Claim No: CA 012/2021
CA 014/2021

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the Name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL
BEFORE CHIEF JUSTICE ZAKI AZMI, H.E. JUSTICE SHAMLAN AL SAWALEHI AND JUSTICE ROBERT FRENCH

BETWEEN

(1) NEST INVESTMENTS HOLDING LEBANON S.A.L.
(2) JORDANIAN EXPATRIATES INVESTMENT HOLDING COMPANY
(4) GHAZI KAMEL ABDUL RAHMAN ABU NAHL
(5) JAMAL KAMEL 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/Appellants

and

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

Defendants/Respondents

JUDGMENT OF THE COURT OF APPEAL

Hearing :	**13-14 October 2022**
Counsel:	Mr. Steven Thompson KC instructed by Onoma FZE for the Appellants Ms. Anneliese Day KC instructed by Clifford Chance LLP for the Respondents
Judgment :	**9 February 2023**

ORDER

UPON the Judgment of Justice Sir Richard Field dated 13 June 2021 (the "Judgment") on the trial of three preliminary issues, being the recoverability of the losses claimed by the Claimants ("Issue 1"), whether the Claimants' claims are time-barred ("Issue 2") and whether certain specified documents are admissible as evidence of the findings and/or matters stated in them ("Issue 3")

AND UPON the Claimants' applications for permission to appeal against the decision on Issue 2 as set out in the Judgment on the grounds of the date on which the limitation period that applies to the Claimants' claims started ("Ground 1") and the limitation period which applies to all of the Claimants' claims ("Ground 2")

AND UPON the Order of Justice Sir Richard Field dated 13 September 2021 granting the Claimants permission to appeal on Ground 1 and refusing permission to appeal on Ground 2

AND UPON the Order of the Chief Justice Zaki Azmi dated 16 November 2021 granting the Claimants permission to appeal on Ground 2

AND UPON reviewing the parties' submissions in the case file

AND UPON hearing counsel for the Appellants and counsel for the Respondents at the hearing listed on 13 and 14 October 2022

AND PURSUANT TO the Rules of the DIFC Courts ("RDC")

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.

2. The Appellant to pay the Respondents' costs of the appeal to be taxed, if not agreed provided that no costs shall be payable in relation to the recoverability issue.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 9 February 2023
At: 3pm

SCHEDULE OF REASONS

Introduction

1. On 13 June 2021, His Honour Justice Field delivered a judgment on preliminary issues,[1] including whether the Appellants' claim against the Respondents was barred by a time limitation applicable under Lebanese law. The Appellants are shareholders in Lebanese Canadian Bank S.A.L. ("LCB") which is a company incorporated in Lebanon. Its wholly owned subsidiary is LCB Investments (Holdings) S.A.L. ("LCBIH"). The First Respondent, Deloitte & Touche (M.E.) a firm of accountants registered in accordance with the laws of Cyprus, had been engaged to audit LCB's financial statements for the financial years ending 31 December 2006, 2007, 2008 and 2009 and the financial statements for the financial years ending 31 December 2008 and 2009 of LCBIH.

2. LCB was identified by the US Financial Crimes Enforcement Network by Notice issued on 11 February 2011 as "a financial institution of primary money-laundering concern". The FinCEN Notice, as it was called, was issued along with a proposed Rule to prohibit US financial institutions from opening or maintaining correspondent or payable-through accounts for LCB.

3. The Appellants alleged that as a result of the Notice, LCB was effectively put out of business as it was unable to handle international banking transactions. It could not operate in the USA. Its relationship with its clearing institutions was immediately terminated. LCB sold its assets and liabilities to Soci�t� G�n�rale de Banque au Liban ("SGBL") for USD 580 million and then went into liquidation.

4. The Appellants alleged that in conducting the relevant audits, the First Respondent was in breach of a range of duties as a result of which it neglected to report the true financial position of both companies and the various illicit activities in which LCB had been involved. The Appellants alleged that the First Respondent, of which the Second Respondent was a partner, was primarily liable for its alleged defaults on the basis that every step taken by it in the performance of the audits was overseen by, and carried out through, the Second Respondent. The Second Respondent was said to be personally liable for the First Respondent's defaults and breaches of duty because he was responsible as Lead Client Service Partner for the LCB audits.

5. The Appellants alleged, *inter alia,* intentional and unintentional defaults on the part of the Respondents under Lebanese law. They pleaded that had the First Respondent properly fulfilled its duties, LCB's involvement in money laundering and deficiencies in its accounts would have been discovered and reported enabling the Appellants to obtain minority shareholder relief, including the removal of LCB's management. The Appellants alleged that if this had happened the business would not have been sold to SGBL, LCB would not have gone into liquidation and the Appellants would still be shareholders in a profitable bank.

6. The Appellants' claim for loss and damage was the difference between the sums that they received and stand to receive following the liquidation of LCB and the value of their shareholding in LCB and the sums that they would have received but for the Respondents' misconduct.

Overview of the Judgment of the CFI on three preliminary issues

7. Justice Field's judgment concerned three preliminary issues:

(1) Recoverability ("Issue 1") - was the Appellants' claimed loss recoverable under Lebanese law?

(2) Time Limitation ("Issue 2")

(a) Which system of law governed the issue of whether the Appellants' claims were time-barred and, if so, what were the applicable limitation periods, when did they start to run and were the claims time-barred under Lebanese law?

(b) In the alternative, if DIFC law governed the issue of whether the Appellants' claims were time-barred, when did the periods in respect of non-deceit claims start to run and were those claims time-barred so that only the Appellants' claims in deceit should proceed to trial?

(3) Admissibility (Issue 3") - which system of law governed the admissibility of evidence in the proceedings. There followed a question whether certain listed documents were admissible under that system of law. Justice Field noted that the issues were to be determined on the basis of a series of agreed facts set out in a Schedule to the Order and the facts as stated in the Re-Re-Amended Points of Claim ("RRAPOC").

Among the agreed facts were:

(a) In respect of Issue 1 - recoverability - the Appellants' claims were based only on Lebanese law (Lebanon being a civil law country); the audits of LCB and LCBIH in question were carried out pursuant to Letters of Engagement between the First Respondent and LCB/LCBIH and; there was no contractual relationship between the Appellants and the First Respondent or the Appellants and the Second Respondent.

(b) In respect of Issue 2 - limitations - the Appellants' substantive claims were based only on Lebanese law; the only provisions of DIFC law relating to limitation that the Appellants sought to rely on in respect of the Lebanese law claims were Article 38 of the 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.

8. In the event, Justice Field held in relation to each of the issues in the following terms:

(1) The loss claimed by the Appellants was recoverable under Lebanese law.

(2) The Appellants' claims were statute barred.

Orders granting permission to appeal

9. On 13 September 2021, Justice Field made the following orders:

"1. The Claimants shall have permission to appeal the Court's finding that the limitation period applicable to claims against the Defendant auditors is five years starting from the date when the relevant auditor reports were put before the general meeting.

2. The Claimants' application to appeal against the Court's finding that "supervisory faults" in Article 178 LCC covered the whole range of auditor defaults so that there was no separate category of non-supervisory defaults beyond the purview of Article 178 is dismissed.

3. The Defendants must pay 75% of the Claimants' costs of the Permission Application to be assessed by the Registrar on the standard basis, if not agreed."

10. In response to a Second Permission Application dated 25 October 2021, His Honour Chief Justice Zaki Azmi on 16 November 2021 ordered that the Second Permission Application be granted and the costs of the Second Permission Application be costs in the case. The Second Permission Application related to the issue going to the construction of the term "supervisory faults" in Article 178 of the Lebanese Code of Civil Procedure ("LCC"). Chief Justice Azmi granted permission to appeal on that ground as well.

11. In the event, the Appellants were granted permissions to appeal, in relation to the limitation issue, on two grounds:

(1) That the primary judge erred in his determination of the start date of the applicable limitation period under Lebanese law; and

(2) That the primary judge erred in holding that all of the Appellants' claims were subject to a limitation period of five years under Lebanese law because they all fell within Article 178 of the LCC.

The Respondents' Notice under RDC 44.75

12. The Respondents filed a Notice seeking to uphold the decision of the Court of First Instance and/or applying for permission to appeal on the recoverability issue. The Notice was given by the Respondents pursuant to RDC 44.75:

"Asking the Court of Appeal to uphold the decision of the Court of First Instance for reasons different from, or additional to those given by the lower court; or

Alternatively applying for permission to appeal."

The Primary Judge's statement of the issues on the limitation question

13. The Primary judge identified the following preliminary issues relating to limitation:

(a) Which system of law governs the issue of whether the Appellants' claims under Lebanese law, set out in the Appellants' pleading, were time-barred?

(b) If the Court finds that Lebanese law governed the issue of whether the Appellants' claims were time-barred, in respect of each of the claims advanced in the pleading:

(i) What is the applicable limitation period(s) under the 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 Appellants' claims time-barred under Lebanese law?

(c) If the Court finds that DIFC law governs the issue of whether the Appellants' claims were time-barred:

(i) When did the limitation period(s) under Article 38 of DIFC Court Law (No 10 of 2004) (relied on by the Appellants 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 Appellants' non-deceit claims (summarised at paragraphs 300 to 301 of the RRAPOC) time-barred such that only the Appellants' claims in deceit (summarised at paragraphs 239 to 299 of the RRAPOC) should proceed to trial?

Statutory framework

Law on the Application of Civil and Commercial Laws in the DIFC (DIFC Law No 3 of 2004)

14. The Primary Judge identified the applicable choice of law rule in relation to limitations, as that set out in the Law on the Application of Civil and Commercial Laws in the DIFC (DIFC Law No 3 of 2004). He referred to Article 8, which provides:

8. Application

(1) Since by virtue of Article 3 of Federal Law No 8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law

on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).

(2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:

(a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,

(b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,

(c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,

(d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,

(e) the laws of England and Wales."

15. The above is to be read with Article 9, which reads:

"9. Submission to Jurisdiction

(1) The Court shall determine any matter before it in accordance with the laws that may apply by virtue of Article 8.

(2) An Arbitrator shall determine any matter before him in accordance with the laws that may apply by virtue of Article 8."

DIFC Court Law (DIFC Law No 10 of 2004)

16. Also relevant is Article 50 of the DIFC Court Law (DIFC Law No 10 of 2004) and particularly Article 50(c):

"50. Application of Evidence

Where proceedings are instituted in the DIFC Court, the rules of evidence to be applied in the proceeding will be the rules that:

(a) are prescribed in DIFC Law; or

(b) are applied in the courts of England and Wales; or

(c) the DIFC Court considers appropriate to be applied in the circumstances."

17. A number of provisions of Lebanese law were set out in the judgment. Those related to the limitations point are reproduced here as set out by the Primary Judge.

The Lebanese Code of Civil Procedure (LCC)

"Chapter 3 Operation of joint-stock companies

Section 1 - Directors

Article 166. Directors are responsible, even towards Third-Parties for all fraudulent acts and all infringements to the Law and the Articles. Proceedings are open to the injured party or individual; they may not be checked even in relation to shareholders, by a vote of the general meeting granting final discharge to the directors.

Article 167. Directors are, on the other hand, responsible to shareholders for their mismanagement.
As a general rule, the Directors' liability for mismanagement is not involved in relation to third parties.

Article 168. The case to be brought against the directors by virtue of the first paragraph of the preceding Article, lies with the company. But in the event of the latter's inertia any shareholder may take proceedings in its place within the limit of his interest in the company.

Article 169. Final discharge, if it is to be used as defence, must always be preceded by a statement of the company's account and the commissioners (auditors) report; it only covers facts of management with which the general meeting may have been acquainted.

Article 171. Proceedings for liability are limited to 5 years dating from the meeting during which the directors were required to account for their management.

Section 2. - Supervisory Commissioners

Article 174. The Supervisory Commissioners exercise a permanent control over the company's operations. They may require to be acquainted with all deeds, all documentary evidence in support of accounts, demand all information from the directors.
Stocktaking of the balance sheet and the profit and loss account shall be put at their disposal 50 days, at the latest, prior to the general meeting.

Article 175. The commissioners report to the general meeting on the situation of the company, the balance sheet, the accounts tabled before them by the Directors and the proposed dividend distribution. Failure (to produce) this report would nullify the deliberation of the general meeting approving the accounts.

Article 176. Commissioners are required to convene the general meeting whenever the directors omit so doing, in cases specified by law or

by the Articles. Likewise they are empowered to convene the meeting in all cases they deem it needful.
They are even bound to do it.

Article 177. They are not to take any interest in a group whose object would be to influence Stock Exchange dealings involving any of the company's securities.

Article 178. They commit their responsibility either individually or jointly, even towards third parties whenever they commit a supervision offence (default) subject to the five-year time limit.

.

Article 254. The proof of commercial matters is not in principle restricted to the respective rules governing civil transactions. Subject to the exceptions resulting from the specific legal provisions, they may be established by all means of proof that, due to practices or circumstances, the judge believes must be admitted.

.

Article 262. In trading matters, action is lost by time limitation after the lapse of ten years, whenever no shorter term has been set (paragraph 1)."

Lebanese Code of Obligations and Contracts (LCOC)

18. Among the Articles of the LCOC cited by His Honour were the following:

"Book I - DIFFERENT CATEGORIES OF OBLIGATIONS

TITLE I - CIVIL OBLIGATIONS AND NATURAL OBLIGATIONS

Article 2. Civil obligation is an obligation the execution of which may be imposed by the creditor upon the debtor.
Natural obligation is a judicial duty the performance of which may not be demanded, but whose voluntary execution has the same value and produces the same effects as the performance of civil obligation.

Book II Title II - ILLICIT ACTS (Offences and Quasi-offences)

Article 121. An offence is an act by which one causes unjust and intentional prejudice to the interests of another.
The quasi-offence is an act by which one causes unjust but not intentional prejudice to the interests of another.

Article 122. Any fact due to man's action which causes unjust prejudice to another man compels its author to offer reparation, at least if he is gifted with understanding .

Article 123. A person is liable for the damage caused by his negligence or by his imprudence as well as for what may result from a positive act.

Article 124. Must equally offer reparation he who has caused prejudice to another exceeding, in the exercise of his right, the limits set by bona fides or by the goal towards which such right has been vested in him.

Article 134. Reparation due for an aggrieved party of an offence (delict) or a quasi-offence (quasi-delict) must correspond, in principle, to the entire damage the aggrieved party has sustained.
Moral as well as sentimental damage is taken into account.

.

Incidental damages are to be taken into consideration, but provided they are obviously linked up with the delictual or quasi-delictual fact."

19. Book V, Chapter III, Title III of the LCOC deals with extinguishment and time limitations as follows:

"Section 1. - General provisions

Article 344. Obligations are extinguished by the inertia of the creditor who has refrained from claiming his rights for a certain period of time.

Section 2. - Starting point and periods of time limitation

Article 348. Time limitation is computed only as from the day when the claim has become due.
The time-limit is calculated by days and not by hours; the initial day is not counted; time limitation is completed when the last day of the time-limit has expired.

Article 349. In principle, no action shall be brought after the expiration of ten years.

.

Article 356. The time limitation is also suspended, in general, in favour of the creditor for whom it is impossible, for reasons beyond his control, to interrupt it.

Section 4. - Effects of time limitation[2]

Article 360. Time limitation operates as a mode of proof of the debtor's discharge; presumption of discharge resulting therefore is indisputable and allows no proof to the contrary.

Article 361. Time limitation extinguishes not only the creditor's action, but the obligation itself which may not henceforth be used under any form, either through action or through exception.
However, the debtor who has been civilly discharged through time limitation, remains held for a natural obligation which may be used for cause for payment."

Lebanese Civil Code of Procedure (LCCP)

Article 4. The judge shall not under the penalty of being considered as carrying out a denial of justice:

1. Refrain from issuing a judgment on the ground of the vagueness or the inexistence of a text.

2. Delay without reason the issuing of a judgment.

In case of vagueness of the provision, the judge shall interpret it in a way that gives it an effect that is consistent with its purpose and ensure harmony between it and the other provisions.

In case of absence of a provision, the judge shall rely on general principles, custom and fairness.

Article 9. The [bringing of a] lawsuit is open to anyone who has a legal and actual interest, or who seeks through it [the lawsuit] to establish a right whose existence is denied or to take a preventative measure to avert an imminent future damage or to keep a record about a right who evidence could cease to exist at the time it comes under dispute, with the exception of situations where the law restricts to certain persons, that it [the law] indicates the capacity, the right to being a claim or to report it or to defend a specific interest.

Article 62 (para 1) A motion for inadmissibility is any reason through which a party seeks a declaration that its opponent's claim is not admissible, without addressing its merits, because he/she/it (the opponent) lacks the right to bring a claim. Are considered as motions of inadmissibility the motion for lack of capacity, the motion for lack of interest (on the part of the claimant), the motion for statute of limitation, the motion for *res judicata* and the motion for expiry or procedural time limits. The motion for time limitation is considered as a motion for inadmissibility without prejudice to the special provisions of article 361 LCOC.

Article 131. Evidence is the bringing of proof before courts on a "fait" or an "acte juridique" that is taken as the basis of a claim, a motion or a defence.

Every person must support courts for the purpose of eliciting the truth."

20. The preceding extracts were as set out in the judgment of the Primary Judge. Translations filed with the Court use the term "prescription" in lieu of the term "time limitation". There is no point taken about the correctness of the translation used by the Primary Judge.

Materials before the Primary Judge

21. Materials before the Primary Judge relevant to the questions of Lebanese law to be determined, included expert witness reports, the texts of the translations of Lebanese statutes referred to above and decisions and writings cited by the expert witnesses and to which they were referred.

22. The Appellants' expert was Professor Hadi Slim, a Professor of Law specialising in private international law and the laws of the Middle-Eastern countries. He is Head of the Masters Program in International Business Law at Francois-Rabelai University (Tours-France) and co-director of the LLM Program of Business Law - Middle-East and Arab Countries at Pantheon-Sorbonne University (Paris 1). He is also a member of the Paris and Beirut Bar Associations. His Honour described Professor Slim as "an impressive witness of high intellectual distinction and erudition who gave his evidence in a balanced, measured way."[3]

23. The expert witness called by the Respondents was Ma&#xfffd;tre Mohammed Farid Mattar, who has practiced law in Lebanon since 1980, specialising in international criminal law, extradition, money laundering, cross-border white collar litigation, arbitration and constitutional law. He is a founding partner in a Lebanese law firm, Levant Law Practice. He has practiced as legal counsel for Jacques & Lewis in London from 1977 to 1980 and assisted in drafting and reviewing many pieces of draft legislation. He has taught at St Joseph University in the concept of law between 1999 and 2006 and has written on constitutional and electoral law, corruption, human rights and jurisprudence. The Primary Judge described him as a "careful witness whose reports were very clearly expressed".[4] He was said to have demonstrated a close familiarity with the areas of Lebanese law in issue and, like Professor Slim, he expressed his views fairly and with the manifest intention of assisting the Court.

24. The experts called by the parties lodged the following reports relevant to the hearing before His Honour:

(1) Professor Slim First Report, 29 July 2020.[5]

(2) Professor Slim Supplemental Report, 22 October 2020.

(3) Ma&#xfffd;tre Mohammed Farid Mattar, First Report 30 July 2020.

(4) Ma&#xfffd;tre Mohammed Farid Mattar, Supplemental Report 22 October 2020.

25. Other materials on the record were referred to by His Honour in the judgment largely by reference to the responses by the expert witnesses to whom those materials were referred in the course of cross-examination and re-examination. They demonstrate the range of the writings relevant to Lebanese law which were before the Primary Judge. They comprised the following:

(1) Nassif, *Treatise on Commercial Companies,* vol 10, (2008) p 1054.

(2) Cozian, Viandier and Duboissey, *Dorits des societes,* 32nd ed.

(3) Lefebvre, *Societes Commerciales* (2017, 48th ed).

(4) Report of Ma&#65533;tre Chakib Cortbaoul used in earlier interlocutory proceedings citing Lefebvre.

(5) Fabia and Safa, *Annotated Code of Commerce.*

(6) Mustapha Kamal Taha, *Principles of Commercial Law.*

(7) Judgment of Beirut Court of First Instance, Decision No 89/150/2017 *Bechara Touma v Pragma Group Holding.*

(8) Elias Nassif, *Treatise on Commercial Companies,* vol 11 (2009).

(9) Judgment of the Beirut Court of First Instance issued 30 April 2014, No 99.

(10) Eduard and Christiane Eid *Treatise on Commercial Law Sade red* (2007)

(11) Tyan, *La prescription* (1977).

(12) Phillipe Merle, *Droit Commercial, Societes Commerciales* (5th ed).

(13) Judgment of Lebanese *Cour de Cassation,* No 133 dated 17 December 1969 - "Abid Khair Decision".

(14) Judgment of French *Cour de Cassation,* 11 February 2003, No 99-20139.

(15) Judgment of Beirut Court of Appeal, No 549, 25 March 1965.

These materials covered more than one issue before the Primary Judge, but demonstrate the range of decisions and textbook writings to which he was taken in addition to the expert evidence of Professor Slim and Ma&#65533;tre Mattar. They also demonstrate the quasi factual nature of the inquiry which necessarily involved an inference, *sub silentio,* about how a Lebanese court would be likely to decide the question.

The expert reports of Professor Slim and Ma&#65533;tre Mattar

26. The principal expert evidence before the Primary Judge comprised two reports by Professor Hadi Slim dated 29 July 2020 and 22 October 2020 respectively and two reports by Ma&#65533;tre Mattar dated 30 July 2020 and 22 October 2020 respectively. Parts of the reports relevant to this appeal are reviewed below to provide a basis for assessing the approach to them which was taken by the Primary Judge.

Professor Slim

27. Professor Slim's key conclusions set out in his first report were as follows:

(a) Article 178 of the Lebanese Code of Commerce is the only specific provision within the Lebanese Code of Commerce (before the amendments introduced in 2019) that deals with the auditors' liability.

(b) Article 178 of the Lebanese Code of Commerce applies where the misconduct attributed to auditors can be characterised as a "supervisory fault".

(c) Articles 166, 167 and 168 of the Lebanese Code of Commerce (before the amendments introduced in 2019) have no bearing in respect of the auditor's liability under Lebanese law.

(d) Articles 166, 167 and 168 of the Lebanese Code of Commerce do not bar shareholders from bringing personally a claim on the basis of Article 178 LCC against the auditors.

(e) Articles 122 and 123 of the Lebanese Code of Obligations and Conduct, which represent the general provisions applicable to tortious liability under Lebanese law, apply where the auditor's misconduct is not a "supervisory fault".

(f) The loss sought by the Claimants fall within the head of losses accepted under Lebanese law.

(g) Under Lebanese law direct and indirect damages are compensated.

(h) Where the auditor's liability is incurred on the basis of a supervisory fault the time limitation period is five years. This period begins to run from the date when the damage is held to have occurred or where its occurrence has been brought to the Claimants' knowledge.

(i) Where the auditor's liability is incurred on the basis of other types of fault, the time limitation period is ten years. This period begins to run from the date where the damage is held to have occurred or where its occurrence has been brought to the Claimants' knowledge.

(j) Lebanese law is largely based on the free admissibility of evidence. In the field of civil and commercial litigation there is only one exception that relates to the establishment of the existence of civil (and not commercial) transactions. It follows that under Lebanese law the free admissibility of evidence applies in the present case.[6]

28. In his comprehensive first report, Professor Slim offered an overview of the Lebanese legal system with particular reference to what he called

"the judicial court system" which is distinguished from the administrative, military and religious court systems.

29. Within the judicial court system, civil courts comprise three levels - courts of first instance, courts of appeal and the *cour de cassation.* The latter court's rulings have no binding precedential affect over the courts of appeal or courts of first instance. That said, the *cour de cassation* has, if not *de jure* authority, at least "weight and ascendency over lower courts."[7] In interpreting a "vague provision" the courts are required by Article 4 paragraph 3 of the LCCP to give them "an effect that is consistent with its purpose and that ensure harmony between it and the other provisions." The courts may refer to the statutory context, historical events preceding the enactment of the provision under consideration and a comparison of it with other provisions on the same subject. Two fundamental rules of interpretation referred to were:

(1) Where a clear specific provision exists it must be preferred to a general provision.

(2) A specific provision must be strictly interpreted.[8]

Courts may rely on past judicial decisions in similar cases. They also commonly refer to scholars' writings.[9]

30. Professor Slim quoted Lebanese scholars who had addressed in their books and writings the issues of Lebanese law which he discussed. He said he had tried not to ignore any scholar whose books and writings were accessible.[10] Further, according to Professor Slim, Article 4 paragraph 3 of the LCCP invited the Lebanese judge, where no provision corresponding to the dispute in issue existed, to rely on general principles, custom and fairness.[11]

31. After offering his overview of the Lebanese legal system and approaches to the interpretation of laws in Lebanon, Professor Slim turned to the issue of recoverability of the claimed loss under Lebanese law.[12] That issue was discussed at considerable length and was followed by a section considering whether the Respondents' claims were time barred under Lebanese law.[13]

32. Professor Slim divided the limitation discussion into the following issues:

(a) The rules applicable to the limitation period especially in connection with tortious liability, under Lebanese law;

(b) The nature of a limitation defence under Lebanese law;

(c) The date on which the time limitation begins to run under Lebanese law in general;

(d) The date on which the time limitation begins to run under Article 178 LCC; and

(e) The limitation periods applicable to the Respondents' claims.

33. The report then set out a number of propositions:

(1) As a specific provision, Article 178 LCC can only be complemented, in respect of the details relating to the computation of the time limitation period, by the general rules provided for in the LCOC.[14]

(2) Assuming that Article 171 LCC may be taken into account to interpret Article 178 LCC, Article 171 does not cover information that was not brought to the attention of the shareholders during the general assemblies.[15]

(3) Assuming that Article 171 LCC may be taken into account, such provisions cannot cover the specific duties owned by auditors toward the Central Bank and the Bank Control Commission.[16]

34. Professor Slim distinguished between "supervisory" and "non-supervisory" faults. He took the view that Article 178 of the LCC referred only to "supervisory faults" and to general provisions of the LCOC in respect of the starting date of the limitation period for which it provided. On that basis breaches amounting to supervisory faults would be subject to the time limitation period of five years provided for in Article 178 LCC which would run from the date on which the damage was held to have occurred or where its occurrence had been brought to the Claimants' knowledge. Non-supervisory breaches would be subject to the time limitation period of ten years provided for in Article 349 of the LCOC. That time period would begin to run on the date where the damage is held to have occurred or where its occurrence had been brought to the Claimants' knowledge.[17]

35. Professor Slim considered the alternative, which he did not support, that Article 178 LCC referred to the limitation period starting date, referred to in Article 171 LCC, and covered only supervisory faults. He also considered a third alternative interpretation under which Article 178 LCC referred to the starting date in Article 171 LCC and covered all types of faults attributable to auditors. He discussed the application of these options to the various breaches alleged by the Appellants.

36. Professor Slim's report went on to consider the admissibility of evidence under Lebanese law which he described as "largely based on the free admissibility of evidence".[18]

37. Admissibility was also discussed specifically in relation to commercial matters, matters that could not have given rise to an agreement and cases requiring the establishment of civil transactions or a challenge to civil transactions. He then discussed the application of his views to various documents relied upon by the Appellants.[19]

38. Professor Slim provided a supplemental report dated 22 October 2020. In that supplemental report he reviewed the first expert report dated 30 July 2020 submitted by the Respondents' expert, Ma&#xfffd;tre Mattar, which is referred to below. Key conclusions in his supplemental report were set out in an Executive Summary. Relevantly to the limitation period he concluded:

"9.8 The breaches by the auditors of their duties relating to the Bank's compliance with [AML] CTF Procedures do not fall within the category of "supervisory faults" (referred to in Article 178 LCC) because those duties correspond to tasks that are not entrusted with the auditors in the sole interest of a company/bank, but in the interests of the entire society, including the shareholders.

9.8 The breaches by the auditors of their duties of informing the shareholders do not fall within the category of "supervisory faults" (referred to in Article 178 LCC) because these duties are due to the shareholders and not to the company/bank.

9.9 Where the fault attributed to an auditor is not a "supervisory fault" the auditor's liability is governed by the general principles relating to time limitation period provided for in the LCOC.

9.10 Where the fault attributed to an auditor is an "supervisory fault", the auditor's liability is governed by Article 178 LCC.

9.11 As Article 178 LCC does not provide for a specific date whereby the specific time limitation period of five years it provides for begins to run, it can only be complemented by the general rules provided for in Article 348 LCOC.

9.12 [He did] not agree with Mr Mattar that Article 171 LCC can be taken into account to complement Article 178 LCC because Article 171 LCC is a specific provision that is only applicable to company's directors.

9.13 It is accepted under Lebanese law that where a specific provision needs to be complemented, such action can only be carried out on the basis of the general provisions of the LCOC.

9.14 Assuming arguendo that Article 171 LCC may be taken into account to interpret Article 178 LCC, such construction would lead to consider that the time limitation period referred to in Article 171 LCC only covers the faults relating to information that were brought to the attention of the shareholders during the general assembly.

9.15 Assuming *arguendo* that Article 171 LCC may be taken into account to interpret Article 178 LCC, Article 171 LCC cannot cover the specific duties [owed] by the auditors toward the Central Bank and the Bank Control Commission, including the auditors' duties relating to the bank's compliance with AML/CTF procedures."

*Ma*tre Mattar*

39. In his first report, Ma*tre Mattar, like Professor Slim, offered a general overview of the Lebanese legal and court system. This was in substantially similar terms. On the question of recoverability, his "key point" was that if damage was suffered by the company and all of the shareholders any claim must be brought by way of a "corporate" action in the name of the company. If damage were individual (i.e. distinct from the damage suffered by the company or by the general body of shareholders) affecting only one or some of the shareholders, the claim could be brought by individual shareholders.[20]

40. The Appellants' alleged loss affected all the shareholders of LCB and so could only be brought by the company and not by an individual claim.[21] In Ma*tre Mattar's opinion under Lebanese law and the interpretation given to it by scholars, the Appellants had no standing to file the DIFC proceedings against the Respondents to recover compensation for their alleged loss.[22]

41. As to limitation, Ma*tre Mattar observed that the legal provisions on limitation are scattered across several codes of Lebanese legislation. He characterised the LCC (which he referred to in his report as "C.Com") as a special law in contra distinction to the general civil law which governs civil matters. He stated:

"2.6 The principal rule on limitation for commercial matters is set out in Article 262 (paragraph 1) C.Com. which provides that the limitation period for commencing legal actions is 10 years from the date of the relevant act **unless a shorter term has been set by a specific law. Importantly Article 178 C.Com. Expressly provides for a shorter limitation period of 5 years for all civil liability actions against companies' auditors."**[23]

42. The specific five year prescription of Article 178 was said to override the general ten year prescription of Article 262 LCC. On that basis the limitation period for all civil liability claims relating to auditors was five years. The period was said to start to run on the date on which the general assembly of shareholders for which the auditors had submitted their report was held.[24]

43. The Appellants' claims were grounded on alleged faults/breaches committed by the Respondents while conducting their audit function/supervisory missions for LCB.[25] They were all, in Ma*tre Mattar's opinion, subject to the five year limitation period provided for under Article 178 LCC. That period started to run from the date when the general assembly of LCB's shareholders to which the audit reports were submitted was held, namely no later than 26 May 2010.[26]

44. On the interpretation of "supervisory" faults referred to in Article 178 LCC, these in Ma*tre Mattar's opinion referred to the auditors' overall mission which, in essence, was "supervisory". This view was supported by reference to the wording of Article 178 LCC, where the term "supervisory fault" was translated from the French *faute de surveillance* and linked up with the designation of auditors as *"Commissaires de Surveillance"*.[27] Ma*tre Mattar rejected the Appellants' contention that there was a distinction to be made between "supervisory" faults and "non-supervisory" faults.

45. The report then went on to deal with admissibility of documents under Lebanese law.

46. In his supplemental expert report on preliminary issues dated 22 October 2020, Ma*tre Mattar responded to Professor Slim's report of 29 July 2020. Like Professor Slim he set out an executive summary listing his key conclusions as follows:

(A) The civil liability of auditors in respect of all potential claims against them is subject to the provisions of Article 178 LCC, which

supersede the civil liability under the general provisions of the LCC.

(B) Article 178 LCC applies to all civil liability claims against auditors arising out of their supervisory faults and provides for a five year time limitation.

(C) Auditors supervisory faults encompass all faults committed while discharging their audit duties as provided for under the applicable laws and regulations.

His conclusions then went on to deal with the question of recoverability, i.e. the availability of an individual shareholder action as against a corporate claim. He concluded that the conditions for the Appellants to bring a claim on the basis of "individual" damage were not satisfied. As to limitation, he reiterated his previous conclusion that the Appellants' claim was time barred by the five year time limitation prescribed under Article 178 LCC.

47. Specifically, in relation to time limitations, Ma�tre Mattar reiterated his previously stated opinion that it is a fundamental principle of law, confirmed in Article 262 LCC. that a specific provision overrides a general provision. Accordingly, Article 178 LCC. applicable to the civil liability of auditors, being a specific provision, should override the general provisions on civil liability of Article 122 LCOC.[28]

48. Ma�tre Mattar also reiterated his position which had been explained at some length earlier in the supplemental report, that there was no room to distinguish "supervisory faults" from "non-supervisory faults".[29]

49. Ma�tre Mattar agreed with Professor Slim that the determination of the time limitation was a complicated and delicate issue due essentially to the content of old Lebanese laws related provisions and their interpretation. He also agreed with Professor Slim's acknowledgment that the majority of Lebanese scholars were of the opinion that a limitation period is of a substantive nature.[30]

50. As to the commencement of the limitation period, Ma�tre Mattar pointed out that the Appellants had not pleaded that they were not aware of any events or circumstances that gave rise to their right to bring a claim. Professor Slim's observations on that topic were said to be irrelevant.[31]

51. Acknowledging that Article 178 LCC did not specify the commencement of limitation periods, Ma�tre Mattar expressed the opinion that rules arising from the legal provisions governing the liability of directors should apply as well to the liability of auditors. He based this upon doctrine which he had consulted in the preparation of his reports.[32]

52. On that basis, under Article 178 like Article 171 LCC, the time limitation period ran from the date on which the general assembly of shareholders was held to which audit reports had been submitted.[33] The same time limitation period applied to the submission of AML reports to regulators which, alongside the preparation of the company's financial statements, was a requirement of law. The auditor's AML-related obligations were said to be part of their supervisory mission for any given year. On that basis the starting point of the limitation period applicable to them should be subject to the same as that applicable to the audit of the financial statements.[34] His position was said to be consistent with the opinion of a number of scholars to whom he referred in his report. He reiterated his general conclusions that all of the Appellants' claims related to supervisory faults on the part of the Respondents and as such were time barred under Lebanese law as they were all subject to the five year limitation period under Article 178 LCC.[35]

53. Ma�tre Mattar then went on to consider the question of admissibility of various documents as evidence of findings and/or matters stated in them under Lebanese law.

The Primary Judge's review of the expert evidence

54. The Appellants contended that the Primary Judge's determination on the limitation issue was "insufficiently reasoned and relied on a statutory construction which is improbable and contrary to established principle". So far as the sufficiency of His Honour's reasoning is concerned, it may be observed immediately that he undertook a detailed review of the evidence of both experts with reference to the materials to which they were referred. As to the sufficiency of his reasons, it was open to the Primary Judge to adopt the reasoning of the witness whom he preferred as part of his own reasoning. His reasons for the determination on the limitation question thus embraced the reasons he adopted together with his own additional observations about that reasoning.

The contentions before the Primary Judge

55. The Appellants contended before the Primary Judge that, as opined by Professor Slim, limitation was a matter of procedure and not substantive law. The question whether the Appellants' claim was statute barred was to be decided by reference to the common law of the DIFC, which directs that the applicable limitation periods would be those provided for in DIFC Laws. The Appellants also argued that the commencement of the applicable DIFC six-year limitation period was 28 July 2011, which was the date upon which the sale of LCB's business to SGBL was approved by the shareholders. The end date of the limitation period was therefore 28 July 2017. The Claim Form had been issued on 19 July 2016. On that basis it was contended that the claims were not statute barred.

56. Alternatively, the Appellants contended that if the limitation period were governed by Lebanese law, then the five-year period in Article 178 did not apply so far as it concerned the First Respondent's failures that stood to be characterised as "non-supervisory". Non-supervisory defaults included the failure to report suspicions of money laundering to the Central Bank of Lebanon under Lebanese Law 318 of 20 April 2001 and Regulations concerning money laundering and terrorist financing made under a document entitled "Basic Circular No 83" dated 18 March 2001. Article 178 was said not to be applicable because these defaults were not "supervisory" defaults. They were premised on a breach of duty to report to the Central Bank of Lebanon. That duty was imposed in the public interest as well as in the private interest of LCB. On that basis it was said the claim in respect of failing to report suspicions of money laundering and financing of terrorism was subject to the ten-year limitation period specified in Article 349 LCOC, starting from the date when the damage occurred or when the occurrence was known to the Appellants.

57. The claims for breaches of supervisory faults were said to be subject to the five-year limitation period specified in Article 178, the start date

being when the damage occurred or it was known by the Appellants as found at trial.

58. In the alternative, the Appellants argued before His Honour that:

(a) In respect of claims relating to supervisory issues addressed in the annual report presented by the First Respondent, the Article 178 five-year limitation period would apply commencing from the date when the annual report was presented to the general assembly.

(b) For claims for supervisory faults going to issues not identified in the annual report, the limitation period would not be the five years specified in Article 178, but the ten-year period in Article 349 LCC, starting from the date the damage occurred or when its occurrence was known to the Appellants.

59. The Respondents contended that the relevant limitation provisions from the LCC, LCOC and LCCP were of a substantive, not a procedural character. Further, they contended that pursuant to Article 8(2)(d) of the Law on the Application of Civil and Commercial Laws in the DIFC (DIFC Law No 3 of 2004) it was the laws of Lebanon on the limitation of actions that applied to these proceedings since those were the laws of the jurisdiction most closely related to the facts of and the persons concerned in the matter before the Court.

60. The Respondents also submitted that under Lebanese law the relevant limitation period was the five-year period referred to in Article 178 LCC and in accordance with the views of such scholars as Fabia and Safa, Tyan and Nassif, the period starts on the date the auditor's report was presented to the shareholders.

61. The Respondents rejected the Appellants' contention that the expression "supervisory fault" did not embrace defaults committed by an auditor where, for instance, the auditor of a bank failed to report suspicions of money laundering and/or the financing of terrorism contrary to Law No 318 of 20 April 2001. The Respondents contended that the mere fact that the role of the auditor of a bank had expanded considerably since the LCC was enacted was nothing to the point.

The Primary Judge's reasoning on the limitation point

62. The Primary Judge took the view that the relevant choice of law rule applicable in determining whether the *lex fori* or *lex causa* determining the limitation period was Article 8 of the Law on the Application of Civil and Commercial Laws in the DIFC (DIFC Law No 3 of 2004). On that basis the relevant law was Lebanese law. In the alternative, the old English choice of law rule yielded the same result.

63. His Honour was persuaded, for the reasons given by Ma&#xfffd;tre Mattar in his Supplemental Report, that the Lebanese limitation defence was substantive as it impacted not only on the right to file a legal action but also on the right asserted in that legal action. Its substantive nature prevailed over its procedural characteristics under Lebanese law.

64. His Honour was not persuaded by Professor Slim's reasoning that there were breaches of duty alleged against the Respondents which could be characterised as "non-supervisory" rather than "supervisory" for the purposes of Article 178. He preferred Ma&#xfffd;tre Mattar's expert evidence that "supervisory fault" encompassed any fault committed by auditors in the course of carrying out their audit function.

65. Article 178 did not specify when the five-year limitation period it prescribed began and the experts had disagreed on that point. His Honour referred to Ma&#xfffd;tre Mattar's opinion and doctrinal statements relied upon by him. In the event, in his judgment on the expert evidence put before the Court, particularly the view of Ma&#xfffd;tre Mattar, the scholarly writings which had been canvassed and a judgment of the Beirut Court of First Instance (Decision 108 of the Beirut Court of First Instance dated 15 November 2009), under Lebanese law the start date of the five-year limitation period in Article 178 was the date on which the auditor's report in respect of the audit complained of, was presented to the general assembly.

66. According to the agreed facts, the Respondents' audit report in respect of the last audit about which the Appellants' complained, was presented to the general assembly of LCB on 26 May 2010. The limitation period for the claims in respect of the last audit expired on 26 May 2015. The Claim Form itself was not issued until 19 July 2016. It followed, in His Honour's opinion, that the Appellants' claims were all statute barred and the preliminary issue relating to limitations was answered accordingly.

Appellate treatment of the foreign law question

67. The appellate approach to the review of the foreign law question was much debated.

68. The Appellants contended that the Court of Appeal is in as good a position as the Primary Judge to determine the applicable Lebanese law. It is entitled to review the evidence before the Primary Judge and come to its own conclusion in relation to the questions of foreign law which he determined. Two bases were offered for this substitutive approach.

69. First, it was submitted that the DIFC Courts adopt what was designated as the "international approach" to matters of foreign law. That is to say the starting point for the DIFC Court is that foreign law is law and so an appeal from a point of foreign law is an appeal on a point of law. The Appellants cited Article 50(c) of the DIFC Courts Law.

70. Secondly, even if treated as a matter of fact under what was called the "English approach", foreign law is a matter of fact of a peculiar kind and the appellate court is in as good a position as the court at first instance to determine it.

71. If treated as just another finding of fact, then the question for this Court would be whether the challenged finding was plainly wrong - *Al Khorafi and Ors v Bank Sarasin-Alpen (ME) Limited* [2015] DIFC CA 003, 3 March 2016 at [169].

72. In support of the so-called "international approach" to foreign law questions, the Appellants cited Article 50(c) of the DIFC Court Law which, it was said, specifically allows the Court to apply such rules of evidence as it may consider appropriate in the circumstances. The application of that provision to the determination of a question of foreign law would have to be preceded by determination of the question whether foreign law is a

matter of law under the international approach or fact (albeit a particular kind of fact) under the so-called English approach.

73. The Appellants referred to Fidel v (1) Felecia (2) Faraz [2015] DIFC CA 002, a decision of this Court. That case concerned an appeal against a decision of the DIFC Court of First Instance dismissing an application to adduce expert evidence on the public policy of the United Arab Emirates with respect to a challenge to the jurisdiction of the Dubai International Financial Centre Courts to entertain a claim for recognition and enforcement of two arbitral awards. The Applicant in that case was the unsuccessful party in the arbitration. He sought permission to rely upon expert evidence concerning UAE Law relating to public policy. The CFI Judge refused permission to adduce the expert evidence, as he was a judge trained and qualified in UAE civil law. It was argued on the appeal that the Primary Judge had erred in refusing to permit formal evidence because non-DIFC UAE law was "foreign" law in the DIFC Courts to be proven as a fact by relevant expert evidence. The Court relied upon Article 50(c) of the DIFC Courts Law as conferring upon DIFC Courts the discretion to apply rules of evidence they consider appropriate in the circumstances.[36] There were no prescribed statutory rules of evidence as to how DIFC Courts should treat matters of foreign or non-DIFC UAE law.[37] The judgment of the Court was delivered by Chief Justice Michael Hwang, with whom Justice Sir Richard Field and H.E. Justice Omar Al Muhairi agreed.

74. The Court held that the DIFC Courts should treat submissions on non-DIFC UAE law as part of legal submissions, as is usually done in international arbitration with respect to issues of any national law.[38]

75. The Court also referred to the "English approach" under which foreign law was to be treated as a fact, pleaded and proven by the submission of expert evidence.[39] The Court accepted that, on this approach, foreign law was not be treated "simply as any other fact" but as fact of a peculiar kind.[40]

76. The fact doctrine did not readily apply in the DIFC. The DIFC Courts are not restricted to the application of English common law or even DIFC Law. With regard to substantive law, the DIFC Courts are, pursuant to Article 8(2) of the DIFC LACCL, allowed to apply laws other than DIFC Law, including: the laws of any jurisdiction expressly chosen by any DIFC Law; the laws of a jurisdiction agreed between all relevant parties concerned in the matter; the laws of any jurisdiction which appeared to the Court to be most closely related to the facts of, and the persons concerned in, the matter; and the laws of England and Wales.

77. As the Court observed the composition of the DIFC Courts differs radically from that of English courts. It comprises judges having expertise in the laws of various jurisdictions. If expert evidence of non-DIFC UAE law were to be required in every case because it was a "foreign" or "non-DIFC" law, expert evidence would a fortiori be required of all other foreign laws despite the individual legal expertise of the DIFC Judge hearing the case.[41]

78. The Court then discussed the "international approach", noting that in international arbitrations foreign law is treated as law. Written expert opinions on disputed questions of foreign law are submitted with Memorials. Chief Justice Hwang said:

> "I believe that there are two reasons why the international approach (and not the English or Taaleem approach) should be applied to questions of non-DIFC UAE law before the DIFC Courts, pursuant to the discretion conferred under Art 50(c) of the DIFC Courts Law. First, unlike the rigid approach, the International Approach enables the DIFC Courts to take on the collective wisdom of its judges on issues of non-DIFC UAE law, whether it be derived from qualifications, practice or judicial experience. Second, by having Counsel make legal submissions on the non-DIFC UAE law in question, appending relevant expert opinions (if any), the DIFC Courts will not meet any of the practical concerns with the *Taaleem.* [sic] Although legal submissions cannot be tested by cross-examination as in the case of expert evidence, legal submissions may be criticised by opposing Counsel from the bar."[42]

The Chief Justice went on to say:

> "Accordingly, given the jurisdiction that this Court has to adopt such rules of evidence as it sees fit, including the rules on the receipt of opinions of legal experts, I take the view that, in all cases where legal experts are offering expert reports on issues of any law other than DIFC law (not merely non-DIFC UAE law), the practice I have described above should be the starting point for deciding on the procedure to be adopted for the presentation of expert legal reports. The presumptive rule should be that legal experts are to write briefs with their analysis of the relevant legal principles of the applicable or relevant law, and to make further submissions applying the legal principles to the facts as alleged by the respective parties, or to argue for a particular decision to be delivered by the court. I should make it clear that this is only a presumptive rule, and the trial judge should always have the discretion to proceed in the manner in which he considers most beneficial for his education - in a system of law with which he is not confidently familiar, even if this results in adopting either of the other approaches described above (or possibly even some other approach)".[43]

79. The first point to be made about that decision is that the Court was dealing with a question of UAE law. The "international approach" was plainly apposite. The second point to be made is that the case did not require for its decision the enunciation of an approach to be mandated on all questions of foreign law coming before DIFC Courts. And it expressly disclaimed that proposition. To repeat what the Chief Justice of the day said:

> ". the trial judge should always have the discretion to proceed in the manner in which he considers most beneficial for his education - in a system of law with which he is not confidently familiar, even if this results in adopting either of the other approaches described above (or possibly even some other approach)."[44]

80. In their skeleton argument, the Respondents pointed out that the issues of Lebanese law before the Primary Judge were dealt with as though they were issues of fact. Moreover, they also pointed out that they were not represented by counsel qualified to make legal submissions to the Primary Judge on Lebanese law. The Primary Judge had proceeded on the basis of the "English approach". At a case management conference held on 26 November 2019, leading counsel for the Appellants had submitted that the Primary Judge should not determine the preliminary issue "without hearing some evidence about the parameters of Lebanese law".[45]

81. The Respondents argued that the Primary Judge having treated Lebanese law, a system with which he was not familiar, as a matter of fact, this Court should treat the issue as a matter of fact. Any appeal should be limited to a review of the Primary Judge's decision and not a rehearing.

82. The taxonomy of fact and law can be blurred at the boundaries. Whether a question is one of fact or law may be a matter of argument.

83. To the extent that foreign law is treated as a matter of fact, it has been described as "a question of fact of a peculiar kind".[46] This rather throws up the difficulty of attempts to shoehorn foreign law questions into clear cut categories of fact or law.

84. Putting the fact law taxonomy to one side, what is important is the approach which a primary judge properly takes to the determination of the question. That approach may vary according to the circumstances - as was expressly contemplated by this Court in *Fidel.* Where the primary judge hears expert witnesses examined, cross-examined and re-examined with reference, as in this case, to a constellation of writings and decisions, it is fair to say that the process adopted is analogous to fact finding even if a peculiar kind of fact finding. And in that case the primary judge has the advantage over the appellate court of exposure over time to the minutiae of the evidence. He is then not in a position dissimilar to that of a judge trying any complex question of fact at first instance. Where the primary judge has simply heard argument, supplemented by reference to juristic writings and decisions, then the nature of the determination may be more analogous to the determination of a question of law.

85. The caution which a Court of Appeal should properly exercise before intervening in cases in which the primary judge has heard evidence, as in this case, is simply a recognition of his or her practical advantage. The question is not so much a question of classification of the issue as one of fact or law, as a functional question - how was the issue of foreign law heard at first instance and to what extent should the Court of Appeal recognise the primary judge's practical advantage where that can be seen to exist? In saying that, it is important not to overstate that practical advantage. If the Court of Appeal determines that, on its face, the finding of the primary judge is wrong having regard to the evidence and other materials before him, then the Court of Appeal should not hesitate to correct the error. But if the finding of the primary judge in such a case is open, albeit one on which reasonable minds might differ, then the Court of Appeal should be slow to interfere.

86. The Respondents cited an observation from Dicey, Morris & Collins, *The Conflict of Laws* (16th ed and 5th Supplement, 2018) that subject to certain exceptions:

> "Generally an appellate court will not have had [.] the opportunity to put questions to the expert witnesses of foreign law will be slow to substitute its opinion of that of the trial judge."[47]

87. The above proposition was approved by the Court of Appeal in *Dexia Crediop Spa v Comune Di Prato* [2017] 1 CLC 969 and see also *R v B* [2018] EWCA Crim 73 at [45].

88. The approach to be taken by this Court must be pragmatic, rather than based on nice distinctions between fact and law. As the Respondents contended, where the foreign law uses concepts, principles and language similar to that of the jurisdiction determining the question, the primary judge and the appellate judge may resort to his or her own legal knowledge to review the primary decision. Whereas in this case, Lebanese law, as the Respondents submitted, is not familiar to the Primary Judge or to this Court, the review must necessarily be light touch. It is true as mentioned in *Fidel* that the DIFC Courts comprise judges from other national jurisdictions in addition to Dubai. Presently they comprise judges from Malaysia (the Chief Justice), the United Kingdom and Australia. However, where the foreign law question coming before the Court concerns a legal system and national law with which the primary judge is not familiar, as in the present case, then it is entirely appropriate that that judge take the approach that the Primary Judge did in this case.

89. The Appellants cited *Byers v Saudi National Bank* [2022] EWCA Civ 43, for the proposition, derived from Parkash, that a foreign law finding based on expert evidence is a finding of fact of a peculiar kind such that the appellate court should be more willing to interfere. The Appellants also referred to *Cassini SAS v Emerald Pasture Designated Activity Company & Ors* [2022] EWCA Civ 102 for the following passage from the judgment of Lord Justice Snowden at [47]:

> "In that regard, although findings as to foreign law are treated as findings of fact by the English courts, it was common ground between the parties that they are different from other findings of fact and are not subject to the same restrictions on scrutiny by an appellate court. Although an appellate court will bear in mind that the trial judge had the advantage of seeing and hearing the expert witnesses, and of clarifying their evidence directly with them, the appellate court is entitled to consider the expert evidence afresh and form its own view of the cogency of the rival contentions in determining whether the trial judge came to the correct conclusion: see Dalmia Dairy Industries Ltd v National Bank of Pakistan [1978] 2 Lloyd's Rep 223 at 286 per Megaw LJ. That is certainly so where, as here, the appellate court has been provided with the reports and a full transcript of the evidence and cross examination of the experts."

90. The Appellants made the point that the scope of Article 178 was "tabula rasa". There was limited Lebanese law or scholarly writing on the issue to guide the Judge on the correct position. On that basis the Judge, assisted by the experts, was said by the Appellants to be entitled to and required to apply his judgment on how a tribunal applying Lebanese substantive law would proceed. The Appellants' argued that Professor Slim's careful analysis of the approach the Lebanese courts were likely to take was of greater assistance when the appellate court looks at the matter afresh, as it is invited to do.

Conclusion on the limitation appeal

91. This Court acknowledges that the Primary Judge had the advantage of close exposure to the expert evidence. As appears from his judgment, he gave thorough consideration to it. He preferred the reasoning of Ma&#xfffd;tre Mattar on the application of Article 178 and the coverage of the term "supervisory" in relation to breaches covered by Article 178. He adopted, as he was entitled to do, the argumentative reasoning offered by Ma&#xfffd;tre Mattar. That adoption necessarily formed part of the content of his reasons for decision on the limitation question. This Court, having reviewed the evidence of both Professor Slim and Ma&#xfffd;tre Mattar, accepts that Ma&#xfffd;tre Mattar gave a coherent and persuasive account of what he as a legal practitioner of many years standing in Lebanon, considered to be the better position under Lebanese law. As His Honour observed, he demonstrated a close familiarity with the areas of Lebanese law in issue.

92. In our opinion, His Honour was entitled to accept and apply Ma&#xfffd;tre Mattar's reasoning on the question of Lebanese law and cannot be said to have committed an appealable error in doing so, nor in the way in which he reasoned to that result.

93. As this case illustrates, questions of foreign law which have not been authoritatively determined in their home jurisdiction ordinarily may only be determined as a matter of evaluation and assessment. The foreign court when it comes to consider such a question might be persuaded by different arguments to a different result. This perhaps highlights the utility of arrangements between courts of different jurisdictions whereby a question of foreign law can be referred by one court for determination by a court in the jurisdiction whose law is in issue. However, that mechanism was not available in this case. The Primary Judge took a thorough and, in our view, correct approach.

94. The appeal is dismissed with costs to be assessed if not agreed.

Disposition of the Respondents' Contentions

95. Although His Honour's decision on the limitation point disposed of the Appellants' case against the Respondents, the Primary Judge had considered the question of the recoverability of the loss claimed by the Appellants. He had identified what he called three rules of Lebanese law:

> (1) A shareholder cannot bring an individual claim for the diminution in the value of his or her shareholding where this is causally connected to loss suffered by the company due to management default.
>
> (2) Nor can a shareholder bring an individual claim of that kind where this is causally connected to loss suffered by the company due to audited fault.
>
> (3) Where all shareholders are damaged across the board by a management default, the claim for management default against directors must be brought as a corporate claim, ut *universi* (i.e. by the company itself) or by a derivative claim, ut *singuli* (i.e. by the shareholders in the name of the company), rather than by the shareholders in their personal capacity.

His Honour had held that these rules did not apply "where there is no risk to the defendants of double recovery". Double recovery would occur if both the company and the shareholders sued to recover their losses. His Honour had held that any risk of double recovery could be addressed by the Lebanese courts under procedures available to them whereby a Lebanese judge could subtract or add compensation depending on the situation. He held that there was no risk of double compensation and that the Appellants' pleaded loss claim was therefore sustainable.

96. The Respondents sought to uphold the dismissal of the Appellants' claim on the basis that the pleaded loss was not recoverable and that His Honour had erred in finding to the contrary. The question was fully argued before this Court. However, having regard to the Respondents' success on the limitation point, the issue of recoverability is moot and need not be dealt with.

97. So far as the costs on the recoverability issue are concerned, there should be no order as to costs.