of Damages and Remedies.

168. I do not accept those submissions. Properly understood, my judgment of 21 August 2014 includes a finding that Sarasin-Alpen acted in deliberate breach of the Financial Services Prohibition in treating (and dealing with) the Claimants, (and each of them) as "Clients" rather than as "Retail Customers". It was that breach which gave rise to the losses sustained by the Claimants: as Retail Customers they should never have been exposed to the risks of investing in a structured (and leveraged) financial product. The submission that the Court made no finding that the conduct of Sarasin-Alpen was "particularly egregious or offensive" ignores, first, my observations in the penultimate paragraph of my judgment of 21 August 2014; where I said this:

> "432. ...I am satisfied that the present is a clear case of mis-selling unsuitable investments to an unsophisticated investor, and to his equally unsophisticated wife and mother. That was carried out by employees of Sarasin-Alpen - motivated, at least in the case of Mr Walia, by a personal interest in the fees that would be generated by the exercise – and without regard to the protection that the Regulatory Law was intended to afford Retail Customers (as these Claimants were)."

and, second, the reasons set out in paragraphs 17 and 18 of the schedule to the Order of 28 October 2014, where – in explaining why I took the view that this was a case in which it was appropriate to make an order against Sarasin-Alpen for the assessment of costs on an indemnity basis – I said this:

> "17.In my judgment of 21 August 2014, I found that the First Defendant, Bank Sarasin-Alpen (ME) Limited, had deliberately decided to act in breach of the regulatory regime applicable to those institutions providing financial services in the DIFC. It had chosen to accept these Claimants as 'Clients' in circumstances in which it had no reason to think that they qualified as clients under that regime. In order to achieve that end, the First Defendant deliberately falsified documents, known as AGBC's, to make them appear as if they had been completed by the Claimants in their own hands in circumstances in which there were employees in the employ of the First Defendant's offices who must have known that that was not the case. The only reason for completing the schedules to those forms in the first person (so as to make it appear that they had been completed by the Claimants themselves) can have been to mislead anyone inspecting those schedules; and, in particular, any regulatory authority. That was, as I held, deliberate malpractice on the part of the First Defendant; done with intent to deceive.
>
> 18. That conduct, as it seems to me, does take this case out of the norm; it is conduct which deliberately seeks to avoid the compliance which ought to be expected of financial institutions operating within the regulatory regime. This is not a case of the First Defendant making a mistake; this is a case of the First Defendant deliberately falsifying its records in order to mislead. That, in my view, is conduct in relation to which this Court ought to mark its disapproval by make an order for costs on an indemnity basis."

Nor do I think that Sarasin-Alpen obtains assistance from the principles which would guide a Court in England and Wales when deciding whether or not to award

exemplary damages. Article 40(2) is not derived from the law of England and Wales: rather, it reflects an intention to depart from that law in favour of the law in the United States of America. The law making authority in this jurisdiction has given the DIFC Courts power to award multiple damages in appropriate cases; and this Court should not decline to exercise that power – when circumstances require – on the ground that a court of England and Wales would not make such an order.

169. In my view this is a case in which the conduct of Sarasin-Alpen calls for an award of multiple damages under Article 40(2) of the Law of Damages and Remedies. The appropriate order, as it seems to me, is that Sarasin-Alpen pay compensation to the Claimants (and each of them) of an amount equal to twice the losses which they have sustained under each of head (A), head (B), head (C) and head (D.

170. *Interest on losses.*

As I have said, earlier in this judgment, the Claimants do not, in terms, advance a claim for interest on Head (A) losses in their "Written Submissions on Quantum" dated 25 February 2015; notwithstanding that, at paragraph 2.2 of that document, "Interest" is included in the summary of "the issues for determination". In the section headed "Interest" (paragraph 31) it is said only that:

> "31. Since the Claimants are already seeking damages for the interest charges by ABK and CBK, the Court only needs to order interest from the point of the last interest charge from ABK and CBK (30 April 2014 and 18 September 2014 respectively). It is submitted that the appropriate order would be to order interest at the rate charged by each of ABK and CBK."

171. Sarasin-Alpen, at paragraph 5.5 of its skeleton argument filed for use at the Quantum Determination, refers to a claim against both Defendants for "compound interest...under Articles 18 and/or 32 of the Law on Damages and Remedies 2005"; and rejects that claim (at paragraph 6.2) on the basis that:

> "6.2.1...The claim is misconceived as the Law of Damages and Remedies 2005 deals with interest on damages for breach of contract, breach of the law of obligations and restitution and not with Regulatory claims."

At paragraph 87 of that skeleton argument it is said that:

> "8.7 If the Court does not accept that the Claimants are not entitled to prejudgment interest, the normal rate of interest in commercial matters is EIBOR + 1% - see *CFI025/2013 GFH Capital Limited v (1) Mr Joseph Zahra, (2) Zedklym Investment Company and (3) Fujairah National Construction Company.*"

172. I accept that this is not a case within Articles 18 or 32 of the Law of Damages and Remedies; but, as it seems to me, Article 35(1)(g) and/or Article 35(3) of that Law – and Article 94(2) of the Regulatory Law itself - empowers the Court to award interest on head (A) losses. I am satisfied that it is appropriate to make such an order in this case against both Sarasin-Alpen and Bank Sarasin. Interest on the head (A) losses is to run at the rate from time to time charged by Bank Sarasin to commercial customers in good standing. If the parties are unable to agree that rate, the Claimants may apply to the Court for the rate to be fixed.

Conclusion

173. For the reasons which I have set out in this judgment I hold:

(1) that Sarasin-Alpen should pay to the Claimants, in addition to monies already paid, a total of US$59,611,899 (being the aggregate of (i) a further US$10,445,049 in respect of head (A) losses and (ii) 2 x US$24,583,425). That sum to be attributed to the individual Claimants as follows:

Mr Al Khorafi	10,622,213
Mrs Al Hamad	34,512,982
Mrs Al Rifai	14,476,704

(2) that Bank Sarasin should pay to the Claimants, in addition to monies already paid, a total of US$24,583,425. That sum is to be attributed to the individual Claimants as follows:

Mr Al Khorafi	4,679,332
Mrs Al Hamad	12,986,491
Mrs Al Rifai	6,917,602

(3) that Sarasin-Alpen alone is to be liable for payment to the individual Claimants of the difference between the sums payable under sub-paragraph (1) and the sums payable under sub-paragraph (2);

(4) that the Defendants are to be jointly and severally liable for payment of the sums payable to the individual Claimants under sub-paragraph (2): and

(5) that the Defendants should pay, jointly and severally, interest on head (A) losses (being the sums ordered to be paid by sub-paragraphs 3(a) and 5(a) of the Order dated 28 October 2014) from 8 October 2008 until payment at the rate from time to time charged by Bank Sarasin to commercial customers in good standing.

174. The costs of the Quantum Determination will be stood over for further determination in the light of such representations as the parties may wish to put before the Court.

Issued by:
Mark Beer
Registrar
Date of Issue: 7 October 2015
At: 4pm