Case No: CFI-048-2019

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

IN THE MATTER OF AN APPEAL UNDER ARTICLE 33(1) OF THE REGULATORY LAW 2004 (DIFC LAW No. 1 OF 2004)

BETWEEN:

ANNA WATERHOUSE

Appellant

and

THE DUBAI FINANCIAL SERVICES AUTHORITY ("DFSA")

Respondent

ORDER WITH REASONS OF JUSTICE SIR JEREMY COOKE

UPON reading the submissions and skeleton arguments of the parties and the documents relied on by each party

AND UPON receipt of the email application by the Appellant to adjourn the hearing on the basis of the medical certificate and other information given by the Appellant

AND UPON hearing Counsel for the Respondent in relation to the application to adjourn

AND UPON adjourning the oral hearing in order to determine the application for permission to appeal on paper in accordance with RDC 44.14

IT IS HEREBY ORDERED THAT:

1.Permission to appeal is refused.

2. The Decision of the Financial Markets Tribunal of 12 August 2019 may be published, with Annexes 1-4 thereto.

3. The Appellant do pay the Respondent's costs of the application for permission to appeal on the standard basis, to be the subject of detailed assessment by the Registrar, if not agreed and the Court fees appertaining to the application, insofar as not already paid.

Issued by:

Nour Hineidi

Deputy Registrar

Date of issue: 12 December 2019

At: 4pm

SCHEDULE OF REASONS

1.On 10 December 2019, I ruled on the Appellant's application for an adjournment of the oral hearing to a further hearing at which oral submissions could be made and decided that the hearing should be adjourned for me to determine the application for permission to appeal on paper in accordance with Rules of the DIFC Courts (the "**RDC**") 44.14 for the reasons which appear in that ruling. The contents of that ruling should be treated as the introduction to these reasons for refusing permission to appeal.

2. Under RDC 44.19 permission to appeal may only be given where the Court considers that the appeal would have a real prospect of success or where there is some other compelling reason why the appeal should be heard. Under Article 33 (1) of the Regulatory Law, appeal lies from the decision of the Financial Markets Tribunal (the "**FMT**") only on a Point of Law.

3. There are 17 grounds of appeal, many of which are duplicative to a significant extent, whilst others involve no point of law at all. It is worth noting at the outset that the proceedings before the FMT constituted a hearing *de novo* and not a review of the decision of the Decision Making Committee (the "**DMC**") of the DFSA.

4. Ground 1, as put forward, appears to be the main point of law taken in the application, where the Appellant contends that the Tribunal failed to apply the correct test for recklessness as set out by the House of Lords in *R v G* [2003] UK HL 50. Grounds 2, 3, 5, 6, 8, 9 and 10 also raise the same basic point in one way or another in relation to the criteria adopted by the Tribunal in relation to this concept of recklessness. There is

however a fatal flaw in the underlying premise of the argument. The reason is straightforward. The tribunal made express findings of knowledge on the part of the Appellant, not only of the facts which should have been reported to the DFSA, namely that Deutsche Bank's Private Wealth Management section in the DIFC ("PWM") was advising on and arranging investments, but also of the appellant's knowledge that this constituted breaches of the DFSA Regulations and that this should have been reported to the DFSA at the first opportunity. With that knowledge, the Appellant failed to make any report on the subject for a period of some 2 years and instead gave misleading information to the DFSA about PWM's activities. This appears clearly from paragraph 220 - 223, 230 - 233, and particularly from paragraphs 234, 236 and 237 - 238 of the Decision.

5. At no time did the DFSA expressly use the word "dishonesty" to describe the conduct of the Appellant before the FMT. On that basis, it is said by the Appellant that the tribunal, in making its decision, had to apply the test of recklessness set out by the House of the Lords. This is said (in context of criminal damage) to involve awareness of a risk that particular circumstances exist or will exist, awareness of a risk of a result occurring and an unreasonable taking of the risk in all the circumstances known to the person concerned. It is said that the Tribunal should, if it was going to make a finding of recklessness against the Appellant, have made clear findings that the Appellant was subjectively aware of a risk, of a result of a risk and had unreasonably taken that risk, but that it never made such findings. In the light of the Tribunal's findings of knowledge, as set out above, these points go nowhere.

6. The following appears from the Decision of the Tribunal;

> 6.1 It was common ground that the Private Wealth Management ("**PWM**") team was in breach of regulatory requirements in providing the regulated financial services of "Advising on Financial Products and Credit" and "Arranging Credit on Deals in Investments" (referred to as "**Advising and Arranging**") in a way which was not disclosed to the DFSA and did not comply with the requirements set out in the DFSA Rulebook (paragraph 10).
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> 6.2 The Appellant was Head of Compliance for the Middle East and North Africa area ("**MENA**") throughout the period from 1 January 2011 - 21 January 2014 and Head of Legal for MENA from November 2011 onwards. She was authorised by the DFSA to perform the licensed functions of Compliance Officer, Money Laundering Reporting Officer and Senior Manager. Whilst there were others who were authorised individuals, she had prime responsibility for compliance matters relating to PWM.
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> 6.3 The DFSA's case was set out in paragraph 28 of the Decision:
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> "The DFSA submits that Ms Waterhouse gave false or misleading information to the DFSA on several occasions, with knowledge that it was false or misleading or with recklessness as to whether or not that was the case. She also, it claims, failed over a substantial period to correct false or misleading information provided by herself or others. If that is established, the DFSA submits that it involves (i) a failure to act with integrity, contrary to Principle 1, (ii) a failure to deal with the DFSA in an open and cooperative way, contrary to Principle 4, and (iii) a contravention of Article 66 of the Regulatory Law."
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> 6.4 The Appellant's case was set out in paragraph 29 and 30 of the Decision;
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> "Ms Waterhouse says as regards the allegations of false or misleading communications with the DFSA, that she believed them to be true. She did not know that Advising and Arranging was taking place; she relied on members of her team, notably Mr Parmar, to investigate compliance issues and to escalate any issues to her if necessary, and she was not aware of this issue and had no reason to be. As regards her alleged general failure to take steps as Head of Compliance to ensure that (i) the PWM business was being carried on in compliance with the applicable regulations and (ii) information being provided to the DFSA was true, she responds that her role was very demanding and that she lacked the resources to discharge it as fully as she would have liked.
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> Abuse of Process and Bias. Ms Waterhouse also asserts that the investigation by the DFSA was an abuse of process on various grounds and that her appeal should be allowed because of that, notwithstanding that this is a de novo hearing of the issues... On 26 February 2019, following the hearing on 31 January 2019, Ms Waterhouse made an application alleging bias and/or apparent bias."
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> 6.5 The central issues related therefore to the knowledge and involvement of the Appellant in the breaches of the regulatory requirements and in the failure to disclose them to the DFSA.
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> 6.6 The Tribunal made clear findings of fact as to the knowledge of the Appellant of the fact that PWM was Advising and Arranging and that she was explicitly told so in a number of emails, presentations at meetings/workshops and reports from 30 October 2011 onwards, as set out in paragraph 230 of the Decision. In the face of the information she was given, she provided false information to the DFSA from 31 October 2011 onwards by email and letters and at meetings with the DFSA representatives until October 2013 and beyond, as appears from paragraph 232. The Tribunal drew attention to the overall picture of a variety of contact with the DFSA where information and documents were withheld by her as evidence showing that she chose not to disclose the existence of the problem of which she knew (see paragraph 233).

7. The Appellant drew attention to the terms of paragraph 232 which contains the following wording:

> "the DFSA claims that despite having been so alerted, Ms Waterhouse repeatedly provided false or inaccurate information, concealed relevant information, or failed to correct false or inaccurate information which others provided or which she had previously provided to the DFSA. They identify a list of occasions. We disregard some of these but agree with the DFSA about the following..." [There then follows a list of 11 such occasions between 31 October 2011 and 1 October 2013].

8. It is said that the Tribunal failed to identify whether, on each occasion listed, the Appellant provided false information, concealed relevant information or failed to correct relevant information or to apply the test of recklessness to each instance. It is said that it was insufficient to say that she was alerted to or informed of the risk without an express finding that she knew of the risk in the manner postulated by the House of Lords in *R v G* (ibid). It is then said that the finding of recklessness in paragraph 236 of the Decision was made without applying the correct test and, as the

DFSA did not alleged dishonesty, the Tribunal must have misunderstood the position when finding knowledge on her part of the risks.

9. These submissions put the cart before the horse. The reality is that the Tribunal made express findings of fact of the knowledge of the Appellant that PWM was carrying out Advising and Arranging functions from October/November 2011 onwards and failed to communicate that to the DFSA until late 2013. The nature of the case put by the DFSA appears at paragraph 6.3 above where, without using the word "dishonesty" the DFSA alleged that the Appellant provided false information either with knowledge of its falsity or with recklessness as to its truth. At paragraphs 236 and 237 of the Decision, the following appears:

> "236. We find that Ms Waterhouse, in breach of Principle 1, failed to observe high standards of integrity and fair dealing in carrying out her Licensed Functions. She acted recklessly and without integrity in repeatedly ignoring clear signs that breaches had been or might be committed and in failing equally repeatedly to bring these to the attention of the regulator. Any competent Compliance Officer in her position would and should have known that these matters should have been communicated to the DFSA at the first opportunity and that, once she was in written and oral discussions with the regulator in this general area, they cried out for disclosure and for candour. This was not an isolated occasion when there was misrepresentation or a failure to disclose but a consistent practice maintained over a long period. There were a number of occasions when Ms Waterhouse should have been candid with the regulator but chose not to be. Only some of this could have been inadvertence or brought on by misplaced priorities when under pressure of work. The DFSA does not allege that Ms Waterhouse was dishonest. She was however certainly reckless perhaps in the hope and/or belief in the first stages that the problems could be resolved without loss to anyone and without the knowledge of the Regulator. It may be that pressures of her workload and the deplorable attitude to regulation of DBDIFC, for which she bore a share of responsibility, contributed to her turning a blind eye and refusing to face up to reality, but her conduct was certainly reckless over a long period.
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> 237. As we have found that Ms Waterhouse knew of the Advising and Arranging problem by November 2011 at the latest and did nothing to communicate that to the DFSA until late 2013, she is clearly in breach of Principle 4 in that she did not deal with the DFSA in an open and cooperative manner or disclose appropriately information of which the DFSA would reasonably expect to be notified."

10. It is in fact clear from paragraph 6.3 above that the DFSA did allege that the Appellant knowingly provided false information to the DFSA although the word "dishonesty" was not used. The DFSA had said expressly in its Answer that the Appellant knew that the PWM business line was Advising and Arranging and in a "Clarification" of its Answer, at the request of the Appellant, set out, next to each communication of the Appellant on which the DFSA relied as constituting false information, whether it was alleged that she had acted deliberately, without due skill or care or both. It was made clear that deliberate conduct was alleged by the DFSA in relation to 15 communications. Thus, she was alleged to have known that the information she was providing or failing to correct on those occasions was wrong. The allegation of dishonesty was clearly made even if the word was not used.

11. The breaches of Principles 1 and 4, namely the Principles of Integrity and Dealing with the DFSA in an open and cooperative manner and disclosing any matter to it of which it would reasonably be expected to be notified, do not require an express finding of dishonesty or recklessness as such. Nor does a breach of Article 66 of the Regulatory Law which requires a person not to provide information which is false, misleading or deceptive to the DFSA or to conceal information where such action is likely to mislead or deceive the DFSA.

12. The concept of Integrity as delimited by the tribunal at paragraphs 226-228 of the Decision, by reference to Court of Appeal authority in England, was not challenged by the Appellant:

> "The concept of integrity is broader than that of dishonesty. It is a useful shorthand to expressly higher standards which society expects from professional persons and which the professions expect from their own members. Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead."

13. In *Batra v Financial Conduct Authority* [2014]UK UT 2014, it was said that:

> "one example of a lack of integrity not involving dishonesty is recklessness as to the truth of statements made to others who will or may rely on them or wilful disregard of information contradicting the truth of such statements."

14. The Tribunal went on to find that this was exactly what the Appellant had done in the full knowledge of Advisory and Arranging activity by PWM. As put in paragraph 234 of the Decision:

> "It must follow from the fact that we find that she was aware of the breaches and did not disclose their existence to the Regulator and that possible breaches were drawn to her attention by PWM and not acted upon that the steps she took were inadequate.

15. Taking the incidents referred to as a whole, it is neither here nor there to identify whether in each case the Appellant specifically provided false information, concealed relevant information or failed to correct information when the Tribunal had found that the overall picture given to the DFSA was inaccurate and known to be so by the Appellant when providing the information.

16. Once the Tribunal had found knowledge on her part of the Advising and Arranging and the need to disclose this to the DFSA as a breach of the regulations, the conclusion reached as to breach of Principles 1 and 4 and Article 66 was inevitable, as the documents showed exactly what had and had not been disclosed. The Tribunal might be considered generous in describing her conduct as reckless rather than downright dishonest but there can be no doubt of their findings of fact as to her knowledge of regulatory breaches, her knowledge of her responsibility to disclose and her failure to fulfil that duty by failing to disclose the true position to the DFSA. It matters not whether this is described as "dishonesty" or as "recklessness" because there was a failure to observe the standards of Integrity imposed on the Head of Compliance and a failure to make full disclosure as she should have done which meant that there were clear breaches of the relevant Principles and Article 66, whether or not the Appellant hoped that the failures to comply with the Regulations would be speedily remedied so that "no harm would be done". She made no dishonest gain directly and may not have considered that she was being fraudulent, but the motivation of the Appellant is neither here nor there as the Tribunal said at paragraph 212 of the Decision. The potential reasons the Tribunal advanced as explaining her conduct not only make sense but

reinforce its conclusions of fact as to breach on her part.

17. When the 127 page Decision of the Tribunal is read as a whole it is clear that it turned on findings of fact as to the knowledge of the Appellant and her failure to pass that knowledge on to the DFSA. None of the grounds of appeal put forward can gainsay those findings and efforts to characterise some findings as perverse in an effort to persuade the court that there is a point of law at issue are futile. As the Respondent puts the point at paragraph 6.3 of its submissions, Grounds of Appeal 4 and 7, which allege perversity on the part of the Tribunal in making the findings it did, do not approach the threshold required for perversity, since the recital of the evidence in the Decision shows, by reference to document passing to and from the Appellant, that the findings made by it were plainly open to it as findings which any tribunal, properly directing itself on the law and to the relevant principles, could properly reach. No particulars were given in support of Grounds 4 and 7 and no explanation was given to justify elevating a challenge to fact findings into an appeal on a point of law by reference to the concept of perversity. Apart from the misguided attempt to raise a point of law on "recklessness", there has been no explanation of the factual conclusions which fall to be impugned as perverse or of any misdirection in law. The Appellant in her email of last night said that she wished to draw attention to some of the correspondence produced by her on November 7 2019 but the reality is that the documents quoted by the Tribunal in its Decision show clearly that not only did she know of the Advisory and Arranging activity because she responded to the information given to her in a way which is inexplicable without such knowledge, but that she made the deliberate decision not pass such information onto the DFSA. The 670 pages (approx.) cannot explain away the material relied on by the tribunal and when seen in context, appear to add nothing significant to the picture presented.

18. Ground 11 relies upon a failure by the Tribunal to deal with alleged breaches of Principles 2, 5 and 6, which were alleged by the DFSA. In paragraph 246 of the Decision, the Tribunal says that, having made the findings which it had in relation to Principles 1and 4 and Article 66, no purpose would be served in determining whether lesser breaches of Principle had taken place. These alleged failings were less significant than those which the Tribunal found the Appellant to have committed and so there was indeed no purpose served in making any findings thereon. Any findings on those matters would not have affected the Decision made in relation to the breaches with which the Tribunal did deal, nor improved the Appellant's position.

19. Grounds 12, 13, 14, 15 and 16 relate to allegations of bias and procedural misconduct in the making of case management decisions about procedural matters and the exclusion of evidence. None of the complaints raised in these Grounds is sustainable nor has any realistic prospect of success. Looked at in the round, the Appellant was not only represented by experienced Counsel but was given every opportunity in a number of hearings to make every point she wished to make. She has not specified any argument or any point that she was prevented from making nor any relevant evidence which she was prevented from adducing.

20. At paragraphs 24 - 25 of her Submissions, the Appellant set out a series of decisions which were said to be a wrongful exercise of case management powers and to constitute unfairness as Ground 12. None of the complaints made however reveal any unfairness or bias on the part of the Tribunal to any objective observer. None raise any point of law in and of themselves. The setting of the hearing date for April 2018; the adjournment of part of that hearing because of the Appellant's stated medical condition in order for her to give evidence at a later date; the refusal to admit irrelevant late evidence from Mr Rihan and the decision to allow written submissions only on sanctions after sending out the draft decision on liability, all constituted rational case management decisions which are beyond challenge. The Appellant was given every opportunity to present her case.

21. Ground 13 repeats the complaint that Mr Rihan's evidence was ruled inadmissible as a separate ground. There is no point of law involved here and it is clear that this evidence was both irrelevant and served weeks out of time and was rightfully excluded.

22. Ground 14 raises the complaint that the Tribunal refused to await the outcome of the Data Information proceedings. Once again, no point of law is involved and the case management decision that no purpose would be served in waiting was correct in as much as all relevant documents fell to be disclosed in the Tribunal proceedings, regardless of the other case.

23. Ground 15 constituted an abuse of process argument which was made to the Tribunal. It is submitted that the Tribunal heard in law in finding that there had been no such abuse. The Appellant submits that although the correct test was set out by the Tribunal it failed to apply it by giving undue weight to some factors and insufficient weight to others. That in itself is an unpromising start for an alleged error of law. The Tribunal set out its reasons at paragraphs 133 to 173 of the Decision. The short answer to the point, as explained by the Tribunal, was that it examined matters de novo with both parties presenting their respective cases regardless of any flawed investigation by the DFSA or any flawed decision by the DMC of the DFSA. The decision in *Warren v A G of Jersey* [2011] UK PC 10, [2010] 1 AC 22 is of no assistance to the Appellant, as the Tribunal pointed out. The complaints made cannot constitute abuse of process when the key issues relate to the Appellant's knowledge and actions as shown by the documents and whether an assessment of those justified the DFSA action in proceeding against her. The Tribunal found as a fact that whatever Mr Glynn's view was, as expressed before the DMC decision, that could not affect the outcome of that decision nor the Decision of the tribunal, both of which were based on the evidence and, in particular, the documents which showed the Appellant's misconduct. Equally, there was no unfairness in pursuing the Appellant when senior managers of the Bank were not pursued because she was the Compliance Officer whose prime responsibility it was to communicate with the DFSA and to ensure that proper reporting took place. It was her failures, rather than those of others which were therefore the most culpable. In consequence the reasoning of the Tribunal on the abuse argument is not capable of being properly challenged.

24. Ground 16 is the allegation of bias, based on the matters already set out as the exercise of case management powers. The issues determined in Annex 3 to the Decision do not appear to be pursued. The allegation as now made, along with others previously made, is pursued without a shred of evidence and should never have been made. It appears that Counsel dissociated themselves from this argument and, if so, they were right to do so. Since all the decisions are justifiable as case management decisions, there is no evidence of bias or apparent bias to an objective observer.

25. The 17th ground of appeal relates to the sanctions imposed on the Appellant. No error of law can be found in the criticisms advanced and it is clear that the Tribunal took account of the criteria set out in RPP 6-4 and came to a reasoned conclusion as to the restriction to be imposed on the Appellant for misleading the DFSA over a period of some 2 years. As succinctly put in paragraph 264 of the Decision, the Appellant "was prepared to withhold and conceal material information about a matter under investigation by the DFSA . If a person is prepared to mislead the regulator in those circumstances, users of the financial services system can have no confidence that he or she will not mislead the regulator in other

circumstances." The Tribunal compared the position of the Appellant with that of Mr Parmar in deciding on sanctions and rightly attributed greater responsibility to her than to him, as his senior and Head of Compliance which, combined with her failure to acknowledge culpability, as compared with his frank admission, inevitably meant that the penalties imposed on her would be greater. Given the circumstances to which the Tribunal referred, there is no possible basis for arguing that either the restriction or the penalties imposed were inapposite.

26. In conclusion, in my judgement, there is therefore no realistic prospect of success on any of the grounds put forward. Nor is there any other compelling reason why this matter should be allowed to go to appeal in the light of the findings of fact of the Tribunal which gave rise to their in inevitable conclusions. No points of law of general interest arise and in any event that would not be a good reason for an appeal to be heard at the expense of the parties.

27. In the circumstances not only must the application for permission to appeal be dismissed but it must follow that the Decision should not now be the subject of any restriction on publication. The restrictions imposed by the Tribunal and Sir Richard Field on publication are therefore lifted.

28. It also follows that the Appellant must pay the costs of the application for permission to appeal since there is no reason why the ordinary rule should not be followed, namely that costs follow the event. The costs of the Respondent are therefore to be paid by the Appellant on the standard basis and to be the subject of assessment by the Registrar if the parties are unable to agree them. If there are any court fees outstanding which have not been paid by reason of any temporary indulgence given to the Appellant, the Appellant must also pay those.