Claim No: CFI-026-2009

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

BETWEEN

(1) RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) AMRAH ALI ABDEL LATIF AL HAMAD

(3) ALIA MOHAMED SULAIMAN AL RIFAI

Claimants

and

(1) BANK SARASIN-ALPEN (ME) LIMITED

(2) BANK SARASIN & CO. LTD

Defendants

ORDER OF JUSTICE SIR RICHARD FIELD

UPON reviewing the Claimants' Application Notice CA-003-2015/1 dated 15 April 2015 for an extension of time in which to file their application for reconsideration at an oral hearing of the decision of Justice Roger Giles dated 24 February 2015, refusing permission to appeal a ruling of the Deputy Chief Justice Sir John Chadwick (the "DCJ") dated 13 January 2015 and for relief against sanctions (if any)

AND UPON reviewing the Claimants' Application Notice CFI-026-2009/28 dated 29 March 2015 for reconsideration of the said decision of Justice Roger Giles

AND UPON reviewing the Claimants' Appeal Notice and supporting documents dated 27 January 2015 seeking permission to appeal against the said ruling of the DCJ

AND UPON reviewing the Claimants' Skeleton Argument in support of Appeal dated 10 February 2015, and their Skeleton Argument in support of the said application for reconsideration of the said decision of Justice Roger Giles dated 3 May 2015

AND UPON reading the relevant material in the case file

AND UPON hearing Counsel for the Claimants

AND IN ACCORDANCE WITH Part 44 of the Rules of the DIFC Courts ("RDC")

IT IS HEREBY ORDERED THAT:

1. The time for filing the application for reconsideration of the said decision of Justice Roger Giles dated 24 February 2015 is retroactively extended to 29 March 2015 for the reasons attached to this Order and the Claimants are granted relief against sanctions (if any) for breach of RDC 44.17.

2. The Claimants shall pay to the Defendants their costs in respect of the Fifth Witness Statement of Rita Catherine Jaballah.

3. Permission to appeal is refused, as the requirements in RDC 44.8 have not been met.

4. In accordance with RDC 44.14, the reasons for this refusal are set out in the Schedule of Reasons attached to this Order.

SCHEDULE OF REASONS

1. The Claimants have applied for reconsideration at an oral hearing of the decision of Justice Roger Giles dated 24 February 2015 refusing permission to appeal a ruling of the DCJ given on 13 January 2015 that the Fourth Witness Statement of Mr Rafed Al Khorafi dated 20 November 2014 ("RAK 4") could not be adduced in evidence at a subsequent quantum hearing.

2. The Claimants have also applied for an extension of time for the filing of their reconsideration application and for relief against sanctions for the breach of RDC 44.17 (if any).

3. There was a hearing on 4 May 2015 at which the Claimants were represented by Mr Roger Bowden.

4. The requested extension of time for the filing of the reconsideration application and for relief against sanction is granted but permission to appeal is refused, for the reasons given below.

THE EXTENSION OF TIME AND RELIEF AGAINST SANCTIONS APPLICATION

5.On 2 March 2015 the Claimants filed an Appeal Notice against the decision of Justice Roger Giles dated 24 February 2015 when they ought to have filed an application for reconsideration of that decision at an oral hearing. Realising the error, the Claimants filed a reconsideration application on 29 March 2015. RDC 44.17 requires such an application to be filed within 7 days of the decision refusing permission to appeal. The 29 March 2015 application was accordingly 27 days out of time. These matters were brought to the attention of the Court in the Fifth Witness Statement of Rita Catherine Jaballah filed on behalf of the Defendants.

6. I am satisfied that the late filing of the reconsideration application has caused no material prejudice to the Defendants or to the Court and that justice requires that the Court extend the time for filing the reconsideration application to 29 March 2015 on terms that the Claimants pay the Defendants the costs incurred in the production of Ms Jaballah's Fifth Witness Statement. I am also of the view that the Claimants should have relief against sanctions (if any) for having breached RDC 44.17.

INTRODUCTION TO THE RECONSIDERATION APPLICATION

7.The First Claimant ("Mr Al Khorafi") and his mother and wife are the Claimants in proceedings against Bank Sarasin-Alpen (ME) Ltd (the "First Defendant") and Bank Sarasin & Co Ltd (the "Second Defendant") in which they contend that each of the Defendants breached the Financial Services Prohibition within the Regulatory Law in the course of selling the Claimants certain investments (the "Sarasin Investments") purchased with funds borrowed for this purpose from Al Ahli Bank of Kuwait K.S.C.P. ("ABK"). Some of these investments were leveraged with financing provided by the Second Defendant. Judgment in the action was handed down by the DCJ on 21 August 2014. He found that both of the Defendants had each acted in breach of the Financial Services Prohibition within the meaning of Article 41 of the Regulatory Law and that the First Defendant had also acted in breach of the Conduct of Business ("COB") Rule 6.2.1.

8. The DCJ further held that the First Defendant was liable to pay compensation under Article 65(2)(b) of the DIFC Regulatory Law and that the Second Defendant was liable to pay compensation under Article 94 of the Regulatory Law. In paragraphs 428 and 429 of his judgment, the DCJ characterised the losses for which the Claimants sought compensation as follows:

> "428. .
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> ▯▯▯

RICHARD HILL: As I understand it, my Lord, yes. I do not have the detail of this so I cannot say too much about it, because I personally just do not know the detail, but that, as I understand it, is what has happened. We would like to submit that that is something that could be included. I accept that my learned friends might want to argue about that, but I would submit that the time to argue about it is when we put in -- we have seen the evidence, as it were. This is not raising new claims. This is a loss which is an ABK loss, which has happened since the trial as I understand it. (p.43)

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JUSTICE SIR JOHN CHADWICK: Well, you will have the opportunity. If they put in a witness statement with material which says -- I mean, I do not know how many properties we are talking about. If they said, "Well, half a dozen of our properties have been the subject of a forced sale, and the result of that is that we have lost 20 per cent, or 30 per cent, of the value of those properties because they were the subject of a forced sale", they would have to establish that the properties were sold by the bank, effectively by ABK, and they will have to establish what the loss on market value was.

MICHAEL BLACK: Well, they would also have to establish a causal link to what has been found against the Defendants.

JUSTICE SIR JOHN CHADWICK: Well, they will have to show that the forced sales were a result of the investments which they made with your bank.

MICHAEL BLACK: Yes, which could be quite a complex matter, which is the point that I am just making, which may require significant disclosure. (p.99)

JUSTICE SIR JOHN CHADWICK: They will have to meet that problem when it arises, but I am not shutting them out from trying to.

MICHAEL BLACK: My Lord, I understand.

JUSTICE SIR JOHN CHADWICK: On post-trial events.. (p.100)"

10. Paragraphs 3 and 5 of the Order made by DCJ Chadwick following the hearing on 27 October 2014 (the "28 October Order") respectively dealt with the amount of the liability of the First and Second Defendants declared in paragraphs 1, 2 and 4:

"3. The amount of the liability under paragraphs 1 and 2 above shall be:

(a) in respect of the losses on the sale of the Claimants investments with the Second Defendant

(i) to the First Claimant, US$ 1,263,549 together with interest to be assessed

(ii) to the Second Claimant, US$ 8,540,000 together with interest to be assessed

(iii) to the Third Claimant, US$ 641,500 together with interest to be assessed

(b) further amounts to be assessed, including amounts in respect of

(i) other fees and interest charged by the Second Defendant and

(ii) losses arising out of the Claimants' relationship with Al Ahli Bank Kuwait ("ABK").

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5. The amount of the liability at paragraph 4 above shall be:

(a) in respect of the losses on the sale of the Claimants investments with the Second Defendant,

(i) to the First Claimant, US$ 1,263,549 together with interest to be assessed

(ii) to the Second Claimant, US$ 8,540,000 together with interest to be assessed

(iii) to the Third Claimant, US$ 641,500 together with interest to be assessed

(b) further amounts to be assessed, including amounts in respect of

(i) other fees and interest charged by the Second Defendant and

(ii) losses arising out of the Claimants' relationship with Al Ahli Bank Kuwait."

11. Paragraphs 7 and 8 of the 28 October Order provided:

"7. All other claims for interest and damages including the quantification of the interest referred to at paragraphs 3(a)(1)-(3) and 5 (a)(1) - (3) above and the quantification of the categories of damage referred to in paragraphs 3(b) and 5(b) above shall, together with any claims including inter alia claims (if any) under Article 40(2) of the Law of Damages and Remedies (Law No. 7 of 2005), be adjourned to be determined at a one day hearing to be held on the first available date after 29 January 2015.

8. The Claimants shall file and serve any evidence in support of their claims on quantum for the quantum determination ordered under

paragraph 7 by no later than **4pm on 20 November 2014**. Subject to further order of the Court, for which the Claimants may apply in writing with a draft of the further evidence on which they seek to rely, such evidence shall be limited to evidence of events which have occurred since 10 July 2013 (being the last day of the trial in these proceedings)."

12. This limitation imposed in paragraph 8 was explained in the DCJ's reasons -

> "The second matter which requires explanation is the restriction on further evidence that I have included under paragraph 8 of my order. There is force in the Defendants' submission that this is not a case in which the Court was asked to order, or did order, a split trial. The evidence on which the Claimants are entitled to rely for the purpose of assessing the quantum of their claims is the evidence that was before the Court at the trial, subject to the possibility that the quantification of those claims maybe affected by post-trial events. It is for that reason that I think it right to restrict the evidence which the Claimants may adduce in support of their contentions on the Quantum Determination to post-trial matters, but I leave open the possibility that there may be some further matters which justice requires the Court to consider; and if there is, the Claimants may apply in writing to rely on evidence on those matters. But such application is to be made in advance of the Quantum Determination; and, in order to determine such application (if any), the Court will require to see, in the draft at least, the further evidence [on] which the Claimants seeks [sic] to rely."

13. On 20 November 2014, the Claimants filed a First Witness Statement of Hamdan Al Shamsi and RAK 4. In doing so the Claimants proceeded on the basis that they were acting in conformity with the 28 October Order and did not need the leave of the Court because this evidence went to post-trial losses. On the same day, the Claimants applied for permission to adduce a Second Witness Statement of Hamdan Al-Shamsi, supported by a Fourth Witness Statement of Gayle Hanlon. Permission was sought because this evidence went to pre-trial losses - additional interest due to ABK and the costs incurred in re-financing the ABK loan taken out to finance the purchase of the investments.

14. The evidence deposed to in RAK 4 dealt with what may be called "the RAFCO losses" and can be summarized as follows. In 2002 Mr Al Khorafi purchased a piece of land in Kuwait City for development, the title to which was transferred to an SPV, RAFCO International Real Estate Co ("RAFCO") of which Mr Al Khorafi is the 100% beneficial owner. On 1 November 2007, RAFCO, Mr Al Khorafi and ABK entered into a loan agreement under which ABK agreed to provide funds to enable the construction of a high rise commercial building on the land. Mr Khorafi personally guaranteed the loan. When interest payments on the loan to RAFCO became due in July 2008, Mr Al Khorafi was unable to meet the payments due. He had expected to be able to make the payments using coupon payments paid on the Sarasin investments but no such payments had been forthcoming. RAFCO had not commenced trading and had no income to service its loan. On 10 January 2013, the Kuwaiti Courts ordered the land to be sold, which it was in June 2014 at an undervalue and Mr Al Khorafi as guarantor was ordered to pay the shortfall outstanding on the RAFCO loan after the proceeds of sale had been put to the repayment of the loan. Accordingly, Mr Al Khorafi wished to claim the difference between the true value of the land and the price for which it was sold and for the shortfall sum for which he was liable under the RAFCO guarantee.

15. On 16 December 2014, the Defendants applied for an order excluding all the evidence filed by the Claimants on 20 November 2014 and the evidence for which they sought permission to call.

16. The Claimants' and Defendants' respective applications came before the DCJ on 12 January 2015. In respect of RAK 4, as the transcript reveals, Mr Brindle QC for the First Defendant submitted that RAK 4 should not be admitted because: (i) all the events related in that witness statement save for the actual sale occurred before the trial and were well known to Mr Al Khorafi;[1] (ii) the RAFCO losses were not pleaded[2] and not within the scope of the 28 October Order;[3] and (iii) the claim for the RAFCO losses would significantly lengthen and complicate the quantum hearing.[4]

17. Mr Hill QC for the Claimants submitted that the RAFCO losses were not a pre-trial event[5]. As the following excerpts from the transcript show, he also submitted that the RAFCO losses were within paragraphs 3(b) and 5(b) of the 28 October Order and the Claimants' pleading:

> "It is then said by my learned friend Mr Brindle that this will lead to an unjustified extension of the process. But, it is not unjustified because this is a head of loss that falls within the order and was contemplated at the hearing in October and it arose following the trial.
>
> There is then the pleading point taken again which, in my submission, is a bad one. Of course it is open to my learned friends to take these points at the quantum hearing but it is certainly not a strike out point. This, again, was a loss within the order and it is within our pleading which pleads, in numerous cases, the fact that we put on the damages on the face of a nil transaction case. And what is more, this particular claim was expressly contemplated in October. Directions were made and there was no provision for further -- for further pleading process. (pp. 136-137)
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> The suggestion (is) made that paragraph 12 of Mr Al Shamsi's evidence insofar as it relates to RAFCO (sic).is outside the terms of my Lord's order and the opposite is the case. This is part of a losses associated with ABK Lending that is expressing within the terms of the order at 3(b) and 5(b). This is a loss that was expressly discussed and contemplated at the hearing that we had. I can give my Lord the reference. No need to take it up now but it is in tab 48 in bundle 14 at page 4244 where I raised the point that there were these losses on foreclosure and it is in that light that the order was made in the terms that it was. And I really do not understand the suggestion that we are now in some way outside the terms of the order when we bring evidence on the very point that we said we were bringing evidence on. (pp. 146-147)."

18. It is also to be noted that in the course of Mr Brindle's opening, the DCJ stated: *"I think I have to decide, do I not, whether this is properly to be regarded as a claim which arises out of the relationship with ABK?"*

19. In his ruling on both sides' applications, the DCJ held that the RAFCO losses were not within the losses specified in paragraphs 3(b)(ii) and 5(b)(ii) of the 28 October Order. His reasons for so holding are contained in paragraphs 15 - 17 of his ruling:

> "15. In those circumstances, the question for determination on this application is whether Mr Al Khorafi's claim to losses which he suffered by reason of the forced sale under the order of the Kuwaiti Court of the plot on which the Tower was to be built is within the

scope of paragraphs 3(b)(ii) and 5(b)(ii) of the Order of 28 October 2014. That is to say, whether those losses are "*losses arising out of the Claimants' relationship with ABK*".

16. In my view, the answer to that question is "No". In the context in which the Order of 28 October 2014 was made, including in particular the categories of loss which the Claimants had sought to recover as described in paragraph 428 of my judgment of 21 August 2014, the "*Claimants' relationship with ABK*" is properly to be understood as the relationship between ABK and the Claimants - in particular the First and Second Claimants - as borrowers from ABK in relation to the funding of their purchase of investments from the Second Defendant. The description "*Claimants' relationship with ABK*" cannot, in my view, be understood to include the relationship between Mr Al Khorafi as guarantor of the RAFCO loan and ABK as lender to RAFCO under the agreement of 1 November 2007; nor to include the relationship between Mr Al Khorafi as beneficial owner of RAFCO as borrower under that agreement and owner of the plot charged to secure that borrowing and ABK as lender.

17. In those circumstances, RAK 4 contains no evidence relevant to the claims which are to be quantified at the Quantum Determination. For that reason I exclude reliance on RAK 4 at the hearing of the Quantum Determination."

THE ROLE AND JURISDICTION OF THE COURT ON THE RECONSIDERATION APPLICATION

ROLE

20.	The role of the Court on this application to reconsider the decision of Justice Giles is to conduct a *de novo* hearing of the Claimants' application for permission to appeal the decision of DCJ Chadwick that RAK 4 could not be adduced at the quantum hearing.

JURISDICTION

21.	RDC 44.8 provides:

"Permission to appeal may be given only where:

(1)the Court considers that appeal would have a real prospect of success; or

(2)	there is some other compelling reason why the appeal should be heard."

22. The words "real prospect of success" also appear in RDC 24.1 which empowers the Court to give immediate judgment if the Claimant or the Defendant has no real prospect of succeeding on their claim or defence as the case maybe. RDC 44.8 and 24.1 are modelled on the equivalent rules in the English CPR, each of which deploys the words "real prospect of success". In *Swain v Hillman* [2001] 1 All ER 91, a decision on CPR 24 .2, Lord Woolf MR held that the words "real prospect of success" meant a "realistic" as opposed to a "fanciful" prospect of success.

23. It is also clear that where the issue in question is a short point of construction and the necessary background evidence is available and is relatively brief, it is open to the Court to decide on an application for permission to appeal whether the construction advanced by the applicant is doomed to fail on appeal if this conclusion can be reached without prolonged consideration and consistently with the interlocutory nature of the application.

THE CLAIMANTS' GROUNDS OF APPEAL

GROUND 1

24.	The Claimants contend that the DCJ erred in law by construing the words in paragraph 428 of the Judgment and / or paragraphs 3(b)(ii) and 5(b)(ii) of the 28 October Order "*the Claimants' relationship with ABK*" as being limited to "*the relationship between ABK and the Claimants (...) as borrowers from ABK in relation to the funding of their purchase of investments from the Second Defendant*". They submit that the DCJ should have concluded that the losses falling within these words, properly construed, include the full extent of the Claimants' relationship(s) with ABK, not limited in the artificially restrictive way the Learned Judge found only to the relationship with ABK in relation to the specific accounts used to finance the Sarasin Investments made with the Defendants.

25. The Claimants further contend that the DCJ should not in any event have excluded the Claimants' claim as he did - effectively as a strike out, without going on to address it at the quantum hearing so as to reach a conclusion on whether there were recoverable losses which had been proved.

GROUND 2

26.	In support of the construction argument raised in Ground 1, relying on those parts of the transcript set out in paragraph 6 above, the Claimants plead as relevant context what the DCJ was told about a claim for foreclosure losses at the hearing on 27 October 2014.

GROUND 3

27.	The Claimants contend that the DCJ misdirected himself by deciding that "*RAK 4 contains no evidence relevant to the claims which are to be quantified at the Quantum Determination*" Hearing. They submit that he should have found that: (a) The RAFCO losses were relevant losses of the Claimants which had yet to be determined; (b) in accordance with DIFC law and the judgment, the Claimants were entitled to compensation for any loss or damage caused to them as a result of the Defendants' misconduct; (c) that as per the discussion between leading Counsel for the Claimants and the DCJ at the hearing on 27 October 2014, such loss or damage includes any loss incurred by the Claimants which was caused by the mis-selling of investments to the Claimants by the Defendants (i.e. that would not have occurred had the Claimants not entered into the relevant investments with the Defendants); and (d) that therefore the First Claimant should be given the opportunity to prove how the loss caused by virtue of his relationship with ABK as set out in RAK 4, which evidence falls within the description of paragraph 3(b)(ii) and paragraph 5(b)(ii) of the Order, was related to and/or caused by the Defendants' mis-selling of investments to him.

GROUND 4

28.&#65533;Under this ground, the Claimants contended that the DCJ decided to exclude RAK 4 on a basis which had not properly been argued before him at the hearing on 12 January 2015, with the consequence that the Claimants were deprived of the opportunity to make submissions in relation to the basis on which the DCJ decided the question.

29. Very sensibly, this ground of appeal was abandoned at the hearing in light of what is recorded in the transcript of the 12 January 2015 hearing (see paragraphs 13 - 15 above) and I need say no more about it.

DISCUSSION AND DECISION

30.&#65533;Grounds 1, 2 and 3 overlap to a significant degree. The Claimants' principal contention in these grounds is that the DCJ was wrong to decide that the RAFCO losses were not losses "arising out of the Claimants' relationship with ABK" within paragraphs 3 (b) (2) and 5 (b) (2) of the 28 October Order.

31. At heart, this is an issue of construction and the question is: when construed against the background of the 28 October Order as a whole, including in particular, paragraphs 7 and 8; the pleadings; the judgment of 21 August 2013, especially paragraphs 428 and 429; and the transcripts of the hearings on 27 October 2014 and 12 January 2015, do the words "arising out of the Claimants' relationship with ABK" include the RAFCO losses, those being losses suffered by Mr Al Khorafi alone and which arose not out of the borrowings taken out by the Claimants for the purpose of purchasing the Sarasin investments but borrowings incurred by RAFCO and guaranteed by Mr Al Khorafi for a construction project in Kuwait City?

32. The Claimants contend that the words "*arising out of the Claimants' relationship with ABK*" include the full extent of the Claimants' relationship(s) with ABK and that the RAFCO losses arise out of that relationship. They pray in aid what their Counsel told the DCJ about the foreclosure losses and the judge's response thereto at the hearing on 27 October 2014.

33. In my judgment, it can be readily concluded that the Claimants' construction arguments would be bound to fail on appeal. The RAFCO losses are radically different from losses arising out of the ABK lending to fund the purchase of the Sarasin investments and an objective observer with knowledge of the relevant background, particularly paragraphs 428 and 429 of the judgment of 21 August 2013, would be bound to conclude, as did the DCJ in his ruling of 19 January 2015, that the words "*losses arising out of the Claimants' relationship with ABK"* refer to the relationship between ABK and the Claimants as borrowers from ABK in relation to the funding of their purchase of the Sarasin investments. It is true that at the hearing on 27 October 2014 the DCJ was told by the Claimants' Counsel that there was a foreclosure loss arising out of a forced sale by ABK at an undervalue and that the judge said to Counsel for the Second Defendant that he was not shutting the Claimants out claiming the aforementioned foreclosure loss as a result of the Sarasin investments, but the Court was not told (because Counsel had not been fully instructed) that the foreclosure arose out of a loan from ABK to RAFCO (guaranteed by Mr Al Khorafi) for a construction project. On the contrary, the Court was told of "*some foreclosures on property as a result of* ***the ABK*** *lending*" (bold supplied), which would have been interpreted by the judge and any objective observer acquainted with the background as a reference to the lending to the Claimants for the purpose of purchasing the Sarasin investments.

34. As to the Claimants' remaining submission that in any event the DCJ should not have excluded RAK 4 as he did, effectively as a strike out, but should have considered whether the RAFCO losses were recoverable at the quantum hearing, in my opinion there is nothing in this contention. The 28 October Order was a matter of necessary (albeit unexceptional) case management with the object, inter alia, of giving directions for the quantum hearing both as to issues and admissible evidence. In promulgating those directions the DCJ proceeded as he was undoubtedly well entitled to do by reference to: (i) the fact that the trial had not been a split trial; and (ii) the recoverable losses as identified in his judgment which, so far as they arose out of the Claimants' relationship with ABK, were founded exclusively on losses arising out of the relationship between ABK and the Claimants as borrowers from ABK in relation to the funding of their purchase of the Sarasin investments.

35. I am accordingly of the opinion that the grounds of appeal advanced before me would be bound to fail and therefore have no real prospect of success. Further, I can see no other compelling reason why the proposed appeal should be heard. It follows that in accordance with RDC 44.8 this renewed oral application for permission to appeal the ruling of the DCJ excluding RAK 4 from the quantum hearing must be and is refused.

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Issued by:

Natasha Bakirci

Assistant Registrar

Date of issue: 21 May 2015

At: 2pm

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[1] pp. 86-89

[2] "Now, it is true that at the October hearing, my learned friend did make some mention of the October hearing, my learned friend did make some mention of this claim.but that is way short of a pleading."

[3] "My learned friend is wrong.to construe Your Lordship's order to say, "Well, this effectively allows carte blanche to bring anything , provided it has got something to do with ABK." That was not what Your Lordship had in mind, I submit."

[4] "It is going to enormously complicate and lengthen the hearing, as also issues of valuation are going to arise."

[5] "And as my Lord observed in opening, we could not have claimed this loss at trial. There might never have been an undervalue. There might never have been a claim."