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 ROGER GILES

UPON reviewing the Claimants' Appeal Notice and supporting documents dated 27 January 2015 seeking permission to appeal against the Order of the Deputy Chief Justice Sir John Chadwick (the "DCJ") dated 13 January 2015.

AND UPON reviewing the Claimants' Skeleton Argument in support of Appeal dated 10 February 2015

AND UPON reading the relevant material in the case file

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

IT IS HEREBY ORDERED THAT:

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

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

Issued by:

Mark Beer

Registrar

Date of issue: 25 February 2015

At: 9am

SCHEDULE OF REASONS

1. The Claimants have applied for permission to appeal from part of a decision of the DCJ given on 13 January 2015. The learned Judge ruled that the fourth witness statement of Mr Rafed Al Khorafi dated 20 November 2014 ("RAK 4") could not be adduced in evidence at a forthcoming hearing.

2. There has not been a hearing (RDC 44.12), and I have not requested submissions from the Defendants (RDC 44.27). Permission to appeal is refused, for the following reasons (RDC 44.14).

Background

3. The Claimants purchased financial products from the Second Defendant on the introduction of the First Defendant. The purchases were funded by loans made to the Claimants, in part by the Second Defendant and in part by Al Ahli Bank Kuwait ("ABK"). After a lengthy hearing, in reasons issued on 21 August 2014 ("the Judgment") the Judge held, in short, that there had been a mis-selling of the investments and that the Defendants were liable to pay compensation to the Claimants; as to the First Defendant under Article 65 (2) (b) of the DIFC Regulatory Law (DIFC Law No 1 of 2004) ("the Regulatory Law") and as to the Second Defendant under Article 94 of the Regulatory Law.

4. The DCJ said in the Judgment -

> "428. The losses in respect of which the Claimants seek compensation can be divided into the following categories:
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> ������������������������������ (1) Losses on the sale of the Claimants' investments with Bank Sarasin (these are agreed as to amount).
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> (2) Other fees and interest charged by Bank Sarasin (these are not yet agreed).
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> (3) Other fees and interest charged by ABK up to 14 December 2009 (these are not yet agreed).
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> The ABK losses are only calculated up to 14 December 2009 as the Claimants only have account statements for ABK up to this point. However, the ABK indebtedness has not been wholly repaid and interest continues to accrue in respect of that liability. The Claimants also seek interest on their losses pursuant to Articles 18 and / or 32 of the Law of Damages and Remedies 2005, and / or Article 65 and / or 94 of the Law of 2004.
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> 429. It is only these categories (together with interest on those losses) which the Claimants seek to recover. The Claimants assert that their quantum calculation is in substance the same irrespective of which claim they succeed on: on the grounds that their case is that if the Defendants had complied with their regulatory obligations, or had given them proper advice, or had acted with accordance with their contractual obligations, or had not made false representations, the Claimants would not have proceeded with any of the investments and would not have taken the lending from ABK or the leverage from Bank Sarasin."

5. Following a hearing on 27 October 2014, orders were made on 28 October 2014 and subsequently issued on 30 October 2014 declaring the amounts of the Defendants' liabilities, being money sums and interest in respect of losses on the sale of the investments and relevantly (paras 3 (b) and 5 (b)) -

> "(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") [ABK]."

6. Paragraph 3 (b) related to the First Defendant and para 5 (b) related to the Second Defendant. The insertions in square brackets are variations in the terms of para 5 (b), the second being simply the use of the acronym. It was not suggested that the first variation was significant and permitted the assessment of amounts in respect of other expenditures or losses as against the Second Defendant.

7. It was further ordered that the quantification of the interest and of "the categories of damage referred to in paragraphs 3 (b) and 5 (b) above" be determined at a subsequent hearing; that any further evidence in support of their claims on quantum be served by the Claimants; and -

> "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."

8. This limitation 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."

9. The Claimants filed witness statements as further evidence for the quantum hearing, two sufficiently described as HAS 1 and HAS 2 and the third RAK 4. As to HAS 2 alone, they applied for permission to adduce it; that is, RAK 4 was proffered as evidence of events which had occurred since 10 July 2013.

10. The Defendants applied for an order that all the evidence be excluded.

The Decision

11. The applications were heard on 12 January 2015. Judgment was given the next day. On their application, the Claimants were permitted to rely on HAS 2 subject to conditions. On the Defendants' application, while doubting the need for it or its evidential value the Judge declined to exclude reliance on HAS 1, but excluded reliance on RAK 4.

12. As to that exclusion, the DCJ said -

> "21. The purpose of RAK 4, also dated 20 November 2014, is described in paragraph 4 of that document:

13. This witness statement relates to the sale of a plot of land which was sold by a company which I wholly own beneficially and in title own the vast majority of the shares. The sale was in June 2014 under Court Order of the Kuwaiti Courts. The sale in June 2014 was below market value

and caused the company loss and as a result a diminution in the value of my shareholding. As is explained in further detail below, that sale, and the resulting diminution in the value of my shareholding was caused by the Defendants' mis-selling of investments.'

> "22.&#65533;. Paragraphs 5-20 of RAK 4, under the general heading *`Detailed Background Leading up to the June 2014 Loss'* describes a history of events from 2002 relating to the purchase by Mr Al-Khorafi and his subsequent transfer to a special purpose vehicle (RAFCO International Real Estate Co), of which Mr Al-Khorafi claims to be 100 % beneficial owner, of a plot of land in Kuwait for development. It is said that, on 1 November 2007, RAFCO, Mr Al-Khorafi and ABK entered into a loan agreement under which ABK agreed to provide funds amounting to KWD 11,600,000 to enable the construction of a commercial building (`the Tower') on the plot. Mr Al-Khorafi was joined in that agreement as guarantor of the loan. Put shortly, it is said that when interest payments on the loan to RAFCO became due in July 2008, Mr Al-Khorafi was under financial pressure in relation to his and his mother's loans from ABK made in connection with the investments which they made with the Second Defendant and that he could not meet the interest payments on the RAFCO loan. RAFCO itself had not commenced trading and had no income to service its loan. In November 2009, ABK applied to the Kuwaiti Courts for an order for sale of the land. That Order was made on 10 January 2013, before the trial, and the land was sold in June 2014, after the trial. Mr Al-Khorafi as guarantor was ordered to pay the shortfall remaining outstanding on the RAFCO loan after application of the proceeds of sale of the land.
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> 23. 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'*.
>
> 24. 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.
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> 25. 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 proposed appeal

13.&#65533;The Claimants put forward four grounds of appeal, supported by a skeleton argument. There was a degree of overlap. They submitted that the loss asserted in RAK 4 was a loss "arising out of the Claimants' relationship with ABK" within the meaning of para 428 of the Judgment (although it had not used those words) and / or paras 3 (b) and 5 (b) of the order made on 28 October 2014, and in any event was part of their losses yet to be determined in the light of the Judgment.

14. Under ground 1, the Claimants contended that the Judge erred in law in construing the words "the Claimants' relationship with ABK" as limited to the relationship as borrowers from ABK in relation to the funding of the purchase of investments from the Second Defendant, and that those words extended to the fullest extent of all their relationships with ABK and all losses arising as a matter of fact from Mr Al Khorafi's relationship with ABK, including that concerned with RAFCO. They contended also that the Judge should not have excluded RAK 4 on his construction of the relevant words "effectively as a strike-out", and should have left to the quantum hearing whether there was a recoverable loss which had been proved.

15. Under ground 2, the Claimants contended that the Judge erred in law in defining "the Claimants' relationship with ABK" in the light of para 428 of the Judgment, when at the 27 October 2014 hearing it was made clear that the categories of loss included post-trial foreclosure by ABK on properties connected with the Claimants. This, they said, and not the paragraph in the Judgment, was the context in which the order of 28 October 2014 was made, and would lead to allowing them to adduce RAK 4 in evidence.

16. Under ground 3, the Claimants contended that the Judge erred in law in deciding that RAK 4 "contains no evidence relevant to the claims which are to be quantified at the Quantum Determination", when the asserted loss was a loss which was caused by the mis-selling of the investments as a matter of fact and so was within the compensation to which they were entitled. They said that they should have been given the opportunity to prove their loss, and that it was within the 28 October 2014 order and they should not have been shut out on a summary basis from pursuing it.

17. Under ground 4, the Claimants contended that the Judge had decided to exclude RAK 4 "on a basis which had not properly been argued before him". They said that the "primary basis" of the Defendants' application had been that RAK 4 rested on matters which occurred before trial, so that permission to rely on them was required but had not been sought; and that they had not had the opportunity to make submissions upon why the loss with which it was concerned was a loss "arising out of the Claimants' relationship with ABK".

Discussion

18.&#65533;The issue is moulded by the orders made on 28 October 2014. The orders confined the future quantum hearing, relevantly by the words "losses arising out of the Claimants' relationship with ABK"; and further by restricting (subject to special application) the evidence on which the Claimants could rely to that before the Court at trial but updated as to post-trial events.

19. No special application was made as to RAK 4. The issue is the scope of the words "*losses arising out of the Claimants' relationship with ABK*", an issue of construction of the orders informed amongst other things by the evidentiary restriction. It is not whether the RAK 4 loss is a loss

recoverable as compensation pursuant to the Articles of the Regulatory Law, but whether it is a loss within the meaning of those words. To the extent that the Claimants contended that loss caused by mis-selling of the investments was the subject of the future hearing and it was sufficient that RAK 4 went to such a loss, they misapprehend the matter.

20. What, then, is the scope of the words "*losses arising out of the Claimants' relationship with ABK*"?

21. Textually, there is no support for giving those words a wider meaning than that given to them by the Judge. There is a world of difference between a loss arising out of the Claimants' (plural) relationship (singular) with ABK, a group relationship of borrowers from ABK to fund the purchases of the financial products, and a loss arising out of one Claimant's relationship with ABK for a completely different purpose with which the other Claimants were not concerned. (If it matters, Mr Al Khorafi's relationship with ABK was also not a relationship of borrower).

22. The Judge noted "in particular" the categories of loss described in para 428 of the Judgment. They did not go beyond the borrowings to fund the purchases of the financial products, the "*other fees and interest charged by ABK*" plainly being fees and interest charged in relation to those borrowings. (As earlier noted, contrary to the Claimants' assertion, para 428 of the judgment does not refer to "*losses arising out of the Claimants' relationship with ABK*"). To that context may be added the manifest intention, absent special application, to limit further evidence to evidence of post-trial events; that is, updating the trial evidence concerning the cost of the borrowings to fund the purchases of the financial products. Unless displaced, these matters amply and conclusively support the Judge's decision.

23. At the heart of the Claimants' contentions was that the context of para 428 of the Judgment had been displaced by what was said at the 27 October 2014 hearing. They relied on two exchanges, one between their Counsel and the Judge and the other between Counsel for the Second Defendant and the Judge. I set out the exchanges, by the italicised parts going a little beyond the passages cited by the Claimants.

24. The first exchange, with the Claimants' Counsel, followed the Judge asking whether the Claimants would be content "to limit evidence as to what has been paid since the day of the trial or since the stage of fresh claims or when [sic]", and was -

> "[Counsel] It is not necessarily a question of what has been paid. It is what loss is sustained. Now I am not talking about loss [of] profit, or anything like that but, for example, I can tell my Lord that since the trial there have been some foreclosures on property as a result of the ABK lending, leading to at least one instance of property sold [at an undervalue].
>
> [Judge] Is this losses generated by ABK for closing [sic: foreclosing] on properties.
>
> [Counsel] Exactly, my Lord.
>
> *[Judge] - which had not happened at the date of the trial?*
>
> *[Counsel] 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 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.*"

25. The subsequent exchange with Counsel for the Second Defendant was -

> *"[Judge] They say they have suffered some losses because of the post-trial forced sale.*
>
> *[Counsel] Well, my Lord, then that will require.*
>
> *[Judge] They could hardly have brought it before the Court at the trial, because it had not happened.*
>
> *[Counsel] No. Well, then that will require, obviously, investigation if they wish to raise that. [Counsel referred to issues of pleading, causation, evidence and disclosure].*
>
> *[Judge] Well, this is material they could not have brought before the trial.*
>
> *[Counsel] Well, whether they could.*
>
> *[Judge] at least that is what is being said.*
>
> *[Counsel] Yes. Whether they could or they could not, and accept for a moment that they could not have brought it, there is still a question of due process, if one wants to use that word, in relation to the Defendants' position, who must be given the opportunity of properly challenging it and making.*
>
> [Judge] 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.
>
> [Counsel] Well, they will also have to establish a causal link to what has been found against the Defendants.
>
> [Judge] Well, they will have to show that the forced sales were a result of the investments which they made with your bank.
>
> [Counsel] Yes, which could be quite a complex matter, which is the point that I am just making, which may require significant disclosure.

[Judge] They will have to meet that problem when it arises, but I am not shutting them out from trying to.

[Counsel] My Lord, I understand.

[Judge] On post-trial events."

26. The Claimants' reliance is misplaced. They submitted that Counsel referred to losses of the "type" of the RAK 4 loss, but that is correct only to the extent of foreclosure; there is much more in the nature of the RAK 4 loss. The reference to loss by foreclosure, no doubt because the Claimants' Counsel was less than fully instructed, is woefully short of describing, or even indicating, a loss via the RAFCO borrowing as described in RAK 4. To the contrary, it is a reference to foreclosures as a result of "the ABK lending", to be understood as the lending for the purchases of the financial products (and it also refers to foreclosures in the plural, more than the one instance of property sold). The Judge so understood Counsel, since he contemplated a case that "they" said that half a dozen of "our properties" had been sold, plainly meaning the Claimants as a group and as borrowers to purchase the financial products and it is clear from the italicised additions to the passages cited by the Claimants that the sales were understood as post-trial events adding to and updating matters between the Claimants as borrowers for the purchases of the financial products, and ABK as their lender: Counsel conveyed no more. RAK 4 goes far beyond this; the June 2014 sales and the order against Mr Al Khorafi are meaningless without the prior history.

27. Counsel's reference to foreclosures can be seen as the reason for the change from "*other fees and interest charged by ABK*" in para 428 of the Judgment to "*losses arising out of the Claimants' relationship with ABK*" in the order made on 28 October 2014, but that relationship is still as borrowers from ABK for the purchases of the financial products.

28. There is nothing in the contention that the Judge should have left the addition of RAK 4 into evidence for the quantum hearing. The orders made on 28 October 2014 stood, and it is not uncommon to have pre-hearing rulings as required by the Judge and brought about by the Defendants' application. Having participated in the process, it is hollow for the Claimants to complain of it as to that part of the result which is not to their liking.

29. I cannot see any procedural unfairness in the Judge coming to his decision.

30. The parties exchanged skeleton arguments prior to the hearing of 12 January 2014, and I have read them and the transcript of that hearing. It is correct that the Defendants' submissions placed some emphasis on RAK 4 going beyond post-trial events, but the Defendants put other matters in support of their application including that it was an unpleaded and new head of loss. In the course of submissions the Judge observed that he had to decide whether the RAK 4 loss was "properly to be regarded as a claim which arises out of his relationship with ABK". The answer of Counsel for the Defendants was to the effect that the orders made on 28 October 2014 did not permit an unpleaded head of loss. The reply of Counsel for the Claimants included submitting that the RAK 4 loss was "part of losses associated with ABK Lending that is expressing within the terms of the order at 3 (b) and 5 (b) [sic]", and Counsel made reference to what had been said about losses on foreclosure at the 27 October 2014 hearing, asserting that "*it is in that light that the order was made in the terms that it was*", and said, "*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*".31. I have not accepted that what was said on 27 October 2014 had the significance attributed to it by the Claimants, but it is clear beyond doubt that whether the RAK 4 loss was within the terms of the order was raised and that the Claimants had full opportunity to put submissions to support that it was.

Decision

31. I may give permission to appeal only where I consider that the appeal would have a real prospect of success, or there is some other compelling reason why the appeal should be heard (RDC 44.8).

32. In my opinion, for the reasons above, the Judge's decision was correct and the appeal would not have real prospects of success, either as to the substantive issue or on the procedural fairness ground. I do not understand the Claimants to suggest another compelling reason why the appeal should be heard, but for completeness, I am not satisfied that there is such a reason. The amount claimed is said to be large, in the order of US$37 million, but that of itself does not provide reason (although it has caused me to give more extensive reasons than ordinarily called for when refusing an application for permission to appeal). As earlier described, the issue is one of construction of the one-off terms of an order, and no point of principle is raised.

Issued by:

Mark Beer

Registrar

Date of issue: 25 February 2015

At: 9am