Claim No: TCD 003/2020

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) NEST INVESTMENTS HOLDING LEBANON S.A.L.
(2) JORDANIAN EXPATRIATES INVESTMENT HOLDING COMPANY
(3) QATAR GENERAL INSURANCE AND REINSURANCE COMPANY P.J.S.C.
(4) GHAZI KAMEL ABDUL RAHMAN ABU NAHL
(5) JAMAL KAMEL ABDUL RAHMAN ABU NAHL
(6) TRUST COMPASS?INSURANCE S.A.L.
(7) TRUST INTERNATIONAL INSURANCE COMPANY (CYPRUS) LIMITED
(8) HIS EXCELLENCY SHEIKH NASSER BIN ALI BIN SAUD AL THANI
(9) FADI GHAZI ABU NAHL
(10) HAMAD GHAZI ABU NAHL
(11) KAMEL GHAZI ABU NAHL

Claimants

and

(1) DELOITTE & TOUCHE (M.E.)
(2) JOSEPH EL FADL

Defendants

ORDER WITH REASONS OF JUSTICE SIR JEREMY COOKE

UPON the Case Management Order of Judicial Officer Maha Al Mehairi dated 18 December 2019 (the "**Order**")

AND UPON reviewing the Claimants' Appeal Notice dated 13 January 2020 seeking permission to appeal against the Order

AND UPON the Order of Judicial Officer Maha Al Mehairi dated 5 February 2020 granting permission to appeal

AND UPON hearing Counsel for the Claimant and Counsel for the Defendants at a telephone hearing on 21 April 2020

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

IT IS HEREBY ORDERED THAT:

1. The Appeal is dismissed

2. The costs of the appeal are to be paid by the Claimant. Any further submissions on costs, whether as to basis or assessment or otherwise, are to be made in writing within 7 days from the date of issuance of this order, with a right of reply within 3 days thereafter.

Issued by:
Nour Hineidi
Deputy Registrar
Date of issue: 23 April 2020
At: 4pm

SCHEDULE OF REASONS

Introduction

1. The Appellants' Notice sets out 3 grounds of appeal against the order of the Court of 18 December 2019 (the "Order").

2. The First is the failure of the Judicial Officer to provide any reasons for the decision to grant the Respondents' application of 19 November 2019 for the hearing of preliminary issues, as set out in the Schedule to the Order ("the Preliminary Issues").

3. The second ground is that the Court failed to apply sufficiently or at all the proper criteria to determine whether the Preliminary Issues were appropriate for trial as such, or alternatively failed to take into account matters which should have been taken into account or took into account matters which ought not to have been taken into account. This second ground is broken down into seven subparagraphs in which it is stated (in summary) that the Court failed:

3.1 properly to balance the risks against the reasonably likely benefits of holding a trial of the Preliminary Issues;

3.2 to give full or any consideration to the risk that a trial of those issues would not dispose of the proceedings;

3.3 to take into account the consideration that the Defendants' Schedule of Agreed Facts would not form a sufficient basis for the Court to try the Preliminary Issues;

3.4 to take into account the consideration that this Schedule of Agreed Facts was not in fact agreed;

3.5 to consider the overlap between the issues to be determined at the trial of the Preliminary Issues and the final trial and the consequent impact on the latter;

3.6 to take into account the impact on the trial timetable, bearing in mind the possibility of any appeal from the trial of the Preliminary Issues; and

3.7 to take into account that the Preliminary Issues had already been litigated to a substantial extent in the Defendants' application for strikeout/summary judgment which was dismissed by Justice Roger Giles in a judgment dated 12 February 2018 and that the application was an impermissible attempt to relitigate those issues.

4. The third ground is that it is inappropriate for the Court to determine matters of foreign law (Lebanese law) as preliminary issues.

5. The Judicial Officer gave permission to appeal on these grounds but despite having said that reasons would be given for the decision which was to be the subject of the appeal, did not provide such reasons. The failure to provide such reasons makes it virtually inevitable in a case of this kind that the Court, on an appeal from the unreasoned decision, cannot exercise its usual review function but effectively involves the Court in making its own decision de novo. A number of the grounds which were put forward in the Notice of Appeal took a more nuanced form in the oral argument, however starkly they were expressed in the Notice and in the Skeleton Arguments put forward by the Appellant. Thus, it was not maintained that a failure to give reasons was in itself always sufficient for an appeal to be allowed or that it was impermissible for the Court to determine matters of foreign law as preliminary issues, although it was said that in this case was inappropriate.

6. The parties were agreed that the criteria which fell to be applied are those set out by Neuberger J (as he then was) in Steele v Steele [2001] CP 106 ("Steele"), where he set out 10 questions which should be asked before a trial of preliminary issue or issues were ordered. It was common ground that there were any number of decisions where the English Court of Appeal had warned about the dangers of ordering such preliminary issues and the "siren song" of the apparent shortcut which turned out ultimately to be nothing of the kind. The exercise in the end is one of "cost/benefit" analysis in determining whether or not the ordering of preliminary issues is likely to lead to savings of time and costs in the efficient administration of justice. Nor was the point put with any force (if at all) that this was re-litigation of matters determined by Justice Roger Giles, it being obvious that the tests for summary judgment are different from those which have to be applied on a hearing on Preliminary Issues (which are not infrequently suggested as an alternative route to summary judgment applications).

7. I need not set out the background to this matter because it is conveniently to be found in the Judgment of Justice Roger Giles dated 12 February 2018 at paragraphs 5 to 14 and in the judgment of the Court of Appeal in March 2019.

8. There was an application, made by the Appellant on 15 March 2020 to adduce new evidence on this appeal in the form of an expert report on Lebanese law from Professor Hadi Slim. This was opposed by the Respondent which, nonetheless, adduced a Lebanese lawyer's expert report from Mr Mattar de bene esse. This application fell to be decided at the same time as the appeal.

9. Attached to this Judgment is the Schedule which sets out the proposed three sets of Preliminary Issues. They fall into two distinct categories. The first two sets of issues raise matters of Lebanese law. The third is an issue of admissibility of evidence, which, it is common ground, should be decided at some stage prior to the trial because it will impact upon the way in which the parties present their cases.

10. The first issue relates to the recoverability of the loss in the value of the shareholdings of the Appellants in LCB resulting from the alleged breaches of duty (faute in Lebanese law) of the Respondents. The Respondents contend that such a claim is for "reflective loss" and that this is not maintainable under the law of Lebanon, which, it is accepted, governs the claims. The second set of issues relate to the time bar defence put forward by the Respondents, which they say is also governed by the law of Lebanon. The Court is asked to determine which system of law governs the question of limitation and to rule upon the application of the alleged time bar under Lebanese Law or that of the DIFC, depending on is decision as to the appropriate governing law.

The Application to adduce new Evidence

11. I have taken into account the two expert reports on Lebanese law. In my judgment, however, the necessary criteria for adducing such evidence on appeal were not satisfied. It was common ground between the parties that the relevant criteria were set out in the English Court of Appeal's decision in Ladd v Marshall [1954] 1 WLR 1489. Two of the three criteria there set out fall for consideration in the present case, neither of which could the Appellant satisfy. The conditions are:

11.1 The evidence could not with reasonable diligence have been obtained for use at the earlier hearing.

11.2 The evidence would probably have had an important influence on the result.

12. Whilst there is a history of exchanges between the lawyers for the parties prior to the Case Management Conference on 26 November 2019 at which the order for Preliminary Issues was made and which history involves some dilatoriness on the part of the Respondents, the critical point is that on 30 October 2019, having been told by the Appellants that they did not see the benefit of any preliminary issues being determined, the Respondents sent a letter to the Appellants proposing the Preliminary Issues and a Schedule of Facts for agreement in the same form as the application later made in the Case Management Information Sheet on 19 November. In that letter it was stated that if there was no agreement to

the Preliminary Issues, the Respondents would make an application to the court in the same terms. The Appellants had therefore some 3 weeks prior to the submission of their Case Management Information Sheet, not only decide whether or not to agree to the Preliminary Issues and Schedule of Agreed Facts, but to obtain any evidence that they wish to adduce at the Case Management Conference. The two Preliminary Issues of Lebanese law had been the subject of debate before Justice Roger Giles and indeed the subject of expert evidence before him which he considered inadequate in the context of summary judgment. Both of the issues raised were therefore well known to the Appellants and had since been the subject of refinement in the pleadings exchanged between the parties, including the pleas of the Appellants themselves in the Re-Re-Amended Particulars of Claim ("The RRAPC") and Reply, as appears hereafter.

13. The Appellants replied to the 30 October letter on 12 November 2019 rejecting the proposal for agreement to the hearing of the Preliminary Issues. Specific objection was only taken to one of the facts set out in the proposed Schedule of Agreed Facts, namely the suggestion that the AML/CTF reports for the years ending 31 December 2006, 2007, 2008 and 2009 were not required to be submitted to shareholders. At that point, if not before, it should have been plain to the Appellants that if they wished to rely on expert evidence of the law of Lebanon, they needed to approach an expert in Lebanese law for that purpose. There were still 2 weeks to go before the hearing itself was scheduled and if there was any problem about obtaining evidence in that time, an adjournment could have been sought. When the Respondents made their application on 19 November in their Case Management Information Sheet, the Appellants protested and wrongly asserted that a formal application was required and that the matter should be dealt with at a separate hearing from the Case Management Conference ("the CMC"), but sought no adjournment. At no time prior to the 26 November CMC, did the Appellants seek to obtain evidence of the law of Lebanon and their evidence before the Court now shows only that there were difficulties when they decided to do so after the event. There is simply no evidence of any attempt on the part of the Appellants to approach an expert in the law of the Lebanon prior to the CMC nor of any difficulty in doing so. Their skeleton argument for the CMC maintained that the issue should be determined at a later hearing but no request for an adjournment was made. It is clear to me that the evidence which has been produced for this appeal could, with reasonable diligence have been made available on 19th November or at the latest on 26 November itself.

14. Furthermore, it is hard to see how the evidence which has now been adduced from Professor Slim could have influenced the decision of the Judicial Officer against the decision which she took. In his Report, Professor Slim set out the two questions that he had been asked to answer:

> 14.1 "As a matter of Lebanese law, what findings of fact a Judge need to make in order to decide whether a loss can be recovered in a particular case?
>
> 14.2 What facts would a Judge need to establish in order to determine whether a fault by an auditor is a "supervisory" fault within the meaning of Article 178 of the Lebanese Code of Commerce?"

15. The Report was thus directed to the question whether or not the Schedule of Agreed Facts was adequate as a basis for the Court to decide the Preliminary Issues relating to two defences raised by the Respondents under Lebanese law, namely the time bar defence and the proposition that reflective loss was not recoverable. That question misses the point which is that the Court would decide the Preliminary Issues of Lebanese law on the basis not only of the Schedule of Agreed Facts but on the basis of the pleas made in the RRAPC, treating the latter as established for the purpose of determining those Preliminary Issues.

16. I was taken to particular paragraphs of Professor Slims' evidence, namely paragraphs 20 and 30 - 32 which were relied on in support of the argument that there were fact sensitive issues which would arise in connection with causation of damage and the nature of the faute of the auditors and which were said to militate against hearing the Preliminary Issues because the impact of such issues would or could prevent the determination of the Preliminary Issues from being dispositive. For reasons which appear below, I do not accept this and do not see how this would impact upon the decision which the Judicial Officer had to make and which I now have to take. The Professor set out the general test for causation of loss in paragraph 24, making the point that causation is a question of fact which is self-evident. In paragraph 25 he stated that there was no concept of reflective loss in Lebanese law (which is one of the proposed Preliminary Issues) and at paragraph 29 onwards stated that Article 178 of the Lebanese Code of Commerce (which is relied on by the Respondents as giving rise to a limitation period of 5 years) only applies to "faults in supervision" as opposed to other failures of the auditors which would be governed by Articles 122 and 123 of the Lebanese Code of Obligations and Contracts. This latter element raises an unpleaded argument on the part of the Appellant but is directed specifically at the limitation debate which represents one of the other Preliminary Issues proposed by the Respondents.

17. I conclude that there is, in truth, no adequate basis for allowing in the new evidence adduced by the Appellants but nonetheless take it into account, along with the evidence of Mr Mattar in making a decision about the hearing of Preliminary Issues.

The Appeal on the Ruling in favour of hearing Preliminary Issues

18. There are particular barriers which stand in the way of any appeal on a case management decision, as shown by RDC 44. There are also some case management decisions where either no specific reasons or very limited reasons are needed because the basis of the decision is so obvious- see English v Emery Reimbold & Strick Ltd [2002]1 WLR 2409 at paragraph 13. This is not such a case, not only because it is a major piece of litigation but because a ruling that there should be preliminary issues requires some explanation. It is important that the parties should know why a particular decision has been made and that any appellant body should be able to see the reasoning in order to examine the correctness of the decision made. It is, as all the authorities show, a good judicial discipline to give reasons, quite apart from the need for justice to be seen to be done and for parties to understand the rational decision-making process of court, particularly when it is adverse to them. It is unfortunate in this case that no reasons were given, particularly when it was said that they would be. Whilst their absence may be a sufficient reason for giving permission to appeal, that is not in itself a sufficient ground for an appeal to succeed because the decision may be shown to be right, even if no reasons are given.

19. The real nub of this appeal turns on the application of the criteria in Steele which this Court must apply for itself since it is unable to review the decision made by the Judicial Officer in the ordinary way because of the absence of reasons. In so doing I bear in mind the particular warnings given by many courts, including the English Court of Appeal and House of Lords about the dangers of ordering preliminary issues which beguilingly appear to represent a shortcut but, when facts are established, turn out to have prolonged the case and increased the expense. I need not set out the overriding objective in RDC 1.6 of dealing with a case justly in such a way as to save expense or RDC 26.35 (7) which requires the court to

consider at a CMC "whether it will be just and will save costs to order a split trial or the trial of one or more preliminary issues", but note that these are relevant matters in the decision I have to take.

Lebanese Law Issues

20. The Respondents maintained that the trial of the Preliminary Issues will not require any disclosure or the production of witness statements and only very limited expert evidence on defined issues of Lebanese law. A preliminary issues hearing would last some 3 days and could take place within a matter of months, if necessary by video-link in these COVID affected days. A full trial, in the Appellants' estimate, would require 40 days and, as at November 2019, the proposed date was the autumn of 2021. It is clear from the evidence before me that extensive disclosure, factual and experts evidence would be required, part of the costs of which have been set out in a witness statement of Mr Stobwasser.

21. The Respondents also maintain that each of the identified issues of Lebanese law represent discrete points which, if decided in their favour will be dispositive of the claim. If reflective loss is irrecoverable as a matter of law of Lebanon, as the claim is founded upon that law, it cannot succeed. If the operative time bar is also a matter of Lebanese law, the Respondents submit that the relevant period is 5 years and that the claims are then time barred. If the operative time bar is a matter of the law of the DIFC then all claims other than those in fraud would be time barred. It appears to be common ground that the issue as to the governing law of limitation turns upon the question whether the Lebanese law of limitation is substantive or procedural. It is accepted that if it is found that there is no bar to the recovery of reflective loss under Lebanese law and that the law of the DIFC applies to questions of limitation, a full trial will be required at least in relation to the fraud allegations. Thus the 2 issues of Lebanese law will be dispositive only if decided in the Respondents' favour.

22. The Appellants' case is that the "agreed" facts proposed by the Respondents are not in fact agreed and are not sufficient to determine the Preliminary Issues. In the absence of evidence of Lebanese law, it is said that the Judicial Officer could not have been properly satisfied that the Schedule of Agreed Facts would provide a sufficient factual basis for determination of the issues. Furthermore, it was said that the Respondents' pleadings were inadequate in setting out the latter's case on Lebanese law and reliance was placed upon the failure to give particulars of that law in relation to the pleaded point that reflective loss is irrecoverable. As already set out, I am unable to see the force of the former argument if the case has been adequately pleaded and the issues are sufficiently clear and likely, if determined in one way at least, to lead to an overall saving in work, time and costs.

23. The Appellants also say that there are fact sensitive issue which full fall to be determined which will make the termination of the Preliminary Issues essentially academic. Those Preliminary Issues cannot be "hermetically sealed" or "surgically confined" in such a way as to render their determination dispositive. The issues of Lebanese law will have to be determined all over again and applied in the context of the facts as found by the trial Judge. The cost/benefit analysis therefore weighs in favour of proceeding to a full trial which will otherwise be postponed as the result of any hearing of preliminary issues, potentially followed by an appeal, whichever way that decision goes. The effect, it is said would be to postpone a trial to sometime in 2022 and to increase costs rather than reduce them.

24. The Respondents stated that there is no question of a re-run of the points determined as Preliminary Issues. Whichever way they are decided, they will be decided once and for all and there will be no need to revert to them. In so far as issues of Lebanese Law arise in relation to particular elements of fact, the Lebanese law experts can give their opinion on the basis of the breaches alleged by the Appellants in the RRAPC.

25. In order to test these points is necessary to examine the cases made out on the pleadings because the basis of the Respondents' arguments is that the Preliminary Issues of Lebanese law fall to be determined not just on the Schedule of Agreed Facts but also on the basis of the facts and breaches alleged in the RRAPC.

26. Taking the issue of reflective loss first, the issue under Lebanese law is not as clearly pleaded as it might be. The RRAPC simply pleads loss suffered on the basis of the difference between the value of the shares held by the Appellants as they would have been if the Respondents had not been in breach of the alleged duties and their value on the sale to SGB in 2011. In the Defence, paragraph 8.2 expressly pleads the irrecoverability of reflective loss but with no express reliance upon the law of Lebanon at all. At paragraph 256 the same point is made. A Request for Further Information of the basis of this plea under Lebanese law was made which was met by a response saying that the relevant principles of Lebanese law would be the subject of expert evidence. There was thus, contrary to the rules of pleading, no attempt to set out the provisions of Lebanese law relied on, although it was plain to the Appellants that, in accordance with the debates before Justice Roger Giles, the Respondents were relying on the law of Lebanon in this context and both parties had proceeded in their pleadings on the basis that it was Lebanese law which governed the claims. In their Reply, at paragraphs 46 and 47, the Appellants claimed that indirect losses were recoverable under Article 261 of the Lebanese Code of Obligations and Contracts.

27. Because this area of dispute had been canvassed in front of Justice Roger Giles, it was known to both parties. One benefit which emerges from the evidence adduced by the Appellants in the shape of Professor Slim's Report, which I have allowed in, despite the rule in Ladd v Marshall , is the limited ambit of this area of dispute, especially when the Report of Mr Mattar is also taken into account. The only point made by Professor Slim as to the facts which need to be explored in the context of recoverable losses is that causation must be established between a faute and the damage sustained (paragraphs 20 and 24). At paragraph 25 he states that Lebanese law does not distinguish between losses caused to shareholders and losses caused to other person/entities and that the common law concept of reflective loss in the context of company law (the loss of shareholders which is inseparable from the loss to the company) does not exist at all under Lebanese law.

28. No questions of fact arise in relation to this contention. Justice Roger Giles had expressed his concerns that there might be exceptions to what he understood, on the evidence of Lebanese law before him, to be an applicable bar to the recovery of reflective loss but none are put forward. The response of Mr Mattar is that the Lebanese Code of Commerce distinguishes between corporate claims and individual claims and that a claim against the auditors is a corporate claim which could be pursued by minority shareholders as a derivative claim if the competent entities within the company failed to take the necessary steps to pursue the claim.

29. Whilst I take the point that neither of the Reports adduced is intended to be comprehensive, the whole purpose of Professor Slim's report was to show that the Schedule of Agreed Facts was not adequate for determination of the issues of Lebanese law and to point to the facts which would fall to be investigated in that context. It is plain that he did not consider that there were exceptions to a rule of recoverability of reflective loss which

would require determinations of fact to be made. As between the experts it is therefore a black-and-white issue as to whether or not reflective loss is recoverable. It is clear that this is a discrete and narrow issue, that the parties are well aware of its ambit and that its determination would be dispositive of the claim if the Court were to find in favour of the Respondents thereon.

30. Looking next at the question of limitation, it is clear that the parties have pleaded their case fully and that the ambit of this area of dispute is clear. The matters had to some extent been canvassed before Justice Roger Giles in any event.

30.1 Reference need only be made to paragraphs 325 and 326 of the RRAPC which sets out the 10 year time bar primarily relied on by the Appellants under Article 349 of the Lebanese Code of Obligations and Contracts and the alternative 5 year time bar relied on under various other provisions where the loss and damage is said to have accrued on 28 July 2011 (which would render the issue of proceedings on 16 July 2016 timely).

30.2 There is no suggestion in the pleadings of any later date for the commencement of the limitation period, nor any suggestion of concealment of the cause of action by the Respondents or lack of knowledge on the part of the Appellants. To the contrary, at paragraph 153 of the RRAPC, the FinCEN Notice of 10 February 2011 is said to have shocked the Appellants who had previously been unaware of the money laundering scheme allegedly operated by LCB.

30.3 In paragraph 265 of the Defence, the Respondents rely on a five-year limitation period under Article 178 of the Lebanese Code of Commerce and contend that the date from which the limitation period runs is 26 May 2010, the last date upon which any relevant audit report was submitted to the Appellants as shareholders at the LCB Annual General Meeting.

30.4 At paragraph 61 of the Reply, issue is joined as to the applicable law governing limitation, as to the five-year limit regardless of the basis of the claim and as to the relevant date from which the period of limitation runs, with a repetition that 28 July 2011 is the relevant date, as the date when the shareholders approved the Agreement for the sale of the assets of liabilities of LCB and its liquidation.

31. In my judgment, it is plain that the issues which arise in the context of limitation are discrete issues and that the only fact issues which arise are:

31.1 the date when loss and damage is said to have been suffered. The dates relied on by the parties have been pleaded with some alternatives and fall within a narrow compass, being either 26 May 2010 or 28 July 2011 (the parties' respective primary cases) or 26 June 2011 when SGB agreed to purchase LCB's assets and liabilities or 10 February 2011 when the Fin CEN Report was published (the parties' alternative cases). These dates are clear and uncontroversial-the only question being whether loss and damage was suffered on one or other of them.

31.2 The new point raised by Professor Slim is that there are 2 kinds of faute for which auditors might be liable, namely "supervisory fault" which would be governed by Article 178 of the Lebanese Code of Commerce and other faults which would be governed by Articles 122-123 of the Lebanese Code of Obligations and Contracts. Whilst this point has not been pleaded by the Appellants, it is again a narrow point to which Mr Mattar has responded and is capable of determination as part of the proposed Preliminary Issues. The Experts can give their views on the breaches alleged by the Appellants in the RRAPC, if there is a distinction to be drawn between one type of breach and another, as Professor Slim maintains.

32. There are thus no relevant issues of fact and no issues of knowledge or concealment which arise on the pleadings which render the expert evidence of Lebanese law academic. The question of reflective loss and damage can be determined in the light of the evidence of Lebanese law as can the limitation point with argument on Lebanese law or DIFC law, whichever is applicable.

33. Whether or not the findings made on the Preliminary Issues of Lebanese law of reflective loss or limitation are determinative of the case, they will hold good, whichever way the decision goes and there will be no need to hear that evidence again. The time and cost involved will not have to be repeated, although the effect of ordering Preliminary Issues which are ultimately determined in the Appellant's favour would result in a delayed trial.

34. If the questions posed in Steele are asked here in relation to the Preliminary Issues of Lebanese law, they give rise, in my judgment to the following answers to the 10 questions set out by Neuberger J (as he then was):

34.1 Yes- the determination of one of the two issues wholly in favour of the Respondents would dispose of the case

34.2 Yes- see above, but if decided in favour of the Appellants, the issues would not extend the preparation of the trial or the trial itself since they would not have to be reheard.

34.3 If Lebanese law is treated as an issue of fact, for the reasons given above, the Preliminary Issues can be determined without the need to ascertain any facts other than the Lebanese law principles, on the basis of the Agreed Facts less the one fact which is recognised as not agreed (see paragraph 13 above) and on assumed facts as set out in the RRAPC .

34.4 DIFC law issues of limitation can be determined without the need to establish any further facts (and appear to be largely if not totally agreed).

34.5 The value of the Preliminary Issues is not affected by the absence of agreement on other facts for the reasons set out above.

34.6 The determination of the Preliminary Issues will not fetter the parties or the court in achieving a just result.

34.7 There is a minimal risk of the determination of the Preliminary Issues increasing costs but it is likely to delay the trial if they are determined in the Appellants' favour, particularly if there is an appeal and the appeal itself will involve costs. However an appeal on these points after a final trial would be just as likely to occur. The impact of this delay can be minimised by fixing a trial date now, sufficiently far ahead for the hearing of the Preliminary Issues and any appeal therefrom to take place in the interim. Work for such a trial need not progress

until the determination of the Preliminary Issues in about 3 months' time or until an expedited appeal therefrom.

34.8 The determination of the Preliminary Issues is not only highly relevant but potentially dispositive if a finding is made in favour of the Respondents.

34.9 No suggestion was made that the determination of the Preliminary Issues would lead to an application for amendment of the pleadings to avoid the consequences of that determination.

34.10 The overall requirements of justice points in favour of determining the Preliminary Issues: because they are potentially dispositive: because they are discrete questions of the law of Lebanon which is indisputably relevant and governs the issue of reflective loss; because they can be determined on the basis of Agreed Facts or facts assumed by reference to the RRAPC; because they are triable without significant delay, even with an appeal, if provision is made on the basis set out in paragraph 34.7 above.

Admissibility Issues

35. It is common ground between the parties that the question of admissibility of the findings of various bodies or of notices issued by various authorities as evidence of money laundering and financing of terrorism or of other regulatory failings should be determined at some stage before trial. The determination is needed for the parties to be able to present their case at trial and to know what is and is not admissible.

36. The Appellants submit that this should be decided much later in the proceedings by the allocated Judge who will have greater knowledge the closer the matter is to trial. Questions of relevance and weight much more readily decided at that point.

37. The Respondents contend that there is a fundamental point of admissibility which is not a question of relevance or weight. In accordance with the rule in Hollington v Hewthorne [1943] AB 857, findings of other bodies and courts are not just not conclusive but not even admissible as evidence. The findings in question are those of the US FinCEN of 10 February 2011, the findings made by ESCA on 16 March 2008 and 1 December 2008, the violation notices issued by ESCA and the suspension of Tabadul's licence, all of which have been pleaded and relied on by the Appellants in the RRAPC.

38. The RRAPC then proceeds on the basis that there was money laundering and financing of terrorism-see paragraphs 55, 246.1 and 311.4 by way of example. Based on this, it is alleged that the First Respondent through its agent and the Second Respondent failed in their duties to report on such matters (as well as on related party loans). The Appellants, in argument, appeared to say that their case against the Respondents was not wholly dependent upon establishing such matters but there is no question that this forms part of the allegations made and if it is to be established, the question of admissibility of these findings and notices must be resolved.

39. This is not a preliminary issue of the same kind as the Lebanese law issues, but it is one that should be determined earlier rather than later because of its impact upon the way in which any trial would take place and the preparation for it. The sooner the parties know whether such matters can be proved by reliance on the documents on which the Appellants seek to rely in their pleadings, the better. The Appellants need to know this should they need or wish to prove the matters by other evidence.

40. I can see no reason why this issue should not be determined that the same time as the hearing of the Lebanese law Preliminary Issues and it appears convenient to do so. At one point it was argued that it might not be the law of the DIFC which governs the question of admissibility but it is hard to see what other law could be material in this context and that question appears as 3.1(a) in the Schedule of Preliminary Issues in any event. I had understood that this gateway point had in fact been abandoned by the Appellants but it is there to be decided, if not, along with the admissibility question.

Conclusion

41. In the circumstances and for all the above reasons I consider that the Judicial Officer came to the right conclusion without expressing her reasons for it. In my judgment, the hearing of the Preliminary Issues on the basis of the Agreed Facts set out in the schedule to the CMC Order (without the passages in parenthesis in the last four items in paragraph 2 to which paragraph 13 above refers) has the potential of disposing of this case in its entirety at much less cost and in much less time than if the matter proceeded to a full trial. The benefits of this for the parties and the Courts is obvious if that eventuality transpires. As with nearly all Preliminary Issues, there is a risk that hearing those issues first may delay the final trial and involve an appeal which will increase costs, but I consider that risk is outweighed by the potential dispositive effect of a short hearing within the course of the next few months and the fact that such issues will be determined once and for all at the early hearing without the need to go back over the findings at any final trial which may take place.

42. It makes sense to tackle on the Admissibility Issue to the Lebanese law issues because it is, on its face, a short point which will need to be determined at some stage and is readily decided at the same time as the other Preliminary Issues.

43. In such circumstances, the appeal must be dismissed and, as the appeal has failed the Appellants must pay the Respondents costs of the appeal. I await any further submissions that the parties wish to make on that subject.

44. The costs of the appeal are to be paid by the Claimant. Any further submissions on costs, whether as to basis or assessment or otherwise, are to be made in writing within 7 days from the date of issuance of this order, with a right of reply within 3 days thereafter.

SCHEDULE 1

Schedule on Preliminary issues

SCHEDULE

PRELIMINARY ISSUES

1. IS THE CLAIMANTS' CLAIMED LOSS RECOVERABLE UNDER LEBANESE LAW?

1.1 Issue

Are the Claimants entitled to recover the loss claimed as a matter of principle under Lebanese law, namely the alleged difference between (a) the sums that the Claimants have in fact received (and will receive) in their capacity as shareholders in LCB (including sums that they stand to receive following the liquidation of LCB) and (b) the sum that the Claimants assert their shareholding would have been worth but for the Defendants' alleged breaches.

1.2 Agreed Facts

(A) The Claimants' claims are based only on Lebanese law.

(B) The audits of LCB and LCBIH which are the subject of the Claimants' claim were carried out pursuant to letters of engagement between DTL and LCB/LCBIH.

(C) There was no contractual relationship between the Claimants and DTL or the Claimants and the Second Defendant.

2. LIMITATION

2.1 Issues

(A) Which system of law governs the issue of whether the Claimants' claims under Lebanese law set out in the RRAPOC are time-barred?

(B) If the Court finds that Lebanese law governs the issue of whether the Claimants' claims are time barred, in respect of each of the claims advanced in the RRAPOC:

(I) What is the applicable limitation period(s) under Lebanese law?

(II) When did the applicable limitation period(s) start to run?

(III) Having regard to the answers to the questions set out above, are the Claimants' claims time-barred under Lebanese law?

(C) If the Court finds that DIFC law governs the issue of whether the Claimants' claims are time-barred:

(I) When did the limitation period(s) under Article 38 of DIFC Court Law (No 10 of 2004) (relied on by the Claimants at paragraph 325.2 of the RRAPOC in respect of their non-deceit claims) start to run?

(II) Having regard to (i) above, are the Claimants' non-deceit claims summarised at paragraphs 300 to 301 of the RRAPOC time-barred such that only the Claimants' claims in deceit (summarised at paragraphs 293 to 299 RRAPOC) should proceed to trial?

2.2 Agreed Facts

(A) The Claimants' substantive claims are based only on Lebanese law.

(B) The only provisions of DIFC law relating to limitation that the Claimants seek to rely on in respect of their Lebanese law claims are Article 38 of DIFC Court Law (No 10 of 1994) in respect of their non-deceit claims and Article 9(1) of the DIFC Law of Obligations (No 5 of 2005) in respect of their deceit claims (see paragraph 325 of the RRAPOC).

(C) Pursuant to an agreement dated 22 June 2011, Soci�t� G�n�rale de Banque au Liban ("**SGBL**") purchased, through arrangement of merger by acquisition, the assets and liabilities of LCB (including the share capital owned by LCB in LCBIH).

(D) DTL produced the following reports in respect of LCB and LCBIH prior to 22 June 2011 (the date that SGBL agreed to purchase the assets and liabilities of LCB):

- LCB Audited Financial Statements for the year ending 31 December 2006
  - Date of Report: 19 January 2008
  - Date of Presentation to Shareholders: 19 January 2008
- LCB Audited Financial Statements for the year ending 31 December 2007
  - Date of Report: 7 June 2008
  - Date of Presentation to Shareholders: 9 June 2008
- LCB Audited Financial Statements for the year ending 31 December 2008
  - Date of Report: 5 May 2009
  - Date of Presentation to Shareholders: 29 May 2009
- LCB Audited Financial Statements for the year ending 31 December 2009
  - Date of Report: 21 April 2010
  - Date of Presentation to Shareholders: 26 May 2010
- LCB AML/CTF Report for year ending 31 December 2006 (
  - Date of Report: 6 February 2007
- LCB AML/CTF Report for year ending 31 December 2007 (
  - Date of Report: 28 February 2008
- LCB AML/CTF Report for year ending 31 December 2008
  - Date of Report: 24 March 2009

- LCB AML/CTF Report for year ending 31 December 2009 (
  - Date of Report: 21 April 2010

3. Admissibility

3.1 Issues

(A) Which system of law governs the admissibility of evidence in these proceedings?

(B) Under that system of law, are the following documents admissible as evidence of the findings and/or matters stated in them?

(I) The notice of finding issued on 10 February 2011 by the United States Financial Crimes Enforcement Network (referred to in the RRAPOC at paragraphs 53 and 54).

(II) The violation notice issued by ESCA to Tabadul on 21 January 2008 and referred to at paragraph 190 of the RRAPOC.

(III) The findings allegedly made by ESCA on 16 March 2008 and referred to in paragraph 194 of the RRAPOC.

(IV) The findings allegedly made by ESCA on 1 December 2008 and referred to in paragraph 202 of the RRAPOC.

(V) ESCA's suspension of Tabadul's licence on 12 January 2009, 11 February 2009, 12 April 2009, 12 May 2009, 19 May 2009, 26 May 2009 as referred to at paragraphs 208, 211, 217, 219, 220, 222 of the RRAPOC.

3.2 **Agreed Facts:** None required. This is a purely legal issue.