THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) ABRAAJ INVESTMENT MANAGEMENT LIMITED (IN OFFICIAL LIQUIDATION)

(2) ABRAAJ CAPITAL LIMITED (IN OFFICIAL LIQUIDATION)

Claimants

and

(1) KPMG LOWER GULF LIMITED

(2) KPMG (A FIRM)

(3) KPMG LLP

Defendants

ORDER WITH REASONS OF CHIEF JUSTICE WAYNE MARTIN

UPON the Claimants' Claim Form dated 29 March 2021 (the "Claim")

AND UPON the Case Management Order of Chief Justice Wayne Martin dated 11 November 2024 (the "Case Management Order")

AND UPON the First and Third Defendants Application No. CFI-041-2021/10 dated 3 May 2024 seeking to strike out portions of the Particulars of Claim served by the Claimants (together "Abraaj") or in the alternative, for immediate judgment in respect of that part of the Claim in which Abraaj ORDR-4472631124-2056 2 of 26 seeks to recover losses incurred by reason of the imposition of fines by the Dubai Financial Services Authority ("DFSA") (the "Application for Summary Dismissal")

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant in the hearing held before Chief Justice Wayne Martin on 4 November 2024

IT IS HEREBY ORDERED THAT:

1. The Application for Summary Dismissal is dismissed.

2. The parties are to confer and establish a timetable for the service of short written submissions with respect to the costs of the Application for Summary Dismissal, on the basis that issues with respect to costs will be decided by the Court on the papers. If the parties are unable to agree upon a timetable within **21 days** of this Order, each party shall provide its proposed timetable to the Court.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 27 November 2024
Time: 1pm

SCHEDULE OF REASONS

Summary

1. The First and Third Defendants (together "KPMG") have applied to strike out portions of the Particulars of Claim served by the Claimants (together "Abraaj") or in the alternative, for immediate judgment in respect of that part of the Claim in which Abraaj seeks to recover losses incurred by reason of the imposition of fines by the Dubai Financial Services Authority ("DFSA") (the "Application for Summary Dismissal"). For the reasons which follow KPMG has failed to establish that the relevant portion of the claim by Abraaj should be summarily dismissed by either striking out portions of the Particulars of Claim or entering immediate judgment.

The issues in the case

2. Applications for summary dismissal of a claim or defence often raise case management issues - the essential issue being whether summary determination without trial is in the interests of justice. For reasons which will appear, case management issues are of particular significance to this Application for Summary Dismissal. It is necessary to view those issues in the context of the issues in the case, and the likely breadth of the trial.

Abraaj's claim

3. The following description of Abraaj's Claim is taken from the Particulars of Claim. To the extent that the description includes statements of fact, they should be read as assertions rather than findings at this stage of the proceedings.

4. The First Claimant, Abraaj Investment Management Limited (in liq) (AIML) is a company incorporated in the Cayman Islands. The Second Claimant, Abraaj Capital Limited (in liq) (ACLD) is a company incorporated in the DIFC.

5. Both companies were members of the Abraaj Group of companies. The Group was engaged in private equity investment and had many billions of dollars under management. The Group was founded by Mr Arif Naqvi and managed by the ultimate holding company of the various companies within the Group, Abraaj Holdings.

6. Both Claimants carried on business from the DIFC providing fund management services. AIML was responsible for managing the majority of the Group's funds, and ACLD performed administrative and management functions delegated to it by AIML.

7. The First and Third Defendants are members of the KPMG network, a multinational network of accountants and auditors. There is a dispute as to whether the Second Defendant exists, which may be resolved by agreement in the not too distant future.

8. Relevantly to the present claim, the Defendants were engaged to provide audit and related services to the Claimants from 2011 onwards. Under their retainer agreements the First and Third Defendants were expressly required to carry out their audits in accordance with the International Standards on Auditing ("ISAs").

9. The Third Defendant was also engaged to provide annual reports on ACLD's returns to the DFSA and, as the auditor of a DIFC incorporated company, is alleged to have been subject to additional duties to comply with DIFC assurance and reporting requirements.

10. The First and Third Defendants gave unqualified audit opinions in relation to the financial statements of each Claimant between the financial years 2013 and 2017 inclusive and the Third Defendant provided independent assurance reports for ACLD for the financial years 2014-2017.

11. From at least October 2012 onwards, the executive management of the Group, or a subset of those persons engaged in dishonest and improper financial conduct and false accounting in order to disguise the liquidity problems being experienced by the Group. Various techniques were engaged.

12. The Abraaj Group collapsed in 2018 and liquidators were appointed in respect of both Claimants.

13. On 29 July 2019, following an investigation, the DFSA released Decision Notices in which AIML was fined USD 299.3m and ACLD was fined USD 15.3m in respect of various regulatory breaches found by the DFSA. The DFSA has not yet enforced payment of those fines, and will review the position before taking any enforcement action.

14. Also, in 2019 the US Department of Justice indicted Mr Naqvi and other senior executives of the Group on various charges of conspiracy, wire fraud, security fraud and theft of investors' money.

15. Abraaj allege that the First and Third Defendants breached various contractual and tortious duties, including the duty to exercise reasonable care and skill in the conduct of the audits, and also failed to comply with the ISAs.

16. Abraaj further allege that these breaches of duties caused them to suffer loss, on the basis that if KPMG had complied with their duties by no later than 30 September 2013 (and every year thereafter) it would have identified and reported the irregularities to the Boards of the Claimants and, in respect of ACLD's irregularities, the DFSA, which would have resulted in the irregularities being drawn to the attention of investors, regulators and creditors which would have stopped further losses being incurred in respect of those irregularities.

17. Abraaj quantifies their losses on the basis of two alternative counter-factual hypotheses. The first is that prompt reporting of the irregularities would have resulted in Abraaj continuing to trade under a new management team under a "turnaround strategy". Alternatively, Abraaj asserts that if the irregularities had been reported by KPMG sooner, Abraaj would have gone into liquidation sooner, thereby avoiding the losses incurred after the time at which the irregularities should have been discovered and reported. Abraaj also seeks compensation in respect of a portion of the fines imposed by the DFSA, being the portion of the fines relating to conduct which would not have occurred on the counterfactual hypothesis that KPMG had promptly reported the irregularities. This is the part of the Claim which is the subject of the Application for Summary Dismissal.

18. Abraaj provisionally estimate their total claims as being in the vicinity of at least USD 600m, including the claim in respect of the fines.

KPMG's Defence and Counterclaim

19. KPMG contend that on Abraaj's own case there was a sophisticated fraud orchestrated by Abraaj and its management which was intended to and did mislead sophisticated investors, regulators and auditors with respect to the true state of their financial affairs. KPMG emphasise that the frauds were perpetrated by the Abraaj companies, and not just their management, as the DFSA found when it imposed the fines.

20. KPMG assert that they performed their duties with reasonable care and skill and in accordance with all applicable standards. KPMG further contend that the failure to identify the fraud was the consequence of the sophistication and ingenuity of the steps taken by Abraaj to mislead KPMG, rather than because of any failing on the part of KPMG.

21. KPMG further assert that if they had taken further steps in the performance of its audit functions those steps would not have revealed the irregularities, with the result that any failure to take such steps cannot be said to have caused the losses claimed. KPMG further contend that even if it had discovered the irregularities and reported them, there would have been no change in Abraaj's behavior or the outcome of that behavior.

22. KPMG further contend that any breach of duty on their part was not the effective and productive cause of the losses. Rather, the cause of the losses was the illegal conduct of Abraaj.

23. KPMG further contend that the losses claimed:

(a) are too remote;

(b) are outside the scope of their duties; and/or

(c) were caused and/or contributed to by the Abraaj companies themselves.

24. KPMG further contend that the losses claimed are irrecoverable due to:

(a) contractual exclusions;

(b) contractual and statutory limitation provisions; and/or

(c) public policy.

For example, KPMG contend that its liability is capped at the amount of the fees which were earned. KPMG also contend that it is contrary to public policy to allow Abraaj to recover compensation in respect of the fines imposed upon them by the DFSA. That contention lies at the heart of the Application for Summary Dismissal.

25. KPMG counterclaim against Abraaj in respect of false representations allegedly made by Abraaj or for which Abraaj is vicariously liable and also for breaches by Abraaj of the 7 of 26 obligations owed to their auditors. The Counterclaims are raised by way of set-off against the Claims, to the extent necessary.

The procedural timetable

26. Extensive directions have been made, largely by agreement, programming the matter to a trial over 10 weeks (including one week of reading time), commencing in October 2026. If the trial proceeds, it will be the longest trial ever conducted in these Courts.

27. When the parties agreed to the timetable and the reservation of time for the hearing, it was common ground that the outcome of the Application for Summary Dismissal would have no material impact upon either the timetable or the length of trial. For reasons which will appear, this is of considerable significance to the appropriate disposition of the Application.

KPMG's Submissions

KPMG's Skeleton Argument

28. In their Skeleton, KPMG contend that the claim for compensation in respect of the fines imposed on the Claimants must fail by reason of the application of two legal principles, namely:

(a) The principle, grounded in public policy, that the law does not permit a party upon whom a criminal or quasi criminal punishment is imposed to pass the burden of that punishment on to another party; and

(b) The legal principle limiting recovery of losses to those within the scope of the defendant's duty, and in this case it was not the purpose of the audits, or the duty of KPMG, to guard against the risk of regulatory fines for deliberate misconduct. [1]

29. KPMG point out that the fines were imposed upon the Abraaj companies, not their managers, and that Abraaj had a right to challenge the DFSA's Decision Notices in the Financial Markets Tribunal, and from there, by appeal to this Court, but did not do so. In particular, they did not contend that KPMG were the cause of the financial irregularities. [2]

30. KPMG emphasise that DFSA made it clear that the fines were being imposed because of the misconduct of the Abraaj companies, by stating that:

"Nothing in this Notice constitutes a determination that any person other than AIML [ACLD] breached any legal or regulatory rule." [3]

Furthermore, in each case the DFSA concluded that the contraventions were "deliberate". [4]

31. KPMG point out that the level of fines imposed were determined by the DFSA taking into account:

(a) Its responsibility to prevent and detect and restrain conduct that might cause damage to the DIFC's reputation;

(b) The seriousness of the contravention;

(c) The importance of ensuring users of financial services in the DIFC are not deceived; and

(d) The importance of deterring other wrongdoers.[5]

32. KPMG point out that the DFSA also imposed fines on senior managers within the Abraaj Group, including a fine of USD 135m on Mr Naqvi, together with other substantial (but lesser) fines on three other senior managers.[6]

33. Further, the DFSA also fined the Third Defendant and an audit partner of the Third Defendant USD 1.5m and USD 500,000 respectively.

34. In the section of the Skeleton dealing with the principles relating to summary dismissal (which do not appear to be controversial) KPMG submit that the rationale behind the availability of summary dismissal:

".is to avoid the Court and the parties incurring time and expense in dealing with matters that have no reasonable prospect of success at trial, so that the case can be determined on the basis of matters that are properly arguable."

35. This proposition must be accepted, which is one of the reasons why it is of particular significance that all parties accept that summary dismissal of the portion of the claim to which the Defendants object would have no material impact on the time and expense involved in trying the Claim. That is because the grounds upon which the Application is brought raise only questions of law, and the facts upon which the claim with respect to the fine and the defences to that claim are based are coterminous with the facts relevant to the other claims and must be investigated and determined in any event.

36. KPMG contends that although the parties agree that the substantive law governing the claim against the Third Defendant is the law of the DIFC, and disagree as to whether the substantive law governing the claim against the First Defendant is the law of the DIFC (as Abraaj contend) or the law of on-shore Dubai (as KPMG contend), this makes no difference because Article 6 of the Judicial Authority Law (the JAL) provides that whatever law is applied by this Court to resolve a dispute, it is always subject to the public policy of the DIFC, consistently with the common law principle to the effect that the law of the forum governs matters of public policy. In any event, KPMG do not contend that public policy relevant to this case differs as between the DIFC and the UAE generally.[7]

37. KPMG rely upon the common law principle that "no Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act",[8] a principle often referred to by the *Latin maxim ex turpi causa non oritur actio.*

38. KPMG contend that the principle has been recognised in the DIFC in *Vegie Bar LLC v Emirates National Bank of Dubai PJSC* [9] and is acknowledged in Article 56 of the DIFC Law of Obligations. [10]

39. KPMG's argument with respect to illegality relies heavily, and indeed depends upon the adoption of what was described by Lord Hoffman as the narrow rule in *Gray v Thames Trains Ltd* .[11]

40. The wider and narrower forms of the principle were expressed by Lord Hoffman in the following terms:

> "The wider and simpler version is that which was applied by Flaux J: you cannot recover for damage which is the consequence of your own criminal act. In its narrower form, it is that you cannot recover for damage which is the consequence of a sentence imposed upon you for a criminal act."[12]

41. KPMG contend that the narrow rule applies to quasi criminal sanctions and regulatory penalties as well as criminal sentences - relying on *Les Laboratoires Servier v Apotex Inc* [13], *Safeway Stores v Twigger* [14] and *Khan v Hussain.*[15]

42. KPMG contends that the narrow rule in Gray survived the decision of the UK Supreme Court in *Patel v Mirza* [16] in which, after a comprehensive review of the illegality defence generally, the majority view was expressed by Lord Toulson JSC in the following terms:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system . In assessing whether the public interest would be harmed in that way, it is necessary:
>
> (a) to consider the underlying purpose of the prohibition which is being transgressed and whether that purpose will be enhanced by denial of the claim,
>
> (b) to consider any other relevant public policy on which the denial of the claim may have an impact, and
>
> (c) to consider whether the denial of the claim would be a proportionate response to the illegality bearing in mind that punishment is a matter for the criminal courts." [17]

43. KPMG contend that this revision of legal principle "did not jettison the preceding case law or change the way in which it applies in the circumstances of this application". [18] KPMG rely on *Henderson v Dorset Healthcare University NHS Foundation Trust* [19] for this proposition.

44. KPMG contend that the narrow rule in Gray precludes recovery of the claim relating to the fines in this case because Abraaj is seeking to recover damages in respect of the consequences of a quasi-criminal act - namely, the imposition of a regulatory sanction in the form of fines. [20] KPMG further contend that permitting Abraaj to pass on the burden of the fines imposed upon them to KPMG would cause incoherence between the civil law and the DIFC's regulatory regime, contrary to the public policy underpinning the narrow rule in *Gray.* [21]

45. KPMG contend, in the alternative, that consideration of the three factors identified in Patel would produce the same result.[22]

46. KPMG further contend that the question of whether the misconduct should be attributed to the corporate Claimants in circumstances in which some but not all of their senior management were guilty of culpable conduct is irrelevant to the application of the narrow rule in Gray. [23] KPMG contend that the cases in which the application of the illegality defence has turned upon questions of whether the conduct and knowledge of certain directors was attributable to the company, so that the company was treated as the relevant wrongdoer[24] were not cases falling within the narrow rule in Gray, as none of the cases involved an attempt to recover in the civil courts a criminal or quasi criminal penalty imposed on the company.[25] KPMG contend that because the fines were imposed upon the companies personally, questions of attribution and agency do not arise.[26]

47. KPMG contend in the alternative that the claims relating to the fines must fail because the risk of the imposition of a fine was not one of the harms falling within the scope of KPMG's duty of care relying on *Caparo v Dickman* [27] and *Manchester Building Society v Grant Thornton UK LLP.* [28] KPMG contend that the purpose of an audit is to ensure confidence in the financial statements and to detect and report any fraud that might result in a material misstatement of the financial position of the audited entity.[29] KPMG support their submission by reference to various provisions within the ISAs.[30] KPMG contend that the harm which it is the auditor's duty to guard against is harm arising because of misstatements in the financial statements, not the risk that financial penalties might be imposed on the company by a regulator for the company's own deliberate misconduct.[31]

KPMG's oral submissions

48. In the course of oral submissions, Senior Counsel for KPMG contended that many of the matters upon which Abraaj relies to assert that the matter must go to trial are only relevant to claims under the wider version of the rule in Gray and are irrelevant to the application of the narrow rule to this case.[32]

49. Senior Counsel for KPMG asserted that the Application was based upon a very narrow issue of law which, if stood over to trial:

> ".won't add very much apart from the time of argument, which will be the same as the time of argument we are having now, to the trial length."[33]

Nevertheless, counsel contended that it was clear from the authorities that the Claim could not succeed and so it should be struck out rather than allow the claim to continue to distort the size of the claim by USD 300m.[34] Senior Counsel reiterated that his fundamental proposition did not depend upon a close examination of the facts, but rather upon the application of a principle of law.

50. Senior Counsel took the Court to various passages in the DFSA Decision Notices to support the proposition that the fines were imposed upon the corporate Claimants because of the misconduct of those claimants and that Abraaj was trying to recover part of those fines. [35]

51. Senior Counsel contended that the fines were imposed in furtherance of the public policy of preventing and restraining conduct causing serious damage to investors and for the purpose of deterring other companies from similar conduct.[36]

52. In answer to a question posed by the Bench, Senior Counsel for KPMG accepted that in the case of an insolvent company application of the illegality defence would cause losses to be suffered by creditors and investors, which was why:

> "When it comes to looking at whether in a company which is tainted by fraud you have to look very carefully at the rules of attribution before deciding that you cannot recover from the auditor the losses which the company has suffered."[37]

However, Senior Counsel asserted that this was a different issue to the issue in this case and that if companies knew that even if they were fined, those fines could be recovered from auditors, the impact and deterrent effect of the fines would be weakened.

53. Senior Counsel took the Court to many of the authorities cited in KPMG's Skeleton placing particular reliance upon the decisions in *Gray, Safeway Stores, Patel* and *Henderson.* Senior Counsel for KPMG reiterated that the fines had been imposed by reason of wrongdoing by the company, not by reason of vicarious liability where the only liability arose from the conduct of the agent or employee, not the conduct of the company itself.[38] For that reason, the fines were imposed on the companies and recovery of those fines from the auditors would contravene the narrow rule in *Gray*.[39] Senior Counsel further submitted that the auditor's duty was owed to the company, not the creditors.[40]

54. Senior Counsel for KPMG also referred the Court to the *Vegie Bar* case, acknowledging that it was a very different kind of case, but was nevertheless a case which acknowledged that immediate judgment could be given on the grounds of illegality.

55. Senior Counsel for KPMG accepted that the illegality defence does not apply to offences of strict liability provided that it is established that the party convicted of the offence or breach was not culpable or guilty of negligence in any way.[41] Senior Counsel also accepted that if the narrow rule did not apply, and the multi factorial assessment espoused in Patel was applied, the principles relating to the attribution of culpable conduct to a company by reason of the misconduct of its officers and agents would apply.[42]

56. In relation to the second limb of the Application, Senior Counsel for KPMG submitted that it is not the duty of the auditor to prevent a company or an individual from committing a regulatory offence. Rather, it is the duty of the auditor to advise on what is found and any shortcomings and errors in the accounts. Senior Counsel accepted that any losses which flow properly and within the rules of causation and proximity from negligent conduct within the auditor's scope of duty can be recovered, but submitted that fines are in a different class because they are imposed by a regulatory authority for a public purpose.[43] Senior Counsel submitted that the fines were not caused by the breach of the auditor's duty - rather, they were simply not prevented by the alleged breach of duty.[44]

57. Senior Counsel for KPMG submitted that it did not matter what proportion of the fines imposed were claimed or recoverable by the Claimants because the principle applied to any portion of those fines.[45]

58. Senior Counsel further contended that if the portion of the total claim relating to the fines was very small, case management principles probably would not support summary determination. However, as the fines represented over one third of the estimated Claim of USD 600m, and that portion of the Claim had no real prospect of success, the Court should dismiss it summarily, not least because it would increase the prospects of a negotiated settlement. [46]

Abraaj's submissions

Abraaj's Skeleton Argument

59. Abraaj submit that there is significant overlap between the matters which gave rise to the fines and the alleged breaches of duty by KPMG.[47] I digress to observe that I do not understand this proposition to be contested for the purposes of this Application. Rather, the Application is based entirely upon the application of the narrow rule in *Gray* or alternatively, the lack of connection between the scope of the auditor's duty and the losses claimed. It is therefore unnecessary to elaborate upon the precise degree of overlap.

60. Abraaj submit that when an application for summary dismissal is concerned with the developing area of law "extreme care" must be taken before granting summary dismissal - relying on *Barrett v Enfield London Borough Council.* [48] In that case Lord Browne Wilkinson observed:

"It is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed to be . true for the purpose of the strike out." [49]

61. Abraaj further contend that where an application to strike out involves a prolonged and serious argument, the Court should generally decline to proceed with the argument unless it is satisfied that the success of the application would obviate the necessity for a trial or substantially reduce the burden of the trial - relying on *Williams & Humbert Ltd and W & H Trademarks (Jersey) Ltd.* [50]

62. Abraaj submit that the application of the illegality defence is neither inflexible nor immutable, relying on Hounga v *Allen* [51] and *Patel v Mertza.* [52] Abraaj accept that the DFSA fines could constitute "quasi criminal penalties" but contend that whether the doctrine is engaged will depend upon all the circumstances of the case. Abraaj further submit that the circumstances of this case raise factual, legal and public policy issues of complexity and importance which can only properly be determined at a trial. [53]

63. Abraaj contend that the flaw in the Application for Summary Dismissal is that it assumes that the wrongdoing of a subset of management employees within the Abraaj Group is to be attributed to the Claimants for the purposes of the application of the illegality defence. That proposition is disputed and involves issues of fact [54]. In the context of attribution, Abraaj refer to *Meridian Global Funds Management Asia v Securities Commission.* [55]

64. Abraaj further contend that the circumstances in which illegal conduct by agents/employees should be attributed to companies so as to prevent them pursuing claims arising from that conduct has been an extremely vexed issue in English law, referring to the differing approaches in *Stone & Rolls (in liquidation) v Moore Stephen,* [56] *Bilta (UK) Ltd v Nazir (no. 2)*[57] and *Singularis Holdings v Daiwa Capital Markets.* [58] Abraaj contend that the consequence of these cases is that the circumstances in which misconduct of employees and agents will be attributed to the company for the purposes of the doctrine of illegality gives rise to issues of nuance and complexity which turn on the facts established at trial viewed in their context.[59] Abraaj further contend that there were "innocent" directors, shareholders and creditors throughout the course of the wrongdoing so that the determination of the issue of attribution will necessarily involve the determination of contested issues of fact.[60]

65. Abraaj further submit that the "special rule" of attribution identified for the first time by the English Court of Appeal in Safeway is inconsistent with subsequent decisions of the UK Supreme Court and has been the subject of sustained criticism. Abraaj contends that Safeway should not be followed in the DIFC. [61]

66. Abraaj further contend that six out of the eight provisions pursuant to which the fines were issued were offences of strict liability, thereby engaging the recognized exception to the illegality doctrine. Accordingly, an illegality defence will not apply unless the corporate claimants have been morally culpable or negligent, which also raises issues of attribution and therefore issues of fact. [62]

67. Abraaj further contend that if the process of multifactorial assessment required by Patel is to be undertaken, it must be undertaken on the basis of facts determined at trial and the outcome of the assessment in this case is highly debatable. Abraaj contend that:

- It would be contrary to the objectives of the DFSA to deny a company the capacity to recover a fine imposed for the provision of inaccurate information from its auditors who negligently failed to detect the inaccuracy;
- Competent auditing is a key component of robust financial services regimes and holding negligent auditors to account would assist to foster and maintain confidence in the financial services industry within the DIFC and prevent wrongful conduct by auditors thereby protecting members and creditors;
- Inaccurate and misleading accounts, which were the reasons the fines were imposed, were the "very thing" the auditors were engaged to prevent;
- The corporate claimants are not wrongdoers seeking to profit from their wrong but are secondary victims, having been placed into liquidation and are now seeking recovery on behalf of innocent creditors and members (the true victims);
- There is nothing inherently objectionable about claiming indemnity in respect of vicarious liability arising from criminal acts - relying on *Lancashire County Council v Municipal Mutual Insurance Ltd;*[63]
- The fines were not issued by criminal courts but are quasi criminal regulatory fines, so that the need for consistency between civil courts and regulatory regimes is less acute than the need for consistency with criminal courts dealing with homicide cases such as *Gray.* [64]

68. On the subject of proportionality, being one of the factors identified in *Patel*, Abraaj submits that:

(a) the Claimants seek to recover only that proportion of fines which is properly attributable to the wrongdoing of KPMG in order to return those sums to their creditors; and

(b) relevant culpability properly attributed to the corporate claimants is better and more fairly reflected in a reduction for contributory negligence than in a denial of the claim in its entirety. [65]

69. Abraaj further contend that in order to determine the illegality defence the Court will need to engage with each contravention identified by the DFSA and then assess the relative culpability of each of Abraaj and KPMG in respect of each aspect of the elements of the breach found by the DFSA in the Decision Notices. That will in turn require analysis of how and when the wrongdoing which led to the imposition of the fine was carried out, the extent and effect of the controls, checks and processes to prevent the wrongdoing, the interrelationship between those controls and the alleged negligence of KPMG in failing to detect and report the wrongdoing, the extent to which unimplicated office holders/members/creditors could be considered culpable, and the extent of the reliance that was placed upon KPMG.[66]

70. Abraaj further submit that issues relating to the attribution of culpability in the context of strict liability for offences is a developing area of law and cases on the subject should only be determined after trial.[67]

71. Abraaj further contend that following the decision in *The Industrial Group v Hamid* [68] a question arises as to whether this Court can properly

recognise an illegality defence in contract when there is no provision to that effect in the DIFC Contract Law.[69]

72. In relation to KPMG's alternative basis for the application relating to the scope of the duty of auditors, Abraaj contend that it is clear that an auditor's function includes protecting the company from the consequences of undetected errors in the accounts, and providing shareholders with reliable information for the purpose of enabling them to scrutinise the conduct of the affairs of their company - relying on *Manchester Building Society v Grant Thornton*.[70] Abraaj contend that it follows that foreseeable losses incurred by reason of breach of the auditor's duty are recoverable. Abraaj further contend that in the circumstances of this case at least some of the fines were imposed as a consequence of KPMG's failure to detect conduct which resulted in the publication of misleading accounts, in breach of KPMG's duties.[71]

73. In response to KPMG's contention that the effective cause of the loss was the Claimants' misconduct not KPMG's negligence, Abraaj contends that their claims are advanced on the basis that but for KPMG's negligence, the misconduct would have stopped earlier than it did. Accordingly, but for KPMG's negligence, the fines imposed by the DFSA would have been lower.[72]

Abraaj's oral submissions

74. By way of preliminary observation, Senior Counsel for Abraaj reiterated the contentions in the Skeleton to the effect that the Court should exercise great caution before making a summary determination in a developing area of law or in cases in which the determination would have minimal impact upon the issues to be canvassed at trial.[73] Senior Counsel also referred to authorities for the well-known proposition that a Court is not to undertake a mini trial on an application for summary dismissal.

75. Senior Counsel also submitted that if the Court concluded that a multifactorial assessment of the kind directed in *Patel* should be undertaken, and that proposition was more than merely arguable, a trial was essential for the purpose of making the factual determinations which were necessary for the purposes of the assessment.[74]

76. By way of introduction to his oral submissions on the topic of illegality, Senior Counsel for Abraaj took the Court to an *aide memoire* which had been presented as an attachment to Abraaj's Skeleton setting out Abraaj's case as to the regulatory provisions which were found to have been breached, whether they were offences of strict liability and whether the breach was only capable of being committed by a corporate entity or could be committed by individuals, which was the distinguishing feature in *Safeway* in relation to attribution. It is clear from the table that some of the provisions found to have been breached are said to be offences of strict liability, and some are not. That proposition does not appear to be contentious, although the boundaries of the proposition may be contentious.

77. Senior Counsel then took the Court to the Decision Notice published by the DFSA in relation to the fine imposed on the Third Defendant, in which the breaches of auditor's duty were found to have resulted in the accounts of Abraaj failing to give a true and fair view, thereby causing damage to investor confidence, the reputation of DIFC, the reputation of auditors in the DIFC and contributing to a loss of confidence in the DIFC markets. Senior Counsel contended that these findings were relevant to the public policy considerations that arise when an illegality defence is under consideration.[75]

78. Senior Counsel then took the Court through the pleaded breaches of duty by KPMG and the causal nexus between those breaches and the fines imposed by the DFSA.[76]

79. Senior Counsel for Abraaj developed eight propositions in relation to the illegality defence:

(1) The narrow rule in *Gray*, developed in the context of a homicide offence for which a substantial sanction was imposed by a criminal court is no longer part of the law of England and Wales, relying on *Patel* and *Henderson.* [77]

(2) This case concerns regulatory fines, rather than a sentence imposed by a criminal court and even if the narrow rule has survived, it doesn't apply to quasi criminal penalties, relying on *Les Laboratoires Servier v Apatex*.[78]

(3) As the Claimants are corporate entities rather than individuals, the Court will necessarily have to deal with issues of attribution at trial, contending that as between the Claimants and the DFSA the Claimants were obliged to accept that they were vicariously liable for the acts of their employees and agents, but different considerations apply as between the companies and their allegedly negligent auditors in the context of an illegality defence - relying on *Singularis, Bilta* and raising the question of whether *Safeway* remained good law in England and Wales and whether the principle in *Safeway* should be adopted as part of the law of the DIFC.[79]

(4) Many of the provisions found to have been breached for the purpose of imposing the fines are offences of strict liability, which distinguishes this case from the narrow rule in *Gray* and giving rise to questions of attribution which in turn raises questions with respect to the conduct of relevant directors and employees. [80]

(5) There are powerful arguments in favour of the Claim against the auditors in relation to the fines passing the three stage test imposed by *Patel*. [81]

(6) There is a contradiction at the heart of KPMG's Application, in that their defence on the merits is directly inconsistent with the findings made by the DFSA at the time fines were imposed upon KPMG, yet they contend that Abraaj is bound by the findings made by the DFSA in the Decision Notices relating to them. [82]

(7) The illegality defence is plainly not suitable for summary determination - referring to the multifactorial assessment required by *Patel*, issues of attribution and the complexities arising from offences relating to strict liability. [83]

(8) There are other compelling reasons for having a trial including the determination of what should be the law and approach adopted in the DIFC, given the conflicting decisions and relative confusion in the authorities in England and the contentious issue of whether illegality can be a

defence to a claim in contract in the DIFC.[84]

80. In relation to the Application based on the scope of the auditor's duty, Senior Counsel contended that this was another developing area of law which should be determined after trial.[85] Senior Counsel also referred to the pleaded breaches of relevant ISAs in support of the contention that the losses claimed were the consequence of the alleged breaches.[86] Senior Counsel further submitted that the causal connection between the DFSA fines and the purpose of the audits is obvious and straightforward,[87] referring to *Manchester Building Society v Grant Thornton.*

81. Senior Counsel for Abraaj drew the Court's attention to other specific ISAs which it is submitted sustain the connection between the purposes of the audit and the breaches which resulted in the imposition of the fines, noting that the impact of the ISAs and the ambit of the auditor's duties would no doubt be the subject of expert evidence in due course.[88]

KPMG's oral submissions in reply

82. In the course of oral submissions in reply, Senior Counsel for KPMG reiterated a number of the propositions advanced in chief. On the subject of whether the illegality defence applied to claims in contract under DIFC Law, Senior Counsel contended that it would be anomalous if Article 56 of the Law of Obligations [89] provided a defence of illegality in relation to claims in tort, but the Court concluded that there was no corresponding defence to claims in contract,[90] relying on the decision in *Vegie Bar*[91]

83. Senior Counsel for KPMG contended that the assertion that there was a fundamental contradiction in KPMG's case misconstrued KPMG's position. KPMG contested the DFSA's findings in relation to its breaches of duty, and accepted that it would be open to Abraaj to contest findings made by the DFSA as well. However, what was not open to Abraaj was to claim compensation in respect of the fines imposed, because of the inconsistency and incoherence to which that would give rise.[92]

84. Senior Counsel for KPMG accepted that offences of strict liability were exceptions to the narrow rule or indeed the broader rule in Gray if the claimant can establish that there was no fault on its part. However, that was not Abraaj's contention in this case.[93] Abraaj accepts that it was vicariously liable for the acts of employees and agents. Senior Counsel further contended that it was clear from the DFSA Decision Notice that the fines were imposed because of culpable conduct on the part of the companies, so that it is not now open to those companies to assert that they were only convicted because of strict liability.[94]

85. Senior Counsel for KPMG further contended that if the multifactorial assessment in *Patel* was applied to the circumstances of this case it would admit of only one answer, which was to the effect that the illegality defence should be upheld.[95]

Analysis

86. In cases in which an application for summary determination is upheld, it is necessary and appropriate for the Court to give full and detailed reasons for its decision, as the decision represents the final determination of the issue or issues. However, if the Court declines to determine the issues on a summary basis, brief reasons for that conclusion are appropriate, as the issues will await final determination after trial. Moreover, in such a case it is usually inappropriate for the Court to express concluded views on any of the issues, in order to avoid at least the perception that those views may have influenced the Judge at trial.

87. As I have decided that this is not an appropriate case for summary determination, my reasons for that conclusion can be expressed briefly, and without any attempt to express a concluded view on issues which will await determination by the trial Judge.

88. There are three reasons why I have concluded that Abraaj's Claims arising from the imposition of fines by the DFSA should not be summarily determined.

89. First, there is no doubt that those Claims give rise to issues of law which need to be developed within the DIFC, both in relation to the illegality defence and the scope of an auditor's duty. The law of England and Wales on those topics is itself developing, and of course there is a question as to the extent to which the principles enunciated in the English authorities either are or should be part of the law of the DIFC, or represent the public policy of the DIFC. I accept Abraaj's submission that in these circumstances it would be undesirable to summarily determine issues of developing law and consider that those issues should be determined on the basis of actual facts found at trial.[96]

90. Second, as already noted, it is common ground that the outcome of the Application for Summary Determination will have little or no impact upon the preparation of the case for trial or the length or burden of the trial. The summary of the arguments presented above shows that, contrary to KPMG's submission, there are many contentious issues which must be determined before it could be concluded that Abraaj's Claims in relation to the fines have no real prospect of success. If all issues were pure issues of law, and their resolution would have a material impact upon the length and burden of the trial, there would be something to be said for summary determination. However, in this case the issues are not exclusively issues of law, for reasons which will be developed, and their summary determination will have no material impact upon the trial. In these circumstances, from the perspective of both case management and the best interests of the development of the law of the DIFC, it is not appropriate to determine the issues of law on a summary basis.

91. Third, the issues which must be resolved in order to determine the claims made by Abraaj arising from the fines imposed by the DFSA are many and varied, and include mixed issues of law and fact. Without attempting to be exhaustive, those issues include at least the following:

(1) Do English common law principles relating to illegality form part of the law of the DIFC or the public policy of the DIFC and if not, should they be applied as part of the law and public policy of the DIFC?

(2) Does the answer to the preceding question depend upon whether the claim is brought in contract or in tort given that there is no express mention of a defence of illegality in the DIFC contract law?

(3) Does the decision in *Vegie Bar* to the effect that a contract to commit an illegal act is unenforceable have any impact upon the issues in this case and if so, should that decision be reviewed in light of the decision in *IGL v Hamid?*

(4) Does Article 56 of the DIFC Law of Obligations import English common law principles relating to illegality as a defence to a claim in tort?

(5) Does Article 6 of the Judicial Authority Law have the consequence that DIFC law and/or public policy with respect to illegality applies if the substantive law of the audit contract between the First Claimant and the First Defendant is not DIFC Law?

(6) If English common law principles with respect to illegality do apply to KPMG's claims:

(a) has the narrow rule in Gray survived *Patel* and *Henderson* generally, or does Gray only remain authority for cases with materially similar facts and if so, is this such a case?

(b) does the principle in *Safeway Stores* remain good law in England and Wales and if so, should it be adopted as part of the law of the DIFC?

(c) if a multifactorial assessment of the kind indicated in *Patel* is to be undertaken in this case, what are the facts relevant to that assessment and what would be the outcome of such an assessment?

(d) does the strict liability exception to the illegality defence apply to some of the breaches which resulted in the imposition of fines and if so, which ones?

(e) to the extent that the strict liability exception applies, is the exception excluded because of culpable conduct on the part of the corporate claimants and if so, have the corporate claimants committed culpable conduct?

(f) do questions of attribution/agency arise:

(i) in assessing whether the illegality defence applies at all; or

(ii) in assessing whether culpable conduct on the part of the companies prevents them from relying on the strict liability exception,

and if so, what are the facts relevant to the application of those principles in this case?

(g) are there innocent directors, officers, shareholders or creditors and if so, what is the effect on the application of the illegality defence?

(7) What is the scope of the auditor's duty under:

(a) DIFC Law; and

(b) non DIFC UAE Law,

in each of contract and tort and do the losses relating to the fines come within the scope of that duty or are they too remote?

(8) What is the scope of the duties imposed by the ISAs and were those duties breached in a way which is relevant to the imposition of the fines?

(9) What portion of the fines, if any, were the consequences of any breaches of duty established as against KPMG?

(10) Has any decision been made by the DFSA as to whether the fines will be enforced in whole or in part, and is KPMG's liability dependent upon a decision by the DFSA to enforce the fines.

92. Many of these issues involve issues of mixed fact and law. Those issues can only be determined after the facts have been found at trial. To the extent that some of these issues are issues of law only, as their resolution would not necessarily determine the outcome of the claims with respect to the fines, it would be wrong in principle and inconsistent with established authority to attempt to resolve those issues in advance of the trial, and other than in the context of the facts established by trial.

93. For these reasons, the Application for Summary Determination must be dismissed.