CFI 062/2021 (1) Millie (2) Molly v Mihard

FEBRUARY 23, 2023 COURT OF FIRST INSTANCE - ORDERS

Claim No: CFI 062/2021

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) MILLIE
(2) MOLLY

Claimants

and

MIHARD

Defendant

ORDER WITH REASONS OF H.E DEPUTY CHIEF JUSTICE ALI AL MADHANI

UPON the Part 7 Claim Form dated 1 July 2021 (the "Claim")

AND UPON the Particulars of Claim dated 29 August 2021 filed in support of the Claim ("PoC")

AND UPON the Defendant's Application No. CFI-062-2021/1 dated 3 February 2022 seeking to strike out parts of the Claim (the "First Strike Out Application")

AND UPON the Claimants' Application No. CFI-062-2021/3 dated 24 May 2022 seeking to amend its particulars of claim filed (the "Amendment Application")

AND UPON reviewing the draft amended particulars of claim filed by the Claimants on 31 March 2022 (the "Draft APoC")

AND UPON the Defendant's Application No. CFI-062-2021/4 dated 16 September 2022 seeking to strike out the Draft APoC (the "Second Strike Out Application")

AND UPON hearing counsel for the Claimants and counsel for the Defendant at a hearing on 27 and 28 September 2022 (the "Hearing")

AND UPON reviewing the parties' evidence including witness statements and submissions filed in these proceedings

AND UPON reviewing the DIFC Law No.5 of 2005, the Law of Obligations (the "Law of Obligations")

AND UPON reviewing the DIFC Law No.1 of 2004, the Regulatory Law (the "Regulatory Law")

AND UPON reviewing the DIFC Law No. 10 of 2004 (the "Court Law")

AND UPON reviewing the Conduct of Business Rules of the DFSA Rulebook (the "COB Rules")

AND UPON reviewing the DIFC Law on the Application of Civil and Commercial Laws in DIFC, DIFC Law No.3 of 2004 (the "Application Law")

IT IS HEREBY ORDERED THAT:

First Strike Out Application

1. The First Strike Out Application is dismissed.

2. A Notice of discontinuance is not required to be served by the Claimants as the Draft APoC is the appropriate procedure in abandoning some of its claims.

3. The Defendant shall be awarded its costs in defending causes of action which were raised in the PoC but have subsequently been abandoned by the Claimants in their Draft APoC. The Defendant's costs shall be assessed by the Registrar, if not agreed between the parties.

Amendment Application and Second Strike Out Application

4. The Second Strike Out Application is granted on the limitation grounds, the governing law, the entity which provided advisory services prior to July 2012, the deceit and negligence claims. The Second Strike Out Application was unsuccessful on the regulatory points which were allegedly "new" claims.

5. The Claimants are granted permission to amend their statement of case and to submit their Draft APoC subject to deletion of all transactions and transfers which occurred prior to 1 July 2015, as these claims have not been brought within the statutory time limit by virtue of Article 38 of the Court Law.

6. The Claimants shall be awarded their costs in preparing their causes of action pertaining to claims prior to July 2012. The Claimants misunderstanding of the wrongs allegedly committed by the Defendant has arisen based on the error that had been described in the first witness statement of Minali.

Issued by:

Hayley Norton

Assistant Registrar
Date of issue: 23 February 2023
At: 2pm

SCHEDULE OF REASONS

The Applications

1. In the Defendant's First Strike Out Application, it seeks to strike out the Claimants' PoC pursuant to RDC 4.16(2) on the grounds, *inter alia,* that the nature and the scope of the Claimant's PoC is not coherent and that some pleaded causes of action do not have any real prospect of success. The Claimants set out to amend the PoC in response to the First Strike Out Application. The Defendant did not provide its consent because it was said that the Claimant *"was not entitled to permission"* because *"it is not possible to serve the* [PoC with] *numerous defective parts".*

2. The Claimants filed the Amendment Application seeking permission to amend the PoC and serve their proposed draft amended particulars of claim. The draft amended particulars of claim was subsequently produced (the "Draft APoC") , however, the Draft APoC met with the Defendant's Second Strike Out Application made on grounds, *inter alia,* of limitation grounds. The Defendant says that even *"if the Court does consider that it is constrained to permit the draft APoC, it can strike out or dismiss those part that it finds have no real prospect of success without another hearing".*

3. I should make it clear that in addition to the oral submissions made at the Hearing over the course of two days, I have read carefully through the evidence filed by both parties. In the event I may omit some arguments or legal authorities relied on, this does not mean that I have overlooked it.

4. My reasons for dismissing the Defendant's First Stike Out Application, granting parts of the Second Strike Out Application and granting the Claimants' Amendment Application except insofar as amendments that concern claims relevant to those transactions and transfers which occurred prior to 1 July 2015 are outlined below.

The underlying facts

5. In November 2020, the Defendant obtained an attachment and a freezing order against the Claimants' bank account and issued proceedings in Switzerland. In March 2021, the Defendant liquidated the Claimants' position. The Claimants' case is that as a result, the Claimants lost USD 5.5 million (the "Disputed Breach").

6. In March 2021, the Claimants issued a pre-action letter against the Defendant seeking restoration of their portfolio value to which the Defendant did not accede. On 1 July 2021, the Claimants issued proceedings before the DIFC Court seeking monetary compensation from the Defendant.

7. Between July 2021 and December 2021, there were correspondence between the Claimants' legal representative and the Defendant's. The Defendant requested further information (the "Defendant's First

RFI"). On 29 August 2021, the Claimants served their PoC.

8. On 28 December 2021, the Defendant requested additional further information from the Claimants (the "Defendant's Second RFI"). The Defendant wrote to the Claimants complaining about the unintelligibility of their statement of case requesting the Claimants to provide information related to (i) the alleged breach of duty (ii) the date and reference number of any transaction entered into as a result; and (iii) the date the Claimants became aware of that breach of duty and that it had caused them loss for the purposes of "limit[ing] the scope" of their claim as it "was so opaque". The Defendant alleges that the Claimants refused to answer any of the Defendant's Second RFI.

9. On 28 January 2022, the Claimants changed legal representative from Emirates Legal FZE to KBH Limited.

10. On 3 February 2022, Al Tamimi issued the First Strike Out Application to the original PoC. The Defendant considered that there was no real prospect of success irrespective of the information that would have been provided by the Claimants to the Defendant's Second RFI.

11. On 9 February 2022, KBH wrote to Al Tamimi indicating that they intend to amend the PoC and that such amendments may deal with the First Strike Out Application.

12. The Claimants sought a stay of the Strike Out Application from the DIFC Court pending the provision of their proposed Draft APoC. On 4 March 2022, the Court granted an extension of time (the "Extension of Time Order") as opposed to a stay of the First Strike Out Application and ordered the Claimants to submit a draft of their APoC in response to the First Strike out Application.

13. On 31 March 2022, the Claimants submitted a draft of their APoC.

14. On 3 May 2022, the Defendant wrote to the Claimants raising series of questions regarding the reference they make to their Draft APoC pertaining to the entity they were referring to in the APoC. Purportedly, the Claimants refused to comply with the Defendant's request.

15. On 9 May 2022, the Defendant refused to provide consent to the Draft APoC. On 20 May 2022, reasons of the Defendant's refusal were submitted to the Claimants.

16. On 24 May 2022, the Claimants filed the Amendment Application and sought directions that it be listed to be heard with the Defendant's First Strike Out Application.

17. Between 24 May and 2 June 2022, the Defendant refused to provide consent that the Amendment Application and the First Strike Out Application should be heard together. On 2 June 2022, it was agreed that the First Strike Out Application and the Amendment Application are to be heard together.

18. On 25 July 2022, the Defendant outlined its reasons for objecting to the proposed Draft APoC primarily based on the fact that it contained numerous "new" claims that the Defendant considered to have no real prospect of success and in many cases are timed barred.

19. On 6 September, the Claimants served a reply in response which allegedly did not engage with the question of whether the proposed amendments have a real prospect of success, instead it focused on whether the claims asserted were in fact "new".

20. On 16 September 2022, the Defendant issued its Second Strike out Application which sought to strike out some of the amendments to the Draft APoC pursuant to RDC 4.16(1) and dismiss some of the claims pursuant to RDC 24.1.

Relationship between the Claimants and the Defendant

21. In the course of 2012, 2014, 2018 and 2020, the Claimants signed four separate advisory agreements (the "Advisory Agreements") with the Defendant. It is claimed that the Defendant provided the following financial services to the Claimants between 2012 and 2020 through the Defendant's representative, Ms Muhapin, the Regional Manager, at the relevant time, of the Defendant's DIFC Branch:

(a) selling investments as principals, including Target Redemption Forwards, Target Redemption Pivot Forwards and Ratio Knock-Out Forwards (Dealing in Investment as principal);

(b) made invitations to the Claimants to enter into credit facilities with it (by, *inter alia* proposing and making available to the Claimants leveraged investment (Arranging Deals in Credit); and

(c) made invitations to the Claimants to enter into investment transactions (including by providing account opening forms and documents relating to potential investment to the Claimants, via its DIFC branch) (Arranging Deals in Investments).

22. It is said that the Defendant was in breach of the DFSA Regulations, under which it was authorised to offer financial services (i) that it conducted and provided financial products without the regulatory authority to do so; and (ii) that it advised the Claimants in relation to risky financial products which were not suitable for them. Further, that the Defendant acted in breach of contract and breaches of duties of care, the Claimants could not and would not have purchased and traded in financial products from the Defendant as and when they did and would not have suffered the losses which they seek to recover, the claims against the Defendant are said to arise under Article 94 of the DIFC Regulatory Law, DIFC Law No. 1 of 2004 (the "Regulatory Law") and under the general law applicable in the DIFC.

23. On behalf of the Defendant, it is denied that the Defendant was carrying out financial services in the DIFC, and so denied that it was subject to the DIFC Regulatory Regime. It is said that all contractual claims against the Defendant must be governed under Swiss Law as agreed between the parties in the Advisory Agreements and it is claimed that even if the claims in respect of misrepresentation and negligence could be maintained against the Defendant under the DIFC Law (which is denied), there is no basis on which the Defendant could be held liable for the actions and omissions alleged.

24. The provision of financial services in and from Dubai International Financial Centre is, and was at the

material times, regulated by the DIFC Regulatory Law.

25. Part 2 of the Regulatory Law provides that the DFSA is a body established under Dubai law with the powers and functions conferred by the Regulatory Law. Article 23 of the Regulatory Law provides that the DFSA has the power to make Rules in respect of any matters related to those functions. In particular, Article 23(2)(c) confers power to make rules in respect of “standards of practice and business conduct of persons in dealing with their customers and clients and prospective customers and clients”.

26. Article 41(1) of the Law contains a general prohibition against carrying out “Financial Services” in the DIFC without a license. Article 41(2) requires the DFSA to make Rules prescribing the activities which constitute a Financial Service. Article 42(1) requires the DFSA to make Rules prescribing which Financial Services may be carried out by a licensed entity. Those articles were (at the relevant time) in these terms:

"41. The Financial Services Prohibition

(1) Subject to Article 41(9) and Article 42(3), a person shall not carry on a Financial Service in or from the DIFC.

(2) The DFSA shall make Rules prescribing the activities which constitute a Financial Service.

(3) The prohibition in Article 41(1) is referred to in the Law as the "Financial Services Prohibition".

...

“42. Authorised Firms, Authorised Market Institutions and Financial Services

(1) The DFSA shall make Rules prescribing which kinds of Financial Services, with such modifications or limitations as may be specified may be carried on by:

(a) an Authorised Firm; and

.....

(3) A person may carry on one or more Financial Services in or from the DIFC if such person is:

(a) an Authorised Firm whose Licence authorises it to carry on the relevant Financial Services;

(4) An Authorised Firm or Authorised Market Institution shall:

(a) act within the scope of its authority under its Licence; and

(b) comply with any condition or restriction applicable to its Licence."

27. Article 87 to 93 of the Regulatory Law provides that where there has been a contravention, the DFSA or the Financial Markets Tribunal has the power to issue a fine, alternatively, the DFSA has the power to issue an administrative censure or to seek an injunction from the Court. Article 94 provides that there shall be a civil claim for damages in certain circumstances.

28. The DFSA Rules made by the DFSA were contained in the DFSA Rulebook and comprised a number of modules. Rules made pursuant to Article 41(2) of the Regulatory Law prescribing the activities which constitute Financial Services are contained in Chapter 2 ("Financial Services") of the General (GEN) Module of the DFSA Rulebook. The Rules setting out standard of practice and conduct are contained, *inter alia,* in the Conduct of Business Module (COB) of the DFSA Rulebook. Rule 3.2.1 prohibits an Authorised Firm from conducting investment business with or for a Retail Client, the Authorised Firm must only conduct investment business with or for a person who is a sophisticated client.

29. To summarise, the Regulatory Framework provided that it was contrary to the Financial Services Prohibition – and so in contravention of the law – to carry out in or from the DIFC a Financial Services without obtaining a license from the DFSA Regulatory authorising that activity. That investment business could only be conducted with or for a client and not with or for a Retail Client. The standards or practice and conduct of persons dealing with their customers and clients and prospective customers and clients were prescribed by Rules issues by the DFSA.

30. A breach of the Regulatory Law or of the Rules issued by the DFSA pursuant to the Regulatory Law, was a disciplinary/regulatory matter for which an Authorised Firm could, *inter alia,* be brought before the Financial Markets Tribunal and or be fined or censured. In addition, pursuant to Article 94 of the Regulatory Law, a civil claim for damages might arise where a person intentionally, recklessly or negligently commits a breach of duty, requirement, prohibition or responsibility imposed under the Regulatory Law or other legislation administrated by the DFSA.

31. The Claimants' case against the Defendant is founded, primarily at least, on two regulatory complains, it is said that (i) before accepting the Claimants as Clients (within the meaning of the DFSA Rules), the Defendant was required to investigate whether they (husband and wife) met the relevant criteria under those rules; and that, in breach of that regulatory obligation, the Defendant failed to carry out any or any sufficient investigations in order to satisfy itself; and (ii) that in advising the Claimants on investments or making invitations and recommendations, the Defendant was obliged to ensure that the products recommended were suitable for them, and that in breach of that regulatory obligation, the Defendant failed to advise that the financial products were unsuitable for the Claimants. The alleged regulatory breaches were identified in the Claimants' Claim Form.

32. It is claimed that the Defendant was not in breach of its obligations to the Claimants in either of those

respects, the Defendant sought to rely on the premise that the Claimants are prolific traders who had investment accounts with at least 12 financial institutions, and traded heavily executing thousands of transactions. As for their trading with the Bank, it is claimed that many of those transactions were executed by the Claimants without the advice of the Defendant. It was said that at least 4 of the 12 financial institutions provided services to the Claimants in or from the DIFC, and that those 4 institutions do not possess the license to provide financial services to Retail Clients, it could only be assumed that the Claimants were categorised as Professional Clients by those financial institutions.

33. It is said that claims under Article 94(2) of the Regulatory Law are either (i) subject to the six-year limitation period by virtue of Article 38 of the Court Law No. 10 of 2004 (the "Court Law") or (ii) new claims for which permission has not been sought to introduce them and "to have an Article 94… needs not only [to] have the facts, you need to identify the rule that is breached. Because it is the rule breach that gives rise to a cause of action." [sic].

34. The Defendant argued that proceedings may be brought under Article 94(2) from the moment the Claimant suffers loss. In the present case, the loss that was allegedly suffered by the Claimants was at the point of the transaction when the Claimants purchased the financial product that they did not want, relying on the statement included in the proposed draft of the APoC which states that the Claimants *"would have invested in low-risk income bearing products with steady rates of return".*

The First Strike Out Application

35. It is fundamental to point out that the Defendant's First Strike Out Application was aimed at the Claimants' non-regulatory claims included in the PoC. The Defendant's draft order expressly seeks to dismiss any pleadings under the Law of Obligations, including those claims set out in the Claimants' Further Information dated 30 September 2021, any claims for breach of contract and remedies which the Claimants sought in the PoC but have been abandoned in the Draft APoC.

36. It is disputed by the Defendant that the claims which are abandoned in the Draft APoC are liable to be struck out and suitable for an immediate judgment. The Defendant submits that where a party discontinues a claim, they "must" serve a notice of discontinuance by virtue of RDC 34.6, it is undisputed that the Claimants have not served a notice of discontinuance. The Defendant assumes that this an attempt to avoid the usual costs consequences. The Defendant states that the Draft APoC abandons various causes of action that appeared in the PoC, and they include the following:

> (a) claim for compensation for legal injuries in the Claim Form and the PoC under paragraph 2.12 (mental agony and legal injuries). This was expressly elaborated under paragraph 10.8 of the PoC and the quantum of this claim sought by the Claimants was USD 1 million "for legal injuries suffered by [the Claimants]". The Claimants do not appear to proceed with this claim of damages in their Draft APoC.
>
> (b) claims in deceit/ fraudulent misrepresentation that were pleaded in the PoC.

(c) claims under Article 94 of the Regulatory Law for alleged breaches of (i) the Defendant's record keeping obligations under COB 2.5.2, 3.4.3 and 3.6.1 (ii) the prohibition on limiting liability in COB 3.2.2 (iii) the rules about conflict of interest in COB 3.5.1 and 3.5.2 and (iv) the rules on best execution in COB 6.4.2 and 6.4.3.

(d) the claim for breach of contract on the basis that the Advisory Agreements contained the FINSA and FINSO as implied terms.

37. The Claimants assert that they do not intend to maintain those claims (abovementioned) in the Draft APoC, and the issue of the Defendant's First Strike Out Application essentially falls away, because in principle a strike out application or an immediate judgment is often answered by an amended pleading. This is because the Court will consider before striking out or granting an immediate judgment whether the claim is curable by an amendment. The Claimant relies on the authority of Soo Kim v Park [2011] EWHC 1781 QB [paragraph 40] where Justice Tugendhat states that *"where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right".*

38. I agree with the Claimants' approach to this matter, namely filing a Draft APoC before the Court, in response to the Defendant's First Strike Out Application, which is consistent with usual practice. This is because my understanding of RDC 34.2 and RDC 34.3 is that a notice of discontinuance is a "unilateral" right afforded to the Claimants, and an amendment does not per se make the discontinuance notice the appropriate procedure. In my opinion, the Claimants approach to simply amend their statement of case and cure the PoC of the alleged defects the Defendant had argued to be "incoherent and unparticularised" was the appropriate route. The Draft APoC now represents the particulars which the Claimants intend to pursue as the particularisation of their case.

39. With reference to costs, the Defendant states that they have incurred substantial costs in defending causes of action that are subsequently abandoned by amendment, such that those costs are wasted, the Defendant requests the Court to treat this as a partial discontinuance with the result that the Claimants will be obliged to pay the costs relating to that part of the proceedings, in accordance with RDC 34.15. In support of the Defendant's argument, they rely on the authority of *RG Carter Projects Ltd v CUA Property* [2020] [paragraph 8-12]. The Defendant assessed their costs in responding to the now abandoned claims of the Claimants' PoC being around 50% of its total costs, a statement of costs has been provided totalling a sum of AED 297.607.18. The Defendant invited the Court to assess this amount immediately under RDC 38.28 or to order an immediate detailed assessment by virtue of RDC 40.1.

40. I will be guided by the Practice Direction 2 to the Rules of the DIFC Court 2019 which states that the general rule upon amendment is that the "party applying for an amendment will usually be responsible for the costs of and arising from the amendment". An order for costs of and caused by means where the court makes this order on an application to amend a statement of case, the party in whose favour the costs

order is made is entitled to the (i) costs of preparing for and (ii) attending the application and (iii) costs of any consequential amendment to his own statement of case.

41. Based on the above, the Defendant shall be awarded an order for their costs of and caused by, in this case as the Draft APoC abandons the abovementioned causes of action (paragraph 36(a) – (d)), the Defendant's wasted time and money defending those pleadings in its statement of defence. The award of costs on a conventional basis would cover the Defendant's costs of amending its statement of defence to delete the now redundant answer to the abandoned plea.

42. The Claimants shall pay the costs of the Defendant and those costs shall be assessed by the Registrar, if not agreed between the parties.

The Second Strike Out Application and Objections

43. The Defendant resisted the Claimants' Amendment Application based on four limbs, first, the claims identified under Article 94 (2) and Article 65 (2) of the Regulatory Law, claims in negligence, or in contract in respect of claims for breaches more than six years old, or in respect of negligence claims more than six years before 1 July 2021, that rely on old duties, are all purportedly time barred and therefore have no real prospect of success. Secondly, all claims pleaded by the Claimants against the Defendant are claims allegedly under the wrong law (the legal relationship of the Claimants and Defendant as agreed under the advisory agreements are governed by Swiss Law), thirdly, the Defendant is not the correct party to claims of any wrongs committed prior to July 2012 and fourthly, the claims for deceit are not properly arguable.

Claims Pre-July 2012

44. The first objection raised in the Second Strike Out Application is that any claims of alleged wrongs committed by the Defendant prior to July 2012 in the Draft APoC ought to be struck out because the Defendant is the wrong entity. It is alleged by the Defendant that it did not begin providing any advisory services to the Claimants until 6 July 2012. The Defendant said that prior to that date, all advisory services were provided by a different entity, Muhaf Asset Management Dubai Limited ("CLAM") which purportedly is the proper defendant to any claims advanced by the Claimants in respect of any wrongdoing committed. Therefore, the Defendant seeks in its Second Strike Out Application that any claims or complaints should be removed from the Draft APoC including any complaints made in respect of the January 2012 Meeting and all documents signed at that meeting.

45. The Claimants argue that the Defendant failed to identify the relevant paragraphs which they seek to remove from the Draft APoC and more importantly it is alleged that the Defendant did not seek in its First Strike Out Application any claims pre-July 2012 to be struck out as currently pleaded. The Claimants contend that the proper defendant to any claims prior to July 2012 is a question of fact that will need to proceed to trial and should not be dealt with at this interlocutory stage of the proceedings.

46. The factual evidence exhibited to Minali's ("Minali") third witness statement provide an overview of the Claimants' position in 2012. On 15 January 2012, the Claimants opened a bank account with Muhaf (the

"Muhaf"). On 20 January 2012, the Claimants entered into an investment advisory agreement with CLAM (the "CLAM Advisory Agreement"). On 11 March 2012, CLAM corresponded with the Claimants notifying them of a legal merger between CL and the Defendant which would take effect on 2 April 2012, subject to regulatory and legal approvals. The merger between the Defendant and CL would effectively involve:

> "Mihard will legally assume all the assets and liabilities and consequently all the rights and obligations of Muhaf […] any existing or future reference to Muhaf in any documentation is to be read as reference to Mihard […] your banking relationship will be with Mihard […] should you so wish, you will, continue to be serviced by your existing Muhaf Asset Management (Dubai) Ltd relationship manger, who will transfer to MihardDubai Branch following the merger, if you execute the requisite Mihardclient documentation."

47. On 2 April 2012, the merger became effective. On 8 April 2012, the Claimants entered into their first advisory agreement with the Defendant (the "First Mihad Advisory Agreement"). Between 6-8 July 2012, the Claimants' relationship manager, Muhapin began providing advisory services to the Claimants on behalf of the Defendant.

48. Firstly, I disagree with the Claimants' submission that this issue is a matter to be resolved in trial, on the contrary, this is the sort of point that ought to be resolved at this stage, particularly when factual evidence are present in facilitating the Court's decision. Secondly, my understanding of the letter is, the merger was directly between two entities, CL and the Defendant, CLAM became a subsidiary of the Defendant as a result of the merger. Whilst the letter clearly states that the Defendant will assume all assets, rights and obligations of CL, there was no reference that the Defendant will assume the same of CLAM. In my opinion, the Claimants' misunderstanding arises from the suggestion that their "banking relationship" will be with the Defendant as result of the merger. However, the letter continues to specifically assert that the "services" offered to the Claimants would continue to be provided by CLAM, there was no suggestion that the Defendant would provide advisory "services" to the Claimants. Accordingly, the legal entity that provided the advisory services prior to 7 July 2012 to the Claimants was in fact CLAM.

49. As part of the oral submissions, the Claimants argued that the Defendant had admitted through Milani's first witness statement [paragraph 5] that the Defendant was the predecessor of CL and CLAM. However, in the Defendant's skeleton argument it was said that the Defendant should not be liable for any alleged wrongs committed by CLAM as it is a separate legal entity and the *"Bank was never the legal successor"* of CLAM. It was said by the Claimants that since the Defendant has changed its pleadings, the appropriate approach would be to withdraw its earlier admission to enable it to use the argument that the Bank is not the legal successor of CLAM and should not be liable for the wrongs committed by CLAM.

50. Whilst I acknowledge that the first witness statement of RCJ errors in analysing the legal and the corporate structure of CL and CLAM in connection with the Defendant, such analysis does not change or impact CL and CLAM's true legal and corporate structure or the correct entity that provided advisory

services prior to 7 July 2012. The misconception of the legal structure of CL and CLAM by RCJ could be based on a number of factors; lack of full evidence at the time of drafting the witness statement or new evidence came to light which was not available at the time of preparing the witness statement. I think the Claimants' argument in this regard is unsound and must fail. However, I recognise that the Claimants' pleadings in the Draft APoC is based on the principle that the Defendant is the legal successor of CLAM and CL, this misconception may have arisen as a result of the error made in RCJ's first witness statement. In the circumstances, the Claimants shall be awarded their costs in preparing the Draft APoC pertaining only to the claims advanced prior to 7 July 2012.

51. Based on the above, any claims of wrongs committed prior to 7 July 2012 including any claims arising from misconduct committed at the January 2012 Meeting should be removed from the Draft APoC as those claims do not have any real prospect of success (paragraph 63-82).

Limitation

52. I will deal with the limitation objection in general to identify from a preliminary view whether the alleged claims which are raised in Draft APoC are in fact statute barred. Since the Regulatory Law of the DFSA does not set out the limitation period of when a party may bring a cause of action, the Court will be guided by Article 38 of the Court Law which expressly states that *"subject to any other DIFC Law, a proceeding must not be commenced more than 6 years after the date of the events that give rise to the proceedings."* As part of the Defendant's oral submissions, it was argued that all transactions and transfers which took place between 2012 – 2015 are caught by Article 38 of the Court Law. Thereby, a cause of action brought after 6 years had lapsed would be time barred, in these circumstances, the Claimants have had the opportunity to bring a cause of action by 1 July 2015. On that account, the Defendant contended that *"limitation is precisely the sort of point which ought to be resolved at an interlocutory stage and the whole point of limitation is that a defendant ought not to be troubled with an out-of-date claim".*

53. On behalf of the Claimants, it is said that causes of action prior to 2015 are not time barred on account of the loss element which did not arise until 2020 when the Defendant liquidated the Claimants' portfolio.

54. It is the Claimants' case that the losses sought in negligence and under the Regulatory Law (Article 65 and 94) being the difference between what the Claimants paid in and the amount received – did not arise until the event of liquidation in March 2020, because it was at that point losses were suffered and the cause of action against the Defendant had materialised (the "Portfolio Theory"). It is the Claimants' submissions that no cause of action could have been sought in negligence or under the Regulatory Law without the operative criterion of "direct loss", or in the case of negligence, could reasonably have been discovered by the Claimants.

55. I have been referred to the decision of *Al Khorafi v (1) Bank Sarasin-Alpen and (2) Bank J. Safra Sarasin Limited* (CA 008/2015) by both parties, in this decision, Sir Justice Field listed three fundamental elements which are required to have occurred to trigger a compensation claim under Article 65(2) of the Regulatory Law, namely (i) a Defendant made an agreement in the course of carrying on a Financial Services

Prohibition; (ii) the Claimant paid money or transferred property to the Defendant under that agreement; and (iii) the Claimant suffered loss that is a direct result of such payment or transfer.

56. In applying the three elements to the Claimants' scenario, they allege that they would not have succeeded in bringing a compensatory claim prior to 2020 under Article 65(2) of the Regulatory Law, as Article 65(2) requires the relevant party that is applying to recover compensation to demonstrate "direct loss" was sustained as a result of a breach of the Financial Promotion Prohibition occurring under the relevant agreement.

57. The Portfolio Theory was rejected by the Defendant on three grounds, firstly that it had not been advanced by the Claimants prior to the Hearing. Secondly, the Claimants cannot rely on losses only crystallised when the portfolio was liquidated owing to paragraph 109.2 of the Draft APoC which stipulates that the Claimants would have nonetheless purchased other investments in alternative low-risk financial products, effectively suggesting that loss would have occurred at the point when the Claimants purchased something they did not want i.e., at the point of the transaction (the "flawed transaction"). Thirdly, the losses suffered by the Claimants emerged at the point of the transaction, relying on the English authority *Shore v Sedgwick Financial Services Limited* [2008] EWCA Civ 863 and on account of paragraph 107 of the Draft APoC which states that *"no transaction basis of loss is the appropriate method of measuring the Claimants' loss i.e. "plac[ing] the Claimants' into the position they would have been in had they never entered into the transaction with the Defendant"* which would effectively suggest that losses would have crystalised at the point of transaction, around the time the payments were made.

58. As part of the Defendant's oral submissions, they argue that *Shore* was a leading authority in which *"a clear distinction was drawn in cases between transactions which give rise to pure contingent liabilities (the "contingent liability cases") and transactions (the "transaction cases")".* In this case, the Court of Appeal held that claims for breach of duty against a financial adviser regarding the transfer of pension benefits in an occupational scheme to a personal pension income withdrawal scheme were statute barred. The Claimant suffered loss for the purposes of section 2 of the Limitation Act 1980 immediately upon the transfer. It was a transaction under which he obtained a bundle of rights which were, from the outset, less advantageous to him. It was not a contingent liability case to which *Law Society v Sephton and Co and Others* [2006] UKHL 22, applied and it was not necessary to wait to see what happened to determine whether he was worse off under the new scheme than the old. The Court of Appeal appeared to have narrowed the scope of contingent liability claims for limitation purposes, perhaps preferring the certainty that "transaction cases" bring. Based on the decision in *Shore,* the Defendant argues that a cause of action in the Claimants' case had accrued at the point of the transaction and not necessarily the period in which the Claimants suffered some of their losses as a result of the Disputed Breach.

59. However, it should be noted that *Shore* was subsequently considered *in Pegasus Management Holding SCA and another v Ernest & Young and another* [2008] EWHC 2720, where Lewison J thought that Dyson J's "subjective" approach was unusual. Both cases demonstrate the difficulties and the uncertainties of limitation law.

60. The Claimants rejected the Defendant's submissions and referred the Court to paragraph 106.1 - 106.4 of their Draft APoC establishing that the Portfolio Theory had been pleaded on account of their calculation of the losses suffered and the damages claimed against the Defendant. The Claimants' calculation takes into account the total amount that was in the Claimants' bank account prior to the liquidation in 2020 (including the margin call) deducting the amount that was withdrawn by the Claimants totalling approximately USD 5.6 million. This is the capital loss pleaded by the Claimants following the liquidation of their portfolio by the Defendant. Further, the Claimants proceeded to provide further evidence demonstrating that the Defendant had in fact understood the Claimants' pleadings were primarily based on the Portfolio Theory relying on paragraph 44.2 of the Defendant's defence which reads as follows:

> "It is admitted the Claimants' portfolio was lower in value at the time of its liquidation than at the time of the Claimants' initial investment. The portfolio suffered significant losses following the collapse in the financial markets due to the Covid019 pandemic. The losses reflect the risks associated with the investments in the portfolio. The Claimants' were aware of those risks and gave instructions for the purchase of the investment in the portfolio."

61. The Claimants relied on the DIFC authority, *Bhatia v ICICI Bank* [2014] where Justice Roger Giles made a preliminary view that the Claimant had a cause of action on a breach of contract against the Defendant and such actionable claim had accrued from the date the losses crystalised, being the forfeiture of the shares. Justice Giles had to consider whether the cause of action brought by the Claimant was a nullity claim contrary to Article 38 of the Court Law. Justice Giles made the distinction between the language used in the DIFC and the language used in the English statute, the Limitation Act 1980.

> "The language of "must not be commenced" in Article 38 is also found (without the "not") in Article 9(1) of the Obligations Law. It is similarly found in Article 123(1) of the Contract Law 2004, DIFC Law No.6 of 2004 which provides that action for breach of any contract "must not be commenced within 6 years after the cause of action had been accrued…" In the Limitation Act 1980, the language is that an action "shall not be brought" after the expiration of a time period. In Horton v Sadler [2006] UKHL 27; (2006) 3 All ER 1182 at [7] 1182 Lord Bingham said: "Despite the language used, this has been taken to mean that the bringing of an action after that time is prohibited but that the Defendant has a statutory defence of time-bar in such a case."

62. Therefore, it could be concluded that Article 38 may prohibit the commencement of proceedings, but it does not state the consequences of commencing contrary to prohibition and does not ascribe to nullity to proceedings.

63. Firstly, it appears that the Defendant has acknowledged that losses arose at the point of the liquidation when the margin call had not been met at the time of the request and this was due to the inherent risk that was associated with the investment in the portfolio. Further, at this preliminary stage, I accept the Defendant's submissions that the limitation clock had accrued at the time of the Claimants' first

transaction, and it is not impossible to conclude that this a correct analysis. I am satisfied that the cause of action accrued upon the first "flawed transaction" when the Claimants signed its first Advisory Agreement in 2012.

64. The rationale for this conclusion is based two-fold. First, the limitation clock started to run as soon as the Claimants had acquired the relevant products from the Defendant which may have been objectively a flawless transaction, but for the Defendant's alleged negligence. Where the transaction is a flawed one, this does not necessarily mean that the Claimants suffered actual damages immediately upon entry into that transaction, however that is the point in which the cause of action had accrued. The Claimants may have intended to invest in "low risk" financial products (denied by the Defendant), both were hoping for better transactions, it makes no difference to the fact that they have entered into a flawed transaction which they would not have done if they had been competently advised (which is denied by the Defendant). If such a flawed transaction has come into existence, that will, in my opinion usually be the damage which the recipient of the advice has suffered which triggered the limitation clock to accrue.

65. Secondly, as a far as I understand the Claimants' pleadings at this relevant time, it is based on a flawed transaction theory, suggesting that if the Defendant had complied with its regulatory duties and code of business rules prescribed by the DFSA, the Claimants would still have entered into a transaction, but it would have been an analogous (a flawless) transaction, where the "Claimants would not have made any further investments in any gold related products and would have instead invested in low-risk fixed income products Draft APoC [paragraph 58.11].

66. I agree with the Court's findings in *Shore.* The Court of Appeal had to determine on the facts of the case (i) the date on which the cause of action had accrued for the purposes of Section 2 of the Limitation Act; and (ii) whether Shore could benefit from the application of Section 14A which extends the limitation period for three years from when the party knew or ought to have reasonably known that it had a claim. It was decided that Shore had knowledge that there had been substantial fall in annuity rates and the level of his drawings would mean that his income would substantially reduce at the triennial review when the maximum pension he would be entitled to withdraw would fall. It was determined that Shore had the knowledge of his actual loss of entitlement to income, its causes, and the relevant conduct of the Defendant in December 1999, however he only brought an actionable claim in September 2005. In *Haward v Fawcetts* [2006] 1 WLR 682, it was determined that the key to "knowledge" for the purposes of section 14A of the Limitation Act is knowing with sufficient confidence to justify embarking on the preliminaries to the issue of writ.

67. The point in Shore was that he had suffered quantifiable loss at the time of the transfer which triggered the cause of action to accrue, what he received from the transaction was inferior to what he intended or should have received. In the current facts, there is, *inter alia,* a dispute about mis-selling financial products to the Claimants who were purportedly miscategorised by the Defendant. The Claimants intended to invest whilst keeping their investments stable and safe, "following the bank's guidance" in which turn resulted in objectively considerable financial losses in or around 2020.

68. The Claimants rely on the principle that they would not have been able to bring a compensatory claim in Court because of the loss element. I disagree with this argument entirely. On 24 October 2012, the Claimants suffered losses on their account as a result of taking high Loan-To-Value (the "LTV") investments coupled with a market downturn causing the Claimants a shortfall on their account and *"requiring them to either repay the loan by selling investment or bring in new capital"* [paragraph 18 of Muhapin's First Witness Statement]. These shortfalls occurred again in December 2012 and March 2013, and the Claimants were requested on various occasions to meet these margin calls. Based on the above, the Claimants' Portfolio Theory does not work; the concept that a cause of action under the Regulatory Law, Negligence or Laws of Obligation would not have been successful without the operative loss element is misconceived, quantifiable losses were suffered and acknowledged by the Claimants in 2012 and 2013. Accordingly, the three fundamental principles, listed in *Al Khorafi,* which are required to trigger a compensation claim under Article 65(2) would have been satisfied in 2012. In my opinion, the Claimants had the knowledge of their losses, the Defendant's misconduct which allegedly mislead them to trade in those high-risk investment. However, the Claimants only brought an action against the Defendant in 2020 when they could not meet the USD 5.6 million margin call.

69. Turning to the question of whether the proposed amendments relating to time-barred claims in the Draft APoC are well pleaded and have a "reasonable prospect of success" if leave to amend is granted by the Court.

70. I remind myself of RDC 24.1 which gives the Court the power to grant immediate judgment against a claimant on the whole of a claim, part of a claim, or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the claim or issue should be disposed of at trial. The Defendant argued that "reasonable prospect of success" does not only mean more than fanciful, or merely arguable case, but the case must also carry "some degree of conviction". Even if the Court were to exercise its discretion and grant leave to amend the Claimants' PoC, the Claimants will not succeed in demonstrating real prospect of success because, *inter alia,* of limitation issues.

71. Earlier in this Order, I have determined that the Claimants' causes of action prior to 1 July 2015 suffered on the limitation grounds and found in favour of the Defendant's submissions that alleged breaches which took place between 2012-2015 are time barred. Therefore, causes of action alleged against the Defendant prior to 2015 will not succeed in demonstrating real prospect of success. Further, there is no compelling reason why those claims could not be disposed of at this interlocutory stage of the proceedings.

72. I turn accordingly to the alternative limitation argument. The Claimants contend that in the event the Court finds in favour of the Defendant and their alleged breaches against the Defendant prior to 1 July 2015 suffer on the limitation grounds, this issue can be remedied by Article 9(1) of the Law of Obligations which stipulates that *"Notwithstanding Article 38 of the Court Law, where a cause of action arises as a result of fraud by the defendant, there is no time limit before which the action must be commenced".* The two prevalent questions before this Court, are whether (i) Article 9(1) can in fact cure the statute barred

allegations claimed against the Defendant and if (ii) Article 9(1) applies to allegations of regulatory breaches.

73. It is said by the Claimants that Article 9(1) of the Law of Obligations is akin to s.35 of the Limitation Act 1980 in the United Kingdom which has the effect if a cause of action arises as a result of a fraud by the defendant, there is no time limit before which a cause of action must be commenced. It was further submitted that in fact prior to the enactment of the Limitation legislation, the relation-back concept had been an existing rule. The Claimants relied on the Rules of the Supreme Court Practice, Order 20, rule 8(7) which granted the English Courts the power to allow leave after expiry of limitation period, in *Rodriguez v. Parker* [1967] 1 QB 116 at 127, Nield J dealt with such an application and stated that the:

> "…principle underlying the powers of the Court […] is that if the proceedings had been, from the beginning, properly formulated or constituted in the circumstances specified in […] the defence of limitation would not have been available to the defendant; and accordingly, if in its discretion, the Court thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in these paragraphs, so that such defects in the proceedings are treated as having been cured ab initio [in other words cured from the beginning, from the date of the writ], the defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place. To contend that in the cases specified in these paragraphs the defendant had an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the Court will not use its powers to amend under the rule."

74. It is the Defendant's submission that Article 9(1) should not assist the Claimants in remedying any limitation issues based on two grounds. Firstly, Article 9(1) should only be applied to causes of action identified in the Law of the Obligations itself. It should not apply to causes of action under any other statute, this is clearly demonstrated in the Contract Law, DIFC Law No.6 of 2004 (the "Contract Law") which contains its own provisions about the effect of fraud pertaining to limitation. Secondly, in any event, Article 9(1) only applies where fraud is an essential element ingredient of the cause of action, a claim under Article 94(2) can be brought on grounds of negligence. Fraud is not an essential element of the cause of action.

75. This was challenged by the Claimants arguing that fraud is not an essential element in bringing a cause of action under Article 94(1) because insofar as the breaches of the Regulatory Law pleaded in paragraphs 68 and 69 to 73 of the Draft APoC are concerned relating to the events in 2012 and 2014 – the breaches of the Regulatory Law were reckless or intentional within the meaning of Article 94(1). It is the Claimants' submissions that recklessness and intentional wrongdoing are capable of amounting to fraud for the purposes of Article 9(1) of the Law of Obligations. It is further said that intentional wrongdoing is listed before reckless and negligence wrongdoing which appears to convey a descending scale of seriousness, it is therefore the Claimants' case that intentional wrongdoing must be equated with dishonesty. In support of the Claimants' argument, they rely on decision of the Court of Appeal in *AIC*

Limited v ITS Testing Services (UK) Limited [2006] where Justice Rix said that “recklessness is a species of dishonest knowledge”, for in both cases there is an absence of belief in truth. It is for that reason that there is "proof of fraud”.

76. The Defendant said that AIC Limited is an authority which dealt with a claim of deceit pertaining to a reckless statement which amounted to dishonesty. Therefore, this authority must be distinguished from a breach of a rule which does not constitute to fraud. The Defendant relied on the statement of Sir David Steel in *Al Khorafi* CFI-014-2016 (18 April 2018) at paragraph 38 where he expressly stated that he was unable to accept the claimant’s submissions that Article 9(1) applies to deceit claims and “Article 9(1) is not only limited to claims of which fraud is an essential ingredient but applies where a matter of pleaded fact the claim has arisen from the defendant’s dishonesty. For this purpose, a distinction is drawn from between “arise from” which is said not to imply that the foundation of the claim is fraud in contrast to “based upon” fraud as used in section 32(1)(a) of the English Limitation Act 1980”.

77. The Claimants’ response is that even if some of the regulatory breaches are time barred, that would not prevent them from pleading the facts in order to establish the breach of the Financial Services Prohibition which took place before the expiry of the limitation period as the Claimants are entitled to rely on the ongoing effects of such breaches.

78. I am persuaded by Sir David Steel’s approach in applying Article 9(1) solely to causes of action where “fraud” is an essential element without providing any further explanation on the rationale of narrowing the compass in terms of causes of action where deceit and dishonesty could equate to fraud. My interpretation of Article 94(1) of the Regulatory Law is that fraud is not an essential element in bringing a civil proceeding against alleged regulatory breaches. Therefore, the alleged breaches and transactions which took place prior to 1 July 2015 could not be remedied under Article 9 (1) of the Law of Obligations because Article 9(1) only applies to causes of action identified in the Law of Obligations itself. It does not apply to causes of action under any other statute.

New claims

79. Since the PoC have not been struck out, the pleaded facts of the PoC remain in issue therefore when determining the question of whether the claims are “new” claims, the PoC will be considered when drawing a comparison between it and the Draft APoC, as proposed to identify if those claims are in fact “new” or have they merely arisen out of substantially the same facts: *Libyan Investment Authority and others v King and others* [2020] EWCA Civ 690. Therefore, the question before me is not a matter of discretion or case management, but a question of law which depends on a thorough examination in order to identify the correct answer.

80. It is said by the Defendant that many of the claims contained in the Draft APoC are “new” claims which were not included in the claim form or the PoC. The Defendant relies on the authority of *Co-operative Group Ltd v Birse Development Ltd* [2013] EWCA Civ 474 at [para 22] particularly the exercise the DIFC Court should adopt in its assessment of whether the claims in the Draft APoC are “new” claims. The

question that was considered in this authority was if a claimant asserts a duty which was not previously pleaded and alleges a breach of such duty, this should amount of a "new claim".

81. The Claimants argued that those claims are not new claims within the meaning of RDC 18.9, and even if they are *"new claim[s], they arise out of the same facts or substantially the dame facts in respect of which the Claimants have already claimed in these proceedings".* The Claimants rely on the wording of RDC 18.9 which supposedly operate similar to the policy of s.35(5) of the Limitation Act, permitting a new claim to be brought outside the limitation period if it arises out of the same facts or substantially the same facts as a claim in the current proceedings in which the claimant has already claimed a remedy. Further, the Claimants put forward in their oral submissions that the operative rule of RDC 18.9 is similar to that of the English rule – when you bring a claim after the limitation period has expired, the limitation effectively dates back to as if you had started it on the original date of the claim form. It closes the gap because the court considers that the new claim is similar or arises substantially out of the same facts and the matters, therefore it could be treated as if it started on the original date of the claim form and not the later date of the amendment.

82. The Defendant argues that RDC 18.9 does not change the substantive limitation period which applies under statute, because the DIFC does not have an equivalent to s.35(5). In fact, the Defendant claims that RDC 18.9 is merely an adoption of CPR 17.4 which applies s.35(5) of the Limitation Act 1980 and since s.35(5) has no effect in the DIFC, RDC 18.9 should not stop the DIFC Court from considering whether the proposed amendment has reasonable prospect of success on the grounds of limitation. Further, the Defendant puts forward that even if the DIFC had the equivalent of a relation back clause, it would not assist the Claimants because they are seeking to bring claims which accrued more than 6 years ago prior to their claim form.

83. In my opinion, the effect RDC 18.9 is to allow an amendment for a new cause of action where a period of limitation has expired under statue with the exception that the new cause of action arises out the same facts or substantially the same facts as the original cause of action. In this case, pleaded facts in the PoC are time barred (accrued prior to 1 July 2015), therefore any new amendment cannot benefit from as having made by way of a separate action commenced on the same date as the original action, because the original PoC suffers from limitation issues.

Article 65 Claims

84. The Defendant argues that Article 65(2), the claim for compensation (paragraph 82.4, 106 and 121.1) is a new claim introduced in the Draft APoC which does not appear in the PoC or in the claim form. The Defendant suggested that the Claimants' failure in seeking permission to introduce it in the Draft APoC is purportedly linked with their recognition that such permission would undoubtably fail on the grounds of limitation. It is said by the Claimants that Article 65(2) is not a new claim as proposed in the Draft APoC, rather a claim where all its basic ingredients were pleaded originally in the claim form. Further, the Claimants say that there is no need to specifically reference the provision in the claim form where in fact the Claimants have pleaded all of the ingredients which give rise to trigger their right to apply to the Court.

85. As I have explained, Article 41(2) of the Regulatory Law provides that the DFSA shall make rules prescribing the activities which constitute a Financial Service. Those Rules are found in the General Module (the "GEN") of the DFSA Rulebook. Where a person makes an agreement in the course of carrying on a Financial Service in breach of the Financial Service Prohibition, that person is not entitled to enforce the agreement against the other party or parties (each a "relevant party"): Article 65(1) of the Regulatory Law. Further, a relevant party to such an agreement is entitled to apply to the Court under 65(2) to recover, *inter alia, "any money paid or property transferred to him under the agreement and; compensation reflecting any loss sustained by the relevant party as a direct result of such payment of transfer".* The prohibition and the right to apply for compensation in the event of breach of the prohibition, under the Regulatory Law are similar to the equivalent provisions in section 19, 26 and 27 of the Financial Services and Markets Act 2000 in the United Kingdom legislation.

86. The act of entering into the agreement itself does not need to be a Financial Service in order for Article 65 to apply. It is sufficient that the agreement was entered in the course of carrying on a Financial Service. In this respect, also, the position under the Regulatory Law is similar to that under the law in the United Kingdom. Further in common with the law of the United Kingdom, there is no requirement in order for Article 65 to be invoked, that the Financial Service is carried on exclusively within the jurisdiction; performance of any part of a Financial Service "in the DFIC" or "from the DIFC" is caught. Therefore, a person carrying on a Financial Service through a DIFC office or personnel in the DIFC is caught by the regulatory regime. This means that any person dealing with a person in the DIFC or operating from the DIFC who is providing a financial service, is protected by the regulatory regime.

87. It is on that basis I am not satisfied that the claim for compensation under Article 65(2) arises out of a new claim. In *Hall v Meyrik* [1957] 1 QB 455, the Court of Appeal refused permission to amend the pleading after the expiry of limitation period because it found that the effect of the amendment sought by the claimant would be to allow them to rely on a different contract and therefore a different cause of action. In this circumstance, the Claimants are not relying on a different contract, they are and always have been relying on the same advisory agreements, therefore the claim for compensation, in my opinion, is not a new cause of action.

88. Turning on to the point of limitation, the English court in *Diamandis v Wills* [2015] EWHC 312 Ch, found that the first issue to be determined upon an application to amend was whether the defendant had an arguable limitation defence to the "new" claim. It is noted that the court may or may not be able to decide on such an application whether a limitation defence is made out. If the limitation defence is successful, the claimant's remedy shall be able to bring a fresh action in which they are free to demonstrate that there is no limitation issue. Accordingly, the burden of proof is on the claimant to show that the defendant does not have a reasonably arguable limitation defence: *Mercer Ltd and another v Ballinger and another* [2014] EWCA Civ 996.

89. The Claimants argue that there is no limitation defence arguable by the Defendant based on threefold, firstly, relying on the Portfolio Theory, that no cause of action could have been sought against the Defendant for recovery of losses until the loss is actually suffered. Secondly even if the Court considers

that the causes of action are time barred, this could be cured by s.9 of Law of Obligations, claiming that the actions of the Defendant were reckless and intentional amounting to "fraud", therefore any cause of action arising out of fraud, there is no time limit which the action must be commenced. Thirdly, in the event the Court's ruling is against the Claimants, it should, nonetheless, allow the amendment because much of the Claimants' pleadings in respect of claim pre-July 2015 would remain relevant, because as a matter of law, the effect of a breach of the Financial Services Prohibition is that any contract which purported to cater for Financial Services to be provided in breach of it, has no contractual effect.

90. Relying on the authority of *Cameron Taylor v BDW Trading* [2022] PNLR 11, the Defendant claim that there is an arguable limitation defence and *"if a defendant can show that it is reasonably arguable that the new claim introduced by the amendments is statute barred, then leave to amend should not be given."*

91. However, an amendment to statement of case would only be permitted if the original cause of action against the Defendant was made within the statutory time period. So, where an amendment is permitted to introduce a cause of action which was made in time at the date of the commencement of the action but arguably out of time on the date on which permission to amend is granted, the defendant is therefore precluded from reliance on the arguable limitation defence at trial. Here, the original cause of action brought against the Defendant was made out of time and outside the statutory period of Article 38 of the Court Law. In this circumstance, Article 65 claim for compensation arising out of transfers or funds that occurred before 1 July 2015 are time barred and paragraphs 82.4, 106 and 121.1 shall be amended to reflect that the Claimants cannot claim compensation for the period prior to July 2015.

Does Article 94 Regulatory Law (General) arise out of a new claim?

92. Article 94(2) of the Regulatory Law provides for compensation to a person who suffered losses or damages as a result of a breach of intentional, reckless or negligence breach of duty, including a breach of prohibition caused by the defendant.

93. The Defendant argues that in order to have an Article 94 claim, one *"needs not only the facts, you need to identify the rule that has been breached, because it is the rule breach that gives the rise to a cause of action",* relying on Sir Justice Field's three elements mentioned in *Al Khorafi case.* The Defendant say that the following allegations and claims under Article 94(2) of the Regulatory Law which appear in the Draft APoC are "new" claims:

> (a) The Defendant breached COB 3.2.1 by failing to explain what the Claimants were being asked to sign/asking the Claimants to sign signature pages without the agreement/without being given the opportunity to review them.
>
> (b) The Defendant breached COB 3.3.2(1)(a) by providing financial services at a time when there was no Client Agreement in place (the Defendant states that there was no mention of this breach in the original PoC).

(c) The Defendant breached COB 2.3.3(4) by failing to inform the Claimants that it only provided financial services to Professional Clients (Defendant contends that certain factual elements were present in the PoC, but it was no alleged that these matters amounted to a breach of COB 2.3.3(4)).

(d) The Defendant breached COB 3.2.1/GEN 4.2.6 by telling the Claimants that the Direct Access Form would allow them to trade day or night without informing the Claimants that it might limit the Banks obligation to advise the Claimants or assess the suitability of trades/ products. (The Defendant submits that certain factual elements were present in the PoC, but it was not claimed that this was a breach of COB 3.2.1/GEN 4.2.6).

(e) The Defendant breached COB 3.2.1/ GEN 4.2.6 by providing the Gold Sheets and giving misleading explanation of them. (The Defendant claims that the Gold Sheets were not mentioned in the PoC).

(f) The Defendant breached COB 3.2.6/GEN 4.2.6 by failing to ensure that the Gold Sheets presented a fair and balanced view of the financial products to which they related.

94. I will summarise the Claimants' submissions in three points, first, the Claimants oppose the Defendant's lack of any objection pertaining to the alleged breaches of the DFSA Rules and GEN Rules in its First Strike Out Application, and since those breaches were not subject to the First Strike Out Application, they were unaffected and originally proceeding to go to trial either way, until the Defendant filed its late Second Strike Out Application, two weeks prior to the Hearing.

95. Second, the Claimants argue that the breaches of the DFSA Rules and Regulatory Law give rise to liability triggering a compensation claim under Article 94(2). The Claimants state they have referred to intentional, reckless and negligent actions and misclassification committed by the Defendant in both the claim form and the PoC, those are the touchstone for liability to arise under Article 94 triggering compensation between January 2012 and March 202. Further, the breaches of the COB and the GEN rules in the Draft APoC are not "new" claims, rather they are better particularised versions of the breaches alleged in the claim form and PoC. Therefore, since those claims are not new claims (denied by the Defendant), the Claimants say the Court should not conduct the exercise of merits of limitation points or any other points.

96. Third, the Claimants put forward in their oral submissions that as far as entitlement to compensation is concerned, the Court will not take an artificial approach in saying the entitlement to compensation in some ways arises during the time when the financial prohibition is still being breached. It is said by the Claimants that the *"Court is particularly likely to say that the entitlement to compensation is something you entitled to sue after the loss has crystalised, after you know you have been damaged and suffered a problem, like in this case. It would be highly artificial for there to be a breach of the financial prohibition which the Claimants cannot sue for in this early stage when he has not suffered the loss. He has not in material terms suffered the loss".*

97. The Defendant stipulates that albeit certain factual elements of those breaches/allegations were

present in the PoC, they were not pleaded properly or in some instances they were not present in the PoC, like the Gold Sheets (paragraph 87). It was said by the Defendant that this should have two consequences, first, since, those claims do not appear in the claim form, they cannot be introduced by amending the PoC. Second consequence is that time of these claims continues to run, which is in connection with the question of limitation.

98. I will deal with the first issue raised by the Claimants, whilst I recognise that the First Strike Out Application did not raise any objections relevant to the alleged breaches of the DFSA Rules and Regulatory Law. However, the objections of the First Strike Out Application were aimed at the PoC. The Claimants subsequently filed their Draft APoC which was met by the Second Strike Out Application raising different issues to the First Strike Out Application. I find the Claimants objections to the Defendant's late objections of their proposed amendment pertaining to Article 94(2) to be quite irrelevant at this stage.

99. Turning to the question of whether compensation claims under Article 94(2) of the Regulatory Law are new claims, or old claims. The Defendant contends that "although certain factual complaints" related to the Defendant's alleged breach of COB 3.2.1 were present in the PoC, however the elements of the claim were not present, for instance, the Claimants did not assert that the alleged wrongs committed by the Defendant amounted to a breach of COB 3.2.1. Therefore, it is the Defendant's case that this would fall within the meaning of "new" claims of RDC 18.9. In my opinion all claims related to the COB 3.2.1 breaches which appear in the Draft APoC are an extension of the factual elements that existed in the PoC, contrary to the Defendant's submissions, I am not satisfied that they would fall within the meaning of "new" claims of RDC 18.9.

100. The Defendant say that it is incorrect for the Claimants to assert that the allegations for breach of COB 3.3.2(1)(a) was pleaded in PoC, because this claim was simply not mentioned at all in the PoC. As a result, the Defendant suggests that the Court should treat this claim as a "new" claim. I disagree with the Defendant's submissions, the alleged breach of COB 3.3.2(1)(a) was referred to in paragraph 11.52 of the PoC which states that *"a Client Agreement should be provided to the Client in good time, to enable him to make an informed decision relating to the relevant financial Service. This was not done in the instant case",* the wording of that paragraph mirrors the wording of COB 3.3.2(1)(a) and (b).

> "(1) Subject to (2), an Authorised Firm must not carry on a Financial Service with or for a Person unless:
>
> > (a) there is a Client Agreement containing the key information specified in App2 which is either entered into:
> >
> > > (i) between the Authorised Firm and that Person; or
> > >
> > > (ii) in accordance with the requirements in Rule 3.3.4; and

(b) before entering into the Client Agreement with the Person, the Authorised Firm has provided to that Person the key information referred to in (a) in good time to enable him to make an informed decision relating to the relevant Financial Service."

101. In my opinion, the question of whether the Draft APoC contains new causes of action requires a comparison between the current PoC and the Draft APoC. A different duty is not being pleaded in the Draft APoC and the breaches alleged are not substantially different to those in the PoC, the nature and the extent of the damage of which the Claimants are pleading is the same in the Draft APoC. In *Diamandis v Wills* [2015], the Court stated that where it is the same duty and same breach, new or different loss, the cause of action will not be considered as a new cause of action, but where it is a different duty or different breach, then it is likely to be a new cause of action.

102. The Defendant acknowledges that the PoC contained elements of an allegation that it had failed to properly inform the Claimants that it only provided financial services to Professional Clients. However, the Defendant argues that the addition in the Draft APoC of this allegation as a specific breach of COB 2.3.3 subject to (4) is sufficient for the Court to determine this issue is a "new" cause of action. I disagree with the Defendant's submission, this claim and the breach of duty all appeared in the claim form wherein the Claimants clearly stated that the Defendant's alleged misclassification of the Claimants led to a breach of COB Rule 2.2, 2.3.1 and 2.3.3. It would be wrong to conclude that this complaint (paragraph 67 and 72 Draft APoC) amounts to a "new" cause of action when it has been the Claimants' case that the alleged misclassification committed by the Defendant led them to invest in high risky financial products and over-exposure which were not suitable for them. I am satisfied that those claims are not new claims for the purposes of RDC 18.9. The Claimants pleaded those allegations clearly in the PoC including the Defendant's alleged failure in explaining the difference between a Professional and a Retail Client, the level of protection afforded to Retail Clients, the possibility of the Claimants being treated as Retail Clients and the fact the Defendant does not provide financial services to Retail Clients (denied by the Defendant) (paragraphs 11.15 and 11.16).

103. Similar to the above, the Defendant accepts that the PoC contained all the factual points of an allegation that it failed to properly inform the Claimants of the impact of the direct access form with no obligation on the Defendant to advice or assess suitability of trade products. This is an invalid objection to argue that the addition made in the Draft APoC (paragraph 83) of this allegation as a specific breach of 3.2.1 should amount to a new cause of action, particularly when all the facts and the matters of such allegation appeared in the PoC in paragraph 11.48. However, it certainly does not make it a new cause of action even if the Claimants did not include the alleged breach of the Defendant's duty is a breach of a specific rule. Paragraph 83 of the Draft APoC will not be removed.

104. The Defendant made another objection pertaining to the allegation of COB 3.2.1 (the "Direct Access Forms") on the basis that the Regulatory Law only gives a standing to a person who is not the DFSA to bring a claim if they have suffered losses and since the Claimant failed to assert that the alleged breaches caused them to suffer losses or damages, the test of Article 94(2) is not met and paragraph 83 of the Draft

APoC shall be removed. I am not persuaded by the Defendant's submission, the Claimants have pleaded a cause of action under Article 94(1) and claimed damages under 94(2) in the PoC in paragraphs 11.2, 11.28, 11.46 and 11.80.

105. With reference to the Gold Sheets (paragraphs 87 and 87.2 of the Draft APoC) I find the Defendant's argument to be misconceived stipulating that the Gold Sheets were not mentioned in the PoC, and that the Claimants ought to file an application to introduce those alleged breaches of document manipulation in its Draft APoC. I disagree with this proposed approach, the Gold-Sheets claim has been pleaded in the PoC under paragraph 6.12, using different terminology, being the excel sheets, nonetheless the Claimants were referring to the same document that was prepared by Ms Muhapin *"to keep track of their booked gold transactions".* In the PoC, the Claimants elaborate in paragraph 11.53 that the omissions made by the Defendant in the excel sheets about their trades (denied by the Defendant) was in breach of COB 3.2.1 by withholding material information to persuade the Claimants to invest in risky products. I find the Defendant's objection to be confusing when this allegation of document manipulation was dealt with in its defence in paragraph 195, 195.1-195.3 refuting any suggestion of withholding material information from the Claimants. Further, as I mentioned above, the addition that this amounted to a breach of COB 3.2.6 does not mean that this allegation should be considered as a new cause of action, and even if it is a new cause, it arises out of the same facts and matters that had been pleaded in the PoC.

106. It is said by the Defendant that the Claimants seek additional damages under article 40(2) of the Law of Damages and Remedies in paragraph 122 and 123 of the Draft APoC, it is the Defendant's case that the additional damages claim was not mentioned in the PoC despite it being a requirement under RDC 17.17(3). The Claimants assert that the objection is a "non-point" and if required the claim from can be amended to reflect their claim additional damages.

107. I do not find the new remedy being sought by the Claimants under Article 40(2) Law of Damages and Remedies is a new cause of action because the remedy that is being sought here arises out of the same factual situations and based on the same alleged wrongs committed by the Defendant. For the purposes of satisfying the requirement under RDC 17.7(3) the Claimants are permitted to amend their claim form to reflect their claim for additional damages under 40(2) Law of Damages and Remedies.

108. Finally, the Defendant argues that given these claims are new claims, the limitation clock will continue to run which is relevant to the question of limitation. I completely disagree with this approach on twofold, first those claims are not "new" claims for the purposes of RDC 18.9, as set out above. Second, even if those claims are new claims, they have arisen out of the same facts and same matters that had been pleaded in the Claimants statement of case and time stops running for limitation purposes at the stage when the Court received the Claimants claim form for issue: *St Helens Metropolitan Borough Council v Barnes* [2006] EWCA Civ 1372.

Claims under COB 3.2.5

109. The Defendant argues that the allegations in paragraphs 63, 69, 74 and 78 of the Draft APoC do not

give rise to a breach of COB 3.2.5 (a) as pursued by the Claimants on account that the rule has no application to the facts alleged by the Claimants. The Defendant contends that the PoC contained an allegation in relation to COB 3.2.5(a) but this was related to a different matter (sharing of information regarding complex trades) an allegation which has not been pursued by the Claimants in the Draft APoC.

110. The duty of an authorised firm under COB 3.2.5(a) is to take reasonable steps to ensure that *"any marketing materials intended for Professional Clients is not sent to or directed to any Persons who are not Professional Clients".* The Defendant argues that the documents which were identified in the paragraphs of the Draft APoC were not invitations or inducements to enter into an agreement in relation to a financial product or financial services, but that instead they were advisory agreements and therefore COB 3.2.5 is not applicable and the identified paragraphs above, should be removed.

111. I agree with the Defendant's submission. The definition of "marketing material" under COB 3.2.4(2) includes invitations or inducements that are designed to persuade a Person [see 3.2.4(1)] to enter into an agreement with the authorised firm to purchase a financial product or engage in a financial service being advertised or offered by the relevant authorised firm. In my opinion, the rule would not be applicable to the advisory agreements that were signed by the Claimants as they had clearly already agreed to be party to them.

112. Whilst I agree that the Claimants' case has always been that the Defendant had not undertaken the required steps to classify them accordingly (denied by the Defendant), nonetheless, I find their submission less persuasive suggesting that "marketing material" would also include advisory agreements because "the advisory agreement consisted of invitations and/or inducement". The Claimants understanding of COB 3.2.5 is incorrect, as COB 3.2.5 applies only as a far as the authorised firm is permitted to promote its marketing material to professional clients. The marketing materials may include for instance, circulating term sheets, marketing presentations, credit facilities, or banking products which would invite or induce the Claimants to enter into an agreement with the Bank. Therefore, it is not the advisory agreements that induced the Claimants to invest with the Bank, it is the promotional conduct of the Defendant that needed to be present to engage this rule. Further, it could not amount to inducement if the Claimants allege that they were provided with loose signature pages and the documents were not identified by the representative of the Bank [paragraph 45 of the Draft APoC].

113. Based on the above, paragraphs 63, 69, 74 and 78 of the Draft APoC do not give rise to a breach of COB 3.2.5 and shall be removed from the Draft APoC.

Compensation element of Article 94(2)

114. With respect to the question of compensation, by virtue of the Regulatory Law, the Claimants are correct to assume that they would have an actionable claim to sue the Defendant for any alleged wrongs committed upon the crystallisation of losses. As explained earlier in this Order, I disagree with the notion of Portfolio Theory advanced by the Claimants based on two-fold (i) the Claimants simply suffered losses in 2012 when they were required to meet margin calls, they had an actional cause of action to bring a claim

against the Defendant's alleged wrongs, but they brought their claim in 2020 (ii) the claims which are brought against the Defendant are statute barred and could not be introduced in the Draft APoC by pleading Article 9(1) of the Contract Law because fraud is not an essential element of Article 94(2). Based on the above, the Claimants are unable to claim for damages prior to 1 July 2015.

Claims under the Law of Obligations

115. It is the Defendant's case that the claims under the Law of Obligations must fail based on three grounds. First, the law of the cause of action is governed undisputedly by foreign law, the Claimants cannot assert that their causes of action fall under the DIFC Law, as if the foreign law does not apply. The dispute could only be determined under the DIFC Law provided the parties omit to pleading the foreign law (here being the Defendant). Second, the Defendant and the Claimants entered into numerous agreements which stipulated their legal relationship would be governed by Swiss Law. Third, the effect of Article 8 of the Application Law is that the question of liabilities owed to the Claimants, one that needs to be determined under Swiss Law, as this is the law of the jurisdiction agreed between the parties by virtue of Article 8(2)(c) subject to two exceptions (i) the Claims under the Regulatory Law, which fall within Article 8(2)(a) and (ii) claims under the Advisory Agreements, which contain DIFC choice of law clauses.

116. The third argument advanced by the Defendant has been refuted by the Claimants on the ground that the advisory agreements entered between the parties are not enforceable based on the Defendant's alleged breach of the Financial Prohibition by virtue of Article 65(1) of the Regulatory Law, including all trades entered into by the Claimants. The Claimants rely on *Khorafi* which concluded that a contract that purportedly provided Financial Services to be supplied in breach of the Financial Prohibition is of no contractual effect. The Claimants also say that in *Khorafi,* Bank Sarasin-Alpen could not rely on an exclusion clause contained in a contract purportedly entered into breach of the Financial Services Prohibition, therefore the Defendant in this case cannot simply rely on the choice of law clauses in a contract entered into in breach of the Financial Services Prohibition.

117. The Claimants assert that their claims in negligence and deceit have reasonable prospect of success based on the premise that these claims "relating as they do" to breaches which concern alleged failures by the Defendant and since the Defendant failed to meet the standards required of an authorised firm under regulatory regime – this has a "regulatory content" and this should engage Article 8(1) of the Application Law, DIFC Law or any other law shall be in force.

118. I am persuaded by the Defendant's submission on the governing law principle. My decision is based on three grounds, first the premise that in order to determine whether the agreements entered into between the Claimants and Defendant are in fact unenforceable, this matter can only be resolved if the governing law is severed from the advisory agreements, otherwise the question of enforceability will be difficult to determine. Second, I agree with Migyt's reference that the choice of law that was agreed between the parties cannot be damaged or "deprived of legal effect" as the choice of law will enable the Court to govern and control the parties dispute. The Defendant and the Claimants will therefore be bound by their agreement of choice of law prior to this dispute because both have gone through the trouble of

agreeing that their legal relationship and any dispute that may arise out of that relationship will be governed by the Swiss Law. A governing law clause should act in the same way as an arbitration clause, an arbitrator would accept (i) the principle that the parties have agreed that their dispute would be resolved by way of arbitration and (ii) the agreement on the choice of law for their arbitration (in the event of an agreement between the parties) both terms would be enforced. Therefore, an agreement on the choice of law should be enforced in the same way.

119. Thirdly, I am dissuaded by the Claimants' submission that since their claims for negligence, deceit and Law of Obligations, "relate" as they do to the Defendant's alleged regulatory breaches, those claims have a "regulatory content" and the DIFC Law should therefore be the governing law for their claims because Article 8(1) (a) of the Application Law is engaged. The Claimants interpretation of Article 8(1) is flawed, the assessment of whether a claim has "regulatory content" is not based on whether a claim has regulatory content, but if the regulatory content of a law is material to that claim. If the Claimants' interpretation is correct that would suggest that any applicant who has a regulatory claim under the relevant regulatory law would by default have the right to bring related civil claims in the DIFC.

120. Finally, the Claimants argument and their reliance on Sir Justice Chadwick's decision in Khorafi that an exclusion clause could not have been relied on because it purportedly was contained in an agreement that was in breach of Financial Prohibition. A distinction must be made between the facts of this case and the matrix of issues in *Khorafi,* in my opinion, an exclusion of liability clause does not carry the same weight or significance as a governing law clause in a contract (that is not to say an exclusion clause of liability is an insignificant clause, but when compared to a clause in the contract that will ultimately determine the framework rules which will govern the dispute between the parties, a distinction must be made). It is on that basis that the governing law should survive any nullification or termination of the contract. The claims under the law of obligations will be removed from the Draft APoC.

Breach of contract and claims for negligence

121. The Defendant argued that paragraph 105 of the Draft APoC is a new claim, and it should be removed because it is a statute barred. In light of the finding mentioned in my order in paragraph 51, any claims of wrongs committed prior to 7 July 2012 including any claims arising from misconduct committed at the January 2012 Meeting should be removed from the Draft APoC as those claims do not have any real prospect of success (paragraph 63-82).

122. With respect to the Claim for negligence to the extent that negligence is said to have been considered of breaches of previously unpleaded DFSA rules. Those claims shall be removed from the Draft APoC as they have been pleaded under the wrong law.

Deceit claims

123. The Claimants say that the substantive amendments relating to deceit claims are all contained in paragraphs 90-101 and the pleas and causation including losses are at 106, 113 and 121.2 of the prayer of the Draft APoC. The Defendant argues that all claims for deceit must be removed as they have been

pleaded under the wrong law.

124. In light of the finding that in respect of the governing law, the Claimants are unable to bring their claims for deceit and negligence in the DIFC. The proper law of the parties relationship such as to give rise to a duty of care and skills is Swiss Law. As a result, there is no need for me to deal with the substantive arguments on the merits of these claims in this judgment. The claims in deceit would be governed under Swiss Law and for that reason, the relevant paragraphs shall be removed from the Draft APoC.

Conclusion

125. The First Strike Out Application shall be dismissed.

126. The Defendant shall be rewarded its costs in relation to the pleas that have been abandoned by the Claimants in their Draft APoC.

127. The Second Strike Out Application is granted on the limitation grounds, the governing law, the entity which provided advisory services prior to July 2012, the deceit and negligence claims. The Second Strike Out Application was unsuccessful on the regulatory points which were allegedly "new" claims.

128. The leave to amend is granted subject to:

(i) deletion of claims prior to July 2012 because the Defendant is the wrong party in this case;

(ii) deletion of all transactions and transfers that took place prior to 1 July 2015 because they are statute barred; and

(iii) deletion of all deceit, negligence and claims under the Law of Obligations because it is pleaded under the wrong law.

129. The Claimants shall be awarded their costs in preparing their causes of action pertaining to claims prior to July 2012. The Claimants misunderstanding of the wrongs allegedly committed by the Defendant has arisen based on the error that had been described in the first witness statement of Minali.

Costs

130. The Claimants shall bear the Defendant's costs with respect to its Amendment Application, this is in compliance with the general position in Practice Direction 2 of 2019, a party applying for an amendment will usually be responsible for the costs of and arising from the amendment.

131. Since the First Strike Out Application has been dismissed, the Claimants shall be awarded their costs in response to the First Strike Out Application.

132. As far as the Second Strike Out Application is concerned, the Defendant has partially won on the limitation grounds, the governing law, the claims against the wrong party, the deceit claims and

negligence claims but failed on the issue of new claims and old claims. Therefore, the Parties are ordered to pay the successful to the extent the other party was successful, otherwise assessed by the Registrar, if not agreed.