Claim No: CFI 26/2009

THE JUDICIAL AUTHORITY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE

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

IN THE COURT OF FIRST INSTANCE BEFORE JUSTICE TAN SRI SITI NORMA YAAKOB

BETWEEN

(1) Rafed Abdel Mohsen Abdel Al Khorafi

(2) Amrah Ali Abdel Latif Al Hamad

(3) Alia Mohamed Sulaiman Al Rifal

Claimants

-v-

(1) Bank Sarasin-Alpen (ME) Limited

(2) Bank Sarasin & Co. Limited

Defendants

Hearing:

18 & 19 April 2010

Counsel:

Kaashif Basit, JSA Law/Eversheds for the Claimants

Mark Hoyle, Al Tamimi & Co for the First Defendant

Judgment:

7 July 2010

JUDGMENT

1. The factual matrix of this case is as follows. The three Claimants are related to each other. The First Claimant is the son of the Second Claimant, she being his mother and the Third Claimant is the wife of the First Claimant and daughter-in-law to the Second Claimant. All three Claimants are Kuwaiti nationals and at all material times reside in Kuwait.



2. The two defendants are banking institutions. The First Defendant, a private bank, was incorporated as a company in Dubai, licensed and regulated by the Dubai Financial Services Authority (DFSA) and authorised to provide financial services in and from the Dubai International Financial Centre (DIFC). The Second Defendant is also a private bank and is based in Basel, Switzerland with branches in Europe, Asia and the Middle East.



3. The First Claimant is a businessman and together with the Second and the Third Claimants had a business relationship with the Defendants and which has now become a bone of contention between them.



4. That business relationship relates to various investments made by the Claimants with the Defendants during the period of 28 June 2007 to 21 February 2008 involving the sum of well over US$74 million. Unfortunately the structured financial products that the Claimants invested in resulted in heavy losses to the Claimants and they bring the present suit against the Defendants for damages for breach of contract and/or negligence and/or misrepresentation. There is also a plea of a breach of a statutory duty against the Defendants and, in the course of his arguments, Mr Basit, counsel for the Claimants, clarified that that breach refers to a breach of Article 94 of the Regulatory Law, DIFC Law No.1 of 2004 which is pleaded solely against the First Defendant. A further claim for additional damages is also pleaded against the First Defendant pursuant to section 40(2) of the Law of Damages and Remedies, DIFC Law No.7 of 2005.



5. The Claim Form was filed by the Claimants on 7 October 2009 and it was served on the First Defendant on 29 October 2009. The Claimants then filed and served the Particulars of Claim on the First Defendant on 10 December 2009 and what followed next was the filing of the Claimants' case summary to the Particulars of Claim dated 23 January 2010 pursuant to RDC 17.47.

6. The First Defendant responded by filing Application Notice 6/2010 on 21 January 2010 applying to set aside the Claimants' statement of case under RDC 4.16 with costs.

7. Pursuant to the Order of the Registrar dated 4 February 2010, the First Defendant filed their Statement of Defence, which termed it as their Holding Defence, on 14 February 2010.

8. Before me, there were three separate Application Notices filed by the Parties. In point of time, the First Defendant filed Application Notice 6/2010 on 21 January 2010 to strike out the Claimants' statement of case under RDC 4.16. Together with this striking out application, the First Defendant seeks alternative orders that proceedings be stayed under RDC 4.2 (6)

(a) until service of proceedings be effected on the Second Defendant; and

(b) pending provision of security for costs to be made by the Claimants under RDC 25.97.

9. The second application, Application Notice 11/2010 dated 12 April 2010, is filed by the Claimants seeking an Order to dismiss the First Defendant's Application Notice 6/2010. I consider this application to be quite unnecessary as the same could be obtained at the hearing of Application Notice 6/2010 when the Claimants would be given every opportunity to submit to the dismissal of the First Defendant's application.

10. The third, Application Notice 30/2010 is also filed by the Claimants seeking to amend their Claim Form and Particulars of Claim and bearing the same date as their Application Notice 11/2010.

11. With the agreement of all parties, I gave priority to Application Notice 6/2010 i.e. the First Defendant's striking out application together with the alternative application for security for costs.

12. I need to mention that, at the date of the hearing of the striking out application, the Second Defendant has yet to be served with the Claim Form and the other necessary papers in this suit. In this respect, two Court Orders, both dated 25 March 2010 have been obtained by the Claimants, one to effect service on the Second Defendant out of the jurisdiction and the other for the extension of the period of such service to 7 October 2010.

13. The First Defendant relies on the provisions of RDC 4.16 and 4.19 to strike out the Claimants' statement of case whether in whole or in part and for ease of reference those Rules are reproduced.

"4.16 The Court may strike out a statement of case if it appears to the Court-

(1) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(2) that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(3) that there has been failure to comply with a Rule, Practice Direction or Court Order.

4.19 Rule 4.16 does not limit any other power of the Court to strike out a statement of case."

14. The first issue raised by Mr Hoyle, counsel for the First Defendant, is that the cause of action under Article 94 has not yet crystallised to enable the Claimants to sue the First Defendant in the DIFC Courts as the DFSA has yet to make a finding that there had been an identified breach by the First Defendant of the Regulatory Law, DIFC Rules of other legislation administered and enforced by DFSA. As such, the cause of action is premature and is an abuse of process and should be struck out.

15. The response to that argument by the Claimants is that Article 94 cannot be raised as a preliminary issue as it is an arguable question of law and cannot be brought in a striking out application. Furthermore, if a finding of breach by the DFSA is intended to be a pre-requisite for a claim under Article 94 it would say so either expressly or by implication. Article 94 is silent on this.

16. It is pleaded that as a regulatory body, DFSA is subject to the Regulatory Law and the rules introduced by the Regulatory Law which inter alia, includes the DFSA Rulebook.



17. There are pleaded allegations in the Particulars of Claim (and these appear at paragraphs 92 to 115) that the First Defendant, through its employees had not discharged its regulatory obligations and, in particular, had failed to analyse and determine that the Claimants had the necessary financial experience and understanding to participate in the type of investments recommended to them and the risks involved. The other negative aspect of the First Defendant's conduct relied upon was the First Defendant's failure to assess the suitability of the investment products. The Claimants allege that they were advised to invest in financial products with high risk profiles, which were wholly unsuitable.



18. For starters, I consider the Claimants' objection to raise the availability of a cause of action under Article 94 as a preliminary issue to be without merit. The issue, as conceded by the Claimants, is very much a question of law for which no evidence is necessary and, as such, objection as to its availability as a cause of action can be questioned at any step of the proceedings, the earlier the better so that a defendant like the First Defendant is warned well in advance of the cause of action it has to answer. Under these circumstances I see nothing objectionable to the issue being raised as a preliminary issue in an RDC 4.16 and 4.19 application.



19. I now come to the more substantial objection that there must be read into Article 94 the requirement that the DFSA is statutorily bound to make a finding that a breach of any of its laws or rules had been committed by the First Defendant before the Claimants can claim damages against the First Defendant in the DIFC Courts. Expressed in another way, the Claimants have no freestanding right under Article 94 to come to the DIFC Courts directly to obtain relief. There must first be a breach established by the DFSA, before an aggrieved party such as the Claimants can claim damages in the DIFC Courts.



20. In this respect, it is not disputed that the Claimants had lodged a complaint of the First Defendant's conduct with the DFSA in December 2009 but, up to the date of hearing before me, the Claimants had not received any response from the regulatory body.



21. The DFSA is the independent regulator for the DIFC, a free trade zone established in Dubai, United Arab Emirates (UAE). Its objectives are to foster and maintain fairness, transparency, efficiency, confidence and stability in the financial services industry in the DIFC.



22. In discharging its regulatory mandate, its website explains its role to be as follows:

"The DFSA administers the Regulatory Law 2004 which is the cornerstone legislation of the regulatory regime. The Law establishes the constitution of the DFSA and enables the creation of the regulatory framework within which entities may be licensed, authorised, registered and supervised by the DFSA.

Under the Law, the DFSA has the power to enforce the Law and Rules that apply to all regulated participants within the DIFC."